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No. 96821-7

SUPREME COURT
OF THE STATE OF WASHINGTON

THE JUDGES OF THE BENTON AND FRANKLIN
COUNTIES SUPERIOR COURT: JUDGE JOE BURROWES,
JUDGE ALEX EKSTROM, JUDGE CAMERON
MITCHELL, JUDGE CARRIE RUNGE,
JUDGE JACQUELINE SHEA-BROWN, JUDGE BRUCE SPANNER
AND JUDGE SAM SWANBERG,

Respondents,

v.

MICHAEL KILLIAN, FRANKLIN COUNTY CLERK
AND CLERK OF THE SUPERIOR COURT,

Appellant.

BRIEF OF *AMICUS CURIAE*
WASHINGTON STATE ASSOCIATION
OF COUNTY CLERKS

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A. INTRODUCTION

The current lawsuit highlights the friction that necessarily follows where elected officials in separate branches of government are tasked with specific, and sometimes overlapping, powers and responsibilities. Washington's constitutional Framers intentionally distributed powers and responsibilities among numerous elected officials at both the state and local level to assure direct accountability to the citizens and to protect the people of Washington from abuses that often arise from the concentration of power.

County Clerks, whose positions are created in the Constitution within the executive branch of county government, perform tasks for the judiciary by virtue of their office, but they are also elected county executive branch officials with independent constitutional and statutory authority and responsibilities for which they are answerable, not to the judiciary, but to the voters.

The Washington State Association of County Clerks ("WSACC") urges this Court to reverse the trial court's decision here.

B. INTEREST OF *AMICUS CURIAE*

As required by RAP 10.3(e), WSACC notes that its interest in this action is set forth in detail in its motion for leave to file this *amicus* brief. Its counsel has reviewed the briefs on the merits submitted both by

Franklin County Clerk Michael Killian and the Benton Franklin County Superior Court Judges (“Judges”).

C. STATEMENT OF THE CASE

WSACC adopts the statement of the case in the brief of Clerk Killian.

D. ARGUMENT

In analyzing the trial court’s order here, it is important for this Court to understand the sources of the County Clerks’ responsibilities and their role in providing services.

(1) Authority and Duties of County Clerks

(a) Constitutional Treatment of County Clerks

Supplementing the discussion offered by Clerk Killian, appellant br. at 6-16,¹ prior to statehood, the clerks of the then district courts were appointed by, and served at the pleasure of, their respective judges, who, in turn, were appointed by the President of the United States; these clerks were not officers of county government. Appellant Br. at 6.

Notwithstanding that history, the Framers opted to provide for *elected* County Clerks. The position of County Clerk is listed in article XI, § 5 of the Washington Constitution among the elected executive

¹ Any reference to appellant Killian’s brief is to his corrected version.

branch positions in county government. That provision was derived from the 1879 California Constitution. Appellant Br. at 6-8. *See Appendix.*

The concept of an elected clerk at the county level was not unfamiliar to the Convention's delegates. Under territorial laws, each local school district was served by a separately elected clerk. From the earliest days the people of Washington were accustomed to structures of local government which placed officers responsible for the public's money and their records within the executive branch and made them directly accountable to the voters.

The fact that County Clerks are elected local officials is the result of the work of the Committee on Counties, Cities and Townships, chaired by Theodore L. Stiles, who also served on the Committee for Judicial Department and later became one of the State's first Supreme Court Justices. He made the motion at the Convention on August 19, 1889 to insert "including a county clerk for each county" into the provision for election of county officers at the commencement of state government. Wash. Const. art. XXVII, § 7; Beverly Rosenow, *The Journal of the Wash. State Constitutional Convention 1889* (1962) ("*Journal*") at 407. The creation of the clerk as an elected local official within a county's executive branch was an intentional choice. If the Framers had intended Clerks to be subservient to the judiciary, it is highly unlikely they would have been

separately elected county executive branch officials; rather, they would have been judicial appointees.²

At the Convention, the Committee on County, City and Township Organization reported to the Committee of the Whole on July 22, 1889, providing for the election of county officials and omitting the words “or appointment,” which had appeared both in the 1879 California Constitution and in William Lair Hill’s proposed draft for Washington’s Constitution as it set out in the July 4, 1889 *Morning Oregonian*.³ The Convention’s *Journal* is silent on why the Committee recommended elimination of appointment of county officials, but the Committee’s recommendation was adopted by the Convention without debate. *Journal* at 705-32; 123-27; 145-49; 158-64; 408-11.

² As noted *supra*, the Framers clearly knew how to make certain judicial branch officials judicial appointees, but specifically *chose* not to do that for county clerks. *See, e.g.*, Wash. Const. art. IV, § 18 (Supreme Court Reporter); Wash. Const. art. IV, § 22; SAR 16 (Supreme Court Clerk); SAR 15 (Supreme Court Commissioner); CAR 16 (Court of Appeals clerks, commissioners); Wash. Const. art. IV, § 23 (court commissioners).

