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No. 97739-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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SPOKANE COUNTY, a Washington municipal entity; AL FRENCH, an individual taxpayer and current Spokane County Commissioner; JOHN ROSKELLEY, an individual taxpayer and former Spokane County Commissioner; and WASHINGTON STATE ASSOCIATION OF COUNTIES, a Washington non-profit association,

Appellants,

v.

THE STATE OF WASHINGTON,

Respondent.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

The Washington Constitution is both clear and controlling in this case. The legislature’s power to establish a system of county government and county commissioner elections is subject to an express constitutional limitation: the system must be **uniform**. The State does not contest that SHB 2887 mandates a county government structure and process for electing county commissioners for Spokane County that deviates from the otherwise uniform system of government that has applied to all noncharter counties until now. The State’s arguments that SHB 2887 comports with the constitutional limitation of uniformity are without merit.

First, the State’s criticism of this Court’s articulation of constitutional uniformity in *Maulsby v. Fleming*, 88 Wash. 583, 153 P. 347 (1915), is not based in law or substance. *Maulsby’s* guiding principle—that uniformity requires county governments to be “in all essential particulars . . . alike”—is neither surprising nor unreasonable. The State offers no law or specific argument for why county government being alike in core parts no longer should be required in Washington.

Instead, the State broadly asserts that the constitution should allow legislative discretion to accommodate the perceived needs of varying counties. The State in short argues that the uniformity provision of the constitution only requires that a county be governed by a body named a

board of county commissioners, and that the legislature is otherwise free to decide the number of commissioners and the method of election county by county. Not only does that contravene any concept of uniformity, but it directly contravenes the constitutional scheme. Under the constitution, the legislature is responsible for the creation of a uniform system of county government—but the power and flexibility to vary the form of government is vested in the people of each county through the home rule charter process. Consistent with that authority, the people of Spokane County have clearly and repeatedly expressed their choice: to retain the uniform system of government shared by all other noncharter counties.

Second, the State’s claim that *Maulsby* has “ossified” lacks merit. Neither Amendment 12 nor subsequent case law has undermined *Maulsby*’s articulation of what uniformity requires. Subsequent state laws, including the Voting Rights Act, confirm rather than question the continuing propriety of *Maulsby*’s holding.

Third, the State offers no substantive argument why *Maulsby* should be overturned. The legal underpinnings of *Maulsby*’s holding remain undisturbed and its articulation of uniformity is not harmful—to the contrary, it protects noncharter counties from paternalistic decisions by the legislature as to what is “best” for particular counties.

Fourth, the State’s assertion that the legislature may classify counties by population for any and all purposes ignores Section 5 of the constitution which identifies only two specific circumstances in which the legislature may classify counties by population: to consolidate the duties of county officials and to set those officials’ compensation. The State’s attempt to create a sweeping third category “for any and all purposes” is an unwarranted reading of Section 5 that would render the two specified circumstances redundant and nugatory. The State’s erroneous interpretation is confirmed by both contemporaneous media descriptions and case law related to Amendment 12, which the State ignores entirely.

Finally, the State’s contention that SHB 2887 is not a special law is a red herring. Spokane County is not challenging SHB 2887 on that basis.

Spokane County respectfully requests that the Court declare SHB 2887 unconstitutional.

## II. ARGUMENT

### A. **The Supreme Court’s Approach to Uniformity in *Maulsby v. Fleming* Remains Good Law.**

#### 1. ***Maulsby* established a straightforward approach to uniformity that comports with the constitutional scheme to prohibit the legislature from varying the form of county government.**

In *Maulsby*, this Court held that, for purposes of Article XI, Sections 4 and 5, uniformity requires that “county governments . . . [be] in all

essential particulars . . . alike” and the systems’ “several parts . . . applicable to each county.” 88 Wash. at 585-86 (quoting with approval *Singleton v. Eureka Cty.*, 22 Nev. 91, 35 P. 833, 835 (1894) and *Wright v. Stanford*, 24 Utah 148, 66 P. 1061, 1064 (1901)). Specifically, the “powers, duties, and obligations . . . [must] be the same in each county . . . otherwise the system is not uniform.” *Id.* at 585-86 (quoting with approval *Singleton*, 35 P. at 835). The State apparently concedes, as it must, that SHB 2887 is unconstitutional under the reasoning set forth in *Maulsby*.

