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No. 90780-3
SUPREME COURT
OF THE STATE OF WASHINGTON

DOWNTOWN CANNABIS CO., LLC; MONKEY GRASS FARMS, LLC;
AND JAR MGMT, LLC d/b/a RAINIER ON PINE

Intervenor-Appellants
v.

CITY OF FIFE,
Respondent
and
ROBERT W. FERGUSON, Attorney General of the
State of Washington,
Intervenor-Respondent

INTERVENOR-APPELLANT REPLY BRIEF

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ORIGINAL

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I.

INTRODUCTION

While both Fife and the Attorney General[1] raise a number of arguments[2] they don't dispute the following. First, state law (I-502) gives the LCB the authority to issue licenses to operate retail stores in cities and counties throughout the state. Fife, by its ban, is preventing what state law allows.

Second, neither Fife nor the A.G. disputes that the license issued by the LCB authorized MMH to operate in a number of locations within Pierce County with Fife being one of them. Fife, by its ban, is preventing what state law allows.

Fife Ordinance 1872 is invalid under Art. XI, § 11.

II.

I-502 REQUIRED THE LCB TO ENACT RULES TO IMPLEMENT THE INITATIVE

State law, through I-502, not only gave the LCB the authority to enact rules to implement its requirements but in fact required the LCB to do so by December 1, 2013. I-502 gave the LCB the authority to issue retail licenses to be used in every county in the state.

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[1] The A.G. intervened in this case. Plaintiff-Intervenors dispute his assertion that he intervened to "defend the will of the voters." (A.G.'s brief at 5.)

[2] Fife devotes a section of its brief to an analysis of field preemption. Neither Plaintiff-Intervenors nor MMH is claiming on appeal that field preemption applies.

I-502 was not simply a licensing or registration requirement for all those who wanted to sell marijuana at retail. Instead, I-502 put stringent requirements on those seeking to obtain such a license and the number of licenses were limited – under state law, the LCB could only issue enough retail licenses in order to ensure that sufficient retail outlets were available statewide to achieve the goals of I-502.

A. I-502 authorized the LCB to adopt rules to implement its requirements.

I-502 required the LCB to adopt rules by December 1, 2013 to carry out its purpose:

> The state liquor control board, subject to the provisions of chapter 3, Laws of 2013, must adopt rules by December 1, 2013, that establish the procedures and criteria necessary to implement the following:
>
> (1) Licensing of marijuana producers, marijuana processors, and marijuana retailers, including prescribing forms and establishing application, reinstatement, and renewal fees;
>
> (2) Determining, in consultation with the office of financial management, the maximum number of retail outlets that may be licensed in each county, taking into consideration:
>
> (a) Population distribution;
>
> (b) Security and safety issues; and
>
> (c) The provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market;
>
> ...

> (6) In making the determinations required by subsections (3) through (5) of this section, the state liquor control board shall take into consideration:
>
> (a) Security and safety issues;
>
> (b) The provision of adequate access to licensed sources of marijuana, useable marijuana, and marijuana-infused products to discourage purchases from the illegal market; and
>
> (c) Economies of scale, and their impact on licensees' ability to both comply with regulatory requirements and undercut illegal market prices;
>
> ...

RCW 69.50.345.

Under the authority of RCW 69.50.345 the LCB adopted a rule that provided that it, and not local jurisdictions, would determine where retail outlets would be licensed and in what number:

> [T]he liquor control board will determine the maximum number of marijuana retail locations per county. The number of retail locations will be determined using a method that distributes the number of locations proportionate to the most populous cities within each county. Locations not assigned to a specific city will be at large. At large locations can be used for unincorporated areas in the county or in cities within the county that have no retail licenses designated ....

WAC 314-55-081(1).

The LCB awarded MMH an at-large retail license to be used within Pierce County. That license allows MMH to operate a retail outlet within unincorporated Pierce County or in any city within Pierce

County that does not have any retail licenses designated. Fife is one such city.

B. State law authorizes those holding a retail license to sell marijuana and marijuana-related products in a jurisdiction in which they are licensed.

As a corollary to the LCB's authority to decide the number of licences that are required in each county to implement I-502 the holder of those licenses are authorized to sell marijuana within the specified geographical limits of those licenses.

I-502 provides that a holder of a retail license may sell marijuana products at retail.