³ Judge Hill was the former editor of the *Morning Oregonian* and had recently served as Oregon’s code commissioner. Having practiced law in Oregon, California, and Washington, Hill expressed a strong desire to reform Washington’s judicial system, and wrote about the benefits for Washington’s residents by patterning Washington’s judiciary after the California model. He addressed the value of creating a system of county superior courts to replace district courts, but, more particularly, the former probate courts. In Judge Hill’s commentary accompanying the proposed draft constitution, he mentioned abuses within the territorial probate court system, which his suggested court structure would end. He also commented on the convenience of access to courts Washington’s people would enjoy by replacing its territorial system with courts of general jurisdiction that would be open for business every day in every county. W. Lair Hill, *A Constitution Adapted to the Coming State*, *Morning Oregonian*, July 4, 1889, at 9. Correspondingly, Clerks would be designated county officials based at the county seats.

By the terms of article XI, § 5, clerks were to be separately elected officials whose terms of office and, more critically, duties were to be “prescribe[d]” *by the Legislature*, and not by the judiciary. From that constitutional authority, the Legislature provided that County Clerks are elected executive branch officials answerable to the people in their respective counties. RCW 2.32.050.

Although they are separately elected executive branch officials, Clerks are *also* clerks of the superior court. Wash. Const. art. IV, § 26. That section was modeled closely on the language of Article IV, § 14 of the 1879 California Constitution. In drafting Washington’s Article IV, the Convention’s Committee on Judicial Department closely followed the language of William Lair Hill’s proposed draft constitution. With regard to clerks, Hill’s proposed § 21 stated: “The county clerk shall be, by virtue of his office, clerk of the superior court,” following California’s provision for superior court clerks.⁴

Article IV, § 26 of our Constitution does not detract from the role of Clerks as county government officials under article XI, § 5. As

⁴ California’s 1879 Constitution provided for the election of the Supreme Court’s clerk in article IV, § 14. Hill’s proposed draft deleted the election of the Supreme Court’s clerk: “§ 20. The justices of the supreme court shall appoint a clerk of that court who shall be removable at their pleasure: but the legislature may provide for the election of the clerk of supreme court, and prescribe the term of his office.” Hill fully understood the difference between a clerk accountable only to the judges, and superior courts clerks the judges could not remove at their pleasure, who would be directly accountable to the electorate.

recounted in Clerk Killian’s opening brief at 31 and in his reply brief at 2, this Court stated in *State v. Superior Court of Jefferson County*, 3 Wash. 702, 704, 29 Pac. 204 (1892)⁵ that apart from a specific proceeding, “neither the court nor the judge can interfere with the ministerial duty of the clerk.”

Moreover, this Court stated long ago, Clerks – like other county executive officials enumerated in article XI, § 5 – “are servants of the county.” *State ex rel. Taylor v. Superior Court for King County*, 2 Wn.2d 575, 580, 98 P.2d 985 (1940). Therefore, it would be incorrect to say that the office of County Clerk is created in *article IV*. Rather, the office is created in article XI, § 5 and implemented by statute, and the Clerk is made the clerk of the court *ex officio* (“by virtue of” his or her office) in article IV.⁶

In *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 385 P.3d 769 (2016), this Court interpreted the status of prosecutors under article XI, §

⁵ That opinion was authored by Justice Stiles, who was a key player at the convention. Justices Hoyt and Dunbar who voted for the majority also served at the convention. See Charles K. Wiggins, *The Twenty-Three Lawyer-Delegates to the Constitutional Convention*, *Wash. State Bar News*, November 1989 at 9-14.

⁶ The fact that a Clerk performs judicial tasks merely by virtue of his or her office is a significant distinction. The Framers were comfortable with *ex officio* officers. The 1854 probate code at § 17 provided that the county auditor, or clerk of the board of county commissioners, was the probate court clerk. The county auditor was the *ex officio* clerk of the board of county commissioners, as well as the *ex officio* clerk of the probate court.

5, the same provision relevant for clerks. Of particular importance to the Court was the election of prosecutors mandated by article XI, § 5:

When the voters choose an elected official, they necessarily choose who will be responsible for the duties of that office. It would be fruitless to delegate the selection of county officers to the voters if the duties of those officers could be freely delegated to officers appointed by other governmental branches.

Id. at 179-80. Thus, the Legislature could not statutorily interfere with the core functions that made county prosecutors in the first place; that is, the powers and duties pertaining to the office recognized in 1889. *Id.* at 180.