The State’s attempt to evade *Maulsby* by characterizing it as “unyielding[ly] rigid[]” and “ossified” is without support. Interpreting a uniform system of county government to mean “alike” in “essential” components is not a surprising nor dated approach. There is nothing particular to the statewide system of county government and elections that is so different today than when *Maulsby* was decided. Indeed, the vast majority of counties in the state have used the uniform system without incident for over 130 years. Rather than identify exactly why that system no longer works for Washington’s counties, the State urges that the constitution requires flexibility to keep up to date with the changing needs of counties. If that is the case, then the State’s dissatisfaction is not with *Maulsby* itself, but with the legislature’s role in the constitutional scheme.

The constitution requires the legislature to create a statewide system

of county government that is uniform. Const. art. XI, §§ 4, 5. At the same time, the constitution allows the voters of individual counties to vary that scheme if the uniform system of government no longer fits a county's needs through the home rule charter process. Const. art. XI, § 4. The State's argument that the legislature requires "discretion" to provide for varying forms of county government within a uniform "system," such as to serve diverse and growing populations, is contrary to this constitutional division of authority. The discretion to make such decisions is vested in local voters, not the legislature.

Here, the voters of Spokane County have repeatedly and emphatically expressed their view on whether they wish to vary their form of county government. Opening Br. at 7. They have voted three times to retain the statewide uniform system of government. *Id.* Specifically, they have voted to reject many of the very changes that the legislature now mandates for only Spokane County in SHB 2887. *Id.* Whether the legislature deems Spokane County's votes unwise or that there is a preferable form of government for Spokane County is irrelevant in the constitutional scheme.

Further, the State fails to explain what uniformity requires in lieu of the holding in *Maulsby*. The State cites no authority in support of its argument that the legislature retains discretion to define uniformity in the

way it deems most convenient for the times. While the State suggests that “little case law enlightens” interpretation of the relevant portions of Sections 4 and 5, Resp. at 3, at the same time it argues against the controlling precedent that does exist: *Maulsby*. The State’s convoluted approach results in its disavowal of two modern-era Attorney General Opinions, authored by two different Attorneys General, on the remarkable basis that the opinions “erred” because they “appl[ied] judicial precedent.” Resp. at 7.

**2. Amendment 12 added one specific authorized purpose to classify counties and did not “reverse” *Maulsby*’s articulation of what uniformity requires.**

The State incorrectly asserts that Amendment 12 “reversed” *Maulsby*. Resp. at 6. This unavailing argument fails to recognize that *Maulsby* stood for two distinct propositions: (1) establishing guidelines for what the constitution requires in a uniform system of county government, and (2) applying those guidelines to the specific law before it, ultimately holding that classification of counties by population for the purpose of consolidating official duties was unconstitutional. 88 Wash. at 585-86. Amendment 12 was enacted specifically in response to only the second proposition to permit classification by population for the purpose of consolidation. Amendment 12 accomplished this by adding to Section 5 a single sentence: “the legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties

certain officers who shall exercise the powers and perform the duties of two or more officers.” Const. art. 11, § 5. Nothing in Amendment 12 addressed *Maulsby’s* analysis of what it means to have a uniform system of county government.

The State does not provide a single historical source to support its reading of Amendment 12. Nor could it. As Spokane County previously explained, both contemporaneous and retrospective news accounts and case law confirm that Amendment 12 was enacted specifically in response to the second proposition only. Opening Br. at 27-28. The State’s failure to rebut any of these sources underscores that nothing in Amendment 12 disturbed *Maulsby’s* ruling as to what uniformity requires under the Washington Constitution.

