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73929-8

No. 73929-8-I

IN THE COURT OF APPEALS, DIVISION ONE,
STATE OF WASHINGTON

CITY OF KENT

Respondent

V.

COREY COBB,

Appellant

BRIEF OF RESPONDENT, CITY OF KENT

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I. INTRODUCTION

On November 6, 2012, Washington voters passed Initiative 502 (I-502), decriminalizing the recreational use of marijuana. Voter approval was conditioned upon the establishment of the offense of driving under the influence for any person operating or in control of a vehicle with 5 or more nanograms of active delta-9-tetrahydrocannabinol (THC) per milliliter of whole blood (hereafter 5 ng/mL or per se level), now codified in Revised Code of Washington (RCW) 46.61.502 (1)(b) and 46.61.506.

On November 4, 2013, Corey Cobb (the appellant) was investigated for DUI. In addition to multiple officer-observed traffic violations, the appellant admitted to using marijuana and exhibited signs of intoxication. After investigation, he also admitted to being under the influence of marijuana, and a blood test ultimately revealed 5.9 ng/mL of THC in his blood. In March 2015, he was convicted by a jury of violating RCW 46.61.502(1)(b).

In this appeal, the appellant attacks the constitutionality of RCW 46.61.502(1)(b), arguing it is an abuse of the state's police powers and is void for vagueness. His arguments rest on the propositions that there is no scientific relationship between the 5 ng/mL per se

limit and a driver being affected by the consumption of marijuana, and that a person cannot know when they will reach the legal limit.

A plain reading of the statutory language does not require a relationship between a driver's ability to drive, and the 5 ng/mL of THC in the driver's blood. This is the essence of the per se limit. Under RCW 46.61.502(1)(b), it does not matter that a driver may be in violation of the statute even when his driving ability may not be impaired. The only question is whether the statute, which makes it unlawful to drive while 5 ng/mL of THC or more is circulating in the driver's blood, bears a reasonable and substantial relationship to the state's interest in protecting the public. Clearly it does.

Second, even if this court were to determine there must be a scientific relationship between a person's ability to drive and the 5 ng/mL level, that burden has been met. In approving I-502, voters relied on numerous studies to decide 5 ng/mL of THC was appropriate to address the state's interest in reducing the risk posed by drivers who consume marijuana and drive.[1]

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[1] Backgrounder-The Science Behind I-502's Per Se Standard. Published by "Yes on I-502 A New Approach to Marijuana, September 12, 2012. www.newapproachwa.org . CP 17-393, App. 1.

The city was not provided a copy of the clerks papers (CP) by either the appellant or the trial court, only a list of what was sent to this court and corresponding page numbers. For that reason, the city cites to the CP generally and attaches as an appendix a copy of the specific document to which the city refers, for the court's convenience.

Although various studies conclude exact certainty regarding impairment may not possible, a presumption of impairment at 5ng/mL is scientifically reasonable. While the appellant may disagree with the voters' determination, this court cannot substitute its judgment for that of the voters. "Where scientific opinions conflict on a particular point, [a legislative body] is free to adopt the opinion it chooses, and the court will not substitute its judgment for that of the Legislature."[2]

The appellant challenges RCW 46.61.502(1)(b) on the basis of void for vagueness, arguing *a person* is unable to determine when his or her blood THC level will exceeded the 5ng/mL limit. He has no standing to bring this facial challenge to the statute. He is only permitted to challenge the statute for vagueness as applied to him under the facts of his case. In his case, the appellant consumed marijuana shortly before driving and admitted to the officer he was under the influence. As a result, he is unable to meet his burden of establishing, beyond a reasonable doubt, that he was unaware that his blood THC level would exceed the legal limit.

In the context of driving while under the influence of alcohol, each of the arguments raised by the appellant have been rejected

[2] *State v. Brayman,* 110 Wn.2d 183, 193, 751 P.2d 294 (1988).

by Washington courts. In addition, while the question of a THC per se limit is a matter of first impression in Washington, appellate courts in numerous other states have addressed the very issues raised here. In every instance, the statutory thresholds relating to marijuana and driving has been upheld.

II. RESTATEMENT OF ASSIGNMENTS OF ERROR

A. RCW 46.61.502(1(b), which makes it a crime to operate a vehicle with 5 ng/mL or more of THC in whole blood, was passed as a proper exercise of the police powers.

B. RCW 46.61.502(1)(b), which makes it a crime to operate a vehicle with 5 ng/mL THC in whole blood, is not void for vagueness.

C. I-502 did not violate art. II, §19 of the Washington Constitution's single-subject rule for ballot measures.

D. Finding RCW 46.61.502(1)(b) unconstitutional invalidates Initiative 502 in its entirety.

III. STATEMENT OF CASE AND PROCEDURAL HISTORY

A. I-502, and the establishment of the per se impairment level of 5 ng/mL THC in whole blood.

On November 6, 2012, Washington voters approved I-502. App. 2.[3] This initiative decriminalized the use of marijuana for

[3] The initiative was initially submitted to the Washington Legislature filed on July 8, 2011. After it failed to vote on the matter, it was presented to a vote of the people. RCW 29A.72.260.

Washington Court Rules of Appellate Procedure (RAP) 10.4(c) permits a party to attach information as an appendix if it regards a "statute, rule, regulation, finding of fact, exhibit or the like" if it presents an issue. The election materials for I-502 are not part of the trial record in this case; however, the initiative itself, its ballot title, and the changes it effected are at issue. The city therefore requests

recreational purposes under state law. App. 3. I-502 also amended numerous driving laws, including RCW 46.61.502, by establishing a person is guilty of driving while under the influence if the person drives a vehicle within this state when "[t]he person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood . . . ." Id. [4]

The group "A New Approach to Marijuana" authored I-502.[5] On its website which was readily accessible before the November 2012 vote, New Approach published the resources it relied upon to present the 5 ng/mL THC per se limit, as well as a number of informational "factsheets" and "backgrounders" explaining the basis for 5ng/mL standard.[6] These documents included:

- Factsheet: Driving Under the Influence of THC (Updated 02/17/12).[7] This document explained the effect of the 5 ng/mL per se limit, and referenced scientific studies demonstrating that THC levels should drop if person waits a few hours before driving.
- Backgrounder: Driving Under the Influence of THC (Updated 02/26/12).[8] This document explained the effect of the 5 ng/mL per se limit, and referenced scientific studies demonstrating that THC levels should drop if person waits a few hours before driving.

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this court consider the materials published by the Washington Secretary of State Office, pursuant to (RAP) 10.4 (c), attached as appendices herewith.

[4] This law is now codified under RCW 46.61.502(1)(b).

[5] App. 4.

[6] App. 1; 4 – 6.

[7] App. 4.

[8] App. 5.

- Backgrounder: The Science Behind I-502's Per Se Standard (Updated 9/29/12).[9] This document referenced the scientific basis for the per se limit, and included reference to six studies supporting the limit being set at the 5ng/mL.
- Factsheet: Other State THC Per Se DUI Laws.[10] This document referenced the per se standards for other states, many of which were lower than the 5 ng/mL proposed by I-502 (e.g. Nevada has a limit of 2 ng/mL (see NRS § 484C.110(3))).

The ballot measure summary for I-502 approved by the Secretary of State provided: "Laws prohibiting driving under the influence would be amended to include maximum thresholds for THC concentration."[11] Washington voters approved I-502 by a margin of 56-44 with more than 3 million Washington residents voting on the issue.[12] Washington voter turnout was believed to be the highest in the country that election season.[13]

B. The appellant's arrest and conviction for driving with more than 5 ng/mL blood THC level.

On November 4, 2013, at approximately 1:00 PM, Kent Police Officer D. Dexheimer traveled westbound on West Smith Street in Kent, Washington. CP 14-16, 17-393; App. 9. In front of his patrol car was a blue El Camino that turned right and "accelerated quickly as it turned and turned wide, going directly into the left lane of the

[9] App. 1.
[10] App. 6.
[11] App. 7.
[12] App. 2.
[13] App. 8.

two westbound lanes." Id. The driver "accelerated to a speed well over the posted 30-mph limit" which gave a reading on the officer's speed measuring device of 40MPH. Id. The officer observed the truck move from "the left lane into the right lane without any signal" in an apparent attempt to pass slower cars in the left lane. Id. The officer activated his emergency lights and signaled the driver to stop, which he did, in the "middle of the right lane." Id. The officer verbally directed the driver to pull off on the side street and stop. Id.

Officer Dexheimer identified the driver as the appellant and described him as "argumentative" and "agitated". Id. The officer, a trained drug recognition expert (DRE), noted "a faint odor of marijuana on [the appellant's] clothing and that the whites of his eyes were reddened in a manner consistent with cannabis ingestion." Id. The appellant told the officer he had several valuables in the truck, including marijuana, and said he had a medical marijuana card. Id. These items were recovered while the officer inventoried the truck's contents prior to it being towed. Id. When asked when he last smoked marijuana, the appellant said he "smoked a 'bowl of it' 5-6 hours prior." Id. He consented to a drug influence evaluation (DIE). Id.

During the DIE, the officer administered several field sobriety tests: the Romberg Balance, Walk and Turn, One Leg Stand, and Finger to Nose. Id. During these tests the officer noted signs of impairment, *i.e.* a "jerky" one-inch sway, muscle tremors in his eyelids and legs, a "slow jerky" gait, and difficultly following instructions. Id.; RPII 16-46. The appellant told Ofc. Dexheimer he smoked a "'bowl' of marijuana 'a couple of hours' prior," and later, that he had "smoked 'a bowl' of marijuana at 8:30 that morning at his house." CP 14-16, 17-393; App. 9. He explained he smoked marijuana to relieve pain. Id. In addition to the signs of use and impairment, the officer described the appellant as "relaxed", giggling, and smiling "inappropriately". Id. During the DIE, the appellant admitted to Ofc. Dexheimer he considered himself "under the influence" of marijuana. Id.; RPII 191, 1-16. At the conclusion of his investigation, the officer believed the appellant was "under the influence of cannabis and unable to operate a motor vehicle safely." CP 14-16, 17-393; App. 9.