By the very same reasoning, even recognizing the specific subset of Clerks' duties to the courts as *ex officio* clerks of the superior court under article IV, § 26, the judiciary may not, as a separate branch of government, intrude upon the powers and duties of County Clerks as they were historically understood to exist in 1889. During the 1889 Constitutional Convention the County Clerks' duties had yet to be enumerated.⁷

⁷ The Committee on Counties, Cities and Townships debated adding "register of deeds," and "recorders and auditors" to the list of county officials set out in Article XI, § 5, lest these duties fall to the County Clerk, with the Clerk then making a higher salary than a Supreme Court Justice. These motions did not carry, as the Convention felt the needs of the counties varied, and the matter could be left to the Legislature. *Journal* at 718-19.

(b) Duties Prescribed in Statute

The duties of the first County Clerks were very much like those of the appointed clerks of territorial days. The many duties of the district and probate court clerks in multiple sections of the territorial law became the duties of the county clerks. Laws of 1891, ch. 57, § 3. That statute is now codified as RCW 2.32.050. The 1891 legislation that became RCW 2.32.050 was largely Hill's work product as code commissioner. Given Hill's status as the drafter of the clerk provisions of Article IV and Article XI, and the likely author of RCW 2.32.050(9), it is highly unlikely that the statute gave total control of the Clerk's actions to the judiciary. Rather, like sheriffs, the Clerks were elected local executive branch officials acting as ministerial officers of the court, executing some but not all of their duties under the direction of the court. But they were also directly responsible to the public for the efficient and lawful functioning of their offices.

Our courts have indicated that in performing many of their duties as the *ex officio* superior court clerk, the Clerk's judicial branch functions are generally ministerial. In *Swanson v. Olympic Peninsula Motor Coach Co.*, 190 Wash. 35, 38, 66 P.2d 842 (1937), a garnishment case, the Court stated in dicta:

The duties of county clerk as clerk of the superior court are defined both by statute and court rules. Generally speaking, a clerk is an officer of a court of justice, who attends to the clerical portion of its business, and who has custody of its records and files and of its seal. Such an office is essentially ministerial in its nature, and the clerk is neither the court nor a judicial officer.

The *Swanson* court correctly noted that Clerks have been given the responsibility for the custody of the court's records, files and seal by the Legislature. *Id.* Plainly, as the Court determined, the Clerk is not the court, and service upon the Clerk is no substitute for service on the other party.

This in no way detracts from Clerks' inherent powers derived from the Constitution as county executive branch officers. Otherwise, the power of the voters to elect the Clerk would be "fruitless." *Drummond*, 187 Wn.2d at 179.

The Legislature has prescribed the terms of office and duties of County Clerks in Title 36 RCW. The term of office for Clerks is four years, as is true for all other county executive officials. The County Clerk must also execute a bond, RCW 36.16.050(3), and swear an oath, RCW 36.16.040, in order to qualify to serve. Clerks collect court-related fees, RCW 36.18.020, and in doing so may elect to accept various payment

methods. RCW 36.23.100.⁸ Clerks may employ collection firms. RCW 36.18.190. They process passports. RCW 36.18.016. RCW 36.16.110 and .115 prescribe how vacancies in the office of clerk are filled. RCW 36.16.125 provides that a vacancy is created if a Clerk abandons his/her responsibilities or is absent from the county; the Clerk's salary may be suspended. RCW 36.17.050. RCW 36.16.120 requires a Clerk to complete the business of his/her office by the end of the term of office and RCW 36.23.040 requires the Clerk to deliver to his/her successor "all books and papers belonging to" the office. As county department heads, Clerks are responsible for performing their duties within the budget and the staff positions that the county commissioners provide.⁹

A Clerk is authorized to appoint deputies to perform her/his services. RCW 36.16.070. That power to appoint deputies is significant. In *Osborn v. Grant County By and Through Grant County Comm'rs*, 78 Wn. App. 246, 896 P.2d 111 (1995), the Court of Appeals ruled that county officials had no authority to interfere with a Clerk's right to select deputies of his/her choosing, noting that as a separately elected official,

⁸ It is noteworthy that this fee collection duty is in Title 36 RCW. The fee-collecting duties of the judicially-appointed clerks of the appellate courts is in RCW 2.32.070.

⁹ RCW 36.40.100 states, "...every county official shall be limited in the making of expenditures or the incurring of liabilities to the amount of the detailed appropriation items or classes respectively." Under RCW 36.40.240, each official is guilty of a misdemeanor should he or she fail to do so.

the Clerk had “sole authority” on hiring decisions. *Id.* at 250. This Court affirmed *Osborn*’s central holding at 130 Wn.2d 615, 926 P.2d 911 (1996), reaffirming *Thomas* and observing that the recourse for a flawed hiring decision by a Clerk, an elected official, was at the ballot box. *Id.* at 624. *See also, Thomas v. Whatcom Cty.*, 82 Wash. 113, 124, 143 Pac. 881 (1914) (county sheriff had “absolute right” to select deputies).