**3. Subsequent case law confirms *Maulsby’s* approach to uniformity.**

Moreover, no court has held that *Maulsby’s* analysis is flawed, no longer controls, or has “eroded” (as the State puts it). Resp. at 6-9. To the contrary, the subsequent case law cited by the State demonstrates the enduring propriety of *Maulsby*.

The primary case upon which the State relies, *Mt. Spokane Skiing Corp. v. Spokane Cty.*, 86 Wn. App. 165, 181, 936 P.2d 1148 (1997), did not even discuss *Maulsby’s* approach to uniformity. Resp. at 7. In that case,

a state law empowered **every** county in Washington to create a public corporation: “**any** city, town, or county may by lawfully adopted ordinance or resolution [create the specified public corporations].” 86 Wn. App. at 172-73 (emphasis added); *id.* at 181 (“Under RCW 35.21.730, **all** counties have the authority to create public corporations.” (emphasis added)). This fact was critical to the court, which explained explicitly that “[b]ecause **each county** has the authority available to it, the system should be deemed uniform.” *Id.* (emphasis added). Thus, *Mt. Spokane Skiing* does not endorse as uniform laws whose provisions “could potentially” apply to all counties, but do not in actuality. *Resp.* at 7. Rather, *Mt. Spokane Skiing* holds that creating an option for any and all counties to exercise certain authority is consistent with uniformity. In stark contrast, SHB 2887 does not apply to every county and does not grant every noncharter county the option of adopting its provisions. Regardless, *Mt. Spokane Skiing* did not involve core functions of county government, like the number and method of election of county commissioners, as is the case here.

Likewise, *Scofield v. Easterday*, 182 Wash. 209, 214, 46 P.2d 1052 (1935), does not support the State’s argument. *Resp.* at 6. That case also did not discuss *Maulsby’s* approach to uniformity. At issue in *Scofield* was application of Article XI, Section 5, as amended by Amendment 12, to a state law that sought to transfer certain duties of the board of county

commissioners to the county engineer. 182 Wash. at 214. The Court explained that Amendment 12 added consolidation of county offices as a permissible classification and then upheld the law on this specific basis:

[Because] the Legislature has the power . . . to prescribe the duties of the county officers and authorize one officer to perform the duties of two or more other officers, it would necessarily seem to follow that the Legislature . . . had the right to transfer [duties among county officers].

*Id.* Thus, *Scofield* was a straightforward application of the consolidation of duties contemplated by Amendment 12, not, as the State suggests, a “substantial[] broaden[ing]” of the legislature’s power to classify by population in general and a “reversal” of *Maulsby*. Resp. at 6, 18.

Finally, the State’s reliance on *State v. Schragg*, 159 Wash 68, 70, 292 P. 410 (1930), is misplaced. Resp. at 12-13. First, *Schragg* is entirely consistent with *Maulsby*’s holding.<sup>1</sup> In *Schragg*, this Court upheld a law because it “classifie[d] counties” for the purpose of “fix[ing] the compensation of county officers . . . and consolidat[ing] certain county offices.” 159 Wash at 69-71. Those are the exact situations in which the constitution expressly allows the legislature to classify counties by population. Const. art. 11, § 5; *see also* Opening Br. at 22-24. *Schragg* is thus illustrative of the type of law in which the legislature can distinguish

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<sup>1</sup> The State’s argument that SHB 2887 is not a special law under *Schragg* is a red herring. *Infra*, Section II.D.

by population between counties in their form of government.<sup>2</sup>

Second, *Schragg* does not cite or address *Maulsby*. That is unsurprising given that *Schragg* does not concern uniformity at all. Rather, at issue in *Schragg* was whether a law was “general” under Article XI, Sections 4 and 5. 159 Wash at 70. The constitution requires that laws must be both general and uniform. These are two separate requirements. *See Wheeler Sch. Dist. No. 152 of Grant Cty. v. Hawley*, 18 Wn.2d 37, 47, 137 P.2d 1010 (1943) (treating mandate that law be general and uniform as distinct requirements under Article IX, Section 2).

