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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Washington Restaurant Association, a Washington non-profit organization;
Northwest Grocery Association, a non-profit organization; Costco
Wholesale Corporation, a Washington corporation; and Washington
Lodging Association, a Washington non-profit organization,

Appellants,

v.

Washington State Liquor and Cannabis Board, a state agency,

Respondent.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

RCW 66.28.170 expressly and unambiguously allows a seller to offer price differentials on wine and spirits if based on common business factors like competitive conditions, efficiencies in handling goods, or costs of servicing an account. The challenged pricing rules nonetheless prohibit those and the vast majority of other pricing differentials, regardless of the market conditions that may support them. The Board, in its Response Brief, does not dispute that. Instead, the Board strives to read ambiguity into the extent of pricing differentials the statute allows, but without explaining how the plain language is subject to different, reasonable interpretations. The Board posits that it had authority to step in, not to attempt to resolve the supposed ambiguity or to apply the general statutory standards to specific situations, but to dictate the minutiae of what business practices to allow regardless of the statutory standard.

But the language of RCW 66.28.170 is unambiguous: a variety of business practices approved for other, non-liquor goods justify a supplier offering a product at different prices to different customers. That the statute contemplates applying general standards to specific situations does not make it ambiguous; that is a common legislative technique, and particularly common in instructing an administrative agency. The Board's challenged rules draw a hard line diametrically opposed to the statute.

Regardless of the statutory factors (e.g., competition, efficiencies, costs, and similar practices employed in other product markets), the rules start with a general prohibition of any business practice in which a “product is not offered to all retailers in the local market at the same price.” WAC 312-24-065.¹ The other pricing rules then carve out narrow exceptions to that blanket prohibition. The Board argues that its pricing rules are nonetheless consistent with the statute because the statutory standards would intercept few practices and the rules allow a few. But it proves too much to say that the rules prohibit what the statute prohibits *and more*. Prohibiting behavior that the statute allows constitutes nullification, or at best amendment, of the statute—and either action is beyond an agency’s purview.

The Board’s other arguments are similarly unpersuasive. The Board’s generalized authority to regulate the sale of liquor does not extend to regulating pricing, much less doing so in ways contrary to express statutory authorization. For decades pricing had been controlled by separate, specific legislative provisions, and I-1183 went further and made clear that it was affirmatively legalizing practices meeting its standards. Finally, the Board appears to conflate its desire to appease divergent stakeholder interests with the duty to make rules that fulfill legislative

¹ As in the Opening Brief, this brief will refer to the rules by its last three digits for simplicity. WAC 314-23-065, for example, will be referred to as Rule -065.

standards and address the facts and circumstances before the agency. The Board here did not do that, and its rulemaking was arbitrary and capricious.

The Court should invalidate the pricing rules. The Board lacks constitutional authority to nullify the Initiative, and the Court lacks constitutional authority to defer to the Board on statutory interpretation.

II. ARGUMENT

A. **The Board Lacks the Authority to Contradict the Plain Language of RCW 66.28.170**

The Board concedes, as it must, that I-1183 changed Washington law and truncated the existing prohibition on all price discrimination, specifically defining certain common practices as falling outside the scope of that historical prohibition. Board’s Response Brief (“Bd.’s Br.”) at 5-6. The law now permits “[p]rice differentials for sales of spirits or wine based upon competitive conditions, costs of servicing a purchaser’s account, efficiencies in handling goods, or other bona fide business factors.” RCW 66.28.170. Notably, I-1183 also specifically eliminated the requirement for uniform pricing on wine, I-1183 § 121(1)(d), and further allowed price discounts on wine and spirits to meet a competitor’s lawful price or when no harm to competition results, *id.* §§ 121(4), 120(5). In short, “Initiative 1183 eliminate[d] the requirement that distributors and manufacturers of wine sell at a uniform price, which would allow the sale

of wine at different prices *based on business reasons*. Spirits could also be sold to different distributors and retailers at different prices.” Wash. Sec’y of State, State of Wash. & Cowlitz County Voters’ Pamphlet at 20 (2011) (emphasis added). Yet the pricing rules require all wine and spirits to be sold at the same price to all retailers within the same “local market,” Rule -065, except for minor exceptions far narrower than I-1183 allows, Rules -080, -085.