RCW 2.32.050 contains a recitation of Clerks’ duties when acting in their *ex officio* capacity as the clerk of the superior court. While most of these enumerated duties pertain to the courts, Clerks are authorized there to take and certify the proof and acknowledgement of a real property conveyance or other written instrument that must be proved and acknowledged. Moreover, RCW 2.32.050(8) specifically references other statutory duties of Clerks when it requires Clerks “[t]o exercise the powers and perform the duties conferred and imposed upon him or her elsewhere by statute.”

(c) Duties Prescribed by Court Rule

There are also court rules pertaining to the functions of County Clerks as *ex officio* clerks of the superior court. CR 78, for example, addresses some of those powers. It is noteworthy, however, that Professor Tegland has described CR 78 and RCW 2.32.050 as follows: “Even when combined, RCW 2.32.050 and CR 78 are not a complete statement of the

powers and duties of a superior court clerk. Literally dozens of other statutes and rules affect the duties of the clerk as well.” Karl B. Tegland, 4 *Wash. Prac. Rules Practice* (6th ed. 2013) at 733. The most recent version of the County Clerk’s Manual for the State of Washington, last updated by Professor Tegland in November 2011, lists most statutes and multiple court rules containing duties of the county clerks and runs to 1435 pages.

GR 29(f) provides that superior court presiding judges have certain powers, but those powers do not extend to “those duties assigned to clerks of the superior court pursuant to law.”

(d) Duties Related to Records

WSACC agrees with the discussion in Clerk Killian’s brief at 12-16 regarding Clerks’ role with regard to records. Clerks have specific record-keeping duties that are both executive and judicial in nature. RCW 2.32.050; RCW 36.23.030. Although a great deal of a Clerk’s recordkeeping pertains to court-related records, WSACC notes that RCW 36.23.030(12) requires the Clerk to keep “[s]uch other records as are prescribed by law and required in the discharge of his or her office.” The Clerk has a statutory duty to safeguard these records. RCW 36.23.040. A Clerk may reproduce and even destroy records, RCW 36.23.065, and such authority extends to exhibits, but that statute requires the Clerk to first

obtain an order from the court. RCW 36.23.070.¹⁰ The Legislature has provided that court records maintained by the Clerk which are reproduced in compliance with the criteria in RCW 36.23.067 “shall have the full force and effect of the original for all purposes.” Some examples of a Clerk’s executive power over records include: a Clerk’s duty to record wills and bonds, RCW 11.20.050; RCW 36.23.030(7), a Clerk’s duty to assist adoptees in connection with contacting birth parents, RCW 36.23.090, a Clerk’s duty to process passports, RCW 36.18.016, and a Clerk’s duty to process payments and collect fees, RCW 36.18.020; RCW 36.23.100.

While a Clerk has a duty to maintain records “appertaining to the court,” RCW 2.32.050, Clerks play no part in maintaining some judicial records. Our Supreme Court has recognized that County Clerks do not “generally maintain the judiciary’s administrative records,” GR 31.1(k)(1), i.e. records relating “to the management, supervision, or administration of a court or judicial agency.” GR 31.1(b)(2). Nor do they maintain “chambers records” which “are controlled and maintained by a judge’s chambers.” GR 31.1(b)(3). Thus, just as some records are executive in

¹⁰ Clerks’ authority to destroy old court records was addressed in AGO 1960 No. 125 where the Attorney General emphasized strict adherence to the legislative policy set forth in RCW 36.23.065. This AGO clearly grasped the dual nature of the office of County Clerk observing that it was by virtue of that office, the Clerk was also clerk of the superior court with statutory duties for keeping court records, files, books, and papers.

nature, some records are court records in the care and custody of the executive branch, and some are purely judicial, and the Clerk has no obligation to maintain such records on behalf of the judiciary.

To summarize, the authorities referenced above evidence a dual status for County Clerks as both county executive branch officials elected by the people of their counties and as *ex officio* superior court clerks – officers of the court who, while they are not judicial officers, have certain ministerial duties for the courts. There are tensions in these roles requiring a nuanced sense of the Clerks’ appropriate role.¹¹

(2) The Judges’ Process for Provoking a Crisis with Clerk Killian Was a Misuse of the Court Rule Process

¹¹ This Court addressed the responsibilities of a Clerk in *Matter of Recall of Riddle*, 189 Wn.2d 565, 403 P.3d 849 (2017), but the Court’s decision did not answer the question posed in this case. Although the backdrop for the recall effort in that action against the Yakima County Clerk was Yakima County’s implementation of the Odyssey records management system, the Court upheld the legal sufficiency of the charges against the clerk on narrow grounds. The recall charges alleged that the Clerk deliberately failed to transmit certain court orders to the requisite agencies and failed to account for fees. The charge most relevant to the issues here was charge three relating to the clerk’s alleged refusal to perform certain in-court duties the superior court judges directed. *Id.* at 579-84. The Court acknowledged in its opinion at 583-84, the dual role of a Clerk, but did not identify the exact contours of the Clerk’s dual role as a county executive branch elected official and *ex officio* clerk of the superior court.

