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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR WEST,
appellant,
Vs.

STATE OF WASHINGTON, et al
respondents

On appeal from the rulings of
the honorable Judges Sutton and Price

AMENDED

APPELLANT'S OPENING BRIEF

Arthur West
120 State Ave N.E. #1497
Olympia, Washington, 98501

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INTRODUCTION

This is an appeal of an Order dismissing action for an injunction and a declaratory ruling in regard to I-502, an unconstitutional initiative that was passed by the voters in November of 2012.

Appellant West alleges that the Trial Court erred in dismissing the case for lack of justiciability when appellant had demonstrated that he was in the zone of interests protected by the State Constitution and when he had demonstrated clear significant adverse impact from the enactment of I-502.

Appellant West was the major financial contributor to, and a board member of the No on I-502 Committee, which drafted the statement against the Initiative for the Voter’s pamphlet and coordinated opposition to I-502. As such he is directly and adversely impacted by the deceptive ballot title, logrolling, single subject, and subject in title violations evident in I-502

West is also a medical marijuana patient residing in Olympia, who has been adversely impacted by a moratorium passed in Olympia as a direct result of I-502. West is a licensed driver in the State, who is now subject to prosecution under the terms of a new criminal law passed without the due process requirement of fair notice to the voting public. In addition, due to the broadened implied consent and per se DUI provisions of I-502, West is now subject to blood testing in violation of the precedent of *Missouri v. Mcneely*, 133 S.Ct. 1552 (2013) and an unconstitutional blood limit that bears no rational connection to actual impairment. (See *People v. Koon*, 832 NW 2d 724 – (Mich: Supreme Court 2013))

Plaintiff also has interests similar to the plaintiffs in WASAVP, in that he opposes broad State supported commercial sale of marijuana due to the impact it will have on children, society, and appropriate medical use.

Further, plaintiff is a member of the people, who reserved the power of Initiative in the explicit language of the State Constitution. Such a reservation of power must carry with it all necessary safeguards to effectuate the intent of the framers. For the people have a reserved right to file initiatives, but no right to contest false and deceptive uses of the Initiative power to enact unconstitutional laws would stand the people's reservation of rights on its head and transform the initiative process into a vehicle for oppression rather than an instrument of the people's power.

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This was not the intent of Grand Master Kegley of the Grange movement or those who supported and enacted the people's power of Initiative.

All of these factors, in addition to the broad issues of public import of this case, require a determination that appellant West has standing and is within the zone of interests protected under Article II, section 1 of the Constitution of the State of Washington in a manner appropriate for determination of the issues raised in this appeal.

Plaintiff alleges that I-502 is unconstitutional because it violates the requirement of Article II, section 19 that the single subject of a bill (or initiative) be embraced within, or fairly indicated in, its ballot title.

Plaintiff alleges that I-502 is unconstitutional because it violates the requirement of Article II, section 19 that a bill (or initiative) contain a single subject and that it not manifest impermissible logrolling. In addition, I-502 violates the scope and object requirement of Article II, section 38. Plaintiff alleges that I-502 is unconstitutional because it was unconstitutional and the fruit of the poisoned tree due to the level of logrolling and unlawful campaign practices employed by its supporters.

I-502 is also a violation of the Supremacy and Guarantee¹ clauses of the federal Constitution, because it stands as an obstacle to and in conflict with the Controlled Substances Act, and the treaty obligations it

¹ **The United States shall guarantee to every State in this Union a Republican Form of Government, [...]**

was enacted to fulfill. I-502 expressly violates International treaties, including those signed in 1961, 1971, and 1988. As such, it contravenes both the Supremacy clause and the Controlled Substances Act in an unlawful manner, and violates the Guarantee Clause of Article 4, section 4.

In addition, I-502 is unconstitutional and violative of the 1st 4th and 5th Amendments and due process in that its criminal portions are vague and subject to various interpretations as to what it criminalizes or exempts, in authorizing unreasonable, cruel and unusual and intrusive searches and seizures of blood, in establishing a new criminal offense for driving that imposes criminal penalties upon drivers who do not manifest criminal intent to drive unlawfully, and who are not, in actuality impaired or dangerous to the public since they will have not consumed marijuana for hours, days, or weeks prior to their arrest for driving “under the influence”. Such a vague statute impairs the Constitutionally recognized right to intra and interstate travel and has a chilling effect on the exercise of protected liberties. It is clear from the above that the specific and material impact of I-502 upon plaintiff cannot reasonably be denied.

The taxation and record keeping scheme scheme of I-502 abridges the right to be free from self-incrimination under the 5th Amendment and *Leary v. United States*, 395 U. S. 6 (1969), (If read according to its terms, the Marihuana Tax Act compelled petitioner to expose himself

to a "real and appreciable" risk of self-incrimination...) and raises preemption issues, presenting issues of broad financial and public import.

The Superior Court's Orders (CP 43-44, 122-123, 175) are also at variance with substantial evidence and the pleadings on file in this case, as well as the remedial nature of the UDJA that was designed to remedy the very type of uncertainty posed by an unconstitutional law, for, as the Legislature has expressly declared, RCW 7.24 is a remedial statute.

In accord with the intent of the Legislature, the Supreme Court has determined that the UDJA is to be liberally construed and is designed to clarify uncertainty with respect to rights, status, and other legal relations. *DiNino v. State*, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984).

Such liberal construction is especially necessary when the issues concern matters of broad importance involving trade, industry and commerce, as is evident by the broad impact of the provisions of I-502 on the State of Washington and its specific impacts upon the appellant.

Appellant asserts that the Superior Court erred in failing to act in conformity with the remedial intent of the UDJA and the constitutional responsibility of the judiciary to resolve an existing controversy involving the creation of an entirely new commodity, and a State taxation scheme, all based upon sales of a schedule 1 substance illegal under the Controlled Substance Act.

The adoption of I-502 has produced and will produce major and significant alterations: in socioeconomic conditions, State statutes, traffic patterns, urban drug use, access to medical cannabis, public health, administration of federally funded health care, federally regulated banking, and have significant environmental, socioeconomic, and local and regional cumulative and secondary impacts, impacts as yet un-assessed in any SBEIS, SEPA or NEPA determination.

Further impacts stem from the circumstance that legalization of recreational marijuana by the States has been preempted by the federal Congress in the enactment of the CSA. 21 U. S. C. 841 states, in pertinent part, under the heading "Prohibited Acts"...

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;...

The Congressional findings in 21 USC §§ 801(7), 801a(2), and 801a(3) state that a major purpose of the CSA is to **"enable the United States to meet all of its obligations"** under international treaties.

This major purpose is thwarted by I-502 and its express contradiction of the international treaties of 1961, 1971, and 1988.

While the issues surrounding federal preemption and the anti-commandeering doctrine are far from clear², nowhere in the CSA or the international treaties it was adopted to facilitate is there room for a State law compelling taxation and registration of those selling a schedule 1 controlled substance.