In defense of these rules, the Board relies heavily on its historical grant of authority to regulate alcohol and deference shown to agencies. The Board argues first that it has the authority to independently regulate pricing practices under either RCW 66.28.030(12), which allows the Board to “regulat[e] the sale of beer, wine and spirits,” or alternatively, under RCW 66.28.320, which allows the Board to enact rules to “regulat[e] the relationships between manufacturers, distributors and retailers.” *See* Bd.’s Br. at 19-21. Then, pursuant to that authority, the Board argues that the pricing rules “clarify and interpret ambiguous statutory language in the context of a larger statutory scheme” by defining what price differentials are allowed. *Id.* at 22.

That analysis is backwards. The first, fundamental analysis is whether the pricing rules comport with the plain language of RCW 66.28.170. They do not. An agency receives no deference in its

interpretation of an ambiguous statute. But even if the Court looks beyond that plain language to consider what authority the Board still has, it is clear the Board cannot djinn up purported ambiguities in the pricing scheme to essentially return the marketplace to uniform pricing.

B. The Rules Prohibit Pricing Practices Permitted by the Statute

Agencies lack “the power to make rules which amend or change legislative enactments.” *Wash. Fed’n of State Emps. v. State Pers. Bd.*, 54 Wn. App. 305, 308 (1989). That should be particularly true when it comes to initiatives, enacted by power the People reserved to themselves, subject to amendment only by the Legislature and only after two years.

Washington Constitution Art. II, § 1. And the Constitution vests the judicial power, which fundamentally includes independent interpretation of laws, in the courts, not agencies. *Id.* Art. IV, § 1; *accord Amalgamated Transit Union, Local 1384 v. Kitsap Transit*, 187 Wn. App. 113, 127 (2015) (“The courts, not the [agency], possess the ultimate power to determine the purpose and meaning of statutes”) (citation omitted).

RCW 66.28.170 allows any pricing differential supported by common business conditions and not otherwise prohibited by laws of general application. While the Board’s rules may not “prohibit all pricing differentials,” Bd.’s Br. at 27, such a defense misses the crux of the required analysis. At issue is whether the Board prohibited *any* pricing

differentials allowed under the statute. It did, and the pricing rules are invalid.

In their Opening Brief, Appellants identified examples of pricing differentials supported by competitive conditions, efficiencies in handling goods, or the cost of servicing a purchaser's account—factors that the Board does not allege are ambiguous—but are nonetheless prohibited by the pricing rules.² *See* Appellants' Opening Brief ("Opening Br.") at 22-25. The Board did not engage with any of these examples and offers no justification for their prohibition. A University of Washington marketing professor identified even more circumstances under which pricing differentials are legitimate, AR 1104-06, but in its brief, as in its decision-making, the Board ignored this analysis altogether.

The Board instead makes a litigation argument that the pricing rules are acceptable because they are not an "exhaustive list" of permitted practices and that there is still some "room" for "case-by-case determinations of whether a discounted price is appropriate under bona fide business factors." Bd.'s Br. at 27. But that injects the same

² *See, e.g.*, Opening Br. at 22 ("[M]any conceivable bona fide business factors besides sheer volume would enable one entity to negotiate a better price than another: one store might be closer to the distributor's office and therefore cheaper to supply ('efficiencies in handling goods'), or a specialty bar might offer an atmosphere more in line with the producer's product, and therefore offer a better marketing opportunity, than the dive bar down the street ('competitive conditions')."); *id.* at 22-25 (highlighting business practices by Rumba, Azteca, and Hotel Murano).

ambiguity that the Board used as a rationale to ignore and “interpret” the statute. And it is contrary to the plain language of the challenged rules. Rule -065 flatly prohibits *all* price differentials within the same local market. Full stop. Rule -080(2) prohibits all channel pricing for established spirits products. No exceptions. What room is there, then, for a rum distiller wishing to differentiate in price for a restaurant (i.e., within the on-premises channel) that specializes in rum and markets it to its patrons, versus the small liquor store next door (i.e., within the off-premises channel) that does most of its sales in Fireball and cheap vodka? If both retailers wish to buy a case of rum, the distiller must offer them both the exact same price—despite the existence of competitive conditions that support a price differential.³

The Board cannot force the rum distiller to turn to the Board for some nebulous “case-by-case” determination when the plain language of statute allows such a practice.⁴ Instead, RCW 66.28.300 allows the Board to investigate those practices that may be abusive or unlawful on a case-

³ As Rumba Rhum & Food explained to the Board, AR 1055, many on-premises retailers offer suppliers the value of having their product promoted by knowledgeable staff and being offered in a setting designed to highlight the product, Opening Br. at 22-23; *see also* AR 1104-06 (Expert Report at 2-4) (explaining the consumer-side variables that support channel pricing). This business factor (competitive conditions) does not disappear (i.e., it is no less bona fide) simply because a product has been on the market for six months, and the Board cannot ignore it or read it out of the statute. Yet Rule -080(2) forbids this practice—just one example of the pricing rules’ conflict with RCW 66.28.170. *See* Opening Br. at 20-25 (providing additional examples).

