No. 45482-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ASSOCIATION OF WASHINGTON SPIRITS AND WINE DISTRIBUTORS,

Appellant,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent

and

WASHINGTON RESTAURANT ASSOCIATION, NORTHWEST GROCERY ASSOCIATION and COSTCO WHOLESALE CORPORATION

Intervenor-Respondents

BRIEF OF INTERVENOR-RESPONDENTS

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When voters enacted Initiative 1183 in November 2011, they terminated the State's commercial participation in Washington's liquor market and modernized the regulatory regime to increase both opportunities for Washington businesses and competition for the benefit of consumers. I-1183 sold the State's spirits distribution business to the newly-authorized spirits distributors. As the price for taking over the State's role, the new distributors had to pay not just annual license fees and on-going revenue-percentage fees, some level of which all licensed participants pay,[1] but a one-time payment of $150 million at the end of the first year of private spirits distribution (reduced by the percentage fees paid for that year, which were never expected to come close to $150 million and ended up at about $46 million).

Appellant is the Association that represents the new spirits distributors, which have benefited tremendously from I-1183. Because its members overwhelmingly dominate the new wholesale spirits business, they paid almost all of the $104 million one-time obligation. The State's revenues will be the same regardless of the outcome of this appeal; the only question is whether the Distributor Association can shift to pre-existing

[1] I-1183 imposed fees of 17% on retail sale of spirits, RCW 66.24.630(4), and 5-10% on wholesale sale of spirits, depending on the category and time period, RCW 66.24.055(3)(a).

businesses a portion of the purchase price for the new business sold to its members.

RCW 66.24.055(3)(c) expressly imposes the one-time $150 million purchase price only on "persons holding spirits distributor licensees." The Association would add the phrase "and on other licensees that sometime act as distributors." Getting to this result requires contradicting principles of statutory interpretation and warping the regulatory structure. The Liquor Control Board and trial court properly declined to do so. Surprisingly, the Association's brief to this Court merely rehashes what it argued below and makes no serious attempt to respond to the lower court's analysis or the arguments put forth below by the Board and Intervenors. *E.g.*, Verbatim Report of Proceedings 29-32 (lower court oral ruling).

I. STATEMENT OF THE CASE

The regulatory structure for liquor that I-1183 addressed had largely been in place since repeal of Prohibition in 1933. The Steele Act allowed private licensed sales of wine and beer but imposed a state monopoly on the distribution and sale of spirits, creating the Liquor Control Board to oversee the State's business enterprise as well as to license and regulate private sellers. Laws of 1933, 1st Ex. Sess., ch. 62. The Act also separated the levels (or "tiers") of private commerce—

production, distribution, and retail; imposed strict limits on the interactions and business relationships between each; and otherwise restricted business competition and innovation. Norman Clark, *The Dry Years* 243 (rev. ed. 2000). By 2011, the Board had annual liquor sales of nearly a billion dollars. After deducting costs, its retail and wholesale activities generated over $425 million in revenue for the State. Wash. State Liquor Control Bd., *2011 Annual Report* at 20 (2012), *available at* http://www.liq.wa.gov/about/fy-2011-annual-report.

In November 2011, voters decided to terminate the State's commercial role in the liquor market and to sell the State's retail stores and its distribution business to private owners. Laws of 2012, ch. 2 (Initiative 1183). The People decided that all participants should be licensed and pay annual license fees and an on-going percentage of their revenue, as had already been the model for wine, and that the businesses that sought the entirely new opportunities created as the State departed the field should not be given them for free. *See* Brief of Appellant at 1 ("[W]ashington voters privatized the spirits distribution business . . . [and] effectively placed an initial value on that business of $150 million dollars.").

Alone among all persons licensed to handle spirits in some way, the holders of spirits distributor licenses received the opportunity to

compete to handle any brand legally sold in the State and to sell those spirits to retail licensees (including on- and off-premises licensees and specialty licensees like hotels), to other spirits distributors, and even for export. RCW 66.24.055(1); *see also* RCW 66.04.021(2) (definition of "spirits distributor"). To make this admitted $150 million business opportunity particularly attractive, I-1183 provides "franchise protection," again uniquely for holders of spirits distributor licenses (not even holders of wine distributor licenses). Laws of 2012, ch. 2, §§ 212-14 (amending RCW 19.126). The State had never been in the business of producing spirits, however, so there was no comparable new business opportunity for those producers. They had previously been selling to the State, and now they would sell to the new spirits distributor licensees. I-1183 did give the producers the ancillary right to sell their own products, but only their own products, directly to retail licensees if that made sense. But unlike the new holders of spirits distributor licenses, producers would largely just continue to sell what they had sold before, reaching the same ultimate consumers through different channels. *See* RCW 66.24.640 (out-of-state distillers holding Spirits Certificates of Approval and in-state distillers). *See generally*, CP 82-87 (Liquor Control Board, *Non-Retail Liquor License Descriptions and Fees Information Sheet*). The Washington