After the DIE, the appellant agreed to a blood draw. Id. This was not performed until 2:25PM, roughly 80 minutes after the officer first observed him driving. Id. The results returned positive for THC at 5.9 ng/mL. CP 467-516, App. 10.

The appellant filed motions arguing the constitutionality of admitting the 5.9 ng/mL THC blood result as per se proof of impairment at trial based on void for vagueness and violation of police powers. CP 17-393. The trial court ruled RCW. 46.61.502(1)(b) was neither void for vagueness nor violative of the state's police powers. CP 445-466, App. 11. He then applied for a Writ of Certiorari in King County Superior Court (superior court) on the void for vagueness issue only, and was denied, because as applied to his case, the statute was not unconstitutionally vague. App. 12. The appellant sought this court's review pre-trial and was also denied upon it finding the issue was likely prematurely raised and a trial record should be developed before higher appellate review. App. 13.

The case went to trial March 10-12, 2015. CP 3-13, App. 14. By agreement of the parties, the city's DUI case proceeded solely under the 5 ng/mL per se THC prong of RCW 46.61.502(1)(b). RPI, 18, 11-25.[14] The officer and the Washington State Toxicologist testified regarding the DUI investigation and blood result at trial. RPI 98-14, RP II 14-84; RP II 93-163. The appellant was convicted of DUI and DWLS3. CP 3-13, App. 14.

[14] He was also charged and simultaneously tried for DWLS3. CP 1-2, App. 15.

Following the verdict, the appellant initially sought direct review by the Washington Supreme Court (supreme court) on the void for vagueness issue which was denied. App. 16. In denying this motion and directing the case be reviewed by this court, the supreme court stated:

> As to the issue of vagueness...it is peculiar to describe such a specific, simple, and clear statute as "vague". "Vagueness" arises from the due process requirement that persons have fair notice of what conduct the law prohibits [citation omitted]...[a]t first blush, the law here provides clear notice: it is unlawful to drive a vehicle in Washington with a blood THC content of 5 ng/mL or higher.
>
> What [the appellant] may be actually urging is the closely-related due process argument that a person cannot know when his conduct passes from lawful driving after consuming a small amount of THC to unlawful driving with 5.0 ng/mL or more of THC...[a]nd this claim implicates an issue closely-related to vagueness: that a person could unforeseeably run afoul of the law because of its unfairness, arbitrariness, or capriciousness. [citation omitted].

Id.

IV. ARGUMENT

Constitutional issues are questions of law that the appellate court reviews *de novo*. *State v. Bao Dinh Dang*, 178 Wn.2d 868, 874, 312 P.3d 30 (2013).

This case presents the first statewide challenge to I-502's 5ng/mL THC per se level. The appellant argues RCW

46.61.502(1)(b) is unconstitutional because it: (1) is an improper exercise of police powers; (2) is void for vagueness; and (3) violates the single subject rule for ballot measures. He cannot meet his burden of proving RCW 46.61.502(1)(b) is unconstitutional.

A. RCW 46.61.502(1)(b) is presumed constitutional.

Statutes are presumed constitutional, and the challenger of a statute must prove beyond a reasonable doubt that the statute is unconstitutional. *Sator v. State Dep't of Revenue*, 89. Wn.2d 338, 346, 572 P.2d 1094 (2010). The beyond a reasonable doubt standard when used in this context describes not an evidentiary burden, but rather a requirement that the challenger convince the court that there is no reasonable doubt that the statute violates the constitution. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). This standard and burden of proof applies whether a statute is enacted by the Legislature, or by the people through the initiative process. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000).

B. Voters acted well within the police powers in establishing the 5 ng/mL per se level set forth in RCW 46.61.502(1)(b).

The appellant argues RCW 46.61.502(1)(b) exceeds the police powers of the state because the science upon which the 5ng/mL

standard is based is flawed.

A party asserting a statute exceeds the state's police power must overcome the presumption that the statute: (1) tends to correct some evil or promote an interest of the state; and (2) bears a reasonable and substantial relationship to accomplishing its purpose. *State v. Robbins*, 138 Wn.2d 486, 492, 980 P.2d 725 (1999). When considering whether a challenged statute bears a reasonable and substantial relationship to accomplishing its purpose, the courts:

> are mindful that the legislature possesses broad discretion in determining what are the appropriate measures to serve and protect the public interest . . . [A]ll that is constitutionally required of the legislature is that a state of facts can reasonably be conceived to exist which would justify the legislation. If the courts can reasonably conceive of such a state of facts, they must presume that such facts actually did exist and that the statute being tested was passed with reference to them.

Id. at 493. (internal citations omitted).

1. RCW 46.61.502 (1)(b) tends to correct some evil or promote an interest of the state.

It is a privilege granted by the state to operate a motor vehicle upon the highways of this state. *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 665, 999 P.2d 29 (2000). This privilege is always subject to such reasonable regulation and control as the

proper authorities see fit to impose under the police power in the interest of public safety and welfare. *Spokane v. Port*, 43 Wash. App. 273, 275-276, 716 P.2d 945 (1986). The Supreme Court has determined the legislature may legitimately adopt statutes that penalize drivers for using the public highways and roads when they are impaired by the consumption of alcohol. *State v. Crediford*, 130 Wn.2d 747, 756, 927 P.2d 1129 (1996).

The *Crediford* court found the alcohol per se statute "served the laudable goal of discouraging drinking and driving.[15] There is no legitimate basis to treat drivers impaired by marijuana any differently, and it does not appear that the appellant presents any challenge in this regard.[16]

2. RCW 46.61.502 (1)(b) bears a reasonable and substantial relationship to discouraging the consumption of marijuana and driving.

The appellant asserts RCW 46.61.502 (1)(b) exceeds the police powers "because in casting so wide a net in its attempt to criminalize driving while under the influence of THC, it criminalizes behavior not generally deemed criminal."[17] [18]

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[15] *Id.* at 752.

[16] Brief of Appellant at 51-52.

[17] Id. at 52.

[18] To the extent the appellant argues the statute is overbroad and captures otherwise lawful conduct, he has no standing to do so. Overbreadth arguments

His argument fails for two reasons. First, the only question is whether the 5ng/mL per se level bears a reasonable and substantial relationship to the goal of safer public roadways. This question bears no relationship to the question of whether a person is suffering the effects of marijuana at a THC level of 5ng/ml. Second, even if it is necessary a relationship exists between 5ng/mL and a person's ability to drive, there is a more than sufficient basis supporting the 5ng/mL per se THC level. Each of these issues will be addressed in turn.

a. The 5ng/mL per se blood THC level is lawful because it discourages the consumption of marijuana and driving.

A law that makes it criminal for a person to drive with any amount of marijuana in his system meets the goal of protecting the public from the dangers of drugged drivers. RCW 46.61.502(1)(b), which establishes a person who operates a motor vehicle with 5ng/mL or higher of THC in the blood, is constitutional regardless of whether a person may or may not show signs of intoxication.

Our state supreme court has twice determined the per se limit for alcohol found in RCW 46.61.502(1)(a) satisfies the constitution as a proper exercise of police powers: *Crediford*, 130 Wn.2d at 756;

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are confined to First Amendment challenges. See *e.g. Seattle v. Montana*, 129 Wn.2d 583, 598, 919 P.2d 1218 (1996).

Brayman, 110 Wn.2d at 195. While the lawfulness of a per se level for marijuana is an issue of first impression for this court, courts in numerous other states have uniformly upheld DUI statutes based on *a* per se level of THC and other drugs, even in cases in which the statute provides for zero tolerance of THC in the blood.

In *Wisconsin v. Smet*, 709 N.W.2d 474, 288 Wis. 2d 525 (2005), Defendant Smet was arrested and charged with violating Wis. Stat. § 346.63(1)(am) entitled: "Operating under influence of intoxicant or other drug" that provides: "No person may drive or operate a motor vehicle while . . . the person has a detectable amount of a restricted controlled substance in his or her blood."[19] Delta-9 THC was listed as a "restricted controlled substance." Upon his arrest, a blood test revealed this defendant had 3.2 ng/mL of THC in his blood. He challenged the statute exceeded the legislature's police powers and violated his right to due process, fundamental fairness, and equal protection.

His appeal was denied. The court found protecting people on the roadways was a proper exercise of police power, and the statute was reasonably and rationally related to this purpose.[20] The court determined the statute would only violate equal protection if it

[19] *Id.* at 477. All non-Washington state-level cases are attached under App. 17.
[20] *Id.* at 479.

was arbitrary and bore no rational relationship to a legitimate government interest.[21] It went on to find because the statute did not require impairment, its application was not arbitrary.[22] The court also noted:

> We observe that ten other states--Arizona, Georgia, Illinois, Indiana, Iowa, Michigan, Minnesota, Pennsylvania, Rhode Island and Utah--also have "*per se*" drug laws prohibiting a person from driving with any amount of certain illegal controlled substances in his or her system, regardless of impairment. Courts from those states that have addressed the constitutionality of their similar statutory provisions likewise have determined that the prohibition against driving with a controlled substance in one's system was rationally related to the governmental goal of protecting other drivers and is a valid exercise of the state's police power.[23]

Id. (internal citations omitted).