⁴ The Board has not created any such mechanism to request reviews of pricing practices in the two-plus years since implementing the pricing rules.

by-case basis and prohibit such specific practices. Such case-by-case determinations must winnow out practices prohibited by RCW 66.28.170, rather than allowing in practices covered by the plain language of the statute. The goals of I-1183, after all, were to curtail costly and burdensome regulations and remove the Board's ability to regulate pricing. I-1183 § 101(1) (purpose).

The Board's Response Brief relies on a flagship example of why the pricing rules are appropriate—but this example underscores how the Board misconstrues RCW 66.28.170. To defend Rule -080, which addresses volume discounts, the Board submits that:

[I]t would be impermissible to charge one price to Safeway for delivery of 100 cases of a particular product, but to charge the liquor store across the street a different price for delivery of the same amount.

Bd.'s Br. at 25. Here, the Board substitutes its own judgment, with no factual record as to the specific situation, for the plain language of RCW 66.28.170. The statute allows the seller to decide whether an adjustment is appropriate based on competitive conditions or savings in servicing the account, even if the accounts happen to be "across the street." I-1183 sought to leave the market participants leeway to negotiate deals for various bona fide reasons, so long as they not run afoul of generally established antitrust or fair practices principles. If the Board suspects

abuses, it can investigate and enforce the pricing discrimination provision of RCW 66.28.170. What it cannot do is enact blanket rules that prohibit all such practices merely because its lack of marketing and distribution expertise leaves it unable to fathom circumstances that could support such a market solution.

The Court need not and should not look past the plain language of the statute. RCW 66.28.170 allows pricing differentials as long as legitimate business conditions support such them. The Board's pricing rules eliminate all nuance from the law and prohibit business practices allowed under the plain language of the statute. That exceeds the Board's authority.

C. The Statute Is Not Ambiguous

To justify the fact that it truncates rights granted by statute, the Board focuses on alleged ambiguities in RCW 66.28.170, specifically the clause "other bona fide business factors." See Bd.'s Br. at 22-27. The Board also attempts to create ambiguity by asserting that differentials explicitly allowed by I-1183 could somehow be discriminatory. *Id.* at 18.

RCW 66.28.170 is unambiguous, and no further interpretation or "clarification" is needed. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 355 (2015) ("We do not require agency expertise in construing an unambiguous statute, and we do

not defer to an agency determination that conflicts with the statute.”). A statute is not ambiguous merely because it states general standards or different stakeholders interpret the statute differently—the question “is whether those interpretations are sufficiently reasonable to warrant further inquiry.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 242 (2002); *Am. Cont’l Ins. Co. v. Steen*, 151 Wn. 2d 512, 518 (2004) (“A statute is unclear if it can be reasonably interpreted in more than one way.”).

During the duration of its rulemaking and this litigation, the Board has not proposed a reasonable, alternative reading of RCW 66.28.170. *See* Opening Br. at 27-29 (discussing lack of reasonable interpretations for “other bona fide business factors”). Instead, the Board has waffled about what, exactly, is ambiguous about RCW 66.28.170’s provision allowing price differentials based on “competitive conditions, costs of servicing a purchaser’s account, efficiencies in handling goods, or other bona fide business factors.”⁵ Its brief now states that the pre-rulemaking practices of distributors, the rulemaking petition, and “the sharply divided comments

⁵ Compare, e.g., CP 691 (Bd.’s Response Brief at 18) (arguing the phrase “other bona fide business factors” is ambiguous), with RP at 25:9-14 (Board’s counsel, responding to trial court’s inquiry as to whether the Board was taking the position that RCW 66.28.170 was ambiguous: “Ambiguity, I mean, we did argue in the brief that they were ambiguous because of that, but my thinking has evolved a little bit since writing the brief.”), and Bd.’s Br. at 18 (“[T]he rules properly clarified an ambiguous area of the law: what differential pricing is non-discriminatory.”).

received during the rulemaking” together “show that there is room for two opinions on the meaning of allowable ‘price differentials’ and ‘other bona fide business practices’ in RCW 66.28.170.” Bd.’s Br. at 23. Varied opinions about application of general statutory standards such as competitive conditions do not render statutes ambiguous. The Board offers no alternative, reasonable interpretation for RCW 66.28.170. *See State v. Keller*, 143 Wn.2d 267, 276-77 (2001) (“[C]ourts are not obliged to discern any ambiguity by imagining a variety of alternative interpretations.”) (citation omitted).