Similarly, in *Riddle v. Elofson*, ___ Wn.2d ___, 439 P.3d 647 (2019), this Court denied an extraordinary common law writ, there, a writ of prohibition, in a case brought by the former Yakima County Clerk regarding the order by the Superior Court Judges requiring her to post a supplemental bond, given problems in her administration of her office. The Court was careful to note that the judges acted pursuant to statutory authority and Riddle had a remedy at law to challenge the added bond order – preliminary injunction/declaratory relief remedies afforded by court rule and statute. Justice Gordon McCloud’s concurrence specifically recognized the dual role of a Clerk as an officer of the court and a separately elected official. *Id.* at ___.

The Franklin County Judges determined to issue a local court rule to impose their will on Clerk Killian by “judicial legislation.” *See* Appellant Br. at 27-36; Judges’ Br. at 24, 26. As this Court is well aware, the exercise of local judicial rulemaking authority is fraught with constitutional and procedural questions. That power was exercised here so as to intrude upon local legislative appropriations authority and the functions of a constitutional executive branch officer of county government.¹²

Our Constitution provides that this Court is at the apex of the judicial branch of government, Wash. Const. art. IV, § 1, but it authorizes the judges of the superior court to “establish uniform rules for the government of the superior courts.” Wash. Const. art. IV, § 24.¹³ The

¹² In the last legislative session, the Legislature enacted SSB 5560 by unanimous votes in both houses to avoid this very type of dispute. Pursuant to that legislation, elected officials (including judges) may not file a lawsuit involving a dispute between such officials until such time as they have made a good faith attempt at mediating the dispute. Laws of 2019, ch. 463, § 1.

¹³ In *State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County*, 148 Wash. 1, 10, 267 Pac. 770 (1928), this Court treated this section of the Constitution not as a grant of authority to the superior courts, but as a mandate for rule uniformity:

It seems to us that the purpose of section was to insure *uniform* rules of minute procedure, and that it should be construed, not as a grant of power to make broad and general rules, but as a limitation upon the courts requiring that the customary rules having to do with the minutiae of court government should be uniform in character so that attorney and client should not be hampered by finding petty rules in each court differing according to the views of the particular judge who presided over the tribunal.

Legislature has conferred rulemaking authority upon this Court. RCW 2.04.190. But this Court has made it clear that it has *inherent* rulemaking authority for the courts stemming from its position at the apex of the judicial branch. As this Court stated in 1928:

Nowhere is there a constitutional provision that the Supreme Court shall have power to make rules for its own government. It can hardly be contended that the able framers of the Constitution intended to grant the superior courts power to make rules and deny it to the Supreme Court. The power to make rules for its general government has always been an attribute of the court. The framers of the Constitution, realizing this, saw that there was no need for such a grant of power to either the Supreme Court or the superior courts.

Foster-Wyman Lumber Co., 148 Wash. at 11.

The Court reaffirmed that view in *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974), differentiating between the courts' inherent procedural rulemaking power and substantive law:

...courts have certain limited inherent powers; among these is the power to prescribe rules for procedure and practice. Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the

(Court's emphasis.) *But see* RCW 2.16.040 ("At its annual meetings, pursuant to section 24, Article IV of the state Constitution, the association shall have power to establish uniform rules for the government of the superior courts, which rules may be amended from time to time.").

essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

(citations omitted).¹⁴

Ultimately, however, by rulemaking, the courts cannot “contradict the state constitution by court rule.” *Id.*

Here, the local rule at issue is not an effort by the superior courts generally to promulgate a *uniform* rule. Rather, the Franklin County local rule treads upon the authority of this Court, expressed through its JIS Committee and the Court User Work Group created in 2012, to facilitate the transition to the paperless Odyssey system in local courts. *See* Superior Court Case Management System (“SC-CMS”) Project, <https://www.courts.wa.gov/?fa=home.sub&org=sccms&layout=2>. It also treads upon the independent constitutional authority of Clerks as county executive branch officials. Indeed, the rule was adopted without appropriate due process attendant upon rulemaking such notice and public hearings. *See, e.g.*, RCW 34.05.320 (APA procedures for rulemaking). It trenches upon the substantive authority of the Franklin County Commissioners to adopt information systems policy for that County.

¹⁴ *Accord, State v. Fitzsimmons*, 94 Wn.2d 858, 620 P.2d 999 (1980); *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981) (refund of jury fees); *State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002) (police advisement of suspect rights); *Sackett v. Santilli*, 146 Wn.2d 498, 504, 47 P.3d 948 (2002) (jury waivers).