The court in *Williams v. Nevada*, 50 P.3d 1116, 118 Nev. 536 (2002) reached a similar conclusion. Defendant Williams drove her van off the road, into the median, then struck and killed six teenagers. Her blood was found to have the active ingredient of marijuana in excess of 2 ng/mL. She was charged and convicted of violating NRS 484.379(3) which provides: "[I]t is unlawful for any person to drive or be in actual physical control of a vehicle on a highway . . . with an amount of prohibited substance in his blood that is equal or greater than two nanograms per milliliter of

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[21] *Id.* at 482.
[22] *Id.* at 482.
[23] *Id.* at 482.

marijuana metabolite."[24] The defendant challenged the statute, arguing it was vague because she would not know when she reached the proscribed limit of 2 ng/mL.[25] The court rejected the argument determining a person of average intelligence could reason ingestion of marijuana could result in exceeding the proscribed level.[26]

In *Love v. State*, 517 S.E.2d 53, 271 Ga.398 (1999), Defendant Love was stopped for speeding in Georgia. Based on the odor of marijuana emanating from his car, he was arrested, and blood and urine samples were taken. Marijuana metabolites were found in both. He was charged with and convicted of O.C.G.A. § 40-6-391(a)(6) that reads: "A person shall not drive or be in actual physical control of any motor vehicle while . . . there is any amount of marijuana or a controlled substance . . . present in the person's blood or urine, or both, including the metabolites and derivatives of each or both . . . ."[27] He argued this statute violated the Equal Protection Clause of both the U.S. and Georgia Constitutions because it unfairly singled out for punishment unimpaired drivers with low levels of marijuana metabolites in their body fluids, despite

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[24] *Id.* at 1119.
[25] *Id.* at 1123.
[26] *Id.* at 1123.
[27] *Id.* at 55.

the fact these drivers posed no threat to traffic safety, which was the purpose of the DUI statute.[28]

The court disagreed. The court noted impaired driving ability was not an element of Georgia's law prohibiting driving with unlawful drugs in one's body fluids.[29] It ruled a statute which makes it unlawful to drive while marijuana residue is circulating in the driver's body fluids bears a rational relationship to a legitimate state purpose - protection of the public.[30] The court noted with the enactment of a per se prohibition against driving after using marijuana, the state's general assembly acted to shield the public from the potential dangers presented by persons who drive while experiencing the effects of marijuana.[31] It recognized the assembly determined "there is no level of illicit drug use which can be acceptably combined with driving a vehicle; the established potential for lethal consequences is too great."[32] The court stated, "the legislature has made it easier for persons to understand and accept that they are legally unable to drive if they consume virtually any amount of [marijuana]. . . ." (internal quotes omitted).[33] [34]

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[28] *Id.* at 55.
[29] *Id.* at 56.
[30] *Id.* at 56.
[31] *Id.* at 56-57.
[32] *Id.* at 57.
[33] *Id.* at 57.
[34] The appeal in *Love v. State*, supra, was granted on the grounds that it was arbitrary for the statute, which was passed to protect public safety, to treat the legal use of marijuana (not punished unless the driver was impaired) different

People v. Fate, 636 N.E.2d 549, 159 Ill.2d 267 (1994) also supports the proposition that whether a person may or may not be affected by marijuana is not necessary to a determination the statute is a proper exercise of police powers. In Illinois, Defendant Fate was charged with driving a motor vehicle with any amount of a drug, substance or compound in his urine resulting from the unlawful use or consumption of cannabis, in violation of Ill. Rev. Stat. 11-501(a)(5).[35] He challenged the statute arguing it violated due process since it was not tied to driving impairment. The court noted:

> There is no dispute that the statute is intended to keep drug-impaired drivers off of the road. At the lowest levels of drug ingestion, no one is impaired. At the highest levels, all are impaired. In the vast middle range, however, the tolerance for drugs varies from person to person and from drug to drug. In this range, depending on the drug and depending on the person, some will be impaired and some will not be impaired at all. The same is also true for alcohol, itself a drug.[36]

The court continued in its ruling:

> The statute in question creates an absolute bar against driving a motor vehicle following the illegal ingestion of any cannabis or controlled substance. This is without regard to physical impairment. Given the vast number of contraband drugs, the difficulties in measuring the concentration of these

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from illegal use of marijuana (punished regardless of whether the driver was impaired), because the effects of the marijuana were the same.

[35] *Id.* at 549.

[36] *Id.* at 550.

> drugs with precision from blood and urine samples and, finally, the variation in impairment from drug to drug and from person to person, we believe that the statute constitutes a reasonable exercise of the police power of the State in the interest of safe streets and highways.[37]

In *State v. Phillips*, 873 P.2d 706, 178 Ariz. 368 (1994), the Arizona court reached the same conclusion. Defendant Phillips was involved in a car accident, where the responding officer noted the smell of alcohol. The defendant there exhibited signs of alcohol use, but the breathalyzer returned a reading of .06/.058. A test revealed the presence of methamphetamine and marijuana metabolite in Defendant Phillips' blood. She was charged with violating section A.R.S. §28-692(A)(3), which prohibits driving or being in actual physical control of a vehicle while having a nonprescription drug or its metabolite in one's body.[38] She challenged the statute on a number of grounds, including vagueness, overbreadth, due process, and equal protection.

The appeal was denied. The court determined: "[T]he legislature was reasonable in determining that there is no level of illicit drug use which can be acceptably combined with driving a vehicle; the established potential for lethal consequences is too great."[39] The court concluded:

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[37] *Id.* at 551.
[38] *Id.* at 707.
[39] *Id.* at 710.

> The state has a compelling legitimate interest in protecting the public from drivers whose ability may be impaired by the consumption of controlled substances and the legislature reasonably could have concluded that the per se prohibition embodied in [the statute] provided an effective deterrent to such activity. And, although [the statute] already makes it unlawful to drive while impaired by illegal drugs, the legislature could have rationally determined that the absence of a reliable indicator of impairment necessitated a flat ban on driving with any proscribed drugs in one's system.[40]

These cases demonstrate a relationship between a particular amount of marijuana metabolites in the blood and the impact it may have on a person's ability to operate a vehicle safely is not material to the question of whether a per se level for marijuana metabolites in a driver's blood is reasonably and substantially related to the goal of protecting the public. In Washington, as in many other states around the nation, even a law prohibiting any marijuana metabolites in a driver's blood would satisfy the constitution. This being so, surely a statute permitting a person to drive with a blood THC level below 5ng/mL, but making it criminal to drive with blood THC that is at or exceeds this level, serves the purpose of protecting the public health, safety, and welfare.

The appellant's arguments that scientific data regarding the affect a particular level of THC may have in a driver's blood is inconclusive, actually supports a per se level of zero tolerance. If,

[40] *Id.* at 710.

as he argues, scientists disagree on the THC level at which a person should drive, then it would be reasonable and substantially related to the purpose of public safety that Washington establish a zero tolerance for THC, let alone a standard that only criminalizes a THC level of 5ng/mL or above.[41] Marijuana may not be the most frightening drug out there, but it is not the innocuous substance the appellant seems to suggest. Our legislators could, if they so choose, overturn the state laws regarding legalization of marijuana and revert to pre-existing laws governing the drug. That, too, would be an appropriate exercise of its police power based on what is known about marijuana and its effects. It would obviously remove this discussion of the 5 ng/mL THC level from the courts, but would make possession of marijuana illegal for most purposes in the state. That the 5 ng/mL THC threshold was made part of the law that decriminalized the recreational use of of marijuana for any reason was a compromise considering that marijuana (and is still listed as) a schedule-I drug under state law.[42]

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[41] Counsel for the city was unable to find any state with a statute setting the per se level as high as Washington's. Whether it is advisable for Washington to allow any level of THC in a driver's blood is debatable, but that is an issue the for legislature, not for the courts, to decide.

[42] RCW 69.50.204: "Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule I...(c) (c) Hallucinogenic substances....(22) Marihuana or marijuana."

The appellant suggests this level casts too wide a net, criminalizing "behavior generally not deemed criminal."[43] To agree with him is to agree exclusively with his interpretation of science presented regarding marijuana impairment. The people, acting as the legislature, did not have to do that. They were free to determine what science to consider and considered that which supported the 5 ng/mL THC level to be in the best interest of the public. Given the drugs known effects and its obligation to protect public safety by controlling impaired driving to the extent possible, the state properly exercised its police powers in setting the 5 ng/mL THC level for DUI.

b. The science supports the relationship between the 5ng/mL limit and a risk to the public.

Even if this court determines there must be a correlation between the per se limit and a person's ability to operate a vehicle safely, RCW 46.61.502(1)(b) is constitutional. The starting point is the presumption that voters were correct in setting the threshold at 5ng/mL.[44] The appellant cannot overcome this presumption. At best, he may show there are differing opinions regarding the suitability of a 5 ng/mL level. However, this is not sufficient to win

[43] Brief of Appellant at 52.

[44] *Brayman*, 110 Wn.2d at 193.

the day.

To prevail, this court must be convinced there is absolutely no circumstance under which a person who has 5ng/mL of blood THC would be affected by marijuana: "[I]f a court can reasonably conceive of a state of facts to exist which would justify the legislation, those facts will be presumed to exist and the statute will be presumed to have been passed with reference to those facts."[45]

So long as scientists disagreed about the effects of marijuana on driving, I-502 voters were free to adopt the opinions of those scientists who viewed driver THC levels at or above 5ng/mL dangerous to the public.[46] "Where scientific opinions conflict on a particular point, the Legislature is free to adopt the opinion it chooses, and the court will not substitute its judgment for that of the Legislature."[47] [48] The appellant has done nothing more than present argument that scientific opinions may conflict.