As discussed in the Opening Brief, the catch-all “other bona fide business factors” is not ambiguous merely because it is not defined within the statute. *See* Opening Br. at 27 (citing *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920 (1998) (“The fact that a word is not defined in a statute does not mean the statute is ambiguous.”)). Nor is the catchall ambiguous simply because it is a catchall. *See, e.g., W. Telepage, Inc. v. City of Tacoma Dep’t of Fin.*, 140 Wn.2d 599, 608-09 (2000) (finding a statute with two catchalls in one sentence unambiguous).⁶

⁶ Even if the catchall were ambiguous, there are accepted canons of construction that cabin such catchall provisions. Under the *ejusdem generis* canon, when a general term follows a sequence of specific terms, “the general term is restricted to items similar to the specific terms.” *In re Estate of Jones*, 152 Wn.2d 1, 11 (2004) (finding catchall in RCW 11.68.070 to be unambiguous and limited by preceding terms). The catchall “other bona fide business reasons” is limited by the preceding, specific business conditions, and its existence does not introduce ambiguity into the remainder of RCW 66.28.170.

The Board also argues that RCW 66.28.170 is ambiguous based on the larger statutory context, arguing that the statute includes “ambiguous statutory language in the context of a larger statutory scheme.” Bd.’s Br. at 22. It points to the fact that other sections of RCW Title 66 address aspects of liquor sales, such as RCW 66.28.190 (prohibiting liquor sales on credit), RCW 28.270 (defining when electronic fund transfers may occur, or sales with debit/credit cards), RCW 66.28.305 (prohibiting the payment of money or similar to retailers to incentivize liquor sales), and RCW 66.28.310 (addressing the kinds of promotional items, like coasters, that may be provided to retailers). *See id.* at 23.

It has not identified any portion of Title 66 that expressly conflicts with RCW 66.28.170. The cited provisions deal with other aspects of a liquor sale, and there is no conflict between, say, allowing a price differential and also prohibiting a supplier from offering more than nominally valuable promotional materials to a retailer. Suspicion of a conflict between statutes does not suffice to create an ambiguity—and do not justify truncating rights specifically granted by RCW 66.28.170.

Even if such a conflict existed, the Board ignores the established principles that the more specific statute controls the general, *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 629 (1994), and that a more recent enactment controls the earlier provision even if

there is a conflict, *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211 (2000). RCW 66.28.170 specifically addresses pricing differentials and the legitimate business practices that constitute lawful price differentials; it controls to the extent there are more general and more dated provisions governing the interactions between suppliers and retailers.

D. The Board No Longer Has General Authority to Control Pricing

In its Response, the Board relies heavily on its general authority to regulate and enforce the State’s liquor laws, and it claims that general authority to regulate pricing would “protect[] the welfare” of the People. *See* Bd.’s Br. at 5. Yet the Board has identified no public safety rationale for its pricing rules, and the People spoke clearly in I-1183 that they intended to remove the Board from controlling pricing and intended to allow market participants to negotiate for price differentials based on market factors applicable to other goods. *See* Opening Br. at 15-16. The Board has no authority to ignore the plain language of the Initiative even if it believes the People erred in their judgment. The two delegations of authority specifically invoked by the Board do not permit the pricing rules at issue here.

1. The authority to “regulat[e] the sale” of liquor under RCW 66.08.030(12) has never included general power to control pricing practices.

RCW 66.08.030 delegates 21 specific tasks to the Board. One of these tasks is “regulating the sale of beer, wines, and spirits.”

RCW 66.08.030(12). *See* Opening Br. at 32-34 (addressing the scope of this delegation). The Board reads its delegated authority to “regulat[e]” a sale broadly to include regulation of the price at which suppliers choose to offer their product to the market regardless of what the Initiative says on that specific topic. Bd.’s Br. at 19-21, 27-31. This position is contrary to fundamental principles of statutory interpretation and agency authority.