> (3) There shall be a marijuana retailer's license to sell marijuana concentrates, useable marijuana, and marijuana-infused products at retail in retail outlets, regulated by the state liquor control board and subject to annual renewal.

RCW 69.50.325.

I-502 gave the LCB the authority to promulgate rules that were consistent with the spirit of I-502 to carry out the requirements of the Initiative. That authority included giving the LCB, and not local jurisdictions, the ability to determine retail outlet locations.

> For the purpose of carrying into effect the provisions of chapter 3, Laws of 2013 according to their true intent or of supplying any deficiency therein, the state liquor control board may adopt rules not inconsistent with the spirit of chapter 3, Laws of 2013 as are deemed necessary or advisable. Without limiting the generality of

> the preceding sentence, the state liquor control board is empowered to adopt rules regarding the following:
>
> ...
>
> (6) Retail outlet locations and hours of operation;

RCW 69.50.342.

Exercising that grant of authority the LCB determined the number of retail outlets it would authorize in each county (and within some larger cities) and authorized each of those retail license holders to sell marijuana daily between 8:00 a.m. and 12:00 a.m.

> A marijuana retailer licensee may sell usable marijuana, marijuana-related infused products, and marijuana paraphernalia between the hours of 8 a.m. and 12 a.m.

WAC 314-55-147.

The LCB issued a retail license to MMH and authorized MMH to sell marijuana and marijuana-related products within unincorporated Pierce County and within certain cities located within Pierce County including Fife. Fife, by its ban, is prohibiting what state law allows.

III.
CONTRARY TO FIFE AND THE A.G.'s ARGUMENTS, THE TEST FOR DETERMINING WHETHER A CONFLICT EXISTS UNDER ART. XI, § 11 IS WHETHER A LOCAL ORDINANCE PROHIBITS WHAT STATE LAW ALLOWS.

Fife and the A.G. argue that despite the clear holdings by this Court that a conflict exists if a local ordinance prohibits what state law allows that the test is not that straightforwad. That is incorrect. The

test is as straightforward as it is written: a local jurisdiction does not have the authority to prohibit an act that is authorized by state law. That is exactly the situation here.

Fife and the A.G. cite two cases they contend support their argument that there are situations where state law allows an act, the local jurisdiction prohibits the act, and yet there is no Art. XI, § 11 conflict. That is incorrect. The two cases did not involve situations where state law allowed the activity at issue.

The first case cited is *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998). There, San Juan County enacted an ordinance prohibiting jet-skis to be used in marine waters and one lake within its jurisdiction except under very limited circumstances. A group challenged the law on various bases including that the local ordinance conflicted with state law and thus was invalid under Art. XI, § 11. The trial court agreed and ruled against San Juan County. On direct review the State Supreme Court reversed the trial court.

The Court, looking at the state statute, determined that the statute was not enacted to ensure that personal watercraft owners could operate their crafts anywhere in the state but instead was a statute enacted to raise tax revenues and create a title system for boats. *Id.* at 694-95. The statute, RCW 88.02.120, provided in part:

"no person may own or operate any vessel on the waters of this state unless the vessel has been registered and displays a registration number and a valid decal ...." *Id.* *Weden* did not involve a situation where state law gave a state agency the authority to issue a limited number of licenses allowing licensees to operate personal watercraft within specific counties. *Weden* did not involve a state law that was enacted to license personal watercraft in order to drive out the illegal use of black market personal watercraft.

In contrast, I-502 was not enacted to allow everyone who wanted to sell marijuana to do so as long as they obtained a state-issued license. Instead, I-502 required the LCB to devise a plan to enact a statewide regulated system for the manufacture, distribution, and retail sale of marijuana. I-502 authorized the LCB to issue licenses for retail sales in every county. And I-502 authorized license holders to sell marijuana products within the jurisdictional limits for which those licenses were issued. That is undisputed. A primary goal of I-502 was to have marijuana available on a statewide basis that was highly regulated and controlled to drive out the illegal sales of marijuana with its attendant crime and violence. Fife's ban is prohibiting what I-502 intended.