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[45] *Id.* at 193; see also *State v. Robbins*, supra.
[46] See *e.g. State v. Dickamore*, 22 Wash. App. 851, 855, 592 P.2d 681 (1979).
[47] *Brayman*, 110 Wn.2d at 193.
[48] While conceding "the *Frye* test does not necessarily apply to drafting legislation", the appellant urges this court to apply this standard to its analysis of the scientific underpinnings of the 5 ng/mL THC threshold. (see *Frye* v. *United States*, 54 App. D.C. 46, 293 F. 1013 (1923). The appellant is unable to cite any authority in support of this argument.

Marijuana is a drug sought after recreationally *because* of its impairing effects.[49] It remains classified as a schedule-I controlled substance under federal and state law.[50] Marijuana/THC is the most common impairing substance detected in drugged drivers.[51] It is the most widely used drug of abuse and has increased in potency over the past 30 years.[52] Presumed recreational use of marijuana/THC by those of driving age has notably increased in the last eight years.[53] THC causes impairment of cognition, psychomotor function, coordination, and executive functioning skills (*e.g.* attention, reaction time, and memory).[54] Peak impairment from smoking marijuana use ranges from 20-40 minutes to two to four

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[49] United Nations Office on Drugs and Crime Cannabis a short overview – discussion paper 3-29, 4 (2012). CP 394-444, App. 18.

[50] 21 U.S.C. §812: "Schedule I (c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:... (10) Marihuana."; see also fn. 30, RCW 69.50.204.

[51] Grotenherman, F., *et al*, Developing limits for driving under cannabis. *Addiction*. 102(12): 1910-1917 (2007). CP 17-393, App. 19; Khiabani, H.A.,, *et al*, Relationship between THC concentration in blood and impairment in apprehended drivers, *Traffic Inj Prev* 7:111-116, 111 (2006). CP 17-393, App. 20.

[52] Sewell, R.A., et al, The effect of cannabis compared on driving. *American Journal of Addiction* (2009) 18(3), 2, CP 17-393, App. 21; UNODC discussion paper at 7. CP 394-444, App. 18.

[53] NHSTA Traffic safety facts: drug and alcohol crash risk at 8 (2015) at 8. App. 22. (Appellant's App. 10).

[54] Raemakers J., et al, Dose related risk of motor vehicle crashes after cannabis use: an update. *Drugs, Driving, and Traffic Safety* (2009) at 495, Cp 17-393; App. 23. Marijuana DUID Workgroup CP 17-393, App. 24. UNODC discussion paper, CP 394-444, App. 18.

hours.[55] Research suggests heavy users of marijuana/THC can be impaired even during extended periods of abstaining from use of the drug.[56] Studies also show long-term heavy marijuana users show impairment in memory and attention that persists after the intoxication period, and such impairment worsens with continued, heavy use.[57]

With this backdrop of marijuana's effects in mind, the following conclusions of scientific studies were presented to the voters for consideration in passing I-502 in the Backgrounder: The Science Behind I-502's Per Se Standard (Updated 9/29/12):[58]

- ". . . crash risk significantly increases at serum THC concentrations between 4-10 ng/mL [2-5 ng/mL in whole blood]."
- "Including cannabis group into the model revealed a THC concentration breaking point at 2 ng/mL, at which the risk of having an accident was significantly increased"
- ". . . while low concentrations of THC do not increase the rate of accidents, and may even decrease them, serum concentrations of THC higher than 5 ng/mL [2.5 ng/mL THC in whole blood] are associated with an increased risk of accidents."
- ". . . THC serum concentrations between 2 and 5 ng/mL establish the lower and upper range of a per se limit for

[55] Marijuana DUID Workgroup, CP 17-393, App. 24.
[56] Bergamaschi, M., et al, Impact of prolonged cannabinoid excretion in chronic daily cannabis smokers' blood on per se drugged driving laws. *Clinical Chemistry*. 59: 519-526, (2015). App. 25. (Appellant's App. 34).
[57] UNODC discussion paper at 10, CP 394-444, App. 18.
[58] App. 1.

defining general performance impairment above which drivers are at risk."

- "For drivers with blood THC concentrations of 5 ng/mL or higher the odds ratio was greater and more statistically significant."

The appellant goes to great lengths to attack these scientific conclusions. He refers to the 2007 article by Grotenherman which questions findings of another I-502 Backgrounder study by Drummer in 2004.[59] [60] The Grotenherman study found, once adjusted for potential uncertainty:

> [S]erum concentrations in the range of between 7 and 10 ng/ml (3.5-5ng/mL whole blood) equal impairment at a BAC of .05% and suggest the range for the selection of a lower legal limit based on the meta-analysis of experimental studies...this paper suggests a range of 7-10ng/ml THC in the serum for the initial non-zero per se limit.[61] [62]

This study supports the conclusion contained in the Backgrounder and the position of I-502's drafters that the 5ng/mL per se THC level in whole blood is an appropriate marker for THC impairment.

The appellant then cites an article by Sewell suggesting caution

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[59] Grotenherman, at 1912 CP 17-393, App. 19.

[60] Drummer, O.H., *et al*, The involvement of drugs in drivers killed in Australian road traffic crashes. *Accident, Analysis, and Prevention*. 26(2) (2004). CP 17-393, App. 26.

[61] Grotenherman at 1915. CP 17-393; App. 19.

[62] Several studies relied upon in setting the per se limit reference samples of plasma or serum: "[A] plasma or serum concentration of 10 ng/mL equates to 5 ng/mL in whole blood." See Backgrounder CP 17-393, App. 1 (citing Schwilke, E, *et al*, *Intra- and intersubject whole blood/plasma cannabinoid ratios determined by 2-dimensional electron impact GS-MS with cryofocusing*. Clin. Chem. 55(6): 1188-1195 (2009)).

in relying on "inconclusive" studies and a calling for additional, tightly controlled research.[63] However, this article also admonishes:

> [P]atients who smoke marijuana should be counseled to have a designated driver if possible, to wait at least three hours after smoking before driving if not, that marijuana is particularly likely to impair monotonous or prolonged driving.[64]

He challenges the findings of the 2006 Ramaekers' study, noting it relied upon another paper that "revealed no significant association between crash risk and cannabis exposure."[65] The appellant ignores this study questioned these findings because of uneven representation of blood samples (207 for THC) to urine samples (3799 for THC-COOH, an inactive THC metabolite), leaving a ratio of 1 blood to 18.3 urine samples tested. It found this an important distribution concern because the inactive metabolite for THC "may have been representative of past use of cannabis rather than recent use."[66] He further ignores it found "peak impairment after THC was comparable to alcohol induced performance impairment seen at (BACs) of >.05 g/dl" and the compensatory behavior observed in driving simulation tasks

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[63] Sewell at 8. CP 17-393; App. 21.
[64] Id.at 9.
[65] Brief of Appellant at 33.
[66] Ramaekers, J.G., *et al*, Cognition and moto control as a function of delta-9 THC concentration in serum and oral fluid: Limits of impairment. *Drug and Alcohol Dependence*. 85 (2006). CP 17-393; App. 27.

performed by those dosed with THC "was never sufficient to fully overcome the overall impairing effect of cannabis."[67]

He questions the 2012 study by Kuypers also referenced in the Backgrounder which determined "THC increased crash risk in a concentrated related manner" at levels in excess of 2 ng/mL.[68] The appellant questions this study because of concerns of possible over-representation of marijuana-using drivers given the number of participants. The authors, while noting this as a potential issue, stated:

> [E]mphasis must not be placed on the absolute values of the [odds ratio or] OR but on the fact that elevated crash risks are associated with the reported drugs in a concentration related manner...the study demonstrated that THC increased crash risk in a concentration related manner."[69]

The 2009 Raemakers study further noted even among recreational marijuana users, "crash risk increases significantly at serum THC concentrations of 4-10 ng/mL [2-5ng/mL of whole blood]."[70]

In addition to attacking the scientific conclusions relied upon by the voters in passing I-502, he compares the work of I-502's drafters to the 2011 Findings Marijuana DUID Workgroup in

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[67] Id. at 487.
[68] Kupypers, K.P.C., *et al*, A case-control study estimating accident risk for alcohol, medicines and illegal drugs. *PlosOne*. 7(8) (e43496) 2012. CP 17-393, App. 28.
[69] Id. at 8.
[70] Raemakers (2009) at 495. CP 17-393, App. 23.

Colorado.[71] From this he divines "the Colorado workgroup specifically did not recommend implementing the 5 ng/mL per se level as there was not sufficient information to determine impairment exists at this level."[72] This is not an accurate summary of the group's findings. Section 42-4-1301(1)(g) of the Colorado Revised Statutes (C.R.S.) provides that a person is impaired if they are affected by alcohol or drugs to "the slightest degree." The Colorado workgroup noted a near 90% conviction rate under that language, and concluded, for this reason, a "per se standard appears unnecessary".[73] Curiously, the appellant fails to mention the Colorado legislature has adopted a presumption of intoxication at 5ng/mL. Specifically, C.R.S. 42-4-1301, entitled "Driving under the influence . . ." provides:

> (6) (a) In any prosecution for DUI or DWAI, the defendant's BAC or drug content at the time of the commission of the alleged offense or within a reasonable time thereafter gives rise to the following presumptions or inferences: (IV) If at such time the driver's blood contained five nanograms or more of delta 9-tetrahydrocannabinol per milliliter in whole blood, as shown by analysis of the defendant's blood, such fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs. (emphasis added).