ASSIGNMENTS OF ERROR

I THE COURT ERRED IN DENYING PLAINTIFF'S STANDING IN VIOLATION OF THE TERMS OF THE RULING IN WASAVP WHEN THE PARTICULAR INJURY AND ZONE OF INTEREST REQUIREMENTS HAD BEEN SHOWN, AND WHEN A LESS STRINGENT TEST WAS APPLICABLE DUE TO BROAD ISSUES OF PUBLIC IMPORTANCE

II THE COURT ERRED IN FAILING TO RECOGNIZE THE DISCRETE CLASS CREATED BY RCW 69.51A AND THE IMPACTS OF I-502 ON THIS CLASS AS A VALID BASIS FOR STANDING

III THE COURT ERRED IN FAILING TO FIND THAT APPELLANT HAD STANDING UNDER THE PEOPLE'S RESERVATION OF RIGHTS TO INITIATIVE IN ARTICLE I, SECTION 32 OF THE STATE CONSTITUTION

IV THE COURT ERRED IN FAILING TO LIBERALLY CONSTRUE THE UNIFORM DECLARATORY JUDGMENTS ACT IN ACCORD WITH ITS REMEDIAL INTENT TO RESOLVE AN EXISTING CONTROVERSY OF SUBSTANTIAL PUBLIC IMPORTANCE .

V THE COURT ERRED IN FAILING TO RESOLVE AN EXISTING CONTROVERSY OF BROAD PUBLIC IMPORTANCE BY REFUSING TO DECLARE THAT I-502 WAS AN UNCONSTITUTIONAL EXERCISE OF THE INITIATIVE POWER.

² See, generally, High Federalism, Marijuana Legalization and the Limits of Federal Power to Regulate the States, David S. Shwartz, *Cardoza Law Review* Volume 35:567

VI THE COURT ERRED IN FAILING TO RECOGNIZE THE IMPACTS OF I-502 ON MEDICAL MARIJUANA PATIENTS AND THE UNCONSTITUTIONAL EFFECTS OF IMPLEMENTATION OF I-502

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I DID THE COURT ERR IN DENYING PLAINTIFF'S STANDING IN VIOLATION OF THE TERMS OF THE RULING IN WASAVP WHEN THE PARTICULAR INJURY AND ZONE OF INTEREST REQUIREMENTS HAD BEEN SHOWN, AND WHEN A LESS STRINGENT TEST WAS APPLICABLE DUE TO BROAD ISSUES OF PUBLIC IMPORTANCE?

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V DID THE COURT ERR IN FAILING TO RESOLVE AN EXISTING CONTROVERSY OF BROAD PUBLIC IMPORTANCE BY REFUSING TO DECLARE THAT I-502 WAS AN UNCONSTITUTIONAL EXERCISE OF THE INITIATIVE POWER ?

VI DID THE COURT ERR IN FAILING TO RECOGNIZE THE IMPACTS OF I-502 ON MEDICAL MARIJUANA PATIENTS AND THE UNCONSTITUTIONAL EFFECTS OF IMPLEMENTATION OF I-502 ?

STATEMENT OF THE CASE

1. This case stems from the adoption of I-502 in 2004. (CP 256)
2. From the Ballot Title appearing on the Ballot, there is an issue of whether I-502 was adopted in violation of Article II, section 19 of the Constitution of the State of Washington, which requires that all bills must have a single subject and that it be reflected in the title. (CP 250)
3. I-502 violated substantive due process and the requirement of notice because it added new criminal penalties for cultivation and a per se DUI provision not reflected in the Ballot Title which stated only that it removed penalties related to marijuana. (CP 250 183-248)
4. I-502 also is preempted by the CSA and violates the constitutional limitation on logrolling because it requires taxing and licensing marijuana sales and incorporates over a dozen earmarks for marijuana revenue for partisan political purposes. (CP at 183-248)
5. As a direct and proximate result of I-502, Cities across the State, including the City of Olympia passed moratoriums banning activities permitted under the medical marijuana statute. CP at 5-6
6. By broadening implied consent to include blood draws, and by establishing a new per se limit unrelated to impairment, I-502 (section 31) violates the Supreme Court's holding in *Missouri v. Mcneely*, the 5th Amendment to the Constitution of the United States and Article I, section *** of the Constitution of the State of Washington. (CP 183-248)

7. On or about November 6 of 2012 the people of Washington approved Initiative 502 by a simple majority vote. (CP 250)

8. I-502 is composed of 41 sections comprising 64 pages. (CP 183-248)

9. The official ballot title for I-502 was as follows:

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 (CP 250)

10. The ballot title was grossly misleading in that it completely failed to accurately reflect that I-502 added new sections to the DUI law and established a per se DUI provision for adults and a zero tolerance DUI law for those under 21. These were not fairly indicated or implied by the title, which stated that it removed, rather than added, criminal and civil penalties related to Marijuana. (CP 250, 183-248)

11. The ballot title for I-502 failed to express the various subjects of the initiative, including the circumstance that I-502 added rather than removed criminal penalties, established new DUI provisions, and established arbitrary and unrelated earmarks for diverse unrelated activities and programs, thereby rendering it constitutionally defective.

Significantly, even in the process of composing a ballot title for I-502 the Washington State Attorney General was unable to discern or identify any rational unity that connected the various diverse earmarks. (CP 250, 183-248)

12. I-502 is an immense and confusing compendium of diverse and unrelated components cobbled together for political expediency composed of six parts, 41 sections, and totaling 64 pages. Part I concerned the intent of the act. Part II contained definitions. Part III was entitled “Licensing and regulation of marijuana producers, processors, and retailers” and was intended to provide for taxation and ongoing regulation commencing in December of 2013. Part IV, entitled “dedicated marijuana fund” established numerous earmarks, many of which had no rational relation to Marijuana and were included merely for improper logrolling purposes. Part V established new DUI provisions for driving with THC in a driver’s blood, and new zero tolerance provisions for those under 21, which again lacked any rational unity with the ostensible subject matter of the act, and which, in contrast to the December 2013 effective date of sections III and IV, was slated to take effect 30 days after the adoption of I-502, on December 6, 2012. (CP 183-248)

13. Finally, section six of the Initiative, entitled Construction, identified three statutes that the initiative was intended to amend, and directed the Code Reviser to introduce legislation to amend these statutes

in the next legislative session. These amended statutes were not set forth in full in the initiative. (CP 246-8)

14. The various provisions of I-502 concerning regulation, new DUI laws, and nearly a dozen individual earmarks were not germane to each other or rationally related, nor did they demonstrate a rational unity. Rather they comprised a hodgepodge of diverse and divergent legislation yoked together as part of a deliberate and opportunistic strategy to create “a species of logrolling most reprehensible and corrupt³” that would guarantee passage of the initiative as a whole despite the public’s lack of enthusiasm for its various separate component parts. (CP 183-240)

15. In their televised advertisements and their official public statements and propaganda, New Approach Washington openly admitted that I-502’s disparate elements had been carefully crafted to secure logrolling support that otherwise would not have attach to the separate potions of the Initiative. (CP 6-7)

16. The primary basis for including DUI provisions identified by NAW was that the exit polling from R19 in California indicated to NAW advisers that the “legalization” provisions would not pass without a criminal DUI component.