**4. Other Washington state laws are not at issue and are irrelevant.**

The State asserts that it can classify by population here because it has done so in other situations. Resp. at 10. But this argument is unavailing. First, none of the cited statutes have been subject to a legal challenge under Sections 4 or 5, and none are before this Court. Indeed, one statute, RCW 36.32.055, has never been invoked by the voters of any county. And of course, the legislature cannot override a constitutional provision simply by passing multiple pieces of like legislation.

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<sup>2</sup> Although, as the State points out, Resp. at 12, the law at issue in *State v. Boyd*, 19 Nev. 43, 5 P. 735, 735-36 (1885), applied to one specific county in perpetuity, *Maulsby* appropriately factored that into its analysis, specifically acknowledging that *Singleton* (which in turn cited to *Boyd*) was directed to a specific county by name. *Maulsby*, 88 Wash. at 585. This Court correctly determined that *Singleton*'s, and in turn *Boyd*'s, articulation of what uniformity requires was nevertheless instructive. *Id.* at 585-86.

Second, the cited laws accord with the constitutional scheme of allowing local decision makers, but not the legislature, to adopt variations in their elected form of government.<sup>3</sup> None of the laws **mandate** any county to change its form of government. Rather, they provide options uniformly available to local decision makers to choose to exercise. In fact, the legislature specifically recognized this difference in its consideration of the Voting Rights Act, expressly drafting it to be “consistent with legal precedent from *Mt. Spokane Skiing*.” RCW 29A.92.005. Accordingly, the Voting Rights Act does not **mandate** but rather allows a county to address a voting rights violation by voluntarily submitting to a local vote a plan to adopt district voting. *See* Opening Br. at 30-31. And it does not grant this authority to a subset of counties, but rather authorizes all Washington counties to take such action. *Id.* In stark contrast, SHB 2887 stands alone as it **mandates** that Spokane County implement a different form of government from the one it has shared with all other noncharter counties for over a hundred years. *Id.* at 8-9.<sup>4</sup>

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<sup>3</sup> *See* RCW 36.32.020 (in part, permitting certain island counties to draw commissioner districts without regard to population); RCW 36.32.055 (permitting voters in certain noncharter counties to decide whether to increase the number of their county commissioners); RCW 29A.92.040 (permitting voters to alter the electoral system to remedy federal voting rights violations). The provision related to island counties only applied to San Juan County, which has since adopted a charter form of government. The statute no longer has substantive effect. The same is true of RCW 36.32.055, which applies to Spokane County only.

<sup>4</sup> The State’s contention that SHB 2887 applies to all five Washington counties with more than 400,000 persons ignores that once a county adopts its own charter, its system of

**5. SHB 2887's fundamental restructuring of Spokane County's government violates the uniformity requirements established by *Maulsby*.**

Finally, the State's argument that the constitution does not require identical operation and functioning of county government is wrong. Resp. at 5. The number of commissioners and their election process are foundational elements of county government, not insignificant components or local operation of an otherwise uniform system. Accordingly, these aspects naturally must be uniform for the system itself to be uniform. *See Maulsby*, 88 Wash. at 585 ("A system of government consists of the powers, duties, and obligations placed upon the political organization, **and the scheme of officers charged with their administration.**") (quoting with approval *Singleton*, 35 P. at 835) (emphasis added).

In sum, SHB 2887 violates the constitutional uniformity requirement set forth in the constitution and as determined in *Maulsby* by mandating that only Spokane County elect five rather than three commissioners, use district rather than countywide elections, and implement districts created by a partisan-appointed committee. Opening Br.

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government is outside the legislature's domain and not subject to laws like SHB 2887. Const. art. XI, § 4. The system must be uniform only as to noncharter counties. The State's contention also is belied by its prior admissions in this case, CP 12-13 (admitting that "Spokane County is the only noncharter county presently affected by SHB 2887, and that all other noncharter counties are subject to a different statutory regime."), and by the clear intent of the legislature. Opening Br. at 24 (citing, among other statements, one co-sponsor of SHB 2887 describing SHB 2887 as "a solution for Spokane County").

at 12-21. This is not a system where “all essential particulars . . . [are] alike.” *Maulsby*, 88 Wash. at 585-6 (quoting with approval *Singleton*, 35 P. at 835). SHB 2887 is unconstitutional.

