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No. 87188-4

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON ASSOCIATION FOR SUBSTANCE ABUSE AND VIOLENCE PREVENTION and DAVID GRUMBOIS,

Appellants,

v.

JOHN McKAY, BRUCE BECKETT, COSTCO WHOLESALE CORPORATION, WASHINGTON RESTAURANT ASSOCIATION, THE YES ON 1183 COALITION, MACKAY RESTAURANT GROUP, NORTHWEST GROCERY ASSOCIATION, SAFEWAY, INC., THE KROGER COMPANY, and FAMILY WINERIES OF WASHINGTON,

Respondents.

Brief of Intervenor-Respondents John McKay, et al.

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ORIGINAL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. IDENTITY OF THE PARTIES 2

III. RELIEF REQUESTED 3

IV. STATEMENT OF THE CASE 3

V. STANDARD OF REVIEW 4

VI. ANALYSIS 6

A. The statutory process for drafting the Initiative's title assured a clearly identified subject and a "true and impartial" title 6

B. Initiative 1183 addresses only a single subject—liquor 9

C. History shows the expansive reach of the subject of liquor 12

D. Each element or provision that Plaintiffs challenge is germane to liquor and to each other 18

1. The allocation of $10 million from the LRF to enhance local public safety efforts is rationally related to liquor 19

2. Subjecting wine to the same regulatory approach as spirits and transitioning the State's privileges to the private sector are rationally related. 25

3. Modifying the LCB's authority regarding liquor advertising and restating liquor policy fall within the subject. 30

E. The Court should reject Plaintiffs' attempt to substitute "hodgepodge" or "logrolling" labels for analysis 31

F. The Initiative is not logrolling, either on its face or in its enactment 37

TABLE OF CONTENTS
(continued)

Page

G. The Initiative does not violate the subject-in-title rule, as has already been finally established 42

1. Article II, Section 19, does not regulate the description of elements within a subject 43

2. The question of whether "fees based on sales" is "a true and impartial description of the measure's essential contents" is not open to further review 43

3. The Initiative apprised voters of its essential contents 46

VII. CONCLUSION 49

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Ajax v. Gregory,
177 Wash. 465, 32 P.2d 560 (1934).....14, 15, 17, 48

Amalgamated Transit Union Local 587 v. State,
142 Wn.2d 183, 11 P.3d 762 (2000).....34, 42, 43, 47

Brower v. State,
137 Wn.2d 44, 969 P.2d 42 (1998).....38

Citizens for Responsible Wildlife Mgmt. v. State,
149 Wn.2d 622, 71 P.3d 644 (2003).....4, 7, 9, 24

City of Spokane v. Taxpayers of City of Spokane,
111 Wn.2d 91, 758 P.2d 480 (1988).....46

DeCano v. State,
7 Wn.2d 613, 110 P.2d 627 (1941).....39, 47

Fritz v. Gorton.,
83 Wn.2d 275, 517 P.2d 911 (1974)..... passim

Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake,
150 Wn.2d 791, 83 P.2d 419 (2004).....6

Gruen v. State Tax Comm'n,
35 Wn.2d 1, 211 P.2d 651 (1949).....47

In re Ballot Title for Initiative,
333, 88 Wn.2d 192, 558 P.2d 248 (1977).....6

In re Ballot Title for Initiative No. 1183,
CV 11-2-01292-9 (Thurston Cnty. Super. Ct. 2011).....8, 47

Kreidler v. Eikenberry,
111 Wn.2d 828, 766 P.2d 438 (1989).....44, 45

TABLE OF AUTHORITIES
(continued)

Page

Kueckelhan v. Fed. Old Line Ins. Co.,
69 Wn.2d 392, 418 P.2d 443 (1966) ..... passim

Marston v. Humes,
3 Wash. 267, 28 P. 520 (1891) 32

McGowan v. State,
148 Wn.2d 278, 60 P.3d 67 (2002) 25, 36

Morin v. Harrell,
161 Wn.2d 226, 164 P.3d 495 (2007) 45

Nat'l Assn of Creditors v. Brown,
147 Wash. 1, 264 P. 1005 (1928) 43

Philippides v. Bernard,
151 Wn.2d 376, 88 P.3d 939 (2004) 25

Pierce Cnty. v. State,
150 Wn.2d 422, 78 P.3d 640 (2003) 7, 23, 31

Pierce Cnty v. State,
159 Wn.2d 16, 148 P.3d 1002 (2006) 45

Power, Inc. v. Huntley,
39 Wn.2d 191, 235 P.2d 173 (1951) 25, 38, 40, 41

Randles v. Liquor Control Bd.,
33 Wn.2d 688, 206 P.2d 1209 (1949) 12, 17, 18, 20

Riblet v. Ideal Cement Co.,
57 Wn.2d 619, 358 P.2d 975 (1961) 44

Schrempp v. Munro,
116 Wn.2d 929, 809 P.2d 1381 (1991) 44

Seeley v. State,
132 Wn.2d 776, 940 P.2d 604 (1997) 32

TABLE OF AUTHORITIES
(continued)

Page

Southcenter Joint Venture v. Nat'l Democratic Policy Comm.,
113 Wn.2d 413, 780 P.2d 1282 (1989) 44

State ex rel. Distilled Spirits Inst., Inc. v. Kinnear,
80 Wn.2d 175, 492 P.2d 1012 (1972) 39

State ex rel. Donohue v. Coe,
49 Wn.2d 410, 302 P.2d 202 (1956) 45

State ex rel. Wash. Toll Bridge Auth. v. Yelle,
32 Wn.2d 13, 200 P.2d 467 (1948) 46

State v. Acevedo,
78 Wn. App. 886, 889 P.2d 31 (Div. 2 1995) 24

State v. Broadaway,
133 Wn.2d 118, 942 P.2d 363 (1997) 44

State v. Jenkins,
68 Wn. App. 897, 847 P.2d 488 (Div. 1 1993) 24

State v. Lundquist,
60 Wn.2d 397, 374 P.2d 246 (1962) 6

State v. Shawn P.,
122 Wn.2d 553, 859 P.2d 1220 (1993) 32

To-Ro Trade Shows v. Collins,
144 Wn.2d 403, 27 P.3d 1149 (2001) 6

W. Petroleum Imps., Inc. v. Friedt,
127 Wn.2d 420, 899 P.2d 792 (1995) 36

Wash. Ass'n of Neighborhood Stores v. State,
149 Wn.2d 359, 70 P.3d 920 (2003) 7, 43

Wash. Fed'n of State Emps. v. State,
127 Wn.2d 544, 901 P.2d 1028 (1995) 5, 36, 38

TABLE OF AUTHORITIES
(continued)

Page

Wash. State Grange v. Locke,
153 Wn.2d 475, 105 P.3d 9 (2005) 46

FEDERAL CASES

Costco Wholesale Corp. v. Hoen,
407 F. Supp. 2d 1247 (W.D. Wash. 2005) 26

Hughes v. Superior Court,
339 U.S. 460 (1950) 32

Nat'l Org. for Reform of Marijuana Laws v. Bell,
488 F. Supp. 123 (D.D.C. 1980) 32

OTHER CASES

Advisory Op. to Attorney Gen.,
681 So. 2d (Fla. 1996) 47

Comm. for a Healthy Future, Inc. v. Carnahan,
201 S.W.3d 503 (Mo. 2006) 24

Defenders of Wildlife v. Ventura,
632 N.W.2d 707 (Minn. Ct. App. 2001) 40

Kennedy Wholesale, Inc. v. State Bd. of Equalization,
53 Cal. 3d 245, 279 Cal. Rptr. 325, 806 P.2d 1360 (1991) 24

Miller v. Bair,
444 N.W.2d 487 (Iowa 1989) 25

SunBehm Gas, Inc. v. Conrad,
310 N.W.2d 766 (N.D. 1981) 33

Wirtz v. Quinn,
953 N.E.2d 899 (Ill. 2011) 40

Yute Air Alaska, Inc. v. McAlpine,
698 P.2d 1173 (Alaska 1985) 45

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

1986 Iowa Acts §§ 770-779 ..... 18, 19

1990 W. Va. Act, Chapter 167 19

Laws of 1913, Chapter 138 ..... 6, 7

Laws of 1915, Chapter 2 13

Laws of 1933, 1st Ex. Sess., Chapter 62 ..... 13, 14, 20

Laws of 1945, Chapter 48 17

Laws of 1949, Chapter 5 ..... 15, 16, 34

Laws of 1969, 1st Ex. Sess., Chapter 21 ..... 16, 34

Laws of 1973, Chapter 1 ..... 35, 36

Laws of 1973, Chapter 122 5

Laws of 1975, 1st Ex. Sess., Chapter 173 17

Laws of 1981, 1st Ex. Sess., Chapter 5 ..... 16, 34

Laws of 1989, Chapter 271 24

Laws of 1993, Chapter 492 21

Laws of 1996, Chapter 118 21

Laws of 1999, Chapter 281 17

Laws of 2003-04, Chapter 160 34

Laws of 2005, Chapter 151 34

Laws of 2006, Chapter 302 26

TABLE OF AUTHORITIES
(continued)

Page

Laws of 2008, Chapter 41 17

Laws of 2009, Chapter 373 ..... 17, 26

Laws of 2011, Chapter 119 ..... 17, 33

Laws of 2012, Chapter 2 (Initiative 1183) ..... passim

RCW 7.24.020 6

RCW 29A.72.020 ..... 5, 7

RCW 29A.72.050 ..... 5, 8, 45, 43, 47

RCW 29A.72.060 ..... 5, 7

RCW 29A.72.080 ..... 5, 8, 44

RCW 46.61.502 22

RCW 47.68.220 22

RCW Title 66 ..... passim

RCW 66.08.060 30

RCW 66.08.170 20

RCW 66.08.180 17

RCW 66.08.190 20

RCW 66.08.200 21

RCW 66.20.010 33

RCW 66.24.170 26

RCW 66.24.310 33

TABLE OF AUTHORITIES
(continued)