³ See testimony of the Honorable John M. Patton, June 24, 1836, reported in Gales and Seaton’s Register, Volume 12, p. 4440, cited in Log=Rolling, Chester Maxey, University of Wisconsin Library

17. The various extraneous earmarks provided by I-502 were also designed to attract broad based support from liberal leaning organizations and special interest groups that otherwise would not have donated to or supported I-502, and many of the earmarks had no rational relation to, or were not germane to, the regulation of Marijuana. (CP 183-240)

18 I-502 mandates taxation and registration of sales of Marijuana in irreconcilable violation of 21 U. S. C. 841, rendering it preempted by federal law, and contains 12 separate earmarks for marijuana revenue, many of which have no rational relation to regulation of Marijuana, such as primary health and dental care services, migrant health services, and maternity health care services under RCW 41.05.220, and the Building Bridges program of Chapter 28A.175 RCW, and the basic health program. (CP 183-240)

19. By casting the initiative in the role of an economic savior of Washington's budget problems, NAW garnered support from democratic legislators, the democratic party and budget conscious citizens who otherwise would never have approved of the other components of I-502. (CP 7-8)

20. I-502 also violated the constitutional limitation on initiative powers that the power of initiative be exercised by the people **independent** of the legislature, since the initiative was supported and sponsored by Legislators and was apparently a product of out of state

ultra-liberal corporate policy makers from the Drug Policy Institute, NORML, and the ACLU. (CP 7-9)

20. Democratic politicians and legislators⁴, in association with national 501(c)3 Nonprofit “charitable” corporations such as the ACLU and NORML, and the Drug Policy Institute supported, promoted, and financed the initiative rendering it fruit of a poisoned tree as it was not a legitimate and lawful creation or expression of the will of the citizens of the State of Washington. (CP 8-9)

21. By combining disparate subjects and earmarks New Approach Washington and I-502’s supporters have allowed the Initiative and referendum procedures to become a forum for political logrolling in violation of the provisions of federal law, and Article II, section 19, and in so acting have undermined the separation of powers implicit in the guarantee of a republican form of government in Article IV, section 4 of the Constitution of the State of Washington. (CP 183-248)

4.17 As the various disparate components of I-502 demonstrate, the initiative process has become a forum for insider political gerrymandering to further partisan political and corporate interests in a manner contrary to the intent of the populists in adopting the initiative,

referendum, and recall powers for the people to exercise independent of the legislature and corporations. (CP 9-11)

22. The people's independent powers have been employed by their sponsors to further a partisan liberal agenda and to afford corporate interests undue influence on the Constitutionally mandated political process of the State of Washington. CP 9-11)

23. The effect of upholding the deceptive ballot title and logrolling design of I-502 would be to undermine the constitutional protections of the initiative process and introduce a new era where public policy in the State of Washington would be determined by hodgepodge legislation paid for and arranged by powerful out of state corporate interests and corporate entities. (CP 7-9)

24. I-502 fails to include adequate standards to prevent arbitrary and capricious action by the Liquor Control Board, and is otherwise an unconstitutional exercise of the people's power of initiative. (CP 183-248)

26. On November 14, 2011, plaintiff West filed a complaint for declaratory relief and relief in regard to I-502. (CP 3-13)

27. On November 30, 2012, plaintiff West filed a motion for a preliminary injunction seeking a declaration that I-502 was unconstitutional (CP 14-24)

13. On December 7, 2013, the Court denied the Motion (CP 43-4)

14. On January 18, 2013, defendants filed a motion for summary judgment. (CP 45-58)

15. On February 22, 2013, the court granted summary judgment of dismissal. An Order was signed on 3-29-2013. (CP 122-123)

28. Plaintiff moved for reconsideration April 4, 2013. (CP 124-153)

29. Plaintiff filed a declaration re new evidence and authority on May 21, 2013, including the Mcneely decision and the Olympia moratorium. (CP 160-17)

30. Plaintiff filed a Notice of Appeal on April 18, 2011. (CP 114-119).

31. On May 24, 2013 the Court entered an Order denying reconsideration (CP 175)

32. On June 17, 2013, the Plaintiff filed an amended Notice of Appeal CP 176-178)

ORDERS ON APPEAL

Appellant appeals from and assigns error to the following Orders. **1.** The December 7, 2013 Order denying plaintiff's Motion for a Preliminary Injunction (CP 43-44). **2.** The Order Granting State's Motion for Summary Judgment. (CP 122-123), and **3.** The Order The Order of May 24, 2013

(CP 175) denying Reconsideration and Plaintiff's Motion and Declaration re New evidence and Authority.

STANDARD OF REVIEW

The Standard of review of a Judgment is de novo. *Parrilla v. King County* 138 Wn. App. 427, (2007). Factual issues are reviewed under the substantial evidence standard and issues of law are reviewed de novo. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991). Appellant contends the Court's rulings were fraught with errors of fact and law and were not based upon the weight of evidence or any reasonable inference therefrom.

RELIEF SOUGHT

Appellant seeks an Order vacating the dismissal of the trial court and n Order of remand with instructions for the Superior Court to enter the relief requested in the Complaint.

ARGUMENT

I THE COURT ERRED IN DENYING PLAINTIFF'S STANDING IN VIOLATION OF THE TERMS OF THE RULING IN WASAVP WHEN THE PARTICULAR INJURY AND ZONE OF INTEREST REQUIREMENTS HAD BEEN SHOWN, AND WHEN A LESS STRINGENT TEST WAS APPLICABLE

By ruling that plaintiff lacked standing, and that the issues were not justiciable, (CP 43-44, 122-123, 175) the Court's determination was at variance with the decision in Washington Association for Substance Abuse & Violence Prevention v. State, 174 Wn.2d 642, (2012) (WASAVP)

In WASAVP, the Supreme Court found that an organization had standing based upon its nebulous objectives to oppose substance abuse.

Appellants have standing to challenge I-1183. First, both appellants appear to have interests that are regulated by I-1183. WASAVP's goal of preventing substance abuse and violence places it within the zone of interests of I-1183, which broadly impacts the State's regulation of alcohol. Washington Association for Substance Abuse & Violence Prevention v. State, 174 Wn.2d 642, (2012)

While organizations and corporations exercise the rights of individuals, they should not be given special privileges or immunities inconsistent with Article 1 section 17.

Just as in WASAVP, West as a medical patient has significant concerns for the adverse impact of State sponsored peddling of a Schedule I controlled substance broadly to recreational users, to the detriment of

those who employ cannabis for health related reasons under the care of a physician.