distilleries are mainly small craft distillers. *See* CP 89-91 (list of Washington distilleries by type).

In the first year of business under I-1183, the new businesses holding spirits distribution licenses acknowledged that they enjoyed an impressive $450 million in sales, all of it new revenue for them. CP 21 (summary of distributor sales data). The producer licensees, on the other hand, had no meaningful new business, just different buyers, and their self-distribution rights were exercised as to a mere $15 million in such sales, or less than 3% of the wholesale market. *Id.*

On June 3, 2013, the spirits distributors paid for their new business opportunity, tendering $104 million after the offset, CP 105-6, a bargain price. Two large national companies, Southern Wine & Spirits and Young's Market, dominate the wholesale market. CP 97-100. They account for 93% of spirits sales by distributors and thus owed the largest share of this obligation. *Id.* In this lawsuit, these Association members seek a refund of approximately three million dollars from the State's coffers.

II. ANALYSIS

The relevant part of the Board's rule, WAC 314-23-025, merely rearranges the verbatim language of the corresponding part of the Initiative, RCW 66.24.055(3)(c):

WAC 314-23-025(1)	RCW 66.24.055(3)(c)
RCW 66.24.055 requires that all persons holding a spirits distributor license on or before March 31, 2013, must have collectively paid a total of one hundred fifty million dollars in spirits distributor license fees by March 31, 2013.	By March 31, 2013, all persons holding spirits distributor licenses on or before March 31, 2013, must have paid collectively one hundred fifty million dollars or more in spirits distributor license fees.

The applicability of the obligation was thus the decision of the voters, not the LCB. The rule, like the statute, demands payment from the new businesses, the "persons holding spirits distributor licenses." Thus, the Association's attack that the rule "exempts in-state distillers, out-of-state distillers, and spirits certificate of approval holders," Brief of Appellant at 1, is essentially an argument against the policy chosen by the voters, and thus can find no judicial acceptance, Verbatim Report of Proceedings 29 (rule that is consistent with statutory language cannot be arbitrary and capricious).

The Association in effect argues that the Board was obligated to *add* language to RCW 66.24.055(3)(c) so as to require payment from other licensees, in addition to the specified "spirits distributor license" holders,

because *other* provisions of I-1183 extended *different* obligations to self-distributors; the Board itself extended another revenue provision in I-1183 to self-distributors; and, recognizing the weakness of its "statutory" argument, failure to require other licensees to pay towards this obligation would violate constitutional privileges and immunities.

These arguments fail.

First, the plain statutory language did not on its face extend this one-time obligation to any other licensees. Looking at the language in context makes clear that this was no oversight. Other provisions show explicitly that the language the Association seeks to graft on to .055(3)(c) was included in other provisions referencing holders of spirits distributor licenses when the People intended such an expansion. The pointed and very specific omission from this provision cannot be trumped by distant and general provisions upon which the Association relies that extend "applicable laws and regulations relating to distributors" to licensees when they act as self-distributors. To adopt the Association's reading would extinguish the clear and multiple distinctions between license types created by the Initiative.

Second, the idea that an agency is obligated to repeat its mistake in modifying the plain language of a statute is weak on its face. And here, the agency's precedent has not yet survived judicial review, was upheld at

the trial level not as proper statutory construction but as exercise of a more general power to impose fees, and is contended by the agency to be distinguishable.

Third, the Association's members have no plausible claim that they are being denied constitutional privileges and immunities. The limited scope of the plain language of the Initiative rationally reflects the different new business opportunities and kinds of licensees.

A. Only Spirits Distributor Licensees, Which Obtained Totally New Businesses, Must Make the One-Time Payment to the State.