Page

RCW 66.24.360 33

RCW 66.24.590 33

RCW 66.24.600 23

RCW 66.44.010 23

RCW 79A.60.040 22

CONSTITUTIONAL PROVISIONS

Iowa Const. Article III, § 29 19

W. Va. Const. Article VI, § 30 19

OTHER AUTHORITIES

Clark, Norman H., *The Dry Years* xi, 108 (1988) 12, 13, 14, 15

Cooter, Robert D. & Gilbert, Michael D., *A Theory of Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687 (2010) 37

Hasen, Richard L. & Matsusaka, John G., *Aggressive Enforcement of the Single Subject Rule*, 9 Elec. L.J. 399 (2010) 39

Kousser, Thad & McCubbins, Matthew D., *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. Cal. L. Rev. 949 (2005) 33

Ruud, Millard H., *No Law Shall Embrace More Than One Subject*, 42 Min. L. Rev. 389 (1958) 38

I. INTRODUCTION

I-1183 is the latest modification to the Liquor (Steele) Act, which ended Prohibition in Washington. That Act regulated the distribution, retailing, advertising, and other aspects of public access to all forms of liquor. As amended, it is codified in RCW Title 66. As public sentiment changed over the years, and different approaches to liquor regulation proved more or less salutary, changes in the law followed. Some changes were narrow; others broad; some were scattershot. Some came through the People; others through the Legislature. Building on that history, and after years of discussion and debate, the People last fall decided overwhelmingly to update the State's liquor regulations by enacting Initiative No. 1183.

The Attorney General's judicially-approved title for I-1183 specifies a single subject, liquor: "Initiative Measure No. 1183 concerns liquor: beer, wine, and spirits (hard liquor)." In addition, the Attorney General identified in the title the "essential" elements addressed within the general subject:

> This measure would close state liquor stores and sell their assets; license private parties to sell and distribute spirits; set license fees based on sales; regulate licensees; and change regulation of wine distribution.

Each challenged provision of the Initiative is, on its face, plainly within the subject of liquor. The whole law (save a few provisions not

even questioned here) involved amendments to Title 66. Each provision also relates to the elements flagged for the voters by the Attorney General as essential—and to the other provisions here challenged. The Initiative did not "hide" any other subjects in its body. Indeed, record contributions by parties both for and against passage of the Initiative, along with the conventional aids of the voters' pamphlet and substantial media coverage (augmented by contemporary social media), likely exhausted the voters' tolerance for information about the real and imagined content and impacts of the law. 4 CP 676-78 (summary of campaign coverage); 2 CP 289-95 (table of contents for DVD exhibits containing all campaign advertisements and public commentary).

II. IDENTITY OF THE PARTIES

These Respondents intervened to support the State's defense of Initiative 1183. John McKay and Bruce Beckett sponsored the Initiative. The other Intervenors are members of the Yes on 1183 coalition: Costco Wholesale Corporation; Washington Restaurant Association, representing 5,000 restaurants; Mackay Restaurant Group, which operates five restaurants in the Puget Sound area; Northwest Grocery Association, representing grocery retailers and related businesses in Washington, Idaho, and Oregon; Safeway, Inc.; The Kroger Company, which operates QFC

and Fred Meyer stores; and Family Wineries of Washington, representing over 100 small Washington wineries.[1]

III. RELIEF REQUESTED

The Court should uphold the trial court's summary judgment finding the title of Initiative 1183 constitutional.

IV. STATEMENT OF THE CASE

On June 17, 2011, the Thurston County Superior Court approved, with minor changes, the Attorney General's ballot title for I-1183. 2 CP 300-02 . On November 8, 2011, over a million Washingtonians cast their votes to make I-1183 the law of the State, passing it with nearly 60 percent of the vote. 2 CP 220.

A month after the election, Plaintiff WASAVP, which had appealed the ballot title, joined with Plaintiff Grumbois, a landlord to a state liquor and wine store in Longview, to file a new complaint in Cowlitz County Superior Court. 1 CP 1-16. The Superior Court denied their motion for a preliminary injunction in December. 3 CP 442. The court expedited the case and ruled on summary judgment that the Initiative's subject was liquor and that changes to wine regulations, liquor policies, and liquor advertising regulations were all within that single subject and satisfied the rational unity test. 9 CP 1617-19. The court

[1] This brief will use the parties' designation below: Plaintiffs, the State, and Intervenors. "Plaintiffs" refers to the two plaintiffs that have chosen to appeal.

found that "fees based on sales" sufficiently described to voters a revenue mechanism found in the Initiative's text. 9 CP 1615-17. The court initially questioned the germaneness of one sentence of one section of the Initiative, which targeted $10 million annually from the Liquor Revolving Fund ("LRF") to enhance local public safety programs. 9 CP 1620-22. The Court found, however, that the sentence was functionally severable on the Initiative's face and requested further briefing on whether severing the section would vitiate voters' intent. 9 CP 1623-24. Defendants sought reconsideration, further showing the relationship between the Initiative's subject and the public safety allocation. 12 CP 2068-81. The court did reconsider, granting the State's Motion for Summary Judgment in full and dismissing the complaint with prejudice. 10 CP 1988-91.

Plaintiffs appealed directly to this Court and again sought injunctive relief. The Commissioner denied the motion, finding that there are barely any debatable issues and that the equities would not be served by halting the implementation of a law presumed to be constitutional. Commissioner's Ruling Denying Injunctive Relief at 13 (April 6, 2012).

V. STANDARD OF REVIEW

Initiatives are presumed constitutional. Challengers bear the heavy burden of showing unconstitutionality beyond a reasonable doubt. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71

P.3d 644 (2003) ("*Citizens*"). This presumption of constitutionality should be all but conclusive here in light of the statutory roles the Office of the Code Reviser, the Attorney General, and the Superior Court undertook in reviewing the Initiative and crafting its title in advance of the election. *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995) (heightened presumption for Article II, Section 19, challenge because "the issue relates to constitutional form").

"To facilitate the operation of the initiative process," the Code Reviser certified the Initiative as to form and content. RCW 29A.72.020; Laws of 1973, ch. 122, § 1 (legislative intent in codifying this requirement). Pursuant to RCW 29A.72.060, the Attorney General then drafted the ballot title to comply with the requirements of RCW 29A.72.050, with the "final" review conducted by the Thurston County Superior Court, RCW 29A.72.080, to ensure that the ballot title was a "true and impartial" reflection of the subject and contents of the Initiative. At least as to the issue decided in advance of the election, Plaintiffs are entitled to no post-election review at all.[2]

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[2] Intervenors also contend, as they did below, 4 CP 667-72, that Plaintiffs here are not entitled to any review because they lack standing. Plaintiffs here allege only that their interests fall within the zone of interests affected by I-1183 rather than article II, section 19. 1 CP 3 (Complaint ¶ 9). That is insufficient. Standing requires being within the zone of interests protected by the "statute or constitutional guarantee" asserted as the basis for a challenge (Article II,

VI. ANALYSIS

A. The statutory process for drafting the Initiative's title assured a clearly identified subject and a "true and impartial" title.

The statutory framework for initiative titles was enacted shortly after the initiative power was added to the Washington Constitution. Laws of 1913, ch. 138. The Legislature rewrote key portions of the statute in 2000, at the request of the Attorney General, to better address the constitutional requirements and avoid the unnecessary investment of private and public resources in campaigns and elections regarding initiatives with procedurally deficient titles. 6 CP 1168-69 (final bill report); *see* House State Government Public Hearing (Jan. 26, 2000).[3] The

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Section 19), not the law targeted by the challenge (I-1183). RCW 7.24.020; *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.2d 419 (2004) (fire districts did not have standing under RCW 7.24.020); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 414-15, 27 P.3d 1149 (2001) (trade show dealer that suffered only economic harm from statute did not fall into its protected zone, as its goal was to protect the public from fraudulent or abusive practices). As applied to initiatives, Article II, Section 19, protects "legal voters" and allows suit if they have "an identifiable interest in challenging a misleading ballot title." *In re Ballot Title for Initiative 333*, 88 Wn.2d 192, 197, 198, 558 P.2d 248 (1977), and both Plaintiffs explicitly represented below that they are "not asserting their interests as taxpayers or generic voters to establish their standing." 12 CP 2034. Plaintiffs have not, moreover, actually proven injury in fact. WASAVP does not allege any concrete injury; it is only "dissatisf[ied] with the general framework of the ordinance," which is insufficient to confer standing. *State v. Lundquist*, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). Mr. Grumbois stands to gain from I-1183, both from an early termination payout from the State, which terminated his lease, 6 CP 1107, and the replacement tenant who recently paid $250,100 for the right to take over that same lease. State Liquor Store Auction, www.publicsurplus.com (search for auction 690561) (last visited April 29, 2012).

[3] Available at http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2000011154 (discussions of why ballot title change is necessary to

previous title requirement, a 25-word question, had led to much confusion and numerous initiative challenges (and a few invalidations). *Id.*

After an initiative is reviewed and certified by the Code Reviser pursuant to RCW 29A.72.020, the Attorney General (not the initiative's sponsors) drafts the ballot title.[4] RCW 29A.72.060. Under the amended statute, courts no longer need to try to discern a subject from elements in the title. The ballot title now must make the "subject" of the initiative explicit in the first 10 words, *id.*, streamlining the process of judicial review. *Compare Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 369, 70 P.3d 920 (2003) (looking to first sentence of ballot title to ascertain subject), *and Pierce Cnty. v. State*, 150 Wn.2d 422, 436-37, 78 P.3d 640 (2003) (same), *with, e.g.*, *Citizens*, 149 Wn.2d at 636 (reviewing title and text of initiative to determine subject was "banning methods of trapping and killing animals," a phrase in neither the title nor body of the initiative).