Fife and the A.G. cite *Lawson v. City of Pasco*, 168 Wn.2d 675, 230 P.3d 1038 (2010) as supporting their claim that there have been situations where a local jurisdiction has been allowed to prohibit what state law allows. That, once again, is simply wrong because the state statute in *Lawson* did not allow what the local ordinance prohibited. There, Lawson, a mobile home park owner, allowed one of the tenants to permanently reside in an RV in the mobile home park. Pasco had an ordinance prohibiting mobile home parks from allowing RV owners from residing in those parks. Lawson sued Pasco and prevailed at the trial court level. The Court of Appeals reversed. The State Supreme Court affirmed the Court of Appeals.

The Court employed the straightforward analysis of whether Pasco was prohibiting what state law allowed. Lawson had been relying upon RCW 59.20.040 that regulated the rights and duties between landlords and tenants of mobile home parks. The Court noted that RCW 59.20.040 simply recognized that RV units could be present on some mobile home parks. The Court noted:

> This acknowledgement that [RV units] could be present on mobile home lots is not equivalent to an affirmative authorization of their presence. The statute does not forbid recreational vehicles from being placed in the lots, nor does it create a right enabling their placement.

Id. at 683.

The Court compared the case to *Weden* where not even an inference could be made that state law required RV units to be allowed in mobile home parks. The opposite is true here. There is not just an inference but indeed I-502 gives the LCB the explicit authority to issue retail marijuana licenses to be used throughout the state of Washington. And it similarly gives the holders of those licenses the right to use those licenses within the jurisdictional limits for which they were issued.

Both Fife and the A.G. attempt to distinguish *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (2014). Fife states: "*Dept. of Ecology v. Wahkiakum County* does not stand for the proposition that a city is required to permit marijuana sales. *Wahkiakum County* is a case about the beneficial use of re-treated sewage." (Fife's brief at 13.) While a correct statement on its face (it dealt with biosolids and not with marijuana) that is not what is important about that case. Instead, the case correctly analyzes what occurs when state law allows something that a local jurisdiction is prohibiting. It is the analysis of the case that is important. The analysis for a state law allowing the use of treated sewage and a state law allowing the retail availability of regulated marijuana is the same. In both cases state law promotes the use, as authorized by

administrative agencies, to achieve a socially beneficial purpose: recycling a waste product in one case and supplanting a harmful black market in the other. In both situations the implementing agencies are tasked with determining whether, and to what extent, to authorize use of these two products. In order to achieve the laws' goals both laws allow the products to be used within the scope of their licenses. Local bans conflict with the state laws because they prevent the authorized use by licensees and they hinder the administrative agencies' plans to achieve the laws' goals.

The A.G. noted that the statute at issue in *Wahkiakum County*, RCW 70.95J, directed the Department of Ecology to establish a program so that biosolids and municipal sewage sludge could be used to the maximum extent possible. Both Fife and the A.G. put great stock into this part of the statute. But that fact is not the important part of the analysis. Both the biosolids program and I-502 were intended to authorize the sale and use of treated sewage and marijuana, respectively, as a matter of public policy. In one case the law seeks to maximize the recycling of a waste product. In the other, the law seeks to eliminate a criminal black market. In both situations, the laws delegate authority to state agencies to regulate and authorize the sale of those commodities to achieve their goals. In both situations, local

bans thwart the achievement of those goals. The statute directed DOE to institute a program and gave DOE the authority to authorize the use, by end-users, of certain biosolids under certain conditions. The same situation exists here. I-502 authorized the LCB to issue marijuana retail licenses. I-502 authorized the holders of those licenses to operate in the jurisdictions for which they were licensed. Fife is prohibiting what state law allows.

The A.G. is correct that I-502's goal was not to devise a scheme where marijuana is used to the maximum extent possible. But that is irrelevant. Instead, one of the primary goals was to drive out black market sales of marijuana with its attendant crime and violence. In order to accomplish that goal, I-502 authorized the LCB to determine how many retail licenses needed to be issued in each county of the state. Allowing local jurisdictions to nullify those licenses conflicts with I-502's mandate to the LCB.

The A.G. also noted: "Applying that directive, 'Ecology adopted a regulatory scheme that specifically grants permits for land applications for class B biosolids and ... *created a right to land application of class B biosolids when a permit is acquired.*'" (A.G.'s brief at 23.) But the same is true here. Applying I-502's directive, the LCB adopted a regulatory scheme that specifically grants permits for retail marijuana

sales and created a right for the holders of such licenses to use those licenses in the jurisdictions for which they were granted. The analysis is the same.