The local rule that forms the predicate for the issuance of the writ of mandamus to Clerk Killian is invalid.

(3) County Clerks' Duties Are Not Merely Ministerial in Nature

The Judges, as evidenced by the present action, would treat the separate election of County Clerks as largely meaningless and would have Clerks be nothing more than judicial subordinates with no independent decision-making capacity. *See also*, Benton and Franklin Counties Judicial Resolution 18-001 attached to the declaration of Judge Bruce Spanner filed March 21, 2018 (arguing that “The Clerk’s function is ‘ministerial.’”). This interpretation would allow judges to override the Clerks’ independent elected status in a fashion the Constitution does not envision. Again, the proper analysis is more nuanced. The Constitution, statutes, and court rules recognize a dual nature to the status of County Clerks as county executive branch officers who perform some tasks related to the judiciary.

(a) Non-Judicial Control Over County Clerks

As noted *supra*, Clerks are county executive branch officers; non-judicial officers have control over them. Clerks’ salaries are set by county commissioners, not the judiciary. RCW 36.17.020. The commissioners generally set the frequency of payment of such salaries. RCW

36.17.040/.042. The commissioners must provide appropriate office space for County Clerks and their staffs, RCW 36.16.090, and this office space must be located at the county seat. RCW 36.23.080. Commissioners are also tasked with auditing the Clerks' accounts, to the extent they handle county funds. RCW 36.32.120(5). The great majority of fees related to court records and services fully or partially comprise county general fund revenue.

Budgetary issues are decidedly not ministerial in nature.¹⁵ As county department heads, Clerks are subject to the provisions of RCW 36.40. The Clerks receive the auditor's demand to file a detailed and itemized estimate of probable revenues and expenditures for the ensuing fiscal year pursuant to RCW 36.40.010 and must timely submit the same on forms provided by the auditor or be liable for a daily financial penalty as stated in RCW 36.40.030. They participate in the county budget hearing process required in RCW 36.40.070 and must comply with the budget ultimately adopted by the commissioners. "...Every county official shall be limited in the making of expenditures or the incurring of liabilities to the amount of the detailed appropriation items or classes

¹⁵ For example, in *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 229 P.3d 774 (2010), the governor declined to include funding for collectively bargained wage increases in her budget submitted to the Legislature. This Court denied a writ of mandamus to compel her to do so, noting that a governor's budgetary decisions are particularly matters of discretion for the executive and are "inappropriate for mandamus." *Id.* at 600.

respectively,” RCW 36.40.100. “Expenditures made, liabilities incurred, or warrants issued in excess of any of the detailed budget appropriations or as revised by transfer as in RCW 36.40.100 or 36.40.120 provided shall not be a liability of the county, but the official making or incurring such expenditure or issuing such warrant shall be liable therefor personally and upon his or her official bond,” RCW 36.40.130. As a county executive branch department head, the Clerk potentially bears criminal liability, for overspending the amount appropriated, or otherwise failing to comply with the provisions of RCW 36.40.¹⁶

In addition to prescribing Clerks’ duties in Title 36 RCW discussed *supra*, the Legislature controls the Clerks’ functions elsewhere. For example, in the area of public records, the Public Records Act (“PRA”) mandates that all agencies, including county offices, must make records available to the public. RCW 42.56.010(1)/.070. This Court has recognized that Clerks are fully subject to the PRA, while the judiciary largely is not. GR 31.1(k)(1). This distinction is important. If Clerks were merely judicial subordinates, then it would follow that they would be exempted from the PRA in the same manner as is the judiciary. The PRA

¹⁶ RCW 36.40.240 (“Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars nor more than five hundred dollars.”). Indeed, as noted in *Riddle*, 189 Wn.2d at 585-87, a Clerk’s failure to appropriately account for, or collect, fees may subject that Clerk to a recall.

also highlights that Clerks have an interest in determining how records are maintained. The PRA requires that Clerks establish procedures for promptly responding to public records requests. RCW 42.56.040. Thus, they must have a say in how records are kept at the courthouse. Clearly, the Legislature recognized the important executive role Clerks play, separate and apart from their judicial duties.

(b) Judicial Control Over County Clerks' Duties

To a significant extent, the question of the degree to which County Clerks are subject to judicial direction is intertwined with the question of the Clerks' dual constitutional role as both elected county executive branch officials and *ex officio* superior court clerks. While the Clerks have certain ministerial duties related to the handling of court records, they also have independent duties and obligations, specifically recognized in statute and in court rule, for which they are answerable to the voters.