In *Baker v. Colorado*, the U.S. District Court for the District of

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[71] Findings of the (CO) Marijuana DUID Workgroup (CO). CP 17-393, App. 24.
[72] Brief of Appellant at 22.
[73] Findings of the (CO) Marijuana DUID Workgroup (CO). CP 17-393, App. 24.

Colorado considered a challenge to this presumption. *Baker v. Colorado*, No. 13-cv-01334-PAB-KLM (2014). In making recommendations to the court, the magistrate noted:

> Scientific research has shown that drivers who consume cannabis within three hours of driving are nearly twice as likely to cause a vehicle collision as those who are not under the influence of drugs or alcohol. As stated *supra* III.A., the evidence presented to the Colorado Senate showed that the risk was even higher . . . The Colorado legislature, hearing evidence that a person with five ng of Delta 9-THC in his blood was far more likely to cause an automobile crash, determined that at that level, impairment reaches a socially intolerable level.

Baker v. Colorado, No. 13-cv-01334-PAB-KLM at 32 & 34.

The magistrate referred to a February 2012 British Medical Journal article: *Cannabis use doubles chances of vehicle crash, review finds*, SCIENCE DAILY (http://www.sciencedaily.com/releases/2012/02/120210111254.htm: "Results show that if cannabis is consumed before driving a motor vehicle, the risk of collision is nearly doubled,") and the May 5, 2013 Senate Committee on Finance, Bill Summary for HB 13-1325, Attachment E, "Understanding Marijuana Terminology": http://www.leg.state.co.us/CLICS/CLICS2013A/ commsumm.nsf/CommByBillSumm/67FCE59EFD2C49D287257B63006C8583. *Baker v. Colorado,* No. 13-CV-01334-PAB-KLM at 33-34, n. 7 & 8.

The appellant also refers to the congressional testimony of Dr. Jeffery Michael from National Highway Traffic Safety Administration (NHSTA) and the doctor's statement that, "beyond some broad confirmation that higher levels of THC are generally associated with higher levels of impairment," precise levels of THC and impairment are not available.[74] The doctor's statements are not inconsistent with the studies relied upon by the voters when they passed I-502.

The Governor's Highway Safety Administration (GHSA) report on drug impaired driving, which begins with the advisement that "[i]t does not attempt to be a complete review of the extensive information available on drugs" is another source he cites.[75] Of this 45-page report, the appellant locks on to a single paragraph on page 11 which states, without citation, that impairment and blood levels for all drugs do not exist and would be difficult to develop.[76] However, on page 10, the author states: "marijuana impairs psychomotor skills and cognitive functions associated with driving."[77] Again, this is consistent with studies relied upon by I-502's voters.

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[74] Brief of Appellant at 23.

[75] Hedlund, J., Drug-impaired driving: A guide for what states can do. *Governor's Highway Safety Association* (Sept. 2015). App. 29. (Appellant's App. 12).

[76] Id. at 11.

[77] Hedlund at App. 29. (Appellant's App. 12).

The appellant refers to a number of post I-502 studies and focuses on the OR portion of those papers, *i.e.* at what level does marijuana increase the odds of a motor vehicle accident.[78] These newer studies do little more than attempt to correlate *any* THC level with increased crash risk. The 2015 NHTSA DUI and Alcohol Crash Risk also warned its results "should be viewed in the context of the established body of scientific evidence" regarding drug use and crash risk.[79] The 2013 Romano article, also submitted by the appellant, noted significant limitations:

> It is impossible to determine the time of marijuana use relative to the crash in [the Fatality Analysis Reporting System (FARS)], and the contribution of [THC] to crash risk may become significant only among recent users. Furthermore, the excessive delays in the collection of some biological samples in the FARS file may have diluted the contribution of marijuana to fatal crash risk.[80]

The 2014 Poulsen article he also cites does go further in correlating crash risk with specific THC blood levels. This study found a slight increase of crash risk with levels of 5 ng/mL THC or higher, noting "[w]hile some studies report no link between blood THC concentrations, there are many reports of increased crash risk

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[78] Brief of Appellant at 28-30.
[79] NHSTA Traffic safety facts risk (2015). App. 22 (Pet App. 13).
[80] Romano E., at al. Drugs and alcohol: Their relative crash risk. *Journal of studies on alcohol and drugs* (2014). App. 30. (Appellant's App. 18).

with recent use of the drug."[81] It also found while there was a "low positive association" between marijuana use and crash risk, increased risk was noted even at levels as low as 2 ng/mL THC.[82] This finding prompted the authors to conclude with the question: "Should any blood THC concentration be considered safe?"[83] The information in these new studies does not go as far as the appellant asks this court to believe it does.

Addressing how one person's physiology may process marijuana differently from another, the appellant refers to the 2006 Raemakers study that showed different THC blood levels in persons of similar age and build smoking marijuana with THC of varied strengths.[84] The variations did exist 5 minutes after smoking, but the appellant omits that "[a]fter both doses, mean THC concentrations rapidly dropped to 1-2 ng/mL within 3-5 hrs after smoking.[85] Despite the initial THC blood differences, the window of

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[81] Poulsen, H., *et al*, The culpability of drivers killed in New Zealand road crashes and their use of alcohol and other drugs. *Accident analysis and prevention*. 67 (2014) 119-128. App.. 31 (Appellant's App. 19).
[82] Id. at 127.
[83] Id. at 127.
[84] Brief of Appellant at 36.
[85] See Raemakers at 119. CP 17-39, App. 27; Karshner E.L., *et al*, Do [THC] concentrations indicate recent use in chronic cannabis users: Addiction 104: 2041-48 (2009) CP 17-393, App. 32. Toennes, *et al*, Comparison of cannabinoid pharmacokinetic properties in occasional and heavy users smoking marijuana or placebo joint. *Journal of Analytical Toxicology*, Vol. 32, 470-477, 474, F. 1 (2008), CP 17-393, App. 33. Findings of the (CO) Marijuana DUID Workgroup (CO) - Discussion points from expert testimony, p. 4. CP 17-393, App. 24.

THC detectability based on this study and other research, information, and expert opinion, supports waiting several hours after smoking and before driving would put one below Washington's per se threshold. This gives a person of common intelligence an ability to estimate how long to wait to drive after using THC and be in a better position to not violate the law.

The appellant cites to a 2015 Australian paper authored by Odell.[86] He points out chronic users had detectable THC levels in excess of 5 ng/mL for several days after their last reported use and suggest similarly situated individuals would be unfairly targeted as their levels exceed Washington's per se level even when apparently abstinent. The findings of this study may add to the debate, but must be considered in light of the limitations. Twelve of the original 21 subjects had "expected" THC blood profiles within the first day, but self-reported last use was not verifiable and subjects were not monitored during the detoxification period, even though the authors agreed this would not have been difficult.[87] One subject relied upon to demonstrate a spike or "double hump" in THC levels days after last reported use was suspected of

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[86] Odell, M. *et al*, Residual cannabis use. *Forensic Science International*. 249: 173-180 (2015). App. 34 (Appellant's App. 33).
[87] Id. at 178.

"clandestine" cannabis use.[88] And of the original 21 subjects, several also left "mostly for not being able to tolerate abstinence."[89] This study should be cautiously considered; participants being unable to abstain from drug use raises a legitimate question of how reliable these findings are.

The 2013 Bergamaschi paper, cited by the appellant for apparently similar reasons as the one above, also discusses chronic use. The authors, who continually monitored subjects for 33 days, found "all subjects THC concentrations was < 1 ng/mL within 24 hours" and further that none of the participants "would have been prosecuted under a 5 ng/ml per se THC level after 24 hours of abstinence."[90]

The appellant argues based on the information above, it is not possible for a chronic user to know when they are at or exceed the 5 ng/mL per se THC level. Although experts and studies state blood THC decreases rapidly and is below detectable levels 2-6 hours post-use, the appellant seems to think this time frame must be

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[88] Id. at 178. (15 ng/mL THC upon admission 2.5 hours post-last reported use to 2 ng/mL 20.5 hours after last reported use to 11 ng/mL 71.5 hours after last reported use).
[89] Id. at 176.
[90] Bergamaschi at 6. App. 25 (Appellant's App. 34).

more precise.[91] He does not provide any cases or authority to support his argument for this level of precision. Again, at issue is a drug known to cause physical and cognitive impairment. Studies show impairment from THC peaks between 40 minutes and 6 hours in both chronic and recreational users.[92] If a person uses as consistently as the subjects in the studies of "heavy" or chronic users the appellant cites, it seems they must expect to be impaired most, if not all, of the time.[93] If a person is unsure if waiting 2, 4, or 6 hours is appropriate given how much they use, it is not unreasonable to expect them to wait longer.

Finally, the appellant argues "no conclusive evidence" has been found showing a correlation between THC levels and impairment "that would allow a person of common intelligence to act in conformity with the law."[94] This argument relies on a 2015 paper from Harman which found, using a driver simulator, that standard deviation of lateral position (SDLP) reached the same levels .05

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[91] Marijuana DUID Workgroup (CO) - Discussion points from expert testimony, p. 4. CP 17-393, App. 24. Toennes at 470. CP 17-393, App. 32.

[92] Sewell at 4. CP 17-393, App. 21. Ramaekers (2006) at 119. CP 17-393, App. 27. Ramaekers (2009) at 485. CP 17-393, 23.