The A.G., in addressing MMH's brief, wrote:

> There, one reason the Court of Appeals found conflict was that if one county could ban use of biosolids, then every county could which would thwart "the entire statutory and regulatory scheme enacted *to maximize* the safe land application of biosolids." *Wahkiakum County*, 184 Wn. App. at 382-83 (emphasis added). But as already explained, here there is no similar intent to maximize marijuana sales.

A.G.'s brief at 31.

The A.G. is correct that I-502 is not attempting to maximize marijuana sales. But the A.G. ignores the fact that I-502 was enacted to achieve certain public policy goals that would be thwarted if local jurisdictions could ban retail sales of marijuana. In addition the A.G. ignores the fact that I-502 required the LCB to determine how many retail outlets each county would need and not one outlet more (thus the "maximum" requirement) in order to drive out marijuana black market sales. The same analysis applies here – if one county could ban retail marijuana outlets then every county could which would thwart the LCB's determination of how many retail outlets needed to be licensed in each county of the state. The same conclusion reached by the *Wahkiakum* court applies here: the local ban is invalid.

Both Fife and the A.G. attempt to distinguish *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004). However, applying the analysis from that case once again demonstrates that Fife's ordinance is invalid.

In *Parkland Light & Water* the Tacoma-Pierce County Board of Health adopted a resolution that required certain water systems to be fluoridated by a certain date. A number of water systems brought suit against the Board challenging its validity. The trial court granted the Board's motion for summary judgment. The Washington State Supreme Court accepted direct review and reversed the trial court.

The Court began its analysis by recognizing that RCW 57.08.012 gave water districts the statutory authority to determine whether to fluoridate their water systems. *Id.* at 432. The Court acknowledged that RCW 70.05.060 gave local boards of health authority to "[e]nact such local rules and regulations as are necessary in order to preserve, promote, and improve the public health and provide for the enforcement thereof." *Id.* at 433. The Court concluded that the broad powers granted under RCW 70.05.060 did not authorize the Board to act in areas where the legislature made a specific delegation of authority to another agency. *Id.* The Court held:

> In this case, we hold that the Board's resolution irreconcilably conflicts with the authority granted to

> water districts ... and the two cannot be harmonized. Essentially, the Board's resolution is a local regulation that prohibits what state law permits: the ability of water districts to regulate the content and supply of their water systems expressly granted to them by statute. The resolution ordering fluoridation takes away any decision-making power from water districts with respect to the content of their water systems, and the express statutory authority granted to water districts pursuant to RCW 57.08.012 would be rendered meaningless. The purpose of the statute is to give water districts, not the Board, the authority over water fluoridation.

Id. at 433-34.

The same is true here. Fife's ordinance irreconcilably conflicts with the authority I-502 gives to the LCB and the two cannot be harmonized. Fife's ordinance prohibits what state law permits: the LCB's ability to grant retail licenses to be used in every county of the state in order to achieve the goals of I-502. Fife's ordinance takes away the decision-making power from the LCB with respect to the granting of licenses to be used within Pierce County. The express authority granted to the LCB under I-502 would be rendered meaningless. I-502 gives the LCB, not local jurisdictions, the authority to license marijuana retail outlets.

The A.G. notes that other states that have legalized limited use of recreational marijuana have allowed local jurisdictions to opt out of allowing retail marijuana outlets. What other states have done, or

have not done, is irrelevant to an Art. XI, § 11 analysis under Washington law.

Fife cites *Bungalow Amusement v. City of Seattle*, 148 Wash. 485, 269 Pac. 1043 (1928) as somehow supporting its argument that it has the authority to prohibit what is allowed under state law. That argument is flawed for the basic reason that *Bungalow Amusement* doesn't deal with Art. XI, § 11. Instead, the Court was faced with the issue of whether the summary enforcement provisions of Seattle's regulations would violate Bungalow Amusement's constitutional rights. *Id.* at 488-89. This case has nothing to do with a conflicts analysis under Art. XI, § 11.

Art. XI, § 11 is clear: if a local law prohibits what a state law allows the local law is invalid. Fife's ordinance is prohibiting the LCB from determining where marijuana retail licenses should be allowed to be used within Pierce County. Fife's ordinance is prohibiting MMH from using the retail license it possesses. Fife's ordinance is invalid.