Undeniably, certain Clerk functions for the courts are ministerial¹⁷ in nature, and the judiciary may direct the Clerks as to how ministerial

¹⁷ 67 C.J.S. *Officers* § 342 defines a ministerial duty as “a simple definite duty imposed by law, arising under conditions admitted or proved to exist, to be performed with such precision and certainty so as to leave nothing to the exercise of discretion. A “ministerial act” by an official is one that a public official is required to perform upon a given state of facts, in a prescribed manner, in obedience with the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed. A ministerial act is devoid of any meaningful official discretion.” As distinct from how rapidly a pleading must be physically filed in the court file (AGO 2001 No. 6), today’s selection of records-keeping systems that address both the needs of the courts, individual judges, their staffs, attorneys, and the public, addresses system

functions must be accomplished relative to judicial records and activity.¹⁸ For example, AGO 2001 No. 6 addressed whether the superior courts could adopt a rule requiring Clerks to file all original pleadings and other documents in the court file within three court days or face sanctions. The Clerk is already required by statute to keep the court's case records. This means the Clerk must not only retain these records in a secure manner as their legal custodian, but must also make these records accessible to both the court and the public. Requiring that the necessary organization be accomplished within a certain number of days is a relatively *de minimis* procedural standard for the court to impose, particularly in light of the fact that in 2001, unlike now, the paper case file was the only access the court and public had to the case record. The Attorney General concluded the courts could require such performance.¹⁹

Many of the ministerial functions subject to court control are set forth in RCW 2.32.050 and CR 78. However, as noted herein and as confirmed by Professor Tegland, County Clerks have a statutory

security issues, and possibly interacts with the rest of county government in dealing with other functions is hardly a "ministerial" function.

¹⁸ Judicial control over ministerial tasks may be strongest in individual courtrooms to which deputy clerks are assigned.

¹⁹ Importantly, the Attorney General in AGO 2001 No. 6 also observed that judges were limited in their ability to sanction Clerks or their subordinates. "[T]he court cannot remove or replace the clerk. ...[T]he voters, and not the court, select the county clerk. State law also assigns personnel decisions as to subordinate employees to the elected clerk."

obligation under RCW 36.23.040 to generally safeguard the records in their custody, transfer them to the custody of their successors, and to perform a variety of functions that have no specific relationship to the courts. In today's world, this entails multiple discretionary choices regarding selection of software, entering into contracts with other agencies, working collegially with multiple agencies and county departments, providing extensive staff training and a host of tasks that are in no way ministerial. The County Clerks, therefore, have responsibilities independent from their status as the *ex officio* superior court clerks to address such records. This gives County Clerks a significant role in the choice and utilization of records systems on a "macro" or public policy basis.

Simply put, merely because County Clerks perform some ministerial tasks for the judiciary, that does not make them *subordinates* of the judiciary. As *constitutional* officers, even performing ministerial functions for the judiciary, Clerks are not somehow second-class or subordinate officers, as the Judges would have this Court believe.

(c) The Current Dispute Involves an Area of Overlapping Authority

The real controversy between Clerk Killian and the Judges in this case is not over ministerial tasks but rather a more critical public policy

issue, involving a discretionary public policy decision rather than a ministerial act, directly related to the Administrative Office of the Courts' decision to implement the Odyssey document and case management systems. When Franklin County adopted Odyssey, the Court, the Clerk, and the County signed an agreement to maintain the record of all case documents digitally within the Odyssey document management system. After the Franklin County court had successfully used Odyssey's digital records access capabilities in its courtrooms for two years and no longer relied on paper files, the Clerk ceased to maintain duplicate paper records.²⁰ This is a department *policy*, as opposed to a *procedural*, decision, that directly impacts the Clerk's operations, staffing and ability to perform mandated duties within the departmental budget the Commissioners appropriated. The Clerks have a constitutionally-based role in such policymaking that the judiciary may not overlook.

As outlined above, the judiciary has procedural authority over, and the Clerk has custodial responsibility for, certain superior court records. It

²⁰ In their brief at 1, the Judges offer a tribute to the "old fashioned" ways of doing court business, claiming that the Clerk "forced" paperless records on them as opposed to "the traditional, reliable and well-practiced form" for records and court processes. But, as noted *supra*, this was a decision of Washington's entire court system, including this Court, starting in 2010. It is long overdue. See Philip A. Talmadge, *New Technologies and Appellate Practice*, 2 Jnl. of App. Prac. & Process 363, 367-70 (2000).