Once the subject is defined, the Attorney General (not the initiative's sponsors) is statutorily required, beyond the constitutional minimum, to draft a "concise description" (limited to 30 words) of the

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assure compliance with constitutional title requirements start at minute 42 and again at 1:17).

[4] The Attorney General raised no single subject concerns with sponsors. 4 CP 718 (Sullivan Decl. ¶ 40).

measure's "essential contents." RCW 29A.72.050. Such a summary, intended to be helpful to the voter, cannot narrow the previously-defined subject.

Any person may appeal the Attorney General's title to the Thurston County Superior Court. RCW 29A.72.080. Lead Plaintiff WASAVP filed such an appeal. *In re Ballot Title for Initiative No. 1183*, CV 11-2-01292-9 (Thurston Cnty. Super. Ct. 2011). WASAVP alleged four deficiencies, including that the ballot title did not indicate that "significant new taxes" would be imposed on sales of spirits. 2 CP 307 (Petition). WASAVP did not allege that the title improperly included more than one subject. That court rejected WASAVP's arguments regarding "taxes" versus "fees," and, after slight revisions, approved the title as being "sufficiently broad" to encompass the Initiative's subject, "sufficiently precise" to give voters notice of its contents, and a "true and impartial description" of the measure. RCW 29A.72.050; 2 CP 300-02 (Order). This "decision of the superior court shall be final." RCW 29A.72.080.

The resulting title, as voters saw it last November:

Voters' Pamphlet

November 8, 2011 General Election

Initiative Measure

1183

Proposed by initiative petition:

Initiative Measure No. 1183 concerns liquor: beer, wine, and spirits (hard liquor).

This measure would close state liquor stores and sell their assets; license private parties to sell and distribute spirits; set license fees based on sales; regulate licensees; and change regulation of wine distribution.

Should this measure be enacted into law?
[ ] Yes
[ ] No

2 CP 242-43. This title complied with all the requirements of the ballot title statute—and Article II, Section 19.

B. Initiative 1183 addresses only a single subject—liquor.

Article II, Section 19, requires that a law's title identify the subject, and that the law's provisions be within that subject when considered in the context of the entire law, not in isolation. *Citizens*, 149 Wn.2d at 636. Plaintiffs now concede, as they must, that I-1183's title states a general subject. Brief of Appellants ("Brief") at 20 n.7. As such, the least restrictive interpretation of the title applies. *Citizens*, 149 Wn.2d at 633.

Plaintiffs unilaterally redefine the subject as "privatizing the sales of hard liquor," the second summary element identified by the Attorney

General. *E.g.*, Brief at 1, 4, 26, 30.[5] They then take each of the challenged provisions out of context and allege that in isolation none relate to the privatization of spirits sales. Their premise is that if there is a primary objective within a subject, the doors swing closed to addressing other objectives within the subject, even when they flow from the primary objective and from each other. But the Constitution restricts only the number of "subjects"—not objectives within a subject. And the "essential elements" do not change the already-defined subject, even if many of the elements can be brought within a narrower subject. *But see* Brief at 26.

Further, Plaintiffs' premise fails because I-1183's objective was not just to privatize *spirits*, as is clear just from the fact that Plaintiffs skip over the first element listed by the Attorney General (closing state liquor stores). As the Initiative expressly stated, the objective was to "[p]rivatize and modernize wholesale distribution and retail sales of *liquor* ... while continuing to strictly regulate the distribution and sale of *liquor*" and to "[g]et the state ... out of the commercial business of distributing, selling, and promoting the sale of *liquor*, allowing the state to focus on ... enforcing *liquor* laws and protecting public health and safety concerning

[5] Plaintiffs quote the "concise description" as a continuation of the title as if the Court should consider both when determining the subject. Brief at 20. The format required by the ballot title statute and used in the Voter's Pamphlet is to the contrary.

all alcoholic beverages." Section 101(2)(a)-(b) (emphasis added). Clearly, the Initiative broadly addressed liquor regulation.

After the ballot title stated the subject of liquor, it described the five "essential contents" within that general subject:

> [1] close state liquor stores and sell their assets; [2] license private parties to sell and distribute spirits; [3] set license fees based on sales; [4] regulate licensees; and [5] change regulation of wine distribution.

(Numbering added). Each of the elements is within the general subject and is germane to the other elements. Each is implemented in the body through a variety of more detailed provisions in Title 66, as a reasonable voter would expect. Thus, to close state stores (Element 1), which sold both spirits and wine, a licensed private system for spirits had to be established (Element 2) and the licensees regulated (Element 4). Existing private wine businesses inherited the freedoms that the state store system enjoyed in the distribution and retailing of wine (Element 5). In closing state stores (Element 1), which were generating money for various state and local purposes (mostly unrelated to the effects of liquor), a choice had to be made to forego or to replace that revenue. Many observers had expressed concerns in prior years about the financial consequences of closing the state stores (Element 1)[6] and that a significant drop in the price

[6] The revenue from state liquor sale is a significant part of state and local government budgets. A feared reduction of state and local revenue was the

of spirits might lead to excess consumption (Element 4). Thus, license fees on sales became a logical method to replace the state markup on sales (Element 3).

All of the major elements of the Initiative thus are within the subject of liquor and have rational unity from one to another. They reduce the State's proprietary role, promote greater competition, protect the public fisc, and maintain public health and safety.

C. History shows the expansive reach of the subject of liquor.

It is unsurprising that Washington citizens turned to the initiative process to change the State's approach to controlling liquor, and I-1183 is neither novel nor unconstitutional. Prior liquor law revisions, many more "hodgepodge" in character, only once raised a concern as to title, and the Court rejected that challenge.[7]

As social norms have evolved, the Legislature, and often the People directly, have altered the balance between access and risk of abuse, sometimes dramatically. The very first initiative to reach the ballot "addressed the traffic in intoxicating liquors," Norman H. Clark, *The Dry*

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primary factor in reversing Gov. Spellman's effort to privatize the state stores in the 1980s. *The Dry Years* at 274. It was also a major factor in the campaigns against liquor-related initiatives the year before I-1183 passed. *See* 6 CP 1125-35 (collecting I-1100 and I-1105 campaign and media materials).

[7] *Randles v. Liquor Control Bd.*, 33 Wn.2d 688, 206 P.2d 1209 (1949), discussed *infra* at pg. 17.

Years xi, 108 (1988),[8] making Washington "bone dry" even before federal Prohibition, Laws of 1915, ch. 2. The Prohibition initiative contained 33 sections and ran over eight dense pages in the voter's pamphlet. 6 CP 1016-25; *see The Dry Years* at 149. The initiative's title referred to "intoxicating liquors," but its text included "whiskey, brandy, gin, rum, wine, ale, beer and any spirituous, vinous, fermented or malt liquor." 6 CP 1017-18.

Prohibition failed, and the People repealed it with Initiative 61. 6 CP 1035. The Legislature followed repeal with the Washington State Liquor Act. Laws of 1933, 1st Ex. Sess., ch. 62 (6 CP 1051-1100). The Liquor Act allowed the sale of liquor (spirits, beer, and wine) and imposed a regulatory structure to "legitimize drinking within the context of an anti-saloon state." *The Dry Years* at 242. The Act "imposed severe restraints on the energies of competition" through licensed sales of wine and beer and a state monopoly for spirits. *Id.* at 243. Sales of spirits by the drink initially were not allowed. Liquor Act § 23(4). The difference in regulatory approach was based on assumptions, now largely abandoned, that spirits were more prone to abuse and that allowing easier access to wine and beer might reduce the use of spirits. 6 CP 1049 (1933 Report of the State Advisory Liquor Control Commission).

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[8] Relevant excerpts from *The Dry Years* are at 5 CP 996-1004, 6 CP 1005-1014.

The Liquor Act imposed—within a single law—not just the regulations discussed above but taxes, fees, and a markup on product sold by state stores. Liquor Act §§ 4, 23, 24, 73. The Legislature created the Liquor Revolving Fund and made liquor markup a major part of State and local revenues. *The Dry Years* at 244-45 ("That the LCB could produce such an attractive fraction of [total state revenue, approximately 17%] was a happy signal to the legislature; it increased the LCB profit markup" repeatedly over the years and occasionally shifted the revolving fund distribution ratio between state and local governments). From the start, most allocations contained no requirement that funds be used to deal with concerns related to alcohol consumption specifically or even public safety more broadly. *E.g.,* Liquor Act § 78 (dedicating portion of funds to pensions).

The Liquor Act was challenged on constitutional grounds, including that it was an amendment within two years of the repeal initiative and that the fees and markup were "taxes." Upholding the Act, this Court acknowledged that "the same subject-matter" extended from "prohibition of the sale of intoxicating liquor" to "regulation of the sale thereof." *Ajax v. Gregory*, 177 Wash. 465, 471-72, 32 P.2d 560 (1934). The court found these diametrically opposed forms of government intervention to be within a single subject. Further, the court found no flaw

in the failure to restrict spending of the Liquor Revolving Fund to only alcohol-related uses. Over one dissent, the Court held that "all moneys from the license fees, permits, and operation of the state stores" were not "taxes" under the Constitution and did not need to go "only into the state treasury," rather than the LRF. *Id.* at 473. These holdings remain the law.