To hold that the Association in WASAPV case had valid concerns justifying standing while barring West relief in this case raises the very specter identified in the Dissent of Justice Sanders in To Ro Trade Shows...

The majority should not be allowed the luxury of denying To-Ro Trade Shows its day in court through unchallenged and inconsistent application of the standing doctrine. We must avoid ad hoc, result-oriented decision making which cripples private litigants who seek to protect their constitutional rights against government infringement. See *To Ro Trade Shows v. Collins*, 997 P.2d 960), 100 Wash.App. 483, (2000)

In addition, since this case involves an action brought for declaratory relief under RCW 7.24, the Uniform declaratory Judgments Act., plaintiff maintains that the unprecedented nature of I-502 and the many novel issues it presents as to DUI blood testing and prosecution, federal and State comity, trade and taxation issues, implied consent and self incrimination and restraint of intrastate travel are broad issues of public importance. As such, the Court's power to decide this case is governed by the clearly established precedent of *Farris v. Munro*, 99 Wn. 2D 326, 662 P.2d 821, (1982). As the Supreme Court held in *Farris*...

Despite petitioner's failure to satisfy... standing requirements, he raised an issue vital to the state revenue process... Thus, the case presented issues of significant public interest that, by analogy to other decisions, allow this court to reach the merits.

The issues of whether the State can lawfully mandate State employees to regulate and tax violations the Controlled Substances Act, require self incrimination of licensees and collect taxes for activities unlawful under federal law, as well as the problems posed by the broadening of implied consent and a per se DUI limit for a substance that is not metabolized like alcohol present issues even more broadly applicable and vital to the State criminal justice system, State and federal comity and revenue process than the issues in Farris. Under these circumstances, the Court erred in failing to find that plaintiff lacked standing to resolve these issues of broad public import.

The remedial nature of the UDJA also supports such a determination, in that the Legislature expressly declared RCW 7.24 to e a remedial statute.

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

In addition to the legislature, the Supreme Court of the State of Washington has declared that liberal construction is required for such remedial statutes.

A liberal construction requires that the coverage of the act's provisions "be liberally construed and that its exceptions be narrowly confined." *Hearst Co. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978)

Under the remedial provisions of Washington's Uniform Declaratory Judgments Act, a person whose rights, status, or other legal relations are affected by a statute may have any question concerning the construction of that statute determined by the court. *Branson v. Port of Seattle*, 152 Wn.2d 862 , 877, 101 P.3d 67 (2004).

Specifically, RCW 7.24.020 reads, in part, as follows:

A person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In accord with the intent of the Legislature, this Court has determined that the UDJA is to be liberally construed and is designed to clarify uncertainty with respect to rights, status, and other legal relations. *DiNino v. State* , 102 Wn.2d 327 , 330, 684 P.2d 1297 (1984).

This is especially necessary when the issue concerns matters of broad importance involving trade, industry and commerce, as is the case with an initiative that establishes an entirely new commodity, one that is federally illegal, and mandates the State to establish a regulation and taxation scheme, therefore also directly impacts the States revenue and budget

procedures, to say nothing of creating a crisis of federalism, and violating the Supremacy Clause and the Guarantee Clause of Article IV, section 4 of the federal Constitution.

II THE COURT ERRED IN FAILING TO RECOGNIZE THE DISCRETE CLASS CREATED BY RCW 69.51A AND THE IMPACTS OF I-502 ON THIS CLASS AS A VALID BASIS FOR STANDING

The Washington State Supreme Court has recently recognized, in a December 5, 2012 ruling granting a stay⁵, the medical use of cannabis in accordance with the terms of the act “does not constitute a crime” and qualifying patients and others who act in compliance with the act are not subject to “civil consequences” under RCW 69.51A.040, the medical marijuana statute. (See Transcript of February 22, 2013, at Page 12)

As a member of the discrete class of citizens protected by this statute, plaintiff West has an interest not shared by the general public, an interest which has been recognized to provide a basis for authorizing a stay of government action by the Supreme Court. (See Transcript of February 22, 2013, at Page 12-14)

This interest has been severely impacted by the advent of I-502 as the many attempts to eliminate or curtail medical use of cannabis since the

⁵ See Cause No. 88079-4, Cannabis Action Coalition v. City of Kent, (ruling filed at CP 39-42)

passage of I-502 demonstrate. These impacts include the moratorium adopted by the City of Olympia. (CP 163-167)

A patient in compliance with RCW 69.51A.040 like West (as well as other patients) will be adversely impacted and unduly chilled in their exercise of fundamental rights of travel and association, since they must choose between not using the State road system or being subject to criminal and civil penalties for conduct that has not been scientifically demonstrated to be harmful or a threat to the public.

It is an adjudicative fact, subject to judicial notice, by reference to the National Institute of Drug Abuse, the Journal of Analytic Toxicology, and the National Highway Traffic Safety Administration, agencies of unimpeachable veracity, that plasma concentrations of a driver's blood are not a valid means of demonstrating impairment.

Plaintiff respectfully requests that the court take judicial notice of the scientifically verifiable fact that no objective peer reviewed study has ever demonstrated a valid basis for per se blood levels of THC to be a valid basis for judging impairment.

As such, any criminal provision that provides for arrest and prosecution based upon blood levels that do not correlate to impairment and which are largely unknown to drivers who lack a mass spectrometer to conduct their own real time blood level monitoring has a real and present danger of chilling travel and association of those citizens in this

state who are lawfully in compliance with RCW 69.51A.040, and also hold a valid Washington State Drivers license, a discreet class which includes plaintiff West⁶. (See Transcript of February 12, 2013, page 12-14)

The court further erred in failing to find that West was within the zone of interests protected by the medical marijuana statute, and that the I-502 based moratorium in the City of Olympia failed to impact his interests in banning his right to associate in a collective garden. (CP 163-167)

These impacts were substantial and meet the test of To Ro Trade Shows.

The Court also erred in failing to recognize that West had a substantial interest in opposing I-502 as demonstrated by his contribution of 1,800 to the No on I-502 committee, his membership on the Board of No On I-502, and his campaigning against the Initiative across the State where he participated in numerous debates with I-502 supporter where they misrepresented the terms and effect of the Initiative. (CP 6-8)

As far as the Implied consent and per se Dui provisions are concerned, the Court failed to recognize the impact of broadening implied consent and the imposition of 0 tolerance and per se limitations on medical marijuana patients and the violation of the terms of McNeely that the implied consent for blood draws represents.

Under *Meneely*, the State cannot compel or coerce an unconstitutional blood draw in conformity with the 4th Amendment. Since Article 1, section 7 of the Washington State Constitution, (No person shall be disturbed in his private affairs, or his home invaded, without authority of law) under a *Gunwall* analysis (See *State v. Gunwall*, 106 Wn. 2d 54, 720 P.2d 808 (1986) provides greater protection for individual privacy from government intrusion, the implied consent provisions of I-502 are presumptively unconstitutional.