First, the Board argues that Appellants are advocating for an implicit repeal of “all of the Board’s rulemaking authority.” *Id.* at 27-30. Not so. “Where an amendment may be harmonized with the existing provisions and purposes of a statutory scheme, there is no implicit repeal.” *See Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 375 (1995). As Appellants have consistently argued, *see, e.g.*, Opening Br. at 26-34, I-1183 *explicitly* repealed the Board’s *generalized* rulemaking authority, *see, e.g.*, I-1183 § 204. After I-1183, the Board must rely on specifically enumerated delegations, such as found in RCW 66.28.030 or other specific provisions directing the Board to promulgate rules. *See, e.g.*, RCW 66.24.055(3)(d) (directing the Board to “establish rules” for new

license fee payments imposed on spirits distributors). And here, the specifically enumerated powers of the Board do not allow it to resume general control of pricing.

Second, RCW 66.08.030(12) cannot be read to encompass every facet of a sale of liquor. *See* Opening Br. at 32-34. “Statutes should not be interpreted in such a manner as to render any portion meaningless, superfluous or questionable.” *Lutheran Day Care v. Snohomish Cty.*, 119 Wn.2d 91, 104 (1992) (citation omitted). If the Board’s authority to “regulat[e] the sale” of liquor is as broad as it suggests, it would trump any specific legislative validation of specific practices. The Board would not need separate authorization to, for instance, “[r]egulat[e] the sale of liquor kept by the holders of licenses which entitle the holder to purchase and keep liquor for sale,” RCW 66.08.030(6), “[p]rescrib[e] the records of purchases or sales of liquor,” RCW 66.08.030(7), “[s]pecify[] and regulat[e] the time and periods when, and the manner, methods and means by which manufacturers must deliver liquor within the state,” RCW 66.08.030(13), or regulate the relationship between manufacturers, distributors, and retailers, RCW 66.28.320. All of these provisions would be superfluous, as would much of the statutory scheme governing liquor.⁷

⁷ It is difficult to discern any limit to the Board’s interpretation of its authority under this subsection, given that sales are fundamental to the entire liquor market.

Given the complex and nuanced approach to pricing adopted by the Legislature since the end of Prohibition—and the People’s express desire to limit the Board’s control over pricing—the general duty to “regulate” the sale of liquor cannot extend to controlling pricing and overriding the express language of the Initiative.

2. The authority to implement three-tier provisions does not extend to general control of pricing.

The Board’s final effort to shoehorn the pricing rules into a legitimate statutory authority invokes the “three-tier system,” set out and governed by RCW 66.28.280 through RCW 66.28.320. *See* Bd.’s Br. at 19-27. The three-tier system governs the relationships between the suppliers, distributors, and retailers, and RCW 66.28.320 delegates authority to the Board to adopt rules “deemed necessary to carry out the purposes and provisions” of the three-tier provisions in RCW 66.28.280-.310. Because pricing is a facet of these relationships, argues the Board, it has authority to promulgate rules in this area of the liquor market even if they contradict what the People decreed in the Initiative. *See* Bd.’s Br. at 20-22.

The Board itself never relied on this statutory provision to justify and defend its rules during the three-year rulemaking process. AR 1574 (CR 103 lists only RCW 66.08.030 as basis for pricing rules); AR 1580-87

(CES; same). It is also new to this litigation. *See* CP 674-96 (Board's Response Brief, filed in Superior Court, makes no mention of this statutory provision). An agency rule must be defended on the record before the agency and based on the reasons given by the agency. Regardless, the Board's authority under RCW 66.28.320 to implement the specific three-tier provisions cannot be used to undermine pricing provisions found in other sections of Title 66 and beyond the scope of the Board's other powers to police three-tier violations.

At the time the People enacted I-1183, the Legislature had not controlled pricing through its three-tier provisions; pricing provisions were separate and direct. The pre-Initiative version of RCW 66.28.170, which is not part of the three-tier chapter, prohibited all price discrimination. RCW 66.28.180, again not part of the three-tier chapter, required uniform pricing and prohibited quantity discounts and sales below the acquisition cost of an item. *See also* RCW 66.24.360 (prohibition on beer and wine sales below acquisition cost by grocery store; provision not part of the three-tier system); RCW 66.28.330 (same prohibition for spirits sales; also not part of the three-tier system).