[93] Participants in the 2013 Bergamaschi study reported smoking from 3 to 30 joints per day, anywhere from 4 to 27 years, depending on the participant. Id at 14-15, Table 2. Odell study participants claimed smoking from 2-3 grams to 50 bongs per day for anywhere 1 to 37 years, again, depending on the participant. Id. at 175, Table 1. App. 25, 33. (Appellant's App. 34, 33).

[94] Brief of Appellant at 43. This argument is addressed in more detail in section C. of this brief.

brAC at THC at 10 ng/mL, not 5 ng/mL.[95] This is one study. Others found:

- [S]erum concentrations of THC higher than 5ng/mL are associated with an increased risk of accidents.[96]
- Serum THC concentrations between 2 and 5 ng/mL have been identified as a threshold above which THC induced impairment of skills related to driving become apparent.[97]
- Between 5 and 10 ng/mL, the proportion of impaired observations were 75% and 90%, respectively.[98]
- Previous studies demonstrated that recent exposure and possible measurable impairment have been linked to plasma THC concentrations in excess of 2-3 ng/mL or 3-5 ng/mL.[99]
- Performance was always worst in tests measuring driving skills at the operational level, *i.e.* tracking and speed adjustment as compared to performance in tests measuring driving performance at the maneuvering level...[d]rivers may be particularly vulnerable to detrimental effects of THC in traffic situations where they specifically employ driving skills that are operated at lower automated levels, such as highway driving.[100]

His argument simply suggests conflict among researchers regarding what level of blood THC indicates impairment. The 5 ng/mL blood THC threshold is where the science indicates risk of impairment appears, and that level is appropriate.

The I-502 studies relied upon by the voters were consistent in

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[95] Harman, R.L., *et al*, Cannabis effects on driving lateral control with and without alcohol. Drug and Alcohol Dependence. (2015). App. 35 (Appellant's App. 39).
[96] Sewell at 8. CP 17-393, App. 21.
[97] Kupypers at 8. CP 17-393, App. 28.
[98] Raemaekers (2006) CP 17-393, App. 27.
[99] Khiabani, p. 114. CP 17-393, App. 20.
[100] Raemakers (2009) at 495. CP 17-393, App. 23.

concluding THC causes measureable impairment at the per se limit of 5 ng/mL. While the appellant expended great effort to attack these studies, and to assert newer studies show disagreement with the I-502 studies, to prevail, this court must be convinced that there is not a single circumstance under which the driving of a person who has 5 ng/mL of THC in his or her blood will be affected. Even assuming this court agrees scientific opinion conflicts on this matter, the voters were free to adopt the opinion they chose, and the court may not substitute its judgment for that of the voters.[101] Science supports a correlation between 5ng/mL and dangerous effects on drivers. The appellant has not met his burden of proof beyond a reasonable doubt, and his appeal should be denied.

C. The statute is not void for vagueness – either as applied to the appellant or facially.

A statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007).[102] The first step in any vagueness challenge

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[101] *Brayman*, 110 Wn.2d at 193.

[102] Under prong two of the vagueness test, a statute is unconstitutional only if it

is to determine if the statute in question is to be examined as applied to the particular case or to be reviewed on its face. *Spokane v. Douglass*, 115 Wn.2d 171, 181-82, 795 P.2d 693 (1990). "A [person] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. *State v. Duncalf*, 177 Wn.2d 289, 297, 300 P.3d 352 (2013).

The appellant argues "a person of common intelligence has no ability to estimate with any degree of certainty what their THC concentration may be," and therefore, RCW 46.61.502 (1)(b) violates due process rights guaranteed by the 14 Amendment because the statute is vague. First, the appellant has no standing to bring this facial challenge to RCW 46.61.502 (1)(b).[103]

Having clearly violated RCW 46.61.502(1)(b) by driving with a blood THC level of 5.9ng/mL, the appellant may only challenge the statute for vagueness as applied to his conduct. Under an "as applied" analysis, the challenged law "is tested for unconstitutional

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invites an inordinate amount of police discretion. *In re Det. of Danforth*, 173 Wn.2d 59, 74, 264 P.3d 783 (2011). RCW 46.61.505(1)(b) provides no discretion to police officers. If a driver's blood THC level is below 5ng/mL, the officer has no discretion to charge the driver under that section of the statute. Appellant concedes that RCW 46.61.502(1)(b) satisfies prong two of the vagueness argument.

[103] Again, much of the appellant's brief centers on the argument that the statute captures otherwise lawful activity. Since this is not a First Amendment challenge, he has no standing to bring a facial argument. *Seattle v. Montana,* supra.

vagueness by *inspecting the actual conduct of the party who challenges the statute and not by examining hypothetical situations at the periphery"* of the scope of the statute.[104]

To be consistent with due process under the first prong of the vagueness test, a penal statute or ordinance must contain ascertainable standards of guilt, so that people of reasonable understanding are not required to guess at the meaning of the enactment. *City of Everett v. O'Brien*, 31 Wash. App 319, 323, 614 P.2d 714 (1982).

> Although no citizen is likely to review all penal statutes, requiring that penal statutes give fair warning in advance allows for criminal laws to be subjected to general public scrutiny and allows each person to investigate if he or she is unsure about the legality of certain conduct. Thus, a penal statute must define the criminal offense with sufficient definiteness that ordinary persons can understand what conduct is proscribed, but this test does not require impossible standards of specificity or absolute agreement because some measure of vagueness is inherent in the use of our language.*State v. Evans*, 177 Wn.2d 186, 204, 298 P.3d 724 (2013)(internal citations and quotations omitted).

That a law requires subjective evaluation to determine whether the enactment has been violated does not mean the law is unconstitutional. *State v. Zigan,* 166 Wash. App. 597, 605, 270 P.3d 625 (2012). "No more than a reasonable degree of certainty can be demanded" and "one who deliberately goes perilously close

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[104] *State v. Pastrana,* 94 Wash. App. 463, 473-74, *review denied,* 138 Wn.2d 1007, 972 P.2d 557, (1999) (emphasis added).

to an area of proscribed conduct shall take the risk that he may cross the line." *Evans*, 177 Wn.2d at 203 (citing *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 72 S. Ct. 329, 96 L. Ed. 367 (1952)).

Our state's supreme court has rejected vagueness challenges in relation to the alcohol per se limit. In *State v. Franco* the court held:

> [A]lthough one can legally drink and drive, *State v. Hansen*, 15 Wn. App. 95, 546 P.2d 1242 (1976), our DWI law makes it perfectly clear that the two activities cannot be mixed to the extent that the drinking affects the driving, or the driver has a 0.10 percent of alcohol in his blood. No further specificity is required if the statute gives fair warning of prohibited conduct. *See In re Powell*, 92 Wn.2d 882, 602 P.2d 711 (1979).[105]

The appellant would like this court to believe the *Franco* decision hinged on its reference to charts available through various sources showing the number of drinks necessary to produce a blood alcohol reading that reached the legal limit.[106] This reference in *Franco* was dicta as the existence of charts was unnecessary to decide the case.[107] The *Franco* court primarily relied on two out of state cases (*Roberts v. State*, 329 So. 2d 296 (Fla. 1976); *Greaves*

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[105] *State v. Franco,* 96 Wn.2d 816, 825, 639 P.2d 1320 (1982).
[106] *Id.* at 825.
[107] "Statements in an opinion that are unnecessary to decide the case constitute obiter dictum and are not controlling under the doctrine of *stare decisis." In re: Pers Restraint Muhllolland*, 161 Wn.2d 322, 331, 166 P.2d 677 (2007).

v. State, 528 P.2d 805 (Utah 1974) in reaching its ruling. In denying a void for vagueness challenge to the DUI law in *Greaves*, the Utah Supreme Court concluded:

> We can see no reason why a person of ordinary intelligence would have any difficulty in understanding that if he has drunk anything containing alcohol, and particularly any substantial amount thereof, he should not attempt to drive or take control of a motor vehicle.

Id. at 808.

Neither *Roberts* nor *Greaves* made mention of the types of charts or formulas to which the appellant believes the *Franco* court says he is entitled.

The fact that six years after the *Franco* decision, the decision in *State v. Brayman* did not rely on alcohol consumption charts also establishes the *Franco* court's reference to the charts is dicta. Like *Franco*, the *Brayman* court determined that drivers were on proper notice under the alcohol per se amendments of 1986, and the statute was not vague.[108]

The California Supreme Court in *Burg v. Municipal Court*[109] addressed this same issue when a driver argued that state's per se alcohol statute failed to notify potential violators of the condition it proscribes, claiming it was impossible for a person to determine by

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[108] *Brayman*, 110 Wn.2d at 196.
[109] 673 P.2d 732, 35 Cal. 3d 257, 198 Cal. Rptr. 145, (1983).

means of his senses whether he was in violation of the statute.[110]

The court observed:

> It is apparently defendant's contention that due process requires notice that is subjectively verifiable, according to the terms of the statute, at the instant before the alleged violation. He claims the statute is invalid because it is impossible for ordinary persons actually to know when their blood alcohol reaches the proscribed point. No court, however, has interpreted the notice requirement so strictly.[111]

The *Burg* court noted due process requires only fair notice, not actual notice.[112] The appellant concedes this point, citing to Washington cases that have come to the same conclusion. Of particular interest is his reference to *City of Seattle v. Eze*[113] wherein the court held:

> . . . [I]impossible standards of specificity are not required. . . . [A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.