But the "happy compromise between prohibition and total repeal of any control" did not last. *The Dry Years* at 246. Subsequent changes have tended toward liberalization, as the Legislature and the People responded to "significant social changes" that "demanded a reevaluation of public morality." *Id.* at 249. Neither the People nor the Legislature has dealt with the different forms of liquor (spirits, wine, and beer) such that they are a separate subject. Nor, prior to this suit, has it been suggested that rational unity between these variations of ethyl alcohol exists only when they are regulated in precisely unitary fashion. Major examples of significant past liquor statutes include:

- **1948: Initiative 171, "An Act Relating to Intoxicating Liquor"** The initiative's text addressed "beer, wine and spirituous liquor." Laws of 1949, ch. 5 (6 CP 1038-44). It repealed the ban on restaurants and clubs serving hard liquor by the drink (making spirits regulation parallel to wine and beer regulation); created new license fees dedicated for general medical research; and modified the Liquor

Revolving Fund, with a special set-aside for localities without any requirement that it be dedicated to alcohol-related spending. *Id.*

- **1969: "An Act Regarding Intoxicating Liquors"**
  The "California Wine Bill" terminated protections for the domestic wine industry, privatizing sales of out-of-state wine previously available only in state stores, and modified the allocation of revenue derived from sales of all liquor (again not described as taxes), among other changes. Laws of 1969, 1st Ex. Sess., ch. 21 (7 CP 1217-33).

- **1981: "An Act Relating to Intoxicating Liquor"**
  This 31-page, 51-section law addressed all three types of liquor and ranged broadly but sporadically within the liquor code. Laws of 1981, 1st Ex. Sess., ch. 5 (7 CP 1275-1370). For example, it expanded the kinds of identification required to buy spirits, wine, or beer at state stores; revised requirements for a retail license for wine or beer; required certain stock sales of licensed corporations to be approved by the LCB; and created a new crime that applied to interfering with officers involved with any form of liquor. *Id.*

The Legislature has altered Title 66 in nearly every session since 1981. Lawmakers have not been confined to dealing with only <u>one</u> of wine or beer or spirits in a given law or to always addressing <u>all</u> of beer,

wine, and spirits at once.[9] Nor have they been confined to treating them all the same in a single law or to addressing off-premises and on-premises retailers in the same law or in the same fashion. Revisions have ranged broadly within the subject of liquor regulation, sometimes touching, sometimes crossing over, the different forms of liquor, different approaches, and different kinds of licensees.[10]

After *Ajax*, the Court also upheld Initiative No. 171 against numerous constitutional challenges in *Randles v. Liquor Control Board*,

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[9] *E.g.*, Laws of 2011, ch. 119, § 101(2)(b), (c) (exception for license applies to beer and wine); § 101(8) (new advertising rule applies to all "liquor"); § 301 (amendment applies only to wine agents); § 401 (expansion of retail rule applies only to beer) (7 CP 1359); Laws of 2009, ch. 373, § 2 (rule amendment applies to wine), § 6 (rule amendment applies to kegs), § 8 (extending exception for serving liquor to include spirits and distillers) (7 CP 1389); Laws of 1975, 1st Ex. Sess., ch. 173, §§ 2, 3 (applies duty-free rules to all "alcoholic beverages"); § 5(11) (prohibiting the sale of any liquor to any state-funded higher-education facility); § 6 (extending certain grandfather clause to liquor, beer and wine importers); § 11 (allowing tax refunds for beer and wine that is unusable); § 12 (creating a new license only for the sale of spirits) (7 CP 1266); Laws of 1945, ch. 48, § 56-A (applies to licenses for all liquor); § 90-A (applies to distillers) (7 CP 1214).

[10] *E.g.*, Laws of 2009, ch. 373, "An Act Relating to Alcoholic Beverage Regulation," § 4 (permitting wineries acting as distributors to maintain one off-premise warehouse); § 10 (allowing transfer of limited volumes of wine only between licensed locations under common ownership); § 11 (allowing the use of credit and debit cards to count as "cash payments" by all private tiers for beer and wine retailers--distributors, manufacturers, and importers) (7 CP 1389); Laws of 2008, ch. 41, "An Act Relating to Alcoholic Beverage Regulation," § 1-3 (revising the definition of "alcohol server" applicable to spirits, beer, and wine and substituting in new term where applicable); § 4 (allowing wine warehouses to handle bottled wine in addition to storing it); §§ 6, 8 (increasing the number of retail licenses allowed per microbrewery and domestic breweries) (7 CP 1370); Laws of 1999, ch. 281, "An Act Relating to the Administration and designation of liquor licenses," § 1 (revising language in RCW 66.08.180 regarding placement of liquor revolving funds); § 3 (revising language regarding duty-free importation of liquor); § 4 (amending amount required for a bond as a bonded wine warehouse); §§ 5-6 (amending regulations on public houses and private clubs) (7 CP 1316).

33 Wn.2d at 688. Plaintiffs alleged that the ballot title was "defective" because it made no references to "taxes or discounts" that the initiative implemented. *Id.* at 694. The Court responded: "A title with reference to the regulation and control of the sale of intoxicating liquors by the drink does not need to have mentioned therein the price the licensee must pay to the state for the liquor he is licensed to sell, nor how that price is made up or arrived at." *Id.* at 695.

For generations, Washington's citizens and lawmakers have understood the regulation of liquor to be one subject, and from time to time have revised regulations ranging broadly within the field of liquor control and directed to some or all forms of liquor. The Court has accepted that understanding of a single subject, and nothing warrants or justifies a dramatic reversal at this late date.

D. Each element or provision that Plaintiffs challenge is germane to liquor and to each other.

The "sections" that Plaintiffs argue are incongruous all fall within the liquor subject and logically relate to other elements in the context of the legislation.[11]

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[11] Germaneness is also shown by the Initiative's similarity to laws that privatized state liquor stores in other states. The Iowa legislature made extensive changes to alcohol laws as part of an appropriations bill, beyond just closing state liquor stores and creating a new license. 1986 Iowa Acts 770-779, § 729 (amending law to remove state liquor stores from retailing liquor and granting same privilege to class E licensees); § 731 (prescribing uniform price for retailers

1. The allocation of $10 million from the LRF to enhance local public safety efforts is rationally related to liquor.

Plaintiffs' central argument now (despite omitting it from the cause of action in their Complaint) is that targeting $10 million from the LRF allocation to cities and counties to enhance public safety programs, I-1183, § 302, is a second "subject" that lacks rational unity with any other part of the Initiative. Brief at 23-26. This argument is irrational on its face and ignores the long history of the Fund and its distributions and the numerous relationships between liquor and public safety evidenced in current law, common understanding, and even the connection between alcohol and safety drawn in Plaintiff's name: Washington Association for *Substance Abuse* ***and*** *Violence Prevention.* Indeed, Plaintiffs themselves conceded that there is an obvious relationship between liquor and public safety. Brief at 25; 12 CP 2128 (Pls.' Opp'n to Motion for Reconsideration)

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purchasing from state but prohibiting regulation on price for the public); § 734(3) (imposing a 60% "mark-up" on price of all liquor); § 746 (eliminating restrictions on liquor advertising and imposing new regulation regarding price advertising off-premises); § 753 (removing requirement that wine prices include mark-up). In 1990, West Virginia enacted the "State Retail Liquor License Act." 1990 W. Va. Act 167-194, § 60-3A-3 (closing state liquors and permitting retail licensees to sell liquor); § 60-3A-8 (regulations regarding application and issuance of new retail liquor license); § 60-31-17 (imposing uniform price and ban on central warehousing for liquor but not wine, no discussion of beer); § 60-3A-21 (imposing a five percent tax on all sales of liquor and distributing tax revenue to municipalities without any restriction on spending). The constitutions of both states include a subject rule, Iowa Const. art. III, § 29; W. Va. Const. art VI, § 30, but no one even made a challenge as far as can be determined.

("Plaintiffs did not, and do not, argue that public safety has no relationship whatsoever to beverage alcohol. Of course it does.") (emphasis added).

The rational unity of the allocation is not based simply on its source in the sales of liquor and licensing of market participants, but on the history of the LRF and the distributions from it; the allocation's context within the Initiative; and helping insure that a greater private role, whether generally or with respect to spirits, does not imperil public health or safety.

The Liquor Act created the Liquor Revolving Fund in 1933 and distributed much of it to "the general fund of the state," to "county old age pension fund[s]," and to cities and counties, without any requirement that the funds be spent on liquor-related programs. Liquor Act §§ 73, 78. That approach has been judicially-approved for decades. *Randles*, 33 Wn.2d 688 (upholding spirits by drink Initiative 171, which also directed new distributions from LRF to state universities for "medical and biological research" not limited to liquor-related research).

The recipients and their shares have changed over time, but counties and municipalities have always been substantial beneficiaries of the hundreds of millions of dollars deposited into the Fund every year. RCW 66.08.190(b). Such distributions do not need a separate appropriation, RCW 66.08.170, and have an implicit relationship to the

subject of liquor because they may only go to localities that allow the sale of liquor, RCW 66.08.200, .210.[12] The Legislature has, without challenge, frequently directed distributions from the LRF to non-liquor-related purposes as part of broader laws.[13]

Initiative 1183 eliminated not just the state stores but the state store markup on liquor sales—the Fund's major revenue stream. The Initiative created a new revenue stream based on the sale of liquor by private retailers and distributors, and Section 302 specifically addressed the distribution of the license fees:

> The distribution of spirits license fees ... through the liquor revolving fund ... must be made in a manner that provides that each category of recipients receive, in the aggregate, no less than it received from the liquor revolving fund during comparable periods prior to the effective date of this section.

This preservation of funding was a key difference from the near passage of I-1100 the year before.[14] Plaintiffs concede this sentence is valid—even

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[12] Public safety has been a major beneficiary of Fund distributions. 8 CP 1606 (In 2011, the LCB "returned $425.7 million to fund essential state and local services such as education, health care, and emergency services.").