The Board argues that it is harmonizing the requirements of various three-tier requirements with the pricing statute by outlawing all but a handful of pricing practices. *See* Bd.'s Br. at 23-24. It is instead

choosing to outlaw pricing differentials made legal by I-1183 based on a vague concern of a potential conflict with other provisions of the three-tier chapter, such as the money's worth provision. *See id.* at 26-27. The substantive provisions of the three-tier system only authorize the Board to oversee overlapping "financial interests" between the three tiers of stakeholders. And the Board possesses that authority only in individualized circumstances: "upon receipt of a request or complaint." RCW 66.28.300. This makes sense in the context of the three-tier system. *See* RCW 66.28.290 (permitting certain overlapping "financial interest[s]" between the three tiers if they do not result in "undue influence").

But the Board cannot inflate its limited authority to make individualized determinations into the universal definition and proscription of undue influence that it has advanced here. *See* Rules -065(2), -075(1); Bd.'s Br. at 22 (arguing that RCW 66.28.300 confers the "specific statutory authority to adopt the fair trade practice rules"). Instead, RCW 66.28.170 governs, permitting price differentials within its standards, and the Board can investigate individualized complaints about whether a particular differential is legitimately within the standards or somehow rises to the level of exerting undue influence. Such a process would harmonize the two allegedly conflicting provisions, without negating one at the expense of the other. *See Vashon Island*

Comm. for Self-Gov't v. Boundary Review Bd. for King Cty., 127 Wn.2d 759, 771 (1995) (“Statutes touching upon the same subject are to be interpreted harmoniously.”)

The Board further claims to be simply adopting part of the three-tier statute in Rule -065. Bd.’s Br. at 29. Rule -065 incorporates a definition found in RCW 66.28.285(6), listing examples of “undue influence.” Not only does that definition apply only to “RCW 66.28.280 through 66.28.315,” but it is also not used anywhere else in Title 66 as a prohibition. In contrast, the Board’s pricing rules state that “the exercise of undue influence is an unfair trade practice and *is prohibited*.” Rule -065(2) (emphasis added). The only time Title 66 includes a prohibition on the exercise of undue influence is under RCW 66.28.290(1), which addresses instances of cross-tier ownership (e.g., a supplier having a financial interest in a retailer). The Board is not therefore simply copying the law into regulation, *but see* Bd.’s Br. at 29, but vastly expanding the existing law to contradict the plain language of another statute.

In sum, the pricing rules cannot be squared with the unambiguous language of RCW 66.28.170, and neither the Board’s general authority under RCW 66.28.030(12) nor its authority to implement the three-tier system under RCW 66.28.320 saves the pricing rules.

E. The Pricing Rules Are Arbitrary and Capricious

The Board makes what it can out of the administrative record it amassed and the three years it took to arrive at the pricing rules. But “how many” and “how long” mean little when the “why” is *ipse dixit* and the “what” consists of arbitrary distinctions. Both the administrative record and the pricing rules demonstrate that the Board acted arbitrarily and capriciously.

Courts reverse even lengthy and well-intentioned rulemaking where the agency acts “without regard to or consideration of the facts and circumstances surrounding the action.”⁸ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46-47 (1998); *see also Children’s Hosp. & Med. Ctr. v. Dep’t of Health*, 95 Wn. App. 858, 873 (1999) (invalidating as arbitrary and capricious a determination that “appear[ed] to have been based on an erroneous interpretation of the statutes and [the agency’s] own regulations as applied to the facts”).

The pricing rules’ approach to channel pricing illustrates the Board’s unreasoned process, untethered to the evidence presented to it and

⁸ The Board differentiates this case from *Ocosta School District No. 172 v. Brouillet*, 38 Wn. App. 785 (1984), arguing that here, “the Board provided proper notice of its rulemaking, held numerous hearings, then made its decisions.” Bd.’s Br. at 37. True enough. *Ocosta*, decided before the Administrative Procedure Act (“APA”) was enacted, addressed a failure to comply with rulemaking procedures—a separate reason rules might be invalid under the APA. 38 Wn. App. at 791. Here, the problem is that after the notice, hearing, and decisions, the Board promulgated arbitrary and capricious rules that did not reflect the facts and circumstances presented to the Board.

unmoored from market realities. The Board chose to allow all channel pricing for wine (and rightfully so), but arbitrarily limited such price differentials for spirits, allowing the differentials for only a six-month introductory period and only for products newly added to suppliers' inventory. Rule -080(2). According to the CES, "[s]ix months is a reasonable amount of time to market" new spirits products, but "[a] winery listed on a restaurant's wine list allows wine to be introduced to consumers. Many vintages are limited in quantity." AR 1585. This explanation is without basis in the record or common sense. None of the stakeholders testified on the amount of time a product needs to be marketed, and six months is a purely arbitrary determination about what is a "reasonable amount of time" from the Board members' point of view. One distinction made for wine—that restaurants introduce new products to consumers—applies equally to spirits, and while many spirits do not have vintages, nor do many wines.