1. The Initiative Means Exactly What It Says.

When asked to construe a statute, the Court starts with its language and "should assume that the legislature means exactly what it says." *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000) (internal quotation and citation omitted). The statutory provision at issue here, RCW 66.24.055(3)(c), is unambiguous regarding who must pay and when they must pay: "By March 31, 2013, all persons holding spirits distributor licenses on or before March 31, 2013, must have paid collectively, [150] million dollars or more in spirits distributor license fees."[2] And that same provision twice uses that limited description of who

[2] The drafters knew that the spirits distribution business opportunities would be snapped up during, or even by the start of, that first year. Retailers and producers needed such services, and franchise protection meant that there would

is obligated: "persons holding spirits distributor licenses" and "spirits distributor licensees." *Id.* There is no ambiguity about who must pay: spirits distributor licensees. This license class is well-defined in law and practice, and it does not subsume other licenses into its definition.

The grant of the spirits distributor license itself expressly shows the distinction between it and other spirits licensees: "[t]here is a license for spirits distributors to . . . sell spirits purchased from . . . licensed Washington distilleries, licensed spirits importers, other Washington spirits distributors, or suppliers of foreign spirits located outside of the United States." RCW 66.24.055(1). Thus, the forms of licenses are neither "similar" nor "identical." Brief of Appellant at 27. Each of these licensees operates its business under a unique classification, with its own license fees that reflects its business model, place in the market, and burden it imposes on the state. RCW 66.24.140 (distiller license allows entity to "blend[], rectif[y] and bottle[]" spirits); RCW 66.24.160 (spirits importer license allows a Washington-based business to import and export spirits purchased from suppliers); RCW 66.24.640 (spirits COA license allows out-of-state distillery or importer to sell spirits in-state). So the phrase "all persons holding spirits distributor licenses" can mean but one

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be few openings once relationships were first established. There is no such stability, practically or as a result of I-1183, in self-distribution, and no justification for charging an up-front price.

thing: only those licensees issued an actual spirits distributor license owe the $150 million obligation. *W. Telepage*, 140 Wn.2d at 609 (if statute is clear on its face, courts only "look to the wording of the statute").

If the Initiative had meant to impose the one-time payment on holders of other licenses than spirits distributor licensees, it would have done so explicitly, using the same language it used in other provisions. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) ("When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings."). For example, Section 106 levied a tax upon spirits sales "by a spirits distributor licensee *or other licensee acting as* a spirits distributor pursuant to Title 66 RCW." Codified at RCW 82.08.150(2), (3), (5), (6)(c) (emphasis added). Similarly, Section 120 prohibited the sale of spirits for less than the cost of acquisition by "a distributor *or other licensee acting as* a distributor." Codified at RCW 66.28.330(1) (emphasis added). This juxtaposition makes plain that RCW 66.24.055(3)(c) was not intended to reach persons sometimes acting as distributors but not holding, or enjoying the full benefits of, spirits distributor licenses. *See HomeStreet, Inc. v. Dep't of Rev.*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) ("A court is required to assume the Legislature meant exactly what it said and apply the statute as written.") (internal quotation and citation omitted); *Densley*,

162 Wn.2d at 220 (distinguishing phrases "active federal service in the military" and "service in the armed forces" under canon requiring deference to Legislature's choice of exact words); *United Parcel Serv., Inc. v. Dep't of Rev.*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984) (finding Legislature's failure to include an exemption for other transportation carriers meaningful).

The plain language of RCW 66.24.055 imposes the obligation to pay $150 million only on those entities that inherited the state's distribution business (and revenues)—the spirits distributor licensees.

2. General operational provisions regarding producers engaged in self-distribution cannot control over the specific language addressing fees.

A general statutory provision must yield to the more specific. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 629-30, 869 P.2d 1034 (1994) (specific provision regarding which fees had to be approved controlled over a general one allowing agency to review reasonableness of fee). Especially in the context of financial obligations, the courts adopt the more narrow construction, *City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982), and do not extend liability to entities not specified by law. *See Dep't of Rev. v. Bi-Mor, Inc.*, 171 Wn. App. 197, 206, 286 P.3d 417

(2012) (Department of Revenue's assessment of taxes on gross receipts overturned), *review denied*, 177 Wn.2d 1002, 300 P.3d 415 (2013).