The Court also erred in failing to recognize the real and substantial impact of the implementation of I-502 on medical marijuana patients, as demonstrated by the provisions of ESSB 5034. (CP 129-32)

Even without relaxed standing requirements, appellant West has been particularly and specifically interested and involved in initiatives and their lawful scope for over 15 years, since the issue of the people's separate and independent powers was raised before the State Supreme Court in the I-602 case.

In the present instance the Court erred in granting summary judgment because, as shown in the record at CP 160-174, 124-153, 25-42 and 59-76, West will be materially and substantially affected by the many specific alterations in State law and local Government directly and proximately resulting from I-502.

Plaintiff certified to substantial impacts of I-502 on medical marijuana patients. These effects range from attacks upon the patients rights, I-502 based moratoria in over 50 cities and Counties and in Olympia where West resides, increased enforcement in defiance of the mandate of I-502, as well as reduced government efforts on marijuana abuse prevention in youth prevention. In addition West is adversely impacted by the new 5 nanogram and 0 tolerance standards in that he is denied the right of travel and association. (CP 74-80)

The compulsory broadening of implied consent to blood draws in I-502 also violates the 4th Amendment under the ruling of the Supreme Court in Missouri v. Mcneely. (See CP at 170-174)

West is particularly and specifically impacted by all of these effects which are the direct and proximate result of I-502. West drives a vehicle on State highways, and is subject to the high I-502 Sin taxes and other charges that will be raised as a result of I-502. (See Transcript of February 22, 2013 at page 12-14)

Further, I-502 is being employed by the State Executive as a basis for a radical restructuring of medical marijuana laws, including the laws governing whether patients can grow at home or even obtain medicine independent of I-502 and its high sin taxes. (CP at 100, 129-32)

As a tax and fee payer, a licensed driver and a medical patient plaintiff West is directly and adversely impacted by the changes in State Government and in the State budget caused by I-502. (CP 100)

In the 2013 Legislative session the impact of I-502 was present in many of the decisions made by the legislature, which had the effect of eroding the protections of I-692. This directly and adversely impact West. (CP 119-123)

All of these are specific and material impacts that demonstrate that plaintiff has standing in this case, especially since standing requirements are relaxed in matters involving issues of broad and overriding public interest, such as the statewide trade and commercial impacts and the nationwide impacts of I-502 on State and federal comity. The vast and inarguable impacts of I-502 justify a relaxed standing standard, and there can be no reasonable argument that either standard is met in this case.

III THE COURT ERRED IN FAILING TO FIND THAT APPELLANT HAD STANDING UNDER THE PEOPLE'S RESERVATION OF RIGHTS TO INTITATIVE IN ARTICLE I, SECTION 32 OF THE STATE CONSTITUTION

As Article I, section 1 and Article II, section 1, of the Washington State Constitution set forth unequivocally, the people reserve the sovereign power to act independently of the legislature to enact legislation.

Article II, § 1 of the Constitution of the State of Washington which originated with the Seventh Amendment thereto in 1912, provides, in material part, that:

"The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, **but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature**, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

The history of the Initiative powers demonstrates that they were adopted as a populist reaction to a popular distrust of the legislature and the effect of private Influence.

For the Initiative process to be transformed into a vehicle for false and deceptive ballot provisions carrying with them like a Trojan horse adverse impacts to vested right is completely at odds with the intent of the people in securing the Initiative powers to begin with. To insulate such actions from review by the people adds insult to injury.

Both history and un-contradicted authority make clear that "[i]t is emphatically the province and duty of the judicial department to say what the law is.", even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch. In *Re Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163, (1976)

The Court erred when it refused to perform its duty to declare the law and restrain the unconstitutional use of the powers reserved by the People. (CP 43-44, 122-123) The Court erred in failing to preserve the principle the initiative process was intended as an instrument for the people to employ in an informed manner free from deception and fraud.

IV THE COURT ERRED IN FAILING TO LIBERALLY CONSTRUE THE UNIFORM DECLARATORY JUDGMENTS ACT IN ACCORD WITH ITS REMEDIAL INTENT TO RESOLVE AN EXISTING CONTROVERSY OF SUBSTANTIAL PUBLIC IMPORTANCE.

This case involves an action brought for declaratory relief under RCW 7.24, the Uniform Declaratory Judgments Act.

Appellant maintains that the issue of whether I-502 is constitutional is a matter of overwhelming and widespread importance, critical to state and federal comity, and to statewide commerce trade and industry, and as such, the Court's power to decide this case is governed by the clearly established precedent of *Farris v. Munro*, 99 Wn. 2D 326, 662 P.2d 821, (1982). As the Supreme Court held in *Farris*...

Despite petitioner's failure to satisfy... standing requirements, he raised an issue vital to the state revenue process... Thus, the case presented issues of significant public interest that, by analogy to other decisions, allow this court to reach the merits.

The remedial nature of the UDJA also supports such a determination, in that the Legislature expressly declared RCW 7.24 to be a remedial statute.

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered. RCW 7.24.120

In addition to the legislature, the Supreme Court of the State of Washington has declared that liberal construction is required for such remedial statutes.

A liberal construction requires that the coverage of the act's provisions "be liberally construed and that its exceptions be narrowly confined." *Hearst Co. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) Liberal construction of a statute "implies a concomitant intent that its exceptions be narrowly confined." *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 140, 145, 530 P.2d 302 (1975). *Miller v. City of Tacoma*, 138 Wn.2d 318, at 324, (1999)

Under the remedial provisions of Washington's Uniform Declaratory Judgments Act, a person whose rights, status, or other legal relations are affected by a statute may have any question concerning the construction of that statute determined by the court. *Branson v. Port of Seattle*, 152 Wn.2d 862 , 877, 101 P.3d 67 (2004).

Specifically, RCW 7.24.020 reads, in part, as follows:

A person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or

franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In accord with the intent of the Legislature, this Court has determined that the UDJA is to be liberally construed and is designed to clarify uncertainty with respect to rights, status, and other legal relations. *DiNino v. State*, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984).

This is especially necessary when the issue concerns matters of broad importance involving trade, industry and commerce, State mandated self incrimination, and State and federal comity as is the case with the I-502.

The UDJA should not and cannot, in accord with a liberal construction, require any showing of harm or damage for “any person” to compel his government to act openly as required by law.

In the Orders and Judgment of the Court (CP 43-44, 122-123) erred in failing to construe the UDJA in accord with its remedial intent to resolve an existing controversy.

V THE COURT ERRED IN FAILING TO RESOLVE AN EXISTING CONTROVERSY TO DECLARE THAT I-502 WAS AN UNCONSTITUTIONAL EXERCISE OF THE INITIATIVE POWER

Both history and the common law make it clear that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *United States v. Nixon*, 418 U.S. 683, at 703, 41 L. Ed. 2d 1039, 94 S.Ct. 3090 (1974), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803), even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71, (1978)

This is the precise responsibility that the Superior Court abdicated in this case, as to both the federal preemption issue raised by I-502's mandatory provisions, and the Article II section 19 problems with I-502's ballot title.