**B. *Maulsby* Should Not Be Overruled.**

Recognizing that *Maulsby* controls the outcome here and mandates reversal, the State briefly suggests that *Maulsby* be overturned. Resp. at 9. Prior precedent is overturned only upon “a clear showing that an established rule is incorrect and harmful” or, in “relatively rare” occasions, “when the legal underpinnings of our precedent have changed or disappeared altogether.” *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (internal quotations and citations omitted).

The State provides no substantive argument for how this standard is met here. The State does not show how *Maulsby*'s legal underpinnings have eroded. Instead, the State offers the vague claim that *Maulsby* has “depriv[ed] Washington . . . of the fruits of representative democracy in the Legislature and squeezing counties to a governmental system blind to their diversity.” Resp. at 9. But in addition to lacking any evidence how *Maulsby* has that claimed effect, it is bizarre under the facts here as the impacted voters of Spokane County have exercised their democratic right in repeatedly rejecting a change to their system of government. The State's claim is further perplexing as it suggests that the State's own uniform

system of county government is harmful to the 32 counties that use it—a proposition with no basis in fact or experience.

The State cites *State v. Pierce*, \_\_ Wn.2d \_\_, 455 P.3d 647 (2020), for the general standard to overturn controlling precedent. Resp. at 9. But *Pierce* is nothing like this case. In *Pierce*, the Court overturned *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), under which it was error to inform potential jurors that they were not being asked to sit on a death penalty case, because a “major basis of the *Townsend* rule ha[d] eroded dramatically: there [wa]s currently no lawful death penalty statute in Washington State.” *Pierce*, 455 P.3d at 652. Moreover, as the *Pierce* Court explained, courts across the nation had overwhelmingly approved of informing prospective jurors when the death penalty was not at stake. *Id.* (citing cases). Here, as explained above, no authority has undermined or questioned *Maulsby*’s holding with respect to what uniformity requires under the Washington Constitution. *Supra*, Section II.A.2-3. In fact, subsequent case law has affirmed *Maulsby* on this point.

As to harm, *Pierce* again is nothing like this case. As the *Pierce* Court explained, the *Townsend* rule was harmful because an onerous number of jurors had to be summoned in homicide cases—it was common to “summon over 1,000 potential jurors in death penalty cases”—and death-qualifying juries suffer an intolerable defect: they disproportionality

exclude people of color. *Pierce*, 455 P.3d at 653. Here, *Maulsby* does no such harm. To the contrary, uniformity protects noncharter counties by ensuring that they will not be subject to the political vicissitudes of the legislature regarding what is “best” for them.

**C. The Legislature May Classify Counties by Population For Only Two Purposes, Neither of Which Applies Here.**

The State’s assertion that the constitution permits the legislature to classify counties by population for any and all purposes is equally unfounded. Resp. at 16-18. Section 5 identifies only two instances in which the legislature may rely on such classifications: to consolidate officials’ duties and set their compensation. Const. art. XI, § 5; *see* Opening Br. at 22-24. The State’s argument otherwise is based on an improper reading of the single sentence that Amendment 12 added to Section 5: “the legislature may, by general laws, **classify the counties by population and provide for the election in certain classes of counties** certain officers who shall exercise the powers and perform the duties of two or more officers.” (emphasis added). The State’s claim that the people of Washington, in enacting this sentence, were in fact making two substantive changes to the constitution—one, allowing for classification of counties by population for any and all purposes and two, allowing for consolidation of county officer duties—is incorrect for numerous reasons, most of which Spokane County

raised in its Opening Brief and the State failed to address in its Response.

First, the State ignores that Amendment 12 must be read as a whole. The legislature's ability to "provide for the election in **certain classes** of counties" necessarily is modified by the means of classification allowed: "by **population**." (emphasis added). Opening Br. at 25-26. Reading Section 5 in the disjunctive, as the State does, would leave "certain classes of counties" undefined. Under that interpretation, nothing would prevent the legislature from classifying counties for the purpose of consolidation on any basis whatsoever, such as the number of educational institutions or miles of river in a county. Such a result would be an absurd interpretation of the constitutional language.