The two general provisions applying some "applicable" laws to the actions or operations of other licensees when they engage in self-distribution do not override the more specific revenue provision contained in RCW 66.24.055. Appellant's Brief repeatedly confirms the focus of these provisions is on continuing regulation of self-distribution *operations* and not on the unique and one-time special assessment on the "initial value" of the privatized spirits distribution business, which is the reason for the $150 million assessment. *E.g.*, Brief of Appellant at 7 ("to the extent a Distiller acts as"), 16 ("act as" repeated five times), 20 ("acting as," "operating as," "operate as").

RCW 66.24.640 simply requires that in undertaking such ancillary operations the self-distributors must comply with the operational requirements applicable to regular distribution: "An industry member operating as a distributor and/or retailer under this section must comply with the applicable laws and rules relating to distributors." When one of these licensees makes ancillary sales of spirits directly to a retailer (thus acting, as to its own brand, like a distributor), that industry member must "act" in conformity with distributor regulations but need not obtain a spirits distributor license for that limited part of its operations. RCW

66.24.640 does not address who is responsible for the one-time $150 million payment to the State. Neither does it deal with other license issuance fees, annual license fees, spirits taxes, or any other kind of financial obligation. Instead it brings the new, private spirits market in line with laws applicable to wine and beer in allowing a producer the option to sometimes sell directly to retailers. *See* RCW 66.24.170(3) (domestic winery license); RCW 66.24.240(2) (domestic brewery license). These laws likewise had no relationship to the imposition of fees or assessments.

RCW 66.28.330 similarly does not address financial obligations. "[T]o the extent consistent with the purposes of" the Act, distillers must "comply with all provisions of and regulations under this title applicable to wholesale distributors selling spirits to retailers." It collects a myriad of regulatory rules applicable to the newly minted spirits licensees, including a prohibition on selling spirits below cost of acquisition, specifying delivery locations for spirits sold to retailers, allowing defensible price discrimination, and requiring written authorization by the brand owners for sales by an agent. RCW 66.28.330.

In contrast, RCW 66.24.055(3) addresses financial obligations of licensees. As the more specific statute, it controls. *Waste Mgmt.*, 123 Wn.2d at 629.

3. The Distributor Association's interpretation reads words out of the statute.

Statutes must be construed so that "no clause, sentence or word shall be superfluous, void, or insignificant." *UPS*, 102 Wn.2d at 361 (internal quotation and citation omitted). The Distributor Association's interpretation of the two operational provisions is overly broad. Neither clause extends "any" or "every" distributor license provision to other licensees with a limited distribution right. Instead, RCW 66.24.640 extends only "*applicable* laws and rules." (Emphasis added.) Similarly, RCW 66.28.330(4) includes the qualification that the distributor provisions apply to distillers only "to the extent consistent with the purposes of" I-1183.

To construe these two clauses to mean "every" provision impermissibly omits--indeed, contradicts--words included in the statute. *UPS*, 102 Wn.2d at 361 (rejecting reading of statute that would ignore the word "therein"); *HomeStreet*, 166 Wn.2d at 452 (rejecting interpretation of statute omitting qualifying phrase because "[e]ach word of a statute is to be accorded meaning"). In those sections that specifically require "distributors and or other licensee acting as a spirits distributor," discussed *supra* at 10-11, the additional clauses "and other licensees acting as a spirits distributors" would be rendered surplusage if the Distributor

Association's catch-all reading applied. *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 79, 872 P.2d 87 (1994) ("A legislative body is presumed not to have used superfluous words.").

In its Brief, the Association attempts to distance itself from the fact that its argument necessarily requires all laws applicable to distributors to always apply to self-distributors. Instead, the Association proposes an untenable distinction, claiming that "obviously" the Board must have "some discretion to reasonably interpret the various provisions of I-1183 and to draft appropriate implementing regulations." Brief of Appellant at 17. Appellant then argues that "unquestionably" the $150 million provision is the kind of "applicable" provision that must apply and require the exercise of that discretion—but with no further explanation (other than invoking the arbitrary and capricious standard, which is misplaced in a statutory authority analysis). *Id.* at 18. This argument is logically flawed and based on no more than wishful thinking.

As discussed below, the statute imposed the operational requirements of distributors on the occasional self-distributor for good reason—to maintain distinction between the licensee—and no reading supports the conflation of all distributor provisions applying to all aspects of non-distributor licensees that self-distribute.

4. The Distributor Association's interpretation would undermine the established regulatory scheme and cause absurd results.