[13] *E.g.*, Laws of 1996, ch. 118 ("An Act Relating to fermented apple and pear cider," which raised new revenue by imposing a new tax on hard cider and allocated the revenue to the general health services account); Laws of 1993, ch. 492, § 311 ("An Act relating to health care," imposing a new tax on beer sales and distributing the new funds raised to the general health services account). 9 CP 1720-25.

[14] The Voters Pamphlet, including the "Statements For" sections, also focused on this preservation of funding generally rather than the $10 million allocation specifically. 2 CP 238-44. Further undercutting Plaintiffs' allegation that the $10 million served as simply a "gift" to garner votes is the fact that such outright

though, like the pre-I-1183 Liquor Act, it does not limit spending to alcohol-related subjects. The second sentence of Section 302 actually tightens the connection between the LRF and the risk of abuse of liquor by creating a link to public safety programs:

> An additional distribution of ten million dollars per year from the spirits license fees must be provided to border areas, counties, cities, and towns through the liquor revolving fund for the purpose of enhancing public safety programs.[15]

In the context of the entire Section and the history of distributions from the LRF, this decision by the People to aim a portion of the funding being preserved at public safety enhancements simply cannot be deemed irrational under any standard – beyond a reasonable doubt or otherwise.

Relationships between liquor and public safety exist throughout Title 66, other laws, and, perhaps most importantly, in voters' understanding of the Initiative. Public safety concerns have always been the reason why liquor is regulated. Driving, boating, or flying under the influence are illegal precisely because liquor's dangers. RCW 46.61.502, 79A.60.040, 47.68.220. Existing law recognizes in many ways the

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gifts to swell local coffers are in fact nearly impossible given the control the Legislature, and local governments, exert over the overall budgets.

[15] OFM projected that LRF distributions to cities and counties will increase as a result of I-1183's license fees by amounts more than $10 million each year. 2 CP 243. As such, the second sentence of section 302 would not distribute "additional" funds but instead restricts $10 million of those funds above the pre-I-1183 level to public safety.

connection between liquor and public safety programs in counties and municipalities. *See, e.g.*, RCW 66.44.010(1) ("All county and municipal peace officers are hereby charged with the duty of investigating ... all violations of [the liquor control] title"); RCW 66.24.600(5) (allowing local governments input into issuance of liquor licenses "in the interest of public safety"); *see also* 9 CP 1613 (LCB Mission Statement reads "Contribute to the safety and financial stability of our communities by ensuring the responsible sale, and preventing the misuse of, alcohol....").

Voters understood that connection. *Pierce Cnty. v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003) (initiatives are construed according to the voters' understanding of the initiative). The Initiative removes distractions to "the more appropriate government role of enforcing liquor laws and protecting public health and safety concerning all alcoholic beverages." Section 101(2)(b). The concern that the Initiative might increase public safety risks was a cornerstone of the campaign surrounding the Initiative. 2 CP 289 (collecting campaign media on DVD exhibits). Indeed, Plaintiff WASAVP opposed the Initiative because, in its view, I-1183 "means more underage drinking and crime, overburdening police and first responders." 2 CP 244 (2011 Voters Pamphlet). Of course, "public safety" as a whole encompasses more than alcohol-induced dangers. But much of the activity of police, fire, and emergency medical

departments does result from liquor abuse – crimes, accidents, and fires. 9 CP 1630-39 (collecting examples of links between liquor abuse and public safety). As the trial court ultimately recognized, "Public safety spending does bear a rational unity with the possible consequences of liquor sales." VRP (3/19/2012 at 23:9-13).

State v. Acevedo established that an allocation of funds need only generally and partially address the problems involved in the main subject. 78 Wn. App. 886, 899 P.2d 31 (Div. 2 1995) (upholding Omnibus Alcohol and Controlled Substances Act); *see also Citizens*, 149 Wn.2d at 638 (initiative provision not a separate subject merely because it is not "necessary").[16] In *State v. Jenkins*, which challenged this same Act, the Court of Appeals approved precisely the connection found here: "The Act addressed alcohol and drug problems by enacting provisions promoting public safety." 68 Wn. App. 897, 901, 847 P.2d 488 (Div. 1 1993); *accord Comm. for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 511-12 (Mo. 2006) (allocation of new tax on tobacco products to Medicaid programs was sufficiently related because they are "public health programs that include treating tobacco-related illnesses"); *Kennedy*

[16] Many allocations in the Omnibus Alcohol and Controlled Substances Act were "solely for" drug- and alcohol-related programs, Laws of 1989, Ch. 271, *e.g.*, § 412, but not all were so limited or direct. *E.g., id.* §§ 404 (monitoring inmate telephone calls), 410 (community mobilization strategies), 411 (building security monitors in secondary schools), 423 (assessment of community-police partnerships) (9 CP 1728-39).

Wholesale, Inc. v. State Bd. of Equalization, 53 Cal. 3d 245, 254-55, 279 Cal. Rptr. 325, 806 P.2d 1360 (1991) (same for directing revenues from increased tax on tobacco products to indigent medical programs); *Miller v. Bair*, 444 N.W.2d 487, 489 (Iowa 1989) (holding that privatization of wine sales was not a separate subject from allocating revenue raised from these new wine sales to cities generally and the military service fund).[17]

2. Subjecting wine to the same regulatory approach as spirits and transitioning the State's privileges to the private sector are rationally related.

The People found that that "the state government monopoly on liquor distribution and liquor stores in Washington and the state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine [both] are outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers." Section 101(1). They

[17] As we argued below and the Commissioner noted, if there is any defect in the challenged sentence it should be severed, consistent with the plain language of the Initiative. 12 CP 2092-2115 (Intervenor-Defs.' Suppl. Brief on Remedy); Commissioner's Ruling at 9. The Court must construe a statute so as to make it constitutional "if at all possible," *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004), and this includes severability. *McGowan v. State*, 148 Wn.2d 278, 294, 60 P.3d 67 (2002). As noted by both the court below, 9 CP 1623-25, and the Commissioner, Commissioner's Ruling at 9, the controlling rule under Article II, Section 19 is that "[i]f the title only embraced one particular subject of legislation," but the act includes "an additional subject," then only "so much of the act as was not covered by the title would be void" but "that part of it included within the title would be valid." *Power, Inc. v. Huntley*, 39 Wn.2d 191, 202, 235 P.2d 173 (1951). This challenged sentence is severable from the Initiative, and its severability clause (§ 304) is dispositive on the question of intent. *McGowan*, 148 Wn.2d at 295 (finding severability clause dispositive when unconstitutional provision in initiative was functionally severable).

decided to close state stores, which were selling all forms of liquor, and not simply end the state monopoly on the sale of spirits. Plaintiffs impose their own policy-driven (and profit-driven) view of these changes, speculating about a contrast between the "greater competition" allowed by privatizing the spirits market and the supposed "reduce[d] competition" from ending what remained of the three-tier system as wine. Brief at 28-30.[18]

Wine retailing and distribution are, of course, part of the general subject of liquor. Changes in their regulation are also germane to privatizing the state stores and promoting competition in the sale and distribution of liquor. As noted above, I-1183 promotes competition in liquor markets, *inter alia*, by eliminating the state monopoly on spirits and

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[18] Washington has not applied a true three-tier system to wine for decades, and what remained prior to I-1183 was three-tiered by virtue of the choices of market participants and not by law. Under the initial regulatory structure, consumers could buy only from retailers, who could buy only from distributors, who were the only customers to which wineries and brewers could sell. Over the years, however, the exceptions have overtaken the rule, as is noted in the *Three-Tier Review Task Force Report.* 1 CP 23-88; *see* Brief at 7. Consumers can completely bypass retailers and distributors by buying directly from wineries (at tasting rooms or over the internet). *E.g.*, RCW 66.24.170(4); 1 CP 41. For decades, retailers had been able to bypass distributors and buy directly from in-state wineries, RCW 66.24.170, 66.24.170, and that right (as a result of a constitutional challenge by Costco Wholesale) was extended in 2006 to allow direct purchases by retailers from out-of-state wineries. Laws of 2006, ch. 302; *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247 (W.D. Wash. 2005). In addition, following the reform of "tied house" statutes, Laws of 2009, ch. 506, the concept of tiers has been substantially eroded. For example, a winery can own a distributor and retailer, or a retailer can own a winery. *E.g.*, 1 CP 43. Neither does I-1183 require a market participant to choose any particular partner, and those who wish to maintain tiers are free to do so.

transferring to the private sector the special privileges that the State had enjoyed as a market participant. It also does so by conforming wine regulations to the new spirits regime. This relationship actually creates a tighter nexus between spirits and wine regulation than has ever been found in Title 66.

Prior to I-1183, the State had exempted itself from many limitations on competition imposed on wine retailers and the distributors that serve them, allowing the State significant cost savings and competitive advantages. 3 CP 412 ("LCB is not subject to the same regulatory constraints as private retailers."); 5 CP 906-09 (study finding state liquor store wine prices significantly lower).

Creating more equal treatment between spirits and wine—allowing warehousing, distributor price competition, and sales to other retailers—is germane to the restructuring of the private system as part of replacing the state's retail and distribution presence. 4 CP 721 (Sullivan Decl. ¶ 52) (detailing the benefits for state store in wine market). Many distributors will now handle both wine and spirits; the private off-premises retailers that will now buy spirits can, like the state stores did, also continue to buy wine; and bars and restaurants will now, when convenient, be able to buy

wine, as well as spirits and other supplies, from off-premises retailers.[19] Creating a convergence between the two regulatory approaches cannot be the basis for finding a lack of rational unity beyond any reasonable doubt. These changes to the wine regulations "find rational unity in the general purpose of the act" because these changes "align the laws governing the sale and distribution of wine with the laws governing the sale and distribution of wine with the laws governing the sale of spirits." Commissioner's Ruling at 12.