Second, as Spokane County previously explained, the State's interpretation would render the provisions regarding consolidation and compensation redundant and irrelevant. Opening Br. at 26. If the legislature has broad authority to "classify counties by population" for any purpose, then the constitution would not need to separately authorize such classification for consolidation or compensation. But that is exactly what the constitution does. To read Section 5 as the State proposes improperly would render these two provisions nugatory. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 260, 11 P.3d 762 (2000) ("[E]ach word in a constitutional provision must be accorded its own separate

meaning, and the court should not embrace a construction causing redundancy or rendering words superfluous.”). Thus, rather than read the word “and” out of the amendment, Spokane County gives meaning to all terms.

Third, the history of Amendment 12—which the State also ignores—confirms the propriety of Spokane County’s reading. As described above, *Maulsby* held that the legislature could not classify counties by population for the purpose of consolidating county official duties under Section 5 as originally written. Opening Br. at 25-28. In response, the voters passed Amendment 12 to add that specific purpose. *Id.* Both contemporaneous media descriptions and case law confirm this limited intent of Amendment 12. *Id.* There is no basis in Amendment 12’s history for the State’s assertion that, in fact, voters intended to implement two different constitutional changes, one of which would broadly allow classification by population for any and all purposes. If that sweeping expansion of power had been the intent and purpose of Amendment 12, there would be some evidence in support. The State has cited none, because there is none.

Fourth, that classification of counties by population is limited to two specific purposes is further confirmed by the contrasting language used elsewhere in the constitution that directs the legislature to classify

municipalities by population. Opening Br. at 23. The State fails to address this authority.

Finally, the State's cases comport with Spokane County's more natural reading of Section 5. In *Scofield*, this Court upheld a law to transfer duties among county officials specifically because that purpose fit within the legislature's existing authority to consolidate duties. 182 Wash. at 214. Likewise, in *Schragg*, the Court upheld a law that classified counties to "fix[] the compensation of county officers . . . and consolidate[] certain county offices." 159 Wash at 69. These cases involved classifications that fall squarely within one of the two permissible constitutional exceptions. Neither stands for the proposition that the legislature has unfettered power to classify by population.

**D. Plaintiffs Never Objected to SHB 2887 as a Special Law.**

Finally, the State's contention that SHB 2887 is not a special law is a red herring. Resp. at 12-14. Spokane County is not challenging SHB 2887 as a special law. To that end, the State's cited cases are inapposite.

As previously explained, *Schragg* does not concern uniformity at all. *See, supra*, Section II.A.3. Rather, in *Schragg* this Court considered whether a state law comported with the requirement under Article XI, Sections 4 and 5 that such laws be "general." 159 Wash at 69-70. The requirement of generality (the only issue raised in *Schragg*) is separate from

the requirement of uniformity (the only issue raised here). *See, supra*, Section II.A.3; *see also Amalgamated Transit Union*, 142 Wn.2d at 260.

As to the State's remaining cases, they are likewise inapt. Both cases concern Article II, Section 28's general "prohibit[ion] . . . [on] any private or special laws." *CLEAN v. State*, 130 Wn.2d 782, 801-02, 928 P.2d 1054 (1996); *Brower v. State*, 137 Wn.2d 44, 60, 969 P.2d 42 (1998). But this is not an Article II, Section 28 case. And, unlike that provision, Article XI, Section 5 contains explicit language as to when classifications by population are permissible, none of which applies to SHB 2887. The State's reliance on cases interpreting a constitutional provision not at issue here is misplaced.

### **III. CONCLUSION**

SHB 2887 mandates a fundamentally different county government structure and process for electing county commissioners based on population and effecting Spokane County only. Such a system is not uniform and violates Article XI, Sections 4 and 5. This Court should declare SHB 2887 unconstitutional.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of April, 2020.

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I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 17<sup>th</sup> day of April, 2020, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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