The ultimate touchstone of federal preemption doctrine is whether congress intended to preempt State law. *Altria Group v. Good*

Article VI, cl. 2, of the Constitution provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Consistent with that command, we have long recognized that state laws that conflict with federal law are “without effect.” *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981)

In 21 USC 903, Congress renounced the intent to occupy the field of regulation “unless there is a positive conflict between the provision of this subchapter and that state law so that the two cannot consistently stand together.” As a result it appears that only conflict or obstacle, and not field preemption, applies (See Crosby, 530 US 372-3) However, I-502 stands as an obstacle to and is in conflict with, the purposes and effectuation of the federal Controlled Substances Act.

A direct conflict exists in the provisions of I-502 which require the State to regulate and tax producers and sellers of marijuana, and which require producers and sellers of marijuana to obtain State licenses to violate the CSA, 21 U. S. C. 841 by producing and selling Marijuana for the recreational market.

Section 4.(1) of I-502 provides “there shall be a marijuana producers license to produce marijuana for sale... regulated by the State Liquor Control Board and subject to annual renewal”

Section 4.(2) of I-502 provides "there shall be a marijuana processors license to process... marijuana for sale...regulated by the State Liquor Control Board and subject to annual renewal"

Section 4.(3) of I-502 provides "there shall be a marijuana retailers license to sell... marijuana...at retain in retail outlets, regulated by the State Liquor Control Board and subject to annual renewal"

Section 11 of I-502 requires every licensed producer and processor to submit samples of marijuana for testing on a schedule determined by the LCB.

Section 27 (1) of I-502 provides "there is levied and collected a marijuana excise tax equal to 25 percent of each wholesale sale in this State of marijuana... Section 27 (2) and (3) provide for similar taxes on producer and retailer sales.

Section 27 (4) provides that all collected taxes "shall be deposited each day in a depository approved by the State treasurer and transferred to the State treasurer..."

Section 28 of I-502 at 1-4 and 5 (a) –(g) provide for disbursement of the revenue from marijuana sales to the various earmarked purposes, many of which, like sections 5(e) and (f) have no rational unity with marijuana.

Under the circumstances described above, federal law (the CSA) prohibits activity that the State law (I-502) and vice versa. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

Further, State legalization of recreational marijuana under I-502 violates the Single Convention on Narcotic Drugs of 1961, the Convention on Psychotropic Substances of 1971, and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, as well as other international treaties dating back over a century, which are too numerous to list

Article 6, called the "Supremacy Clause," provides that the U.S. Constitution, the laws of the United States, and all treaties made under the authority of the United States, are "the supreme law of the land." In addition, article I, section 10 prohibits the states from engaging in numerous activities, including coining money, passing ex post facto laws or laws impairing the obligation of contracts, and, with certain exceptions, engaging in war. Finally, the 10th Amendment further provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." These

provisions establish the boundaries of federal preemption of state laws. Under the Supremacy Clause, if a state law is preempted by the U.S. Constitution **or a federal law or treaty**, the state law cannot be enforced.

Pursuant to the Supremacy Clause, any state law that conflicts with a federal law is preempted. *Gibbons v. Ogden*, 22 U.S. 1 (1824). A conflict exists if a party cannot comply with both state law and federal law.

Obstacle (or conflict) preemption occurs when a statute such as I-502 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). *Geier v. American Honda Motor Co.*, 529 US 861. Although the preemption doctrine has been somewhat altered by *Wyeth v. Levine*, the dissent by Justices Alioto, Scalia and Roberts in that case presents the most compelling analysis.

While the exact parameters of the Tenth Amendment and preemption are admittedly unclear, and while both the preemption and

anti-commandeering doctrines have been criticized⁷ as incapable of contending with the “Crisis of Federalism” resulting from the broad recreational legalization of marijuana by the States, the CSA has been upheld as a valid exercise of Commerce clause power in *Gonzales v. Raich*, 545 U.S. 1, (2005).

By requiring State officials to license and tax production and sales of marijuana, and by requiring producers and sellers of marijuana to obtain licenses and report their sales, I-502 creates an arguable case of obstacle preemption, since private individuals could not independently do under federal law what I-502 requires of them. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

A further problem with State mandated licensing and taxation of marijuana sales, while such activity is still a federal crime, is that the Supreme Court’s ruling in *Leary v. United States*, 395 U. S. 6 (1969), prohibits compelled self incrimination as a member of a suspect class violating federal law. This taxing and registration scheme stands as an obstacle to the effectuation of the intent of the CSA and international treaties. The August 29 Cole Memo raises additional issues as to whether I-502 violates the anti-commandeering doctrine. *Printz v. U. S.*, 521 U.S. 898 (1997)

⁷ See, generally, *High Federalism, Marijuana Legalization and the Limits of Federal Power to Regulate the States*, David S. Shwartz, *Cardoza Law Review* Volume 35:567

As the Supreme Court has recognized, in *Local 587 v. State*, 142 Wn.2d 183, 2008, “The people acting in their legislative capacity are subject to constitutional mandates.” In addition...

“An exercise of the initiative power is an exercise of the reserved power of the people to legislate. In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute. The fact that the legislative body has the power to achieve a particular result does not necessarily render its action constitutional; it must follow constitutional procedures. The people acting in their legislative capacity are subject to constitutional mandates. The initiative process cannot be used to amend the constitution.” *Local 587 v. State*, 142 Wn.2d 183, 2008

Nor should the people in their legislative capacity be able to alter the principles of State and federal comity or violate the Establishment Clause of Article IV of the federal Constitution.

Appellant believes that many of the legal issues under Article II, section 19 in this case are controlled by the clearly established precedent of *Local 587 v. State*, where the Supreme Court previously invalidated a defective Initiative.

Similarly, as designed by out of State political consultants hired by George Soros and the Soros funded and shadowy Drug Policy Alliance, I-502 includes a number of features that diverge from accepted constitutional standards.

While numerous politically motivated and unrelated earmarks, and unrelated regulatory and criminal subjects appear to violate the single

subject and logrolling prohibitions of Article II section 19, the critical defect of I-502 is that the ballot title completely failed to give any form of notice, express or implied, of the new criminal penalties included in and enacted by I-502. (CP at 250)

The ballot title, in addition to being un-inclusive of the new DUI provisions of the measure, was also grossly misleading in that it expressly stated that it would remove, not add, criminal penalties. (CP at 250)

The facially unconstitutional nature of I-502, for a variety of reasons, combined with the imminent prospect of adverse impacts stemming from the enforcement of its criminal components-impacts which specially affect plaintiff West-provide a sound basis for the court to enter the relief requested.