Oddly, Plaintiffs agree that the new spirits distribution approach is pro-competitive, but label "anti-competitive" the conforming changes to wine regulation.[20] Brief at 28. Everything that Plaintiffs claim the Initiative has allowed retailers to do as to wine since December, Brief at 29, the Initiative will allow retailers to do as to spirits in June.

The People found that the wine restraints were "outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers." Section 101(1). That finding is entitled to deference, and

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[19] I-1183 effected a change in allowing "off-premises" retailers of spirits and wine (e.g., grocery stores) to sell in limited quantities to bars and restaurants (which represent roughly one-third of spirits sales)– but not to other off-premises retailers (§§ 103(1), 104(2)). This change, available since December with respect to wine, was a natural part of transitioning the State out of the liquor business since state stores sold liquor to bars and restaurants but not to off-premise retailers. 3 CP 383.

[20] Plaintiffs also ignore the broad support that I-1183 enjoyed from those market participants that Plaintiffs claim will suffer—small wineries, restaurants, and small mid-size grocers (represented here by several Intervenors).

despite the heavy burden they bear, Plaintiffs offer no evidence for their assertions that price uniformity and restrictions on warehousing and retailer-to-retailer sales alone created a "level playing field in Washington's wine industry."[21] Brief at 28-29.

What really drives these competition arguments are the distributors, who benefited enormously from three-tier structure, funded the opposition to I-1183, and now stand behind this litigation. Connelly Decl. ¶ 6, Ex. E (article discussing involvement of the Wine & Spirits Wholesalers Association in this case); 6 CP 1140 ($9.2 million in donations to opposition to I-1183 from the Association). The Court should not allow commercial actors to cloak themselves as protectors of the electoral process to overturn the election they lost.[22]

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[21] If a "level playing field" (Brief at 8, 29) were necessary for competition or to serving remote areas, the State would long ago have extended that approach to food, shelter, medical supplies, and other necessities, and I-1183 would not have gained the support of numerous smaller businesses, including many represented by Intervenors and, belatedly, one of the original Plaintiffs below. Decl. of Ulrike Connelly in Support of Respondents' Opp'n to Appellants' RAP 17.4(b) Emergency Motion ("Connelly Decl.") ¶ 3, Ex. B (article discussing Gruss, Inc.'s decision to drop out of this litigation). Competition flourishes in almost every other product sold in Washington, and those products are available in every part of Washington, even though wholesalers of every product other than wine are neither required nor protected from competition.

[22] Intervenors also contend that neither named Plaintiff here is an appropriate party to bring this challenge, as discussed *supra* note 2.

3. Modifying the LCB's authority regarding liquor advertising and restating liquor policy fall within the subject.

Finally, Plaintiffs tepidly argue that the addition of one clause and the deletion of others created separate subjects that require the invalidation of the entire Initiative.[23] Brief at 30-31. These arguments are premised on strained interpretations of the Initiative, contrary to its plain language and to the constructions adopted by the agency and the Attorney General. These arguments underscore Plaintiffs' implausible reading of I-1183 and their malleable treatment of what constitutes a separate "subject."

Plaintiffs admit that the advertising changes occurred in the context of modifying provisions that previously applied to state store advertising, Brief at 11-12, and those changes are thus germane to that main element as well as within the subject. But contrary to Plaintiffs' assertion, LCB retains its power under RCW 66.08.060 to "adopt any and all reasonable rules as to kind, character, and location of advertising of liquor." Section 108. Advertisements are not immunized from any regulation simply because they include a lawful price. *But see* Brief at 12, 31. These changes are rationally related to the subject.

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[23] Even if these clauses somehow rise to the level of separate subjects, they are neither in the title or even in the summary of "essential contents" and are easily severable. *See* note 18 *supra*.

Changes to the state policy regarding liquor relate to the subject of liquor. The People were entitled to conform Title 66's policy statements to their decision to modestly increase access to liquor for responsible adults. Moreover, because including an affirmative policy statement does not constitute a separate subject, *Pierce Cnty. v. State*, 150 Wn.2d 422, 435-36, 78 P.3d 640 (2003), eliminating a policy statement certainly does not.

E. The Court should reject Plaintiffs' attempt to substitute "hodgepodge" or "logrolling" labels for analysis.

Effectively admitting that the four elements they challenge are within the subject of liquor, Brief at 22 (all are within "one general topic"), Plaintiffs revert to negative labels, "hodgepodge" and "logrolling," with no real context or analysis. I-1183 is not a "hodgepodge," and it was not required to be either more or less comprehensive.

Plaintiffs admit that an "enactment dealing comprehensively with a broad subject area" satisfies the single subject rule. Brief at 26. Paradoxically, they maintain that less ambitious reform, dealing with fewer substantive provisions, somehow creates many subjects out of one. History, of course, shows otherwise. *See supra* at Part VI.C.

Without even attempting to articulate when permissible broad reform becomes unconstitutionally <u>less</u> broad, Plaintiffs believe they discharge their burden by simply applying the pejorative "hodgepodge."

Brief at 28. But the Constitution does not require that a law address, alter, or repeal every provision of the existing statutory regime governing a subject. As the Court stated in the first case construing Article II, Section 19: "whether the changes are few or many, it is still one subject." *Marston v. Humes*, 3 Wash. 267, 278, 28 P. 520 (1891) (upholding changes to code of civil procedure).

"Hodgepodge" change, whatever that means, within a single subject is still within that subject. "To hold otherwise would ignore modern day realities." *Kueckelhan v. Fed. Old Line Ins. Co.*, 69 Wn.2d 392, 404, 418 P.2d 443 (1966). "The Legislature is free to approach a problem piecemeal and to learn from experience." *State v. Shawn P.*, 122 Wn.2d 553, 567, 859 P.2d 1220 (1993); *accord Seeley v. State*, 132 Wn.2d 776, 806, 940 P.2d 604 (1997) (The "'State may direct its law against what it deems the [biggest] evil[s] without covering the whole field of possible abuses.'") (quoting *Hughes v. Superior Court*, 339 U.S. 460, 468 (1950)). "Failure to address a certain problem in an otherwise comprehensive legislative scheme is not fatal to the legislative plan." *Nat'l Org. for Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123, 137 (D.D.C. 1980).

Plaintiffs invent a new legal theory of logrolling: logrolling by *omission* of elements. Such a theory would limit lawmaking to a level not required by the plain language of Article II, Section 19, nor case law. It is

difficult to imagine any law immune from invalidation if impermissible hodgepodge can be conjured, subsequent to the legislation's enactment, because some elements also within a subject were not addressed.

In enacting I-1183, the People exercised their discretion to reform much—but not all—of the existing liquor system, and they were not forced to choose between reforming either just one or every possible aspect of state control, or addressing just one or all types of liquor. Plaintiffs' "hodgepodge" approach would have the Court tell the people that unless they change everything in Title 66 they must split their desired liquor reforms into numerous pieces. But the single subject constitutional provision neither "require[s] legislation [be] piecemeal," nor prevents it from broadly addressing a subject. *SunBehm Gas, Inc. v. Conrad*, 310 N.W.2d 766, 772 (N.D. 1981); *see* Thad Kousser & Matthew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. Cal. L. Rev. 949, 961 (2005) (separate votes on possibly related elements can lead to poor lawmaking). In fact, tracing the history of each of the RCW provisions also amended by I-1183 reveals that many other single acts amended numerous of the same provisions.[24]

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[24] *E.g.*, Laws of 2011, ch. 119, §203 (amending RCW 66.24.360, which is also amended by Section 104; section regards grocery store licenses); § 213 (amending RCW 66.20.010, which is also amended by Section 109; section regards permitting process); § 301 (amending RCW 66.24.310, which is also amended by Section 111; section regards wine agents); §403 (amending RCW

Plaintiffs seem to suggest, also without authority, that every element, provision and sentence in a law, no matter how small, must not only be within the subject, and must not only relate to at least one other provision (making it germane in context), but must relate to *every* other provision. Brief at 21-23. But that is not what the Constitution says. Nor has any decision of this Court expressly or impliedly ever held that every minor section of the law must relate to every other. These single subject decisions adopt the common sense proposition that even an element that might in isolation seem outside a subject is germane in context if related to an element within the subject, but not every element. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 209, 11 P.3d 762 (2000) ("[M]atters which ordinarily would not be thought to have any common features or characteristics might, for purposes of legislative treatment, be grouped together and treated as one subject"). And the Court has often upheld lengthy substantive acts that combine various elements and range broadly within a topic, without looking individually at the interconnectedness of each provision with *every* other provision.

In *Kueckelhan*, the Court held that a 360-page revision of the insurance code bill did not violate Article II, Section 19, and regulations

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66.24.590, which is also amended by Section 115; section regards hotel licenses); *see also* Laws of 2005, ch. 151; Laws of 2003-04, ch. 160; Laws of 1981, 1st Ex. Sess., ch. 5; Laws of 1969, 1st. Ex. Sess., ch. 21.

governing insurance and the establishment of the State Fire Marshall's office and duties fell within the same general subject because "fire insurance regulation and rating, fire loss, fire prevention, and fire investigations" were all rationally related. 69 Wn.2d at 402-04.[25] The Court never entertained the idea that the Act must be examined at the granular level of every new or changed element. *Id.*

Similarly, the lengthy initiative in *Fritz v. Gorton* concerning campaign disclosure laws was upheld, 83 Wn.2d 275, 517 P.2d 911 (1974), even though it contained 50 separate sections (and, if you follow Plaintiffs' subsection approach, a total of 263 elements), Laws of 1973, ch. 1. The initiative challengers alleged that it contained at least six separate subjects: "(1) disclosure of campaign financing; (2) limitations on campaign spending; (3) regulation of lobbying activities; (4) regulation of grass roots educational activities; (5) disclosure of financial affairs of elected officials; and (6) public inspection of records." *Fritz*, 83 Wn.2d at 290. The Court "easily" rejected the assertion that there was a single subject violation. *Id.* "[E]ach of the subtopics of Initiative 276 bears a close interrelationship to the dominant intendment of the measure." *Id.*

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[25] Plaintiffs attempt to distinguish *Kueckelhan* on the grounds that the law there was a comprehensive insurance code. Brief at 26. They elevate form over substance. The law appeared "comprehensive" only in that it was a recodification of numerous prior laws to create a more organized, but largely unchanged, insurance code.