A statute should also be read to avoid unlikely, strained or absurd results. *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 799, 947 P.2d 727 (1997). A reading that imposes every "provision applicable to licensed distributors" on those licensees that at times *act* to distribute their own product would erase the distinction between the license types and result in non-distributor licensees being subject to multiple obligations. That is because "all laws applicable to distributors" would include not just those laws and regulations that the Distributor Association wishes to share—such as the $150 million payment—but literally all laws, whether they grant a benefit or impose an additional requirement. The Board has not adopted such a broad interpretation for either spirits or the substantially similar winery provision enacted in 2006. RCW 66.24.170(3) (allowing wineries to distribute and retail their own wine but requiring that "any winery operating as a distributor and/or retailer under this subsection shall comply with the applicable laws and rules relating to distributors and/or retailers").

The Distributor Association's approach would impose the $1,320 annual spirits distributor license fee on non-distributor licensees that already owe an annual issuance fee on the licenses for their basic types of

business. RCW 66.24.055(4) (spirits distributor annual fee of $1,320); *see* WAC 314-23-030(2)(a) (annual fee for spirits COA holders is $200); RCW 66.24.140 (distillery license annual fee is $2,000); RCW 66.24.140(1) (craft distillery license annual fee is $100); RCW 66.24.160 (spirits importer annual fee is $600).

The Association admits that doubling up those fees would be "[a]n unreasonably strict reading of RCW 66.24.640 and RCW 66.28.330(4)," Brief of Appellant at 16-17, but that is the reading demanded by the Association's argument. How can it be that extending the 'applicable laws' provisions that far would be "unreasonable" and "make little or no sense" but that it would be arbitrary and capricious not to extend them almost that far by imposing the initial spirit license fees on these entities. The Court should defer to the Board's dividing line, not the Association's.

The "all laws applicable to distributors" approach would impose not just obligations but also those benefits that have to date been exclusive to distributors, such as the franchise protections granted under Chapter 19.126 RCW (distributors only), and the limited right to export product from the state, RCW 66.24.055 (spirits distributors) and WAC 314-23-050(1)(d) (spirits importers). Under the Distributor Association's reading, the fact that RCW 66.24.640 specifically states that distillers may only sell their own product would be swallowed by .640's next sentence regarding

"applicable laws and rules relating to distributors." *See Am. Legion Post #149 v. Wash. Dep't of Health*, 164 Wn.2d 570, 587, 192 P.3d 306 (2008) (rejecting interpretation of initiative that would conflict with structure of other provisions). By applying all of the laws governing spirits distributors to non-distributor licensees that at times act as a distributor, the Legislature's, and the Board's, careful classification between license types would be compromised, leading to dual and at time conflicting obligations.

In short, the Distributor Association's proposed interpretation that "all applicable laws" means "all laws" (except those it does not like) must be rejected to avoid an interpretation that is "unlikely, absurd, or strained." *Double D Hop Ranch*, 133 Wn.2d at 799 (rejecting interpretation of wage statute that would draw a distinction between two kinds of employees that was highly unlikely).

5. RCW 66.24.640 parallels the existing wine and beer manufacturers' provisions and was not meant to break new ground.

Statutes relating to the same subject area of the law should be interpreted consistently. *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 204, 95 P.3d 337 (2004). When extending the right to self-distribute their own products to Washington wineries and breweries, the Legislature also extended "the applicable laws and rules relating to distributors" to the

wineries and breweries exercising their new retail privilege. RCW 66.24.170(3) ("[A]ny winery operating as a distributor and/or retailer under this subsection shall comply with the applicable laws and rules relating to distributors and/or retailers . . . ."); RCW 66.24.240(2) ("Any domestic brewery operating as a distributor and/or retailer under this subsection shall comply with the applicable laws and rules relating to distributors and/or retailers."). The Board has not been interpreting either of these provisions to mean that "all laws and rules relating to distributors" apply to wineries and breweries, and there is no reason to think I-1183's parallel provisions were intended to have different meaning. *See Judd*, 152 Wn.2d 195 at 204; *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008) (finding that "[t]he legislature is presumed to know the law in the area in which it is legislating, and statutes will not be construed in derogation of common law absent express legislative intent to change the law").