The Board's briefing and citations provide no further explanation as to why spirits suffer under significantly truncated channel pricing rules vis-à-vis wine. The parties agree that one "bona fide business factor" that justifies channel pricing is "that bars and restaurants serve to introduce new products to consumers who may then purchase a whole bottle at a retail store." Bd.'s Br. at 35. But the Board's subsequent string citation to

the administrative record, *id.*, is devoid of any rationale for why wine is treated differently from spirits and why six months is sufficient to allow channel pricing for spirits. Indeed, the cited comments do not differentiate between wine and spirits.⁹

A final example further illustrates the arbitrariness of the pricing rules. After its years of hearings and supposed deliberation, the Board enacted an exemption to its general prohibition on price differentials to allow discounts for deliveries to multiple locations if owned by the same licensed entity. Rule -085(3). Within a month of the rule going into effect, the Board took a single meeting with distributors and immediately acted to remove that exemption with no record support. *See* Opening Br. at 42-43. While the Response Brief repeatedly acknowledges the agency’s sudden change of heart but—consistent with its previous nonresponse—it provides *no* rationale or explanation for doing so. Bd.’s Br. at 12 n.2, 27

⁹ *See* AR 123 (identifying the “unique position of restaurants as a place *for spirits and wine* brands to market, introduce, launch, and revitalize their product”) (emphasis added); *id.* at 387-88 (discussing the impact on the restaurant industry as a whole “if channel pricing goes away”); *id.* at 408 (arguing that some liquor stores “offer *wine and spirit* sampling” and should therefore be considered the same channel as bars and restaurants) (emphasis added); *id.* at 457 (noting that off-premises retailers may promote specific wine and spirits brands or newly introduced products and possess a greater selection than on-premises retailers); *id.* at 700, 730 (duplicating AR 457); *id.* at 776 (acknowledging lower prices generally to on-premises retailers as a marketing practice); *id.* at 928 (acknowledging the marketing benefits on-premises retailers provide to wineries, without any comparison to spirits or distilleries); *id.* at 933 (noting that on-premises retailers provide “a market where people can come in and experiment and try new products”); *id.* at 1282 (irrelevant discussion of economic “predation” in general terms); *id.* at 1799 (irrelevant Bureau of Alcohol, Tobacco, and Firearms circular regarding what constitutes an impermissible “gift” under 27 U.S.C. § 205(b)(3)).

n.6. Such action without explanation epitomizes the Board's process and favoritism.

The inexplicably inconsistent pricing rules and the Board's unreasoned process are the hallmark of arbitrary and capricious rules and rulemaking.

III. CONCLUSION

The pricing rules prohibit legitimate, beneficial business practices that the People chose to introduce into the Washington liquor marketplace and are now codified as law. The Board clearly disagrees with the wisdom of I-1183 and its loosening of the regulatory belt, but it is not the agency's role to second-guess legislation. Its duty is to administer and enforce the law. The Court should invalidate the pricing rules as a dereliction of that duty.

DATED: June 8, 2018

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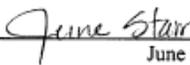
CERTIFICATE OF SERVICE

On June 8, 2018, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Mary M. Tennyson Sr. Assistant Attorney General R. July Simpson Assistant Attorney General 1125 Washington St SE PO Box 40110 Olympia WA 98504-0110 MaryT@atg.wa.gov RJulyS@atg.wa.gov Attorneys for Respondent	<input checked="" type="checkbox"/> Via the Appellate Court Web Portal <input type="checkbox"/> Via hand delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email
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**I certify under penalty of perjury under
the laws of the State of Washington that
the foregoing is true and correct.**

EXECUTED at Seattle, Washington, on June 8, 2018.



June Starr

PERKINS COIE LLP

June 08, 2018 - 3:58 PM

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