



# 2023 AG REQUEST LEGISLATION

## REPEALING UNCONSTITUTIONAL STATUTES FROM STATE LAW

### What's the problem?

For 220 years, American courts have had the authority and responsibility to evaluate statutes passed by legislatures against challenges to their constitutionality. The Washington state constitution (Article IV, § 25) directs the state Supreme Court to advise the governor of any “defects and omissions in the laws” judges have determined to exist as a result of those challenges. In a recent report to the Legislature, Chief Justice Gonzalez listed statutes determined to be unconstitutional but that remain on the books. As a result, those trying to understand the law may be misled, undermining the state’s objective to make the law clear and accessible for all. Examples of unconstitutional statutes still on the books include:

- **Death Penalty.** Major portions of chapter 10.95 RCW authorized and regulated capital punishment for aggravated first degree murder. The court ruled this unconstitutional for failing to protect against racial disproportionality in *State v. Gregory*, 192 Wn.2d 1, 19 (2018) (citing WASH. CONST. art. I, § 14).
- **Forced sterilization.** RCW 9.92.100 allows a judge to order certain people sterilized. This is unconscionable and at least questionable under *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
- **Loyalty oaths.** RCW 9.81.070 required public employees to sign loyalty oaths attesting that they are not communists and do not belong to subversive organizations. The United States Supreme Court ruled this unconstitutional in *Baggett v. Bullitt*, 377 U.S. 360, 366-67 (1964).
- **Disclosure of private financial records.** RCW 21.20.380 authorized administrative subpoenas of customer banking records from financial institutions without notice to the customer. The court ruled this violates article I, § 7 of the state constitution in *State v. Miles*, 160 Wn.2d 236, 244 (2007).
- **Adult entertainment.** RCW 7.48.050 through .100 classified certain adult entertainment facilities as nuisances and authorized courts to enter preliminary injunctions against them. A federal court ruled this violates the First Amendment in *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 138-39 (9th Cir. 1980).
- **Presumption of innocence.** RCW 9.94A.530(2) provided, in part, that criminal defendants must either object to the state’s description of their criminal history or be deemed to have admitted it. The court ruled this unconstitutionally shifts the burden of proof to the defendant in *State v. Hunley*, 175 Wn.2d 901, 915 (2012).

### What's the solution? **SB 5087 / HB 1090**

The Legislature should remove language from the Revised Code of Washington that has been identified by the justices of the state Supreme Court or judges of the superior courts as defects and omissions in the laws pursuant to Article IV, section 25 of the Washington state Constitution. Leaving unconstitutional and unenforceable statutes on the books misleads the public and makes it harder for people to understand the law, undermining confidence in our government.

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