Id. at 27 (internal citations omitted).[114] (Quoting *Nash v. United States*, 229 U.S. 373, 377, 57 L. Ed. 1232, 33 S. Ct. 780 (1913),

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[110] *Id.* at 740.
[111] *Id.* at 740.
[112] *Id.* at 740.
[113] 111 Wn.2d 22, 759 P.2d 36 (1988).
[114] See also *State v. Sullivan*, 143 Wn.2d 162, 19 P.3d 1012 (2001) for similar language.

the court stated, "[T]he law is full of instances where a man's fate depends on his estimating rightly . . . .")[115] [116]

Like the per se level for alcohol, the per se level for marijuana provides sufficient notice to a person to understand how to act in conformity with the law, and as acknowledged by the appellant, perfection is not necessary. The Nevada Supreme Court has

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[115] In support of his arguments, the appellant refers to a number of Washington cases that found a specific law gave inadequate notice of proscribed behavior. These cases are distinguishable from the issue presented here because the constitutional flaws in those cases related to the failure of the *language* of the statute to provide actual discernable notice of what behavior was unlawful. In the instant case, the language of RCW 46.61.502(1)(b) is clear and notice is certain. It is the ability to comply with the language that is he challenges. The cases referred to include: *In re: Powell*, supra, (statute that authorized enacting of emergency rules regarding controlled substances without compliance with notice, public comment procedure; it was unreasonable to expect average persons to maintain continuous contact with office of the Code Reviser to determine which substances were designated as controlled); *State v. Jordan*, 91 Wn.2d 386, 588 P.2d 1155 (1979) (notice inadequate because no agency given authority to classify drugs as legend drugs, requiring review of entire WAC to determine a drug's legality); *State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977) (statute unconstitutional because it failed to give notice Valium was a controlled substance without review of the frequently updated Federal Register which was not readily available); *State v. Martinez*, 85 Wn.2d 671, 538 P.2d 521 (1975) (statute unconstitutional because it did not apprise of circumstances when "willful loitering" on school or adjacent premises was punishable); *Seattle v. Pullman*, 82 Wn.2d 794, 514 P.2d 1059 (1973) (ordinance unconstitutional as the words idle, loiter, loaf imply no wrongdoing on part of those engaged in prohibited practices). But, see also *State v. Brown,* 33 Wash. App. 843, 658 P.2d 44 (1983) (statute found constitutional because it provided adequate notice that Valium is a controlled substance where a person of common intelligence could discover that Valium is diazepam or that diazepam is Valium by referring to the *Physicians' Desk Reference* commonly found in reference libraries, doctors' offices and pharmacies, as well as other drug-related publications available to consumers).

[116] Interestingly, the appellant urges this court to interpret the language "estimating rightly" as a standard to meet to avoid statutory vagueness. This quote of the Court in *Nash v. United States* was made to simply acknowledge that statutes are lawful even when they lack specificity such that the person committing an act must estimate rightly when his conduct crosses the line from legal to criminal behavior.

reached this conclusion. Nevada has a per se limit for THC of 2 ng/mL.[117] In *Williams v. Nevada*, supra, the ruling court determined a person of average intelligence could reason the ingestion of marijuana could result in exceeding the proscribed level.[118] There is no reason for this court to rule differently.

With the above law in mind, in his as applied challenge, the appellant must prove, beyond a reasonable doubt, under the circumstances of this case, he could not have had the ability to reason the THC level in his blood may have been over the legal limit established in RCW 46.61.502(1)(b). The facts here demonstrate he was under the influence of marijuana when his blood THC level was found to be 5.9ng/mL roughly 80 minutes after he was stopped. His driving showed signs of impairment which included an improper lane change, speeding, failing to signal a lane change, and stopping for the officer in the middle of the road; he admitted he was under the influence of marijuana, but stated he had a medical authorization and was "being legal" about it; he could not recall specifically when he used marijuana that day, *i.e.* two, five, or six hours before; during the DIE he exhibited red conjunctiva, a jerky one-inch sway, muscle tremors in his eyelids

[117] NRS 484.379(3), supra.
[118] 50 P.3d at 1123.

and legs, a slow jerky gait, and had difficultly following instructions; and he appeared relaxed, smiling, and giggling during at various times during contact the investigation.

The appellant knew he had consumed marijuana within hours of driving. And, as an apparently knowledgeable user, reasonably should have been aware of the effects this drug had upon him. It is disingenuous for him to argue that the statute is void as applied to him by asserting he had no way of knowing he would have a THC level over the per se level. His as applied challenge must fail.

Even if the court considers the appellant's facial challenge to RCW 46.61.502(1)(b), he failed to carry this burden as well. The statute could not be more clear. A person of average intelligence could reason the ingestion of marijuana could result in exceeding the proscribed level of 5 ng/mL. If one does not use marijuana, then one does not run the risk of violating this law. When one chooses to use this impairing drug, however, they are on notice that failure to take precautions could put them in violation of. RCW 46.61.502(1)(b). Nothing prevents a driver of average intelligence from taking precautions by reviewing the studies of the dissipations rates of THC after marijuana consumption, or of obtaining a blood test after using marijuana in order to develop a better

understanding of how their body metabolizes THC and then to tailor future use and driving.[119]

It appears beyond coincidental the facts of this very case support the link between the ingestion of marijuana and the level of THC found in the appellants blood. His use of marijuana and exhibition of its effects confirms the accuracy of the studies relied upon by I-502 voters. He should have understood ingestion of marijuana could result in his blood exceeding the proscribed level of THC. As the supreme court held in both *State v. Franco*, supra, and *State v. Brayman*, supra, when reviewing Washington's per se level for alcohol, and the Nevada Supreme Court found in *Williams v. Nevada*, supra, which upheld the per se of 2 ng/mL level of THC under Nevada law, a person of average intelligence could reason ingestion of marijuana could result in exceeding the proscribed level.

At best, the appellant has established scientists may disagree on the proper per se levels for THC in a driver's blood. However, "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his

[119] See numerous studies in sub-section B.2.(b) of the argument section.

action would be classified as criminal conduct."[120] The appellant has not established, beyond a reasonable doubt, that the statute is facially void for vagueness.

D. I-502 did not violate the single-subject requirement of article II, §19 of the Washington Constitution.

There are two distinct prohibitions in Washington Const. art. II, §19: (1) the single-subject rule and (2) the subject-in-title rule. *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 654, 278 P.3d 632 (2012). The purpose of the single subject rule is to prohibit the enactment of an unpopular provision pertaining to one subject by attaching it to a more popular provision whose subject is unrelated. *City of Burien v. Kiga,* 144 Wn.2d 819, 826, 31 P.3d 659 (2001). Const. art. II, §19 is to be liberally construed in favor of the legislation. *State Fin. Comm. v. O'Brien,* 105 Wn.2d 78, 80, 711 P.2d 993 (1986).

In determining whether an initiative relates to one general subject or multiple specific subjects, Washington courts look to the provision's title for guidance. *Filo Foods, LLC, et al, v. City of SeaTac*, 183 Wn.2d 770, 782, 357 P.3d 1040 (2015). A title may be general or restrictive, "in other words, broad or narrow, since the legislature in each case has the right to determine for itself how

[120] *Eze*, 111 Wn.2d at 27.

comprehensive shall be the object of the statute." *Wash. Ass'n*, 174 Wn.2d at 654.

Where a title is general, "[a]ll that is required [by the constitution] is that there be some 'rational unity' between the general subject and the incidental subdivisions." *State v. Grisby*, 97 Wn.2d 493, 498, 647 P.2d 6 (1982). The existence of rational unity is determined by whether the matters within the body of the initiative are germane to the general title and whether they are germane to one another. *Kiga,* 144 Wn.2d at 826. In assessing whether a title is general, it is not necessary it contain a general statement of the subject of an act; "[a] few well-chosen words, suggestive of the general subject stated, is all that is necessary." *Wash. Ass'n*, 174 Wn.2d at 655 (citing *Amalgamated Transit*, 142 Wn.2d at 209.

A restrictive title is narrow as opposed to broad, specific rather than generic. *Filo Foods,* 183 Wn.2d at 783. A restrictive title "is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation." *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997) (citing *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 23, 211 P.2d 651 (1949), overruled on other grounds.) Restrictive titles are not given the same liberal construction as general titles; laws with restrictive titles fail if their

substantive provisions do not fall "fairly within" the restrictive language. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 633, 71 P.3d 644 (2003).

I-502 was filed July 8, 2011 for submission to the Washington State Legislature.[121] When the legislature failed to act, the initiative was added to the 2012 General Election ballot.[122] Division-III of this court has concluded I-502 was an initiative to the legislature, meaning the legislative title, not the ballot title, controls the analysis of the single-subject requirement.[123] The legislative title of I-502 reads, in part: "AN ACT Relating to marijuana; amending RCW [other statutory citations omitted]...46.61.502 [driving under the influence]."[124] Based on well-settled law, the language of this title is general, requiring only "rational unity" between it and the specifics of the initiative. The inclusion of the 5 ng/mL per se level for marijuana-related DUIs would be one of those specifics.[125] The legislative title of I-502 clearly meets the single-subject requirement

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[121] App. 3.
[122] App. 7.
[123] See *State v. Rose*, 191 Wash. App. 858, 867, 365, P.3d 756 (2015).
[124] App. 3.
[125] "Examples of general titles include: 'AN ACT Relating to violence prevention,' *In re Boot, 130 Wn.2d 553, 566, 925 P.2d 964, 971 (1996)*; 'An Act Relating to Community Colleges,' *Wash. Educ. Ass'n v. State, 97 Wn.2d 899, 906-07, 652 P.2d 1347 (1982)*; 'An Act Relating to the death penalty,' *Grisby,* 97 Wn.2d at 498; 'An Act Relating to industrial insurance,' *Wash. State Sch. Dirs. Ass'n v. Dep't of Labor & Indus.,* 82 Wn.2d 367, 371, 510 P.2d 818 (1973)." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 415, 143 P.3d 776 (2006).

of art. II §19.