The general provisions identified by the Distributor Association, when "applicable," serve to ensure that the complicated liquor law regulatory scheme applies as necessary to COA licensees and distillers, closing off possible loopholes or unintentional restrictions. *E.g.*, RCW 66.28.270(3) (allowing distributors to accept electronic funds transfers in place of cash but not COA licensees); RCW 66.24.570(6)(a) (allowing a

sports entertainment facility to contract with distributor for certain services but not COA licensees); RCW 66.24.590(4) (allowing hotel licensees to purchase spirits only from distributors and retailers, but not distillers or COA licensees); RCW 66.24.540(1)(a)(ii) (motel licensees, same); RCW 66.24.363(5) (list of entities prohibited from bearing costs of sampling at a grocery store does not include COA licensee); RCW 66.24.371(2) (same for beer/wine specialty shop). Such a general, context-specific provision does not override the more specific language of RCW 66.24.055(3)(c), which deals directly with who is obligated to pay the one-time $150 million obligation—and does not include any license holder other than a spirits distributor license holder.

B. The Board Is Not Bound to Repeat its Mistakes, Especially When the Alleged Precedent Should Itself Be Reversed.

Recognizing that their position is in conflict with the plain language and the purpose behind RCW 66.24.055(3)(c), and contending that the Board is entitled to *no* deference in its interpretation of that subsection, the Distributors Association points to the same Board's interpretation of a different part of the statute, RCW 66.24.055(3)(a), urge that it receive complete deference, claim a resulting inconsistency, and assume the inconsistency must be resolved by overturning the interpretation of subsection (c) rather than that of subsection (a).

Even putting aside the Association's selective invocation of deference to agency interpretation, this inconsistency cannot sustain the Association's substantive position. First, the Board's interpretation of subsection (a) is in flux: (a) it is the subject of ongoing agency action resulting from a Superior Court finding of a failure to comply with Chapter 19.85 RCW (small business impact statements)[3]; and (b) if the Board were to determine to continue to adhere to the interpretation, that rule will be the subject of an appeal challenging its consistency with I-1183. Under these circumstances, it would be most appropriate for this Court to confine its analysis to the statutory basis for subsection (c), eschewing the issuance of dicta concerning a provision that has not been briefed here and that ultimately could be the subject of a separate appeal.[4]

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[3] Court's Opinion, Thurston County Superior Court No. 12-2-1312-5, at 10 (Apr. 29, 2013). The Board has since conducted a short survey but has not yet asked the Superior Court to determine if that satisfies the SBEIS requirement.

[4] Should the Court enter this thicket, and conclude that there is inconsistency in the Board's approach, the Court would readily find that the Board's interpretation of subsection (a) is the one that is unfaithful to the language, intent, and structure of I-1183: (1) subsection (a) literally is limited to "spirits distributor licensee[s]" and not other license holders; cf. *supra* at 8-11; (2) where the drafters intended a distributor license issuance fee to be paid by those not holding distributor licenses they explicitly provided for that -- for instance, subsection (d) requires retail licensees to pay a distributor license fee when "selling for resale" if "no other distributor license fee has been paid" on the sale. But (a) the failure to specify self-distributing distillers as obligated to pay distributor license fees must be deemed advertent and not subject to agency rewriting; and (b) an interpretation requiring all self-distributing distillers to pay distributor license fees would render subsection (d) superfluous -- because the distiller and not the retailer would always be obligated for the fee. Subsection (e) provides that spirits inventory cannot be subject to multiple assessments of the spirits distributor license issuance fee.

C. The One-Time Fee for the New Business Opportunity Purchased by Distributor Licensees Does Not Violate the Privileges and Immunities Clause.

The Distributor Association's constitutional claim, arguing that the Rule grants a significant privilege to distillers and COA licensees in violation of Washington's privilege and immunities clause, fails for similar reasons. I-1183 has three separate types of fees relevant to distributors--annual license issuance fees, on-going revenue percentage fees, and the one-time business opportunity transfer payment. While there is some overlap, there is indisputable logic in assessing the business opportunity payment only on those who got the core new business opportunity. Verbatim Report of Proceedings 30 ("[T]here are difference between the classes. They have different licenses. They have different requirements, and they are not in identical or similar businesses.")

The Distributor Association's argument omits the standard of review for such a constitutional challenge, fails to properly contest the Superior Court's factual finding as to the different businesses, and instead rests on a turn-of-the-century case that by the 1930's was already viewed as inapplicable to modern business methods and understanding of the law.