The Court did not engage in a rational unity analysis between the elements in isolation, such as analyzing whether, for example, "public records" by themselves have a relationship to "grass roots education." Neither was the Court troubled by the relationship (or lack of one) between individual subsections, such as § 25's requirement that "[e]ach state agency shall ... make available for public inspection and copying all public records," with § 18's newly imposed duty on "[e]very employer of a lobbyist" to file a certain disclosures concerning their contributions to legislators or their families. Laws of 1973, ch. 1. Although such subsections, in facial isolation, were not related to each other, the Court recognized that rational unity was also "easily" established in the context of the general subject. *Fritz*, 83 Wn.2d at 290; *see also Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 901 P.2d 1028 (1995) (upholding Initiative 134, another campaign reform measure, stretching over 33 sections with a total of 188 sub-sections altogether). Under a constitutional analysis, "the court 'must read [the initiative] in its entirety, not piecemeal, and interpret the various provisions of the [initiative] in light of one another.'" *McGowan v. State*, 148 Wn.2d 278, 288, 60 P.3d 67 (2002) (Article II, Section 19, challenge) (quoting *W. Petroleum Imps., Inc. v. Friedt*, 127 Wn.2d 420, 428, 899 P.2d 792 (1995)).

F. The Initiative is not logrolling, either on its face or in its enactment.

Plaintiffs assert stridently that I-1183 is somehow the "epitome" of logrolling. Brief at 19, 37. Unable to articulate a basis for that allegation in the substance and language of the Initiative and its title,[26] Plaintiffs go outside the plain language and rely on disputed facts and inferences that they professed both below and here to abjure for the purposes of summary judgment determination. *E.g.*, Brief at 24 (alleging that $10 million allocation was included to "reduce opposition" by firefighters and policemen "that helped defeat Costco's prior liquor privatization initiative").

Plaintiffs cannot rely on disputed facts while claiming that no question of fact is material. *See* 4 CP 672-83 (Intervenors also objected to Plaintiffs' reliance on facts below). They asked below that the case be decided on summary judgment because their challenge to I-1183 "is purely legal and should be resolved as a matter of law." 13 CP 2171. But

[26] Even putting aside the ballot title drafting process, which does not apply to normal legislation, it is unlikely logrolling can even take place in the initiative context. *See* Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687, 699 (2010) ("While direct democracy can suppress legislators' bargains, it cannot replace them with political bargains that come directly from the people. ... Tens of thousands of citizens cannot negotiate with one another, lending support on one proposal in exchange for others' support on a second proposal."). What concerned Justice Rosellini in *Fritz* regarding initiatives specifically, in reasoning decidedly not adopted by the Court in *Washington Fed'n* (*but see* Brief at 18-19) is more accurately described as "riders," and the solution, if they truly are separate subjects, is to nullify and sever them.

what is evident from the logical connections among the initiative's provisions and from the "legislative history" is not logrolling but legitimate efforts to compromise and address potential issues within a subject.

Logrolling occurs when proponents trade their support for *unrelated* proposals by consolidating them to create a majority that would not otherwise exist for either proposal. *Power, Inc. v. Huntley*, 39 Wn.2d 191, 199, 235 P.2d 173 (1951); *see* Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389, 391 (1958); 4 CP 653-55 (discussing history of single subject rule in Washington). A variant of logrolling is a "rider," a provision for which enactment is secured only "by attaching it to other necessary or desirable legislation," but which does not have enough support to pass on its own. *Brower v. State*, 137 Wn.2d 44, 69, 969 P.2d 42 (1998).

Plaintiffs focus on this second variant of logrolling when they repeatedly claim that the purpose behind the single subject rule is to prevent, at all costs, that a voter must "vote for something of which he disapproves in order to obtain approval of another unrelated law." Brief at 18 (citing *Wash. Fed'n of State Emps.*, 127 Wn.2d at 552). But Plaintiffs ignore the "unrelated" limitation in this expression because they know that everything they challenge in I-1183 is related to the subject and to

something else in the Initiative. Any different test would make legislative compromise impossible and require a "hodgepodge" of splintered pieces of individual legislation.

Courts have always balanced the need to check legislative abuses with the awareness that a too-literal or too-liberal application of Article II, Section 19, would interfere with democracy. The single-subject provision is "to be liberally construed so as not to impose awkward and hampering restrictions" upon the Legislature or People. *Kueckelhan*, 69 Wn.2d at 403 (citing *DeCano v. State*, 7 Wn.2d 613, 110 P.2d 627 (1941)).[27]

Courts thus respect the difference, in practical and constitutional terms, between logrolling and the indispensable (often commendable) process of legislative compromise. "[W]e cannot conceive that the framers of the constitution intended to forbid the resolution of differences." *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 179, 492 P.2d 1012 (1972). "[T]here is a difference between impermissible logrolling and the normal compromise which is inherent in the legislative process. A diverse and complex enactment ... is likely to

[27] A deferential standard also reduces the risk that the subjectivity inherent in determining what is a "subject" creates room for subconscious judicial policy biases to trump democratic preferences. Daniel Lowenstein, *Initiatives and the Single Subject Rule*, 1 Election L.J. 35, 47-48 (2002); Richard L. Hasen & John G. Matsusaka, *Aggressive Enforcement of the Single Subject Rule*, 9 Elec. L.J. 399, 400, 416 (2010) (analyzing 150 cases). The antidote, reflected in this Court's decisions, is to apply the standard deferentially and with restraint. *Id.* at 418.

result from compromise and negotiation among the members of the General Assembly. The presence of such legislative compromise does not mean that the Act violates the single subject rule." *Wirtz v. Quinn*, 953 N.E.2d 899, 911 (Ill. 2011) (citing *Defenders of Wildlife v. Ventura*, 632 N.W.2d 707, 713-15 (Minn. Ct. App. 2001)); *see Fritz*, 83 Wn.2d at 281 ("[T]he electorate generally has exercised its collective-coordinate legislative judgment and the powers of initiative and referendum with acumen ... equal to that of state legislatures.").

None of the changes enacted by I-1183 were "hidden" from the public and thus logrolled through the election. *See* 4 CP 680 (discussing news and campaign coverage of allegedly "hidden" elements); *contra* Brief at 2. The text of the Initiative was set forth in the Voters' Pamphlet—and thus any "hidden" provisions were hidden in plain sight of the voter and of the vigorous opposition. 2 CP 234-44 (Voters Pamphlet).

That the supporters of I-1183 addressed the policy preferences of the People, including concern over reduced funding for state and local governments and public safety risks from private sales of spirits, is not logrolling. Addressing some or all of the possible consequences of what might be the major catalyst of change is hardly an arranged marriage of strangers, as in *Power*, where two separate bills, which did not pass on their own, were combined, and the lack of rational unity between

appropriations and a corporate excise tax simply underscored the back-door tactics employed by legislators. 39 Wn.2d at 198.

Given that the provisions challenged by the Plaintiffs are all related to the general subject of liquor and are germane to the law when viewed as a whole, there is no occasion for the Court to go further. Plaintiffs still have not, in any event, articulated a coherent argument as to why there was "logrolling" here. For example, they speculate that the wine reforms "might be objectionable to many voters," Brief at 2, 19, but cannot explain, and do not try to explain, why those same reforms enacted for spirits were popular (as part of the "primary objective of the Initiative"), Brief at 2. Plaintiffs note that I-1100 "almost obtained a majority vote" and claim that a $10 million "earmark" was added by I-1183 solely to logroll it over the hump on which I-1100 faltered. Brief at 19. But the record shows that it was the overall funding, not the restricted use of a fraction of it, that was the main difference, and they fail to tell the Court that the reforms regarding wine, the three-tier system, and Title 66 proposed in I-1100 were even more extensive than in I-1183. 4 CP 725-33 (e.g., I-1100, § 35 proposed dismantling three-tier system).

Concern with the public fisc was undisputedly a factor in the demise of I-1100 (as well as prior efforts at getting the state out of the liquor business) and clearly the imposition of license fees and the first

sentence of section 302 (not challenged here), assuring minimum continued LRF distributions, addressed those concerns.[28] No evidence in the record suggests that directing $10 million of that to public safety enhancements was pivotal.[29] The sentence was not listed in the "essential contents" and barely mentioned in the Voters' Pamphlet or campaign. The prior sentence in Section 302, preserving general funding levels, was pivotal, and Plaintiffs do not challenge it. "In short, [there is] no evidence of the evils which the constitutional provision was designed to avoid." *Kueckelhan*, 69 Wn.2d at 404.

G. The Initiative does not violate the subject-in-title rule, as has already been finally established.

Plaintiffs contend that the Attorney General should have used the more pejorative term "taxes" in describing one of the elements being addressed within the subject of liquor. The argument fails for three reasons: the accuracy of description of an element within a subject is not a

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[28] Examining sponsors' motivations cannot create second subjects not present on the face of a law. *See Amalgamated*, 142 Wn.2d at 212 n.5. Plaintiffs purported below to agree. 13 CP 2231-32. In any event, the drafting history of I-1183, *see* 4 CP 662-67, shows that no separate camps of interests consolidated to push through their separate agendas. The drafting process was one of logical extension of prior legislation and addressing perceived problems; in short, legitimate compromise. I-1183 was drafted with the input of many constituencies, including distillers, wineries, distributors, retailers, and legislators. 4 CP 710-18 (Sullivan Decl. ¶¶ 9-41). Drafts of the initiative were widely distributed for comments and ideas. *Id.*

[29] Defendants offered below to prove the insignificance of the $10 million provision, but Plaintiffs insisted that there were no factual issues. Afraid to know what those who had already voted by mail said made the difference to them, Plaintiffs are not now entitled to act as if they know.

concern of Article II, Section 19; such accuracy is a concern of the ballot title statute, but the argument over the accuracy of the phrase in question was finally resolved before the election; and the phrase communicated the substance to the voters.