IV.
FIFE AND THE A.G.'s ARGUMENT THAT BECAUSE LCB'S RULE STATES THAT LOCAL JURISDICTIONS CAN IMPOSE RULES AND ORDINANCES THEN LOCAL JURISDICTIONS CAN SIMPLY BAN ALL RETAIL OUTLETS IS FLAWED.

Fife and the A.G. both cite an LCB administrative provision in support of their argument that local jurisdictions are allowed to ban

retail outlets. They are wrong. The LCB promulgated WAC 314-55-020(11) that provides:

> The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements.

First, this is an administrative rule and is not a mandate by I-502. The LCB is allowed to promulgate rules to carry out its requirements under I-502 but cannot issue rules in contradiction of those requirements. RCW 69.50.342.

Second, this administrative rule simply states that a retail marijuana license issued by the LCB is not a super license allowing the holder to disregard all other rules that would otherwise apply. For example, I-502 licensees cannot claim that because they hold such a license that they do not have to comply with applicable fire codes. Instead, the rule makes it explicit that a license holder is not exempt from building or fire codes, zoning ordinances, and licensing requirements. The rule does not state that a local government can ban retail outlets that the LCB has licensed to operate. Nor could the LCB issue such a rule because that would be contrary to the requirements of I-502 that the LCB issue retail licenses throughout Washington State.

The A.G. makes a curious argument that RCW 69.50.354 gives the LCB the discretion whether to issue any marijuana retail licenses at all. (A.G.'s brief at 15-16.) In other words, according to the A.G., the LCB could simply refuse to issue any marijuana retail licenses for the entire state resulting in no retail sales of marijuana. The A.G.;s interpretation flies directly contrary to I-502's, and the people's, intent. In addition, this argument is irrelevant: here, the LCB did issue a retail license to MMH and did authorize MMH to operate within Pierce County including within Fife.

The A.G., in addressing an argument raised by MMH, argues that if local jurisdictions have the ability to require all businesses to comply with local ordinances then those local jurisdictions have the ability to require local businesses to comply with federal law. (A.G.'s brief at 27.) First, that is irrelevant because Fife has no such requirement and has not asserted such a claim. Second, the A.G. is once again amending WAC 314-55-020(11) to include a term that the LCB did not include. If the LCB had wanted to include that license holders could not operate in jurisdictions that required all businesses to comply with federal law it would have stated that in the rule. It did not.

The A.G. next argues that allowing Fife to prohibit retail sales will not have much of an impact because Tacoma has stores that are selling marijuana. (A.G.'s brief at 29.) The A.G.'s argument was soundly rejected in *Wahkiakum County*. *Wahkiakum County* recognized that analytically, under a conflicts analysis, the question isn't whether one or just a few local jurisdictions prohibit what is allowed under state law. Instead, the issue is if local jurisdictions have the ability to ban the allowed state activity whether those bans would thwart the legislature's intent. *Id.* at 10-11. Using that analytical framework, the question becomes if all local jurisdictions had the authority to ban the retail sales of marijuana would those bans thwart the intent of I-502. The answer is yes. Local jurisdictions acting singularly could, in the aggregate, completely nullify an initiative that the voters passed on a statewide basis. [3]

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[3] The A.G. quotes Alison Holcomb from an article from The Stranger as somehow supporting his argument that I-502 did not care about whether retail outlets were available statewide. (A.G.'s brief at 31.) The A.G. quoted: "getting stores open is a bigger priority than making them convenient." While that is a portion of the quoted portion of the article, it left out the context that Ms. Holcomb was being asked about the 1,000 foot rule imposed by I-502. Read in context, the quote offered by the A.G. has nothing to do about what any I-502 sponsor thought about whether local jurisdictions should be allowed to prohibit what I-502 allows. The full quote is as follows: "The federal government has made it clear that locating marijuana storefronts within 1,000 feet of locations frequented by minors is a major concern," says Alison Holcomb, who wrote the ballot measure and led the I-502 campaign called New Approach Washington. (And she's absolutely correct here—the feds have cracked down on medical pot dispensaries in these areas. It was primarily important to pass I-502, break through the wall of prohibition, and work out the details later.) "In drafting Initiative 502, a primary goal was minimizing friction with federal marijuana enforcement policy to maximize the possibility of actual implementation," she says. "A whole range of issues undoubtedly will need to be

V.
THE LCB, USING THE AUTHORITY GRANTED TO IT BY I-502, DETERMINED AND DIRECTED THAT 31 RETAIL LICENSES WOULD BE ISSUED FOR PIERCE COUNTY AS THAT WAS THE NUMBER OF RETAIL OUTLETS THAT WOULD BE NEEDED TO FULFILL I-502's REQUIREMENTS.