Because the classification here does not prohibit but merely affects spirits distribution, the Distributor Association is at most entitled to rational basis review under both the federal equal protection clause and

Article I, Section 12. *UPS*, 102 Wn.2d at 369 (applying rational basis review to taxation classification); *State ex rel. Scott v. Superior Court for Thurston Cnty.*, 173 Wash. 547, 551, 24 P.2d 87 (1933) (applying rational basis review to an equal protection challenge brought against allegedly arbitrary discrimination when fees were based on truck's carrying capacity). The leeway granted to legislative classifications is even more liberal when the statute at issue is a revenue provision. *Home Depot USA, Inc. v. Dep't of Rev.*, 151 Wn. App. 909, 926, 215 P.3d 222 (2009) ("'The Legislature has broad discretion in making classifications for purposes of taxation.'") (quoting *UPS*, 102 Wn.2d at 368); *Ex Parte Camp*, 38 Wash. 393, 397 (1905) (distinguishing between statutes regarding revenue and those whose object is regulation for purposes of review under an article I, section 12 challenge). In short, the "challenger bears the burden of showing there is no reasonable basis for the questioned classification in a revenue statute." *UPS*, 102 Wn.2d at 369.

In *UPS*, the Supreme Court pointed out that the "differences between the classes need not be great" to allow differential treatment under the privilege clause. It may be as small as differences in the "physical and chemical" constitution of the commodity or as mundane as a difference in the method of operating a business. 102 Wn.2d at 367-68. The Supreme Court has upheld very nuanced differential burdens, such as

a tax deduction allowed for a retailer that financed its own credit sales but not for those that contracted the credit sales to a vendor, *Home Depot*, 151 Wn. App. at 927-28; a tax imposed on a floating hotel but not a land-based hotel, *Black v. State*, 67 Wn.2d 97, 100-01, 406 P.2d 761 (1965); and a tax imposed on admission fees for golf, skiing, skating, and billiards, but not bowling, *Hemphill v. Tax Comm'n*, 65 Wn.2d 889, 892, 400 P.2d 297 (1965).

The differences between distributors (which got a new opportunity to sell an unlimited range of spirits) and COA licensees and distillers (which continue to sell their own products and do so directly only on occasion) is not even as subtle as the differences in those cases, and the Distributor Association has advanced no evidence to contradict the statutory assumptions. *Compare* RCW 66.24.055 (spirits distributor license), *with* RCW 66.24.140 (distiller license), *and* RCW 66.24.640 (spirits COA license). True distributors receive franchise protections from the State, *see* Chapter 19.126 RCW, but the other entities do not. Unlike the cigar shops in *Seattle v. Dencker*, 58 Wash. 501, 507, 108 P. 1086 (1910), distributors and COA licensees do not operate "similar and identical" businesses, particularly for purposes of who should pay to get the core spirits distribution business opportunity.

The Distributor Association argues that despite any differences in scale, method of operation, primary business focus, or any other differences, as long as an industry member "acts like a distributor," they are engaged in the "same business" and thus must be treated the same in every way. The Washington Supreme Court has rejected such a myopic focus under the rational review test. In *UPS*, the challenged tax exemption applied only to vehicles that crossed over state lines more than 25% of their driving time. 102 Wn.2d at 362-63. UPS argued that the exemption granted a privilege to their competitors who used delivery schedules that included more intrastate travel while conducting an identical shipping and delivery business. *Id.* at 368. The court dismissed this argument. *Id.* The test is not whether the classes are engaged in the same business, but "whether any state of facts can reasonably be conceived that would sustain the classification." *Id.* at 369.

Like the higher use tax imposed (and upheld) on UPS delivery trucks because fewer of their trucks crossed state lines compared to their competitors, *id.* at 368-69, I-1183 permissibly distinguished between the license holders that have taken over the lion's share of the State's business and those that simply got a bit more flexibility to sell direct. *Id.* (upholding the fee in part because the UPS method of operating used more state resource than differently taxed entities).

III. CONCLUSION

The Association's desired interpretation would require the courts to *add* language to RCW 66.24.055(3)(c) so as to require payment from other licensees, in addition to the specified "spirits distributor license" holders, because *other* provisions of I-1183 extended *different* obligations to self-distributors. Such an interpretation not only violates statutory interpretation, but also the logic and policy behind the I-1183.

Intervenor-Respondents respectfully request the Court to affirm the judgment below, which correctly follows the plain language of RCW 66.24.055(3)(c).

RESPECTFULLY SUBMITTED this 29th day of May, 2014.

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CERTIFICATE OF SERVICE

On May 29, 2014, 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.

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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 May 29, 2014.

Maryellen Walsh