Far from lacking access to pertinent court files, the Judges here have laptops and iPads, paid for by Franklin County's taxpayers, with access to all Franklin County case files back to 1895.

is common in our constitutional system that members from different branches often share authority in the same area. This Court has recognized that “complete separation was never intended and overlapping functions were created deliberately” by the Framers. *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 242, 552 P.2d 163 (1976). Rather, “cooperation and coordination among the branches is to be encouraged.” *Carrick v. Locke*, 125 Wn.2d 129, 137, 882 P.2d 173 (1994).²¹

In *Juvenile Director*, this Court reversed a trial court order directing the Grant County commissioners to increase the juvenile court director’s salary. The Court emphasized the need for “reciprocity” between the legislative and judicial branches. *Id.* at 248. It held that before a court may exercise any inherent authority regarding funding of judicial services, but such inherent authority must be established by clear, cogent, and convincing evidence documenting that the funds provided failed to allow the judiciary to hold court, conduct the administration of justice efficiently, or fulfill their constitutional duties. *Id.* at 251.²²

²¹ Thus, rather than file the present mandamus action, the Judges would have been well-advised to “look for a continuity of necessary cooperation” between the different branches to solve the issue. *Juvenile Dir.*, 87 Wn.2d at 251. Similarly, GR 29(c) provides: “In those cases where the superior court is not responsible for the management of the clerk’s office, the presiding judge should communicate to the county clerk any concerns regarding the performance of statutory court duties by county clerk personnel.”

²² The Wisconsin courts have addressed the issue of inherent judicial branch authority, finding such inherent authority only over activities specific to the existence of

This is not a situation where the Court's inherent authority is abused by the Clerk's position on Odyssey. The Judges are able to hold court without paper files; they are not in a position to order the county commissioners to appropriate additional funds for the Clerk to continue to maintain a redundant set of paper records, which they demand he do. While *Juvenile Director* addressed judicial powers in the context of county legislative authority, its analysis also applies to executive branch authority, particularly in light of the fact that commissioners have executive as well as legislative functions. Its lesson that officials in the different branches of government must cooperate, rather than litigate, applies here.

E. CONCLUSION

County Clerks serve dual constitutional functions. They are first and foremost county executive branch officials answerable to county voters, not the judges, for their position. Although they are the *ex officio*

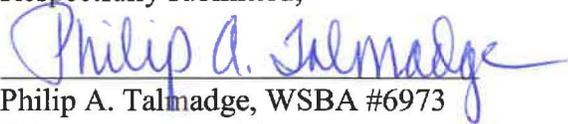
the judiciary as a separate functioning branch of government. *See, e.g., Gabler v. Crime Victims Rights Bd.*, 897 N.W.2d 384 (Wis. 2017) (banning authority of executive branch board to consider and discipline a judge for a criminal sentencing decision); *Barland v. Eau Claire Cty.*, 575 N.W.2d 691 (Wis. 1998) (circuit court's authority to remove judicial assistant despite collective bargaining agreement); *Complaint Against Grady*, 348 N.W.2d 559 (Wis. 1984) (time limits for judges to resolve cases); *Integration of Bar Case*, 11 N.W.2d 604 (Wis. 1943) (regulation of attorneys); *Thoe v. Chi., Milwaukee & St. Paul Ry. Co.*, 195 N.W. 407 (Wis. 1923) (legislation defining the legal sufficiency of evidence); *In re Courtroom*, 134 N.W. 490 (Wis. 1912) (county regulation of courtroom facilities); *In re Janitor of Supreme Court*, 35 Wis. 410 (1874) (interference with appointment of supreme court janitor).

clerks of the superior court, this does not mean Clerks are bound entirely by judicial direction on policy issues associated with recordkeeping.

While courts have the inherent authority to protect themselves from an action that would materially curtail their ability to fulfill their duty, a Clerk who has reasonably exercised her/his discretion to manage the custody of and access to case documents in a way that allows her/his department to function within the budget provided by the county commissioners is operating within the scope of duties the Legislature has prescribed.

DATED this 26th day of July, 2019.

Respectfully submitted,



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APPENDIX

Wash. Const. art. XI, § 5

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office: *Provided*, That 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. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population: *Provided*, That it may delegate to the legislative authority of the counties the right to prescribe the salaries of its own members and the salaries of other county officers. And it shall provide for the strict accountability of such officers for all fees which may be collected by them and for all public moneys which may be paid to them, or officially come into their possession.

Cal. Const. art. XI, § 5:

The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of Boards of Supervisors, Sheriffs, County Clerks, District Attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. It shall regulate the compensation of all such officers, in proportion to duties, and for this purpose may classify the counties by population; and it shall provide for the strict accountability of county and township officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession.

Wash. Const. art. IV, § 26

The county clerk shall be by virtue of his office, clerk of the superior court.

Wash. Const. art. XXVII, § 7

All officers provided for in this Constitution including a county clerk for each county when no other time is fixed for their election, shall be elected

at the election to be held for the adoption of this Constitution on the first Tuesday of October, 1889.

RCW 2.04.190:

The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals, and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the **Brief of *Amicus Curiae* Washington State Association of County Clerks** in Supreme Court Cause No. 96821-7 to the following by the method indicated below:

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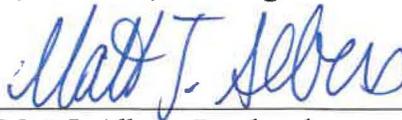
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 26, 2019, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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