Both Fife and the A.G. repeatedly raise up the fact that I-502 (RCW 69.50.345(2)) directs the LCB to determine the maximum number of retail outlets that may operate in each county and that the Act did not direct the LCB to determine the minimum numbers for any one county. (A.G.'s brief at 4, 7, 14, 15; Fife's brief at 1.) Fife and the A.G., by making this argument, are once again demonstrating their misunderstanding of how the Act works.

I-502 requires the LCB to determine how many retail outlets should be licensed in each county in order to meet the Initiative's objectives, including providing:

> adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market.

RCW 69.50.345(c). Once the LCB determined the number of retail licenses needed to provide adequate access to marijuana for each county then that number was the maximum number of retail outlets that could be issued for that county. In other words, the LCB must

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revisited down the road, but getting stores open is a bigger priority than making them convenient." https://slog.thestranger.com/slog/archives/2013/01/25/under-i-502-pot-stores-banned-almost-everywhere-in-seattle.

determine both a minimum and a maximum number with both numbers being the same – no more, no less. I-502 did not allow an open market of retail outlets. Instead, it could only issue a limited number of retail licenses and only those licensees were authorized to sell recreational marijuana under tightly regulated controls.

What is important to the analysis here is that I-502 gave the LCB the authority to determine where licenses needed to be issued and did not grant that authority to local jurisdictions.

> There may be licensed, in no greater number in each of the counties of the state than as the state liquor control board shall deem advisable, retail outlets established for the purpose of making marijuana concentrates, useable marijuana, and marijuana-infused products available for sale to adults aged twenty-one and over.

RCW 69.50.354. It is the LCB, not local governments, that determines how many licenses should be issued in each county of the state. If the LCB determined that a particular county need not have any retail outlets and still fulfill the purposes of I-502 then it not only couldn't issue licenses for that county but indeed was required to issue no licenses for that county because zero would be the maximum number of licenses that could be issued and still fulfill the requirements of I-502.

While Fife and the A.G. may be of the opinion that because the LCB has licensed retail stores for Tacoma that no retail outlets should be operated in Fife that is not their determination to make under I-502. Instead, I-502 authorized and directed the LCB to make those determinations. Fife, by banning retail outlets, is prohibiting what is not only allowed but indeed required under state law – I-502 requires the LCB to determine how many licenses to issue in the counties of the state and then issue those licenses "for the purpose of making marijuana concentrates, useable marijuana, and marijuana-infused products available for sale to adults aged twenty-one and over." RCW 69.50.354.

Fife argues that there is no conflict under Art. XI, § 11 because the LCB did not conclude that a certain number of retail licenses should be issued for use only in Fife as it did for other cities within Pierce County. (Fife's brief at 5.) That is irrelevant. Fife is ignoring the fact that the 17 at-large retail licenses that the LCB designated for use in Pierce County were authorized to be used in any city where a license had not been specifically designated – this included Fife. I-502 gave the LCB, and not local jurisdictions, the authority to determine where retail licenses could be used. The LCB had the authority, not Fife, to determine whether the intent of I-502 could be achieved while

excluding Fife from the places where a retail license could be used. Finally, as the *Wahkiakum* court held, if all local jurisdictions had the authority that Fife is claiming then the local jurisdictions could thwart the intent of the state statute.[4]

VI.
FIFE IS CORRECT: AN AGENCY'S REGULATIONS ARE PRESUMED VALID AND ARE GIVEN GREAT WEIGHT.

Fife points out that an agency's regulations are presumed valid and are given great weight. (Fife's brief at 25.) That is correct. Here, the LCB has enacted regulations clearly stating it has the authority to issue retail licenses in all counties and it has the authority to issue retail licenses for use in Pierce County and all cities, such as Fife, that were not specifically singled out for licenses. Indeed, it issued a license to MMH and MMH is authorized, under that license, to open a retail outlet in Fife.