Our supreme court has held, however, when an initiative is to the people, the ballot title controls, even if a legislative title exists.[126] In that case, the question remains whether I-502's ballot title was general or restrictive. This requires review of its language from the 2012 General Election Ballot.

> Initiative Measure No. 502 concerns marijuana.
>
> This measure would license and regulate marijuana production, distribution, and possession for persons over twenty-one; remove state-law criminal and civil penalties for activities that it authorizes; tax marijuana sales; and earmark marijuana-related revenues.
>
> Should this measure be enacted into law? [ ] Yes [ ] No[127]

This ballot title is general as it does not concern a specific aspect of marijuana but the entire subject of the drug as regulated under the RCW. The ballot title "concern[ed] marijuana" and sought to address regulation of "marijuana production, distribution, and possession" for citizens over age 21. Similar to Initiative 1183 (I-1183), at issue in *Wash Ass'n*, supra, and discussed in *Filo Foods*, supra, the ballot title of I-502 indicates "a general topic and then

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[126] *Wash. Ass'n*, 174 Wn.2d at 655. The ballot title..."consists of a statement of the subject of the measure, a concise description of the measure, and the question of whether or not the measure should be enacted into law." *Filo Foods,* 183 Wn.2d at 782 (citing *Wash. Ass'n,*, 174 Wn.2d at 655.

[127] App. 7. The ballot summary, which immediately follows the ballot title, reads: "Laws prohibiting driving under the influence would be amended to include maximum thresholds for THC blood concentration."

listed some but not all of its substantive measures."[128] I-502 dealt with the broad subject of marijuana and its overall regulation. I-1183 privatized liquor sales and addressed all aspects related to the sale of liquor in the state. In addressing the challenge to that initiative on the same basis asserted here, the court in *Wash Ass'n*, supra, found the section pertaining to public safety earmarks of tax revenue from liquor sales was "germane to the general topic of I-1183, whether that is liquor or the narrower subject of liquor privatization".[129] It also concluded the "relationship between liquor regulation and public welfare supports our finding that these issues share rational unity."[130] This same rationale applies to the legalization of the previously illegal and impairing drug marijuana under I-502. It stands to reason that *any* Washington law concerning marijuana would fall under the umbrella of the title's stated purpose, to include the 5 ng/mL per se level set of RCW 46.61.502(1)(b). The test for rational unity is met, and there is no violation of the single-subject prong of art. II § 19.

Should this court conclude the ballot title is restrictive, the single-subject requirement for restrictive titles is also satisfied.

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[128] *Filo Foods*, 183 Wn.2d at 784.
[129] *Wash Ass'n*, 174 Wn.2d at 656.
[130] *Id.* at 657.

Again, the ballot title read "concerns marijuana" and sought to regulate its "production, distribution, and possession" in Washington. It did not single out any specific subset pertaining to marijuana, but was intended to include all laws germane to marijuana in Washington. The appellant concedes as much: "the title of I-502 implies that it only deals with the legalization of marijuana and adjusting the law to implement change."[131] From the ballot title, a reasonably intelligent person would conclude all laws related to the marijuana in Washington would be affected by I-502.[132] Although the ballot title did not enumerate each law that would be affected with the initiative's passing, it was not required to do so. There is nothing misleading about the title nor is there a colorable claim that it was somehow deceptive in its language. Again, the city maintains the ballot title was a general one, but also

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[131] Brief of Appellant at 56.

[132] See *State v. Korum*, 157 Wn.2d 614, 642, 141 P.3d 13 (2006): Finding Initiative 159 had a restrictive title (""An Act Relating to increasing penalties for armed crimes"), the consecutive sentencing portion of that initiative was one a *reasonably intelligent* person would conclude is within the scope of the act; *State v. Miller*, 92 Wash. App 693, 702, 964 P.2d 1196 (1998): Agreeing with the supreme court that Initiative 159 had a restrictive title, the court found a *reasonably intelligent* person would be aware that an increased penalty for theft of a firearm was included in the scope of the act; *Vallan v. Miyahara*, 90 Wash. App. 324, 330, 950 P.2d 532 (1998): Concluding SSB 5308 was a restrictive title, the title violated the single subject rule because it read "AN ACT Relating to the use of examinations in the credentialing of health professionals ..." and would not have apprised a *reasonably intelligent* person of sections pertaining to reallocation of authority from the Board of Denture Technology and the Secretary of State/Department of Health.

that it satisfies the single-subject rule under either a general or restrictive analysis.

Should this court find I-502 *did* violate the single-subject rule, the entire initiative must be voided, as there would be no way "to assess whether either subject would have received majority support if voted on separately."[133] It need not come to this. Analyzing I-502's ballot title as either a general or restrictive one, it is clear the initiative complied with art. II §19 of the Washington Constitution.

E. Finding the per se THC threshold of RCW 46.61.502(1)(b), unconstitutional would void I-502 and all laws affected by its passage, as there is no express or implied ability to sever sections of the act found to violate the constitution.

A legislative act is unconstitutional in its entirety if the invalid provisions cannot be severed, meaning that it (1) cannot reasonably be believed that the act would have passed without the invalid portions or (2) elimination of the invalid portion would render the remaining part useless to accomplish the legislative purpose. *Wash. Ass'n*, 144 Wn.2d at 681. As regards the latter, the test is whether the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish its purpose.

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[133] *Kiga*, 144 Wn.2d at 825 (citing *Power, Inc. v. Huntley*, Wn.2d 191, 200, 235 P.2d 173 (1951).

Hall v. Niemer, 97 Wn.2d 574, 582, 649 P.2d 98 (1982).

Finding any change enacted by I-502 unconstitutional would invalidate the entire initiative and all the laws it affected. There is no way to know if I-502 would have passed had it not included the 5 ng/mL THC level for DUI and its related statutory amendments.

The existence of a severability clause is not dispositive on this question.[134] Argument regarding severing sections of I-502 is pointless here, however, as it did not include a severability clause in the event any section was found unconstitutional.[135] The deliberate omission of this precaution should be considered by this court as evidence the drafters and voters wished to have I-502, and the changes it brought, to be an "all or nothing" effort. For this reason, the 5 ng/mL THC level must be considered to have been "intimately connected with the balance" Washington citizens sought between the legalization of recreational marijuana and the legitimate public safety concerns surrounding this change.

The 5 ng/mL blood THC level cannot logically be separated from the rest of I-502's language as it clearly was essential to the initiative's balance of legalizing recreational drug use and public welfare. For these reasons, any conclusion the per se THC level of

[134] *Wash. Ass'n*, 144 Wn.2d at 681.

[135] App. 3.

RCW 46.61.502(1)(b) and/or its related statutes are unconstitutional voids I-502 in its entirety.

V. CONCLUSION

In passing I-502, and decriminalizing marijuana use, Washington voters recognized the impact upon public safety. They chose to set the 5 ng/mL per se blood THC level for marijuana-related DUIs, and placed the responsibility to avoid this threshold upon those who those who use marijuana and drive. They were well within their right to do so. A person must not be permitted to use THC-products, either occasionally or with abandon, and be permitted to argue they could not have known better, in light of all available and reasonably ascertainable information. This applies to every person who uses marijuana and drives on a public highway in our state, which includes Appellant.

The per se THC threshold sets the limit for the population generally, not each person individually. Due process does not require more, it only requires fair notice of what it proscribed. There is no question regarding what is prohibited by the revised law: RCW 46.61.502(1)(b) makes it clear driving at or above 5 ng/mL blood THC is per se impairment in our state. How a person goes about determining if might be in violation of this law is neither an

impossible task nor an unreasonable burden. Although it is not as simple as "if you smoke you know", if a person does use marijuana, just as if one consumes alcohol, there are on notice impairment is consequence and should react accordingly. A person with the desire to know if they are "estimating rightly" has tools available to them to assist them. And while marijuana's psychoactive component, THC, may not be as predictable as alcohol, the science supports the 5 ng/mL blood THC threshold, as well as when a person can estimate when they are likely below that threshold. This requires marijuana users to remain mindful of how much they use and how often. This is not too heavy a burden to bear in exchange for the ability to lawfully use marijuana.

I-502 did not violate the state's police powers in setting a 5 ng/mL per se THC level of marijuana DUIs. The science in support of this level provided an ample basis for the legislature to conclude setting that level was appropriate "to correct some evil or promote interest of Washington citizens" and that it bore "a reasonable and substantial relationship" to achieving that purpose.[136]

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[136] *Robbins*, 138 Wn.2d at 492.

Under either a general or restrictive title analysis, I-502 did not violate art. II §19. The initiative clearly put voters on notice of what laws would be affected by its passage. The initiative to the people comported with the requirements of the Washington Constitution.

Finally, should this accept the appellant's argument and find the changes I-502 made to RCW 46.61.502(1)(b) and/or its related statutes unconstitutional, then entire act should be considered void. There is no way to determine whether or not the initiative would have passed without the inclusion of the 5 ng/mL per se THC level along with legalization of recreational marijuana.

Based on the science, case law, and argument above, the city asks this court find no error in the state's setting the 5 ng/mL per se level of THC for DUI.

Respectfully submitted this 16th day of May, 2016.

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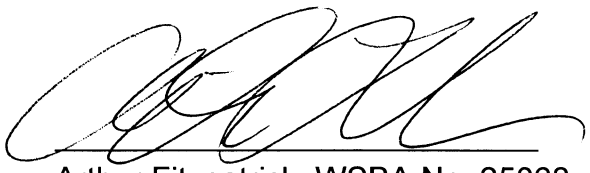

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