1. Article II, Section 19, does not regulate the description of elements within a subject.

Article II, Section 19, states that the single subject "shall be expressed in the title." "Any 'objections to the title must be grave and the conflict between it and the constitution palpable before we will hold an act unconstitutional.'" *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 372, 70 P.3d 920 (2003) (quoting *Nat'l Assn of Creditors v. Brown*, 147 Wash. 1, 3, 264 P. 1005 (1928)). By definition, if there are no separate subjects under the single-subject analysis above, *see supra* Part VI.B-D, and if the subject, liquor, is accurately described, the title is valid. Neither "fees based on sales" nor "taxes" is part of the description of the subject in the title of I-1183. Thus, unlike the situation in *Amalgamated*, the extent to which fees are taxes is irrelevant under Article II.

2. The question of whether "fees based on sales" is "a true and impartial description of the measure's essential contents" is not open to further review.

Whether "fees based on sales" would sufficiently communicate this element of the Initiative's contents to voters was, Plaintiffs neglect to note, resolved in the pre-election appeal under RCW 29A.72.050(1): "[t]he

concise description must contain no more than thirty words, be a true and impartial description of the measure's essential contents, clearly identify the proposition to be voted on, and not, to the extent reasonably possible, create prejudice either for or against the measure." This statute was explicitly written to meet the constitutional title requirements of Article II, Section 19, as discussed *supra* at Part VI.A.

Thus pre-election review under RCW 29A.72.080 is the appropriate time to determine accuracy of the Attorney General's title. *State v. Broadaway*, 133 Wn.2d 118, 126, 942 P.2d 363 (1997) (initiative title statute "provides a vehicle for assuring that an inaccurate ballot title does not remain on an initiative so as to mislead" the people supporting the initiative). That review occurred; the issue was resolved; and there is no room for a post-election reprise.[30] "[T]he public interest is served by finality." *Kreidler v. Eikenberry*, 111 Wn.2d 828, 834, 766 P.2d 438 (1989) (refusing to review Superior Court's decision as to adequacy of ballot title); *see Schrempp v. Munro*, 116 Wn.2d 929, 939, 809 P.2d 1381 (1991) (refusing to review certification of initiative and stating that "the

[30] Even absent the structure created by the Legislature to assure resolution of issues like this before the election, issue preclusion would apply. The issues are identical; there was a final judgment on the merits; WASAVP is a party in both actions; and there is no injustice. *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989). There is no constitutional right to an additional appeal, and issue preclusion applies even when there is such a right and a matter is on appeal. *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 621, 358 P.2d 975, 977 (1961).

initiative/referendum process requires as much procedural certainty as possible"). Finality is needed so that the campaigns, the Voters' Pamphlet, and the voters may rely on the determination by the Superior Court. *Kreidler*, 111 Wn.2d at 834; *accord State ex rel. Donohue v. Coe*, 49 Wn.2d 410, 415-16, 302 P.2d 202 (1956) ("the legislative determination to limit the scope and extent of the superior court review, and ... appellate court review [of precursor to RCW 29A.72.050] is in the interest of facilitating the operation of the reserved legislative power and is justified by the practicalities of the situation").

The finality that the Legislature assigned to the appeal decision of the Thurston County Superior Court prevents invalidation of the People's will as a result of procedural issues that could have been corrected in advance. Hearing on SB 2587 (discussing the importance of finality in ballot appeals as part of the reason that new ballot title statute was needed). *See Morin v. Harrell*, 161 Wn.2d 226, 232-33, 164 P.3d 495 (2007) (rejecting argument that Article II, Section 19, involves substantive constitutional rights); *Pierce Cnty v. State*, 159 Wn.2d 16, 40, 148 P.3d 1002 (2006) (Article II, Section 19, violations are procedural in nature); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (finding initiative sponsors were entitled to rely on lieutenant governor's

certification of initiative as to form as indication that initiative complied with single subject rule).

3. The Initiative apprised voters of its essential contents.

Even if "license fees based on sales" had been the subject of the Initiative, the statement of subject only must "give[] such notice as should reasonably lead to an inquiry into the body of the act itself, or indicate[], to an inquiring mind, the scope and purpose of the law." *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 26, 200 P.2d 467 (1948). And as Plaintiffs admit, Brief at 17, it is the voters' "common and ordinary" understanding of a term that drives the Article II, Section 19, analysis, not a "technical definition" found by looking at the body of the initiative. *Wash. State Grange v. Locke*, 153 Wn.2d 475, 492, 105 P.3d 9 (2005) (rejecting plaintiffs' technical definition to make out a subject-in-title claim); *accord City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 97-98, 758 P.2d 480 (1988) ("In determining voters' intent, courts should not read into an initiative technical and debatable legal distinction[s] not apparent to the average informed lay voter.") (quotation omitted).[31]

[31]A Florida court rejected a challenge to an initiative's title based on the argument that the "fee" imposed was actually a tax, holding: "[T]he initiative 'imposes a levy—whether characterized as a fee or tax ....' There is no confusion relative to who pays, how much they pay, how long they pay, to whom they pay, and the

Plaintiffs contend instead that these are technically taxes, not license fees, under legal tests created to avoid circumvention of constitutional provisions that are inapplicable here. Intervenors agree with the State's analysis of those technical definitions. But in terms of the test applicable if "license fees based on sales" placed a limitation on the subject, Plaintiffs cannot dispute that the body of the initiative is consistent in calling the "fee" a "fee" and basing it on sales,[32] that voters understood that I-1183 imposed a financial charge—whether a fee or a tax—on those who sought the privilege of selling spirits, and that the charge was intended to replace revenue generated by state store sales of liquor. Even if the Thurston County Superior Court's ruling is not "final," the reasoned opinion of the Attorney General and that court, both obligated to avoid "prejudice either for or against the measure," RCW

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general purpose of the payment." *Advisory Op. to Attorney Gen.*, 681 So. 2d 1124, 1128-29 (Fla. 1996) (citation omitted).

[32] This not a case in which a "key word in the title...had been given a definition within the body of the act broader" and different from its "common and ordinary meaning." *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 21, 211 P.2d 651 (1949). Such was the case in *DeCano*, where the title gave "no intimation whatsoever that the *body* of the act contain[ed] an amended definition of the word 'alien' which br[ought] within its purview a whole new class of persons who are not in fact aliens in common understanding." 7 Wn.2d at 624 (emphasis added). Similarly, the *Amalgamated* court found that the *title* of the initiative did not adequately reflect "the *contents* of the initiative" because the body redefined the term "taxes" to have a "broader meaning than its commonly understood, traditional meaning." 142 Wn.2d at 223, 227 (emphasis added). But here, as in *Gruen*, "we have a very different situation, as neither of the key words under consideration ... is defined in the body" of the act. 35 Wn.2d at 221.

29A.72.050, create more than a dispositive "reasonable doubt" as to Plaintiffs' claim.

If the connection to sales and the creation of an excess are what make something a tax, voters were on notice that this fee was tax-like from both the language of the Initiative and 80 years of judicial and legislative precedent established that the fees created an excess over regulatory costs that could be used for other purposes. Indeed, Plaintiffs never address *Ajax v. Gregory*, in which the Court explicitly held that "all moneys from the license fees, permits, and operation of the state stores" were not "taxes" under the Constitution and did not need to go "only into the state treasury," rather than the Liquor Revolving Fund. 177 Wash. at 473. Not just to pay for regulation but for the *privilege* of selling alcohol in Washington, interested parties must pay money, in the form of fees. I-Section103.

And the electorate certainly was not deceived in fact. The Court in *Fritz v. Gorton* recognized that "[w]ith improved means and methods of communication there is little reason to doubt that a substantial percentage of the public is better informed" than ever before, 83 Wn.2d at 284—a statement even more true nearly thirty years later, as voters today have access to (or cannot escape) a remarkable amount of information beyond the traditional voters pamphlet. I-1183 underwent a very public process of

drafting and an unusually intense public debate. *See* 4 CP 662-67 (summary of I-1183 drafting process); 2 CP 289-95 (compilation of all I-1183 news and campaign materials). The opposition stridently contended that I-1183 imposed new taxes. *See* 3 CP 432-442 (compiling media coverage regarding argument that I-1183 imposed "taxation"); 4 CP 681-83 (summary of the "taxation" campaign media). Plaintiffs allegations that any subject-in-title violation occurred here is meritless.

VII. CONCLUSION

Initiative 1183 continues a long tradition of the People legislating to update state liquor laws and policy. After decades of debate, the Initiative removes the State from the business of selling liquor—all liquor, not just spirits—and creates corresponding transitional provisions. The effects of focusing the State's role on control of abuse cascaded through Title 66, causing alignment of wine regulations with the new spirits regulations, alterations in the manner in which the state received and distributed revenue from the sale of liquor, and changes in various policies, initiatives, and regulations related to control abuse. Plaintiffs' attempt to elevate some of these into separate subjects falls far short of overcoming the logic and internal coherency of the Initiative and the presumption of constitutionality. Initiative 1183 contains one subject,

liquor. Intervenors respectfully request the Court to uphold the judgment below.

RESPECTFULLY SUBMITTED this 30th day of April, 2012.

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