The ballot title was grossly misleading in that it completely failed to accurately reflect that I-502 added new sections to the DUI law and established a per se DUI provision for adults and a zero tolerance DUI law for those under 21. These were not fairly indicated or implied by the title, which stated that it removed, rather than added, criminal and civil penalties related to Marijuana.

The ballot title for I-502 failed to express the various subjects of the initiative, including the circumstance that I-502 added rather than removed criminal penalties, established new DUI provisions, and established arbitrary and unrelated earmarks for diverse unrelated

activities and programs, thereby rendering it constitutionally defective. Significantly, even in the process of composing a ballot title for I-502 the Washington State Attorney General was unable to discern or identify any rational unity that connected the various diverse earmarks.

In Fritz v. Gorton, 83 Wn.2d at 331-332 (1974) the Court held that initiatives are subject to Article II, Section 19. In writing for the plurality, Justice Rosellini found an opinion of the Oregon Supreme Court to be instructive:

A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon, which is derived from newspaper comments or from conversation with their associates. We think the assertion may safely be ventured that it is only a few persons who earnestly favor or zealously oppose the passage of a proposed law initiated by petition who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage. *It is important, therefore, that the title to laws proposed in the manner indicated should strictly comply with the constitutional requirement.* Fritz, 83 Wn.2d at 331-332, quoting State ex rel. v Richardson, 48 Ore. 309, 319, 85 P. 225 (1906) (italics in original).

The ballot title defects are especially egregious in that I-502 is an immense and confusing compendium of diverse and unrelated components cobbled together for political expediency, composed of six parts, 41 sections, and totaling 64 pages. (CP 183-248) Part I concerns the intent of the act. Part II contains definitions. Part III is entitled “Licensing and regulation of marijuana producers, processors, and retailers” and compelled the State to regulate and tax violations of the Controlled Substances Act commencing in December of 2013. Part IV, entitled “dedicated marijuana fund” establishes numerous earmarks, many of which have no rational relation to Marijuana and were included merely for improper logrolling purposes.

Part V establishes new DUI provisions for driving with THC in a driver’s blood, and new zero tolerance provisions for those under 21, which again lack any rational unity with the ostensible subject matter of the act, and which, in contrast to the December 2013 effective date of sections III and IV, took effect 30 days after the adoption of I-502, on December 6, 2012.

Finally, section six of the Initiative, entitled Construction, identified three statutes that the initiative is intended to amend, and directed the Code Reviser to introduce legislation to amend these statutes in the next legislative session. These amended statutes were not set forth in full in the initiative. (CP 183-248)

The various provisions of I-502 concerning regulation, new DUI laws, and nearly a dozen individual earmarks were not germane to each other or rationally related, nor did they demonstrate a rational unity. Rather they comprised a hodgepodge of diverse and divergent legislation yoked together as part of a deliberate and opportunistic strategy to create “a species of logrolling most reprehensible and corrupt⁸” that would guarantee passage of the initiative as a whole despite the public’s lack of enthusiasm for its various separate component parts.

These factors combine to produce an initiative that cannot reasonably be capable of surviving a constitutional challenge, particularly in light of the importance afforded Article II, section 19 by the Courts of the State of Washington in requiring that bills embrace a single subject, reflected in their title, and that they be free from the pernicious effects of logrolling.

ARTICLE II, SECTION 19

Article II, section 19 of the Washington Constitution provides that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.”

The purpose behind Article II, Section 19 in the context of initiatives is threefold: (1) to fairly apprise the

⁸ See testimony of the Honorable John M. Patton, June 24, 1836, reported in Gales and Seaton’s Register, Volume 12, p. 4440, cited in Log=Rolling, Chester Maxey, University of Wisconsin Library

voters of the issues being considered; (2) to prevent surprise or fraud upon the voters; and (3) to prevent logrolling initiatives. Washington Toll Bridge Authority, 32 Wn.2d at 24-25; Patrice, 136 Wn.2d at 852.

I-502 subverts each of these purposes.

This provision has been part of the basic framework of our state's government for over 150 years, appearing not only in our state constitution at its original adoption, but in the Organic Act of 1853 establishing Washington as a territory. Article II, section 19 is a cornerstone of good government, ensuring that our lawmakers legislate honestly. Article II, section 19's single-subject and subject-in-title rules require our elected legislators to enact laws with forthrightness and clarity. We demand the same of initiatives.

One purpose of article II, section 19 is to prevent the practice of combining two bills, neither of which would pass on its own, but when the proponents of the measures combine their interests both can be enacted. *See Pierce County* , 150 Wn.2d at 430 (citing *Power, Inc. v. Huntley* , 39 Wn.2d 191 , 198-99, 235 P.2d 173 (1951)).

Another closely related purpose is to prevent the attachment of an unpopular bill to a popular one on an unrelated subject in order to guarantee the passage of the unpopular provision. *Pierce County* , 150 Wn.2d at 429 -30. Finally, the purpose behind the subject in title rule is to guarantee that the members of the legislature and the public are given

notice of the subject matter of a bill. *Id.* at 430; *Amalgamated Transit*, 142 Wn.2d at 207.

In *Amalgamated Transit*, the common and ordinary meaning of the term "tax" in the ballot title *was not broad enough* to encompass the technical definition assigned to the term in the initiative text. More fees were impacted than the initiative title led voters to believe, creating a subject in title violation. *See Amalgamated Transit*, 142 Wn.2d at 191-92

Similarly, the clause "remove state-law civil and criminal penalties" employed in I-502 is not broad enough to encompass the addition of an entirely new DUI statute broadening implied consent to allow for mandatory blood draws of drivers criminalizing drivers on the mere suspicion of the officer in the street, and allowing for conviction based upon test results without evidence of impairment, tests which lack any reliable scientific basis to demonstrate that those failing the test are actually impaired.

VI THE COURT ERRED IN FAILING TO RECOGNIZE THE IMPACTS OF I-502 ON MEDICAL MARIJUANA PATIENTS AND THE UNCONSTITUTIONAL EFFECTS OF IMPLEMENTATION OF I-502

The Court also erred in failing to consider the chilling effect on travel and association likely to result from the overbroad terms of I-502.

As I-502 sponsor Pete Holmes stated (CP 127) “This is simple, don’t drive if you think you may be impaired” This is a classic case of overbreadth and a chilling effect, since it is impossible to reasonably determine what one’s blood level of THC is.

Michael Dorf, in *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238 (1994). note 13, at 265 argues that “the kind of chilling effect that justifies the First Amendment’s overbreadth doctrine” also applies to any other “right to engage in *primary conduct*”); *Similarly, Fallon in Making Sense of Overbreadth*, 100 Yale L.J. 853 note 36, at 861 n.48 (“[T]he concept of a ‘chilling effect’ logically embraces every situation in which people are deterred from engaging in conduct, especially constitutionally protected conduct, by fear of prosecution due to the costs or risks of defending a lawsuit.”); *id.* at 884 n.192 (noting that justification for First Amendment overbreadth doctrine “would support a doctrine of equal sweep in cases involving alleged infringements of other fundamental rights”); Professor Schauer further notes that..., “[I]nvidious chilling of constitutionally protected activity . . . can occur not only when activity shielded by the [F]irst [A]mendment is implicated, but also when any behavior safeguarded by the Constitution is unduly discouraged.”.