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[4] Fife also points out that the LCB has not taken any action to protest Fife's ban. That is irrelevant. In numerous cases in which the Court determined that a local law was invalid under Art. XI, § 11 the state was not the party contesting the local law. Instead, it was a party affected by the local ordinance. *See, e.g., Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 479 P.2d 47 (1971); *Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, 153 Wn.2d 657, 105 P.3d 985 (2005); *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004). If a local jurisdiction prohibits what state law allows, it is invalid.

VII.

AN A.G.'s OPINION IS ENTITLED TO SOME DEFERENCE.

Fife points out that the A.G. has rendered the opinion that Fife's Ordinance does not conflict with I-502.

First, an A.G.'s opinion is not binding on a court. Instead, it deserves some deference. *City of Seattle v. State and Dept. of L & I*, 136 Wn.2d 693, 703, 965 P.2d 619 (1998). And when the A.G.'s analysis is wrong or flawed then obviously it should not be given any weight.

Second, a court gives even less deference to an A.G.'s opinion when it deals with statutory construction. *Id.* The A.G.'s opinion here involves statutory construction.

Finally, the fact that the state legislature has not taken action to correct the A.G.'s erroneous opinion could involve a number of reasons. First, I-502 was an initiative and as such it could not be easily amended after the first two years of passage; instead, amending the initiative required a two-thirds majority of the legislature. Second, the legislature may have had higher priorities it was faced with than addressing this problem. This Court should not infer much from the fact that the legislature has not addressed this issue.

CONCLUSION

New Approach Washington was the coalition of Washington citizens who believed that treating marijuana use as a crime had failed and that it was time for a new approach. The result: the crafting of I-502. I-502 was a new approach. I-502 was not, contrary to how Fife and the A.G. attempt to paint it, a licensing or registration requirement for anyone who wanted to engage in the retail sales of marijuana. Instead, I-502 was a detailed regulatory scheme to provide access to marijuana and marijuana related products for those twenty-one years and older throughout the state. I-502 directed the LCB to determine where retail outlets needed to be licensed in order to ensure that there was statewide access to state-regulated marijuana. One of the primary purposes of I-502 was to drive out the black market sales of marijuana with its associated crime and violence – this could only be accomplished by ensuring that there was statewide availability of the product. I-502 gave the LCB, not local jurisdictions, the authority to determine where and how many retail outlets each county needed in order to achieve this goal. I-502 gave the LCB, not local jurisdictions, the authority to determine where a licensee could operate.

The LCB determined that 31 retail licenses needed to be issued for Pierce County in order to fulfill the requirements of I-502. 31 was

both the maximum, and the minimum, number of licenses that were needed. The LCB issued license authorizes MMH to operate a retail outlet within Pierce County and within the City of Fife.

There is simply no way to get around the fact that Fife is prohibiting what state law allows. Fife is prohibiting the LCB from issuing retail licenses to be used in a place that the LCB has authorized its use. Indeed, Fife is preventing the LCB from fulfilling its obligations under I-502. Fife is prohibiting MMH from using its license within city limits. Fife is prohibiting what is allowed under state law.

Both Fife and the A.G. argue that all local jurisdictions have the authority to ban retail marijuana sales. I-502's whole purpose was to implement a statewide system for the regulated distribution and sale of marijuana. If local jurisdictions have the ability to ban retail sales then that would be a direct conflict to the very reason I-502 was enacted. Local bans thwart the goals of I-502.

Fife's ban prevents what is allowed under state law. Fife's ban is invalid under Art. XI, § 11 of Washington's Constitution. The ruling by the trial court should be reversed with this case remanded to the trial court to resolve issues that were before it but not addressed because of its ruling that there was no Art. XI, § 11 conflict.

Dated this 13th day of April, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Gina A. Mitchell, declare that on April 13, 2015, I caused the following pleadings:

1. Intervenor-Appellants Reply Brief

together with this Declaration of Service, to be served on counsel for all parties as follows:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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I do apologize, here is the actual brief

Greetings, attached for filing with the Supreme Court is the Intervenors-Appellants Reply Brief. It is being filed by Salvador A. Mungia, WSBA No. 14807 of Gordon Thomas Honeywell on behalf of all Intervenors- Appellants. Pursuant to agreement among the parties, the brief is also being served via this email. Please let me know if there is anything further you require. Thank you.

Gina Mitchell Assistant to
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