Keyishian v. Board of Regents, 385 U.S. 589 (1967) exemplifies the chilling effect strategy in operation. There, the Court struck down as overly vague New York laws that provided for the removal of state

teachers who uttered or committed any seditious or treasonable words or acts.¹⁰⁸ “The crucial consideration is that no teacher can know just where the line is drawn between ‘seditious’ and nonseditious utterances and acts.”¹⁰⁹ In invalidating the statute on its face, the Court emphasized the chilling effect such vague terms would cause, describing the scheme as “a highly efficient *in terrorem* mechanism.”¹¹⁰ As the Court noted,

It would be a bold teacher who would not stay as far as possible from utterances or acts that might jeopardize his living. . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

Similarly, even for other constitutional rights beyond the first Amendment, the courts have employed a chilling test to invalidate statutory schemes with vague or overbroad criminal or civil penalties *See Colautti v. Franklin*, 439 U.S. 379, 394 (1979) (invalidating state statute because it “conditions potential criminal liability on confusing and ambiguous criteria,” and “therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights”). And, as Tony Amsterdam – who is widely recognized as the author of *The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 103 – has pointed out, the Court’s facial invalidation of economic regulations in the heyday of the *Lochner* era was designed to prevent vague laws from chilling the property rights *Lochner* protected.

I-502, facially and as applied, sweeps too broadly in encompassing unimpaired lawful fundamental constitutional conduct within its ambit, and has unscientific, vague and arbitrary per se limits that authorize criminal penalties and administrative sanctions for drivers who have not violated any State law, and who have no accurate way of knowing whether their blood concentration is above or below the unscientific and arbitrary level set by I-502.

In the case of drivers under 21, I-502 criminalizes past actions which may have taken place up to a month previously, and its zero tolerance provisions are extreme enough to criminalize driving by those who merely have been exposed to second hand smoke at a public event or residence, a serious and facially over broad restriction.

Clearly, under I-502, it would be a bold patient (or minor) who would not stay as far as possible from acts that might jeopardize his freedom and ability to drive, and the danger of this chilling effect upon fundamental rights to liberty as well as intra and interstate travel is evident. Yet I-502 does not set forth standards that allow drivers to know when they may be judged to be “impaired” by an arbitrary blood level of THC.

It is impossible for a citizen to determine with certainty the level of THC in ones blood at any given time, and as such, a driver’s compliance with the criminal provisions of I-502 must be based upon guesswork. This is not a reasonable or valid regulatory or criminal scheme.

Insofar as the defendants argue that the plaintiff is just as likely to be deemed “impaired” now as he will be under I-502, this argument fails to recognize that under I-502 the definition of “impaired” will change from “under the influence or affected” to 5 nanograms per milileter.

Under a reasonable extension of Frye, any RCW 69.51A.040 compliant patient such as plaintiff West could be reasonably suspected of having a blood concentration over 5 nanograms per milileter and be subject to arrest and the loss of his license or privilege to drive any time they get behind the wheel of a vehicle.

This should be seen to impede the constitutional right to travel recognized by the Supreme Court in *Shapiro v. Thompson*.

Finally, it seems obvious that the registration requirement, again as a practical matter, will impede the constitutionally protected right to **travel**. See *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), overruled on other grounds in *Edelman v. Jordan*, 415 U.S. 651, 671, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974).

In *Shapiro*, the Supreme Court held that the right to travel was protected by the fifth and fourteenth amendments to the United States Constitution. The Court invalidated state laws conditioning eligibility for welfare benefits on residency for 1 year in the state on the ground that such a requirement has a chilling effect on that right. 394 U.S. at 631. This chilling effect is just one of the many constitutional defects of I-502.

The Court erred in the Orders of December 7, March 29, and May 24, 2013, in failing to find that plaintiff had standing or that there was an existing controversy of substantial importance that required resolution.

CONCLUSION

In a variety of contexts, the Washington State Supreme Court has recognized that standing questions should be analyzed in terms of the public interests presented.

“Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer. *Washington natural Gas v. PUD No. 1*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969); accord, *Vovos v. grant*, 87 Wn. 2D 697, 701, 555 P.2d 1343 (1976).

The issues surrounding the State’s regulation and taxation of a federally scheduled controlled substance and the development of an entirely new market for an agricultural commodity are of broad concern to State and federal comity, as well as trade and industry, as is the elimination of patient’s rights under I-692, as a direct and proximate result of I-502.

This case presents issues of significant statewide public interest that, in light of the remedial nature of the UDJA and black letter precedent, compels this court to reach the merits of the important issues

presented. The arbitrary use of standing to deny adjudication of constitutional issues eviscerates the intent of the legislature in providing for a remedy under the UDJA in circumstances where an uncertainty in the rights, status and legal relations exists.

The issue of whether the initiative power of the citizens can be employed in a deceptive manner to set earmarks based upon a federally preempted taxation scheme relying on self-incrimination in violation of the holding in *U.S. v. Leary* is a case of an existing case or controversy of broad public importance that requires swift and ultimate determination.

It has been nearly three decades since Jack Herer wrote his landmark book on the myths and misconceptions behind the war on drugs⁹. The myth that I-502 is without impact on medical marijuana patients is just the latest in a long series of similar distortions of reality that characterize the decades long conflict surrounding the continuing prohibition of controlled substances, which now, at least insofar as marijuana is concerned, appears to have entered into a new and covert phase.

Under prohibition, gangsters like Alphonse Gabriel Capone bought legal immunity by administering bribes to police and politicians. He (Capone) practically paid off every law

⁹ Herer, Jack. 1985. *The Emperor Wears No Clothes*. Ah Ha Publishing, Van Nuys, CA.

enforcement agent and politician in the districts in which he operated his illegal businesses¹⁰.

If there is a substantive difference between this and the scheme of I-502, it eludes this appellant.

RELIEF SOUGHT

Appellant respectfully requests the following relief: That an Order of Remand issue with directions to the Superior Court to vacate the Order of dismissal and to enter a Declaratory Ruling declaring I-502 unconstitutional as adopted, written and as applied, and directing that an immediate injunction or writ issue under the seal of the Superior Court barring the application or enforcement of I-502.

Respectfully submitted February 19, 2013.


ARTHUR WEST

CERTIFICATE OF SERVICE

I certify that this document has been Served on and/or Emailed to counsel for the respondents at their address of record on or before February 19, 2014. Done February 19, 2014.


ARTHUR WEST

¹⁰ Sullivan, Edward D. *Rattling the Cup on Chicago Crime*. New York: The Vanguard Press, 1929.