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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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WASHINGTON ASSOCIATION FOR SUBSTANCE ABUSE AND  
VIOLENCE PREVENTION, a Washington non-profit corporation;  
DAVID GRUMBOIS, an individual,  
Appellants,

v.

The STATE OF WASHINGTON,  
Respondents,

and

COSTCO WHOLESALE CORP., *et al.*,  
Respondent-Intervenors.

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**BRIEF OF APPELLANTS**

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## I. INTRODUCTION

Initiative 1183 ("I-1183") exemplifies why Article II, § 19's "single subject" and "subject-in-title" rules are enshrined in the Washington Constitution. The measure presented voters with hodgepodge legislation having several hidden and/or misrepresented objectives. I-1183 exploited the initiative process to serve the special interests of large retailers such as Costco, its biggest financial supporter. Upholding I-1183 would compromise the integrity of future initiatives and eviscerate the salutary purposes of Article II, § 19.

The constraints of Article II, § 19 promote two fundamental constitutional requirements that protect the the manner in which laws, including initiatives, are enacted. First, voters should be able to understand easily and have full notice of the subjects of the initiative on which they are voting. Second, an initiative should not be an exercise in logrolling where the initiative drafter cobbles together unrelated subjects in order to attract voters or takes advantage of the popularity of one subject to obtain passage of another subject that lacks majority support. I-1183 violates these two constitutional requirements.

The primary objective of I-1183 is to privatize the sale and distribution of hard liquor in the State. But I-1183 goes far beyond simply privatizing hard liquor distribution and sales. I-1183 also (1) earmarks

\$10 million annually for public safety programs unrelated to carrying out the purposes of the initiative; (2) fundamentally alters the distribution and pricing laws for wine to allow for, *inter alia*, discriminatory pricing; (3) removes the State's power to regulate advertising of the price of beverage alcohol (beer, wine, and hard liquor); (4) eliminates the important and long-standing public policies of "encouraging moderation in the consumption of alcohol" and its orderly marketing; and (5) imposes taxes (in guise of fees) on the distribution and sale of hard liquor.

The cobbling of these subjects constitutes classic logrolling. I-1183's sponsors acknowledge they attached the earmark for public safety to garner votes in light of a similar initiative's failure to obtain majority support a year earlier. Potentially unpopular changes to wine distribution and pricing laws that benefit the large retailers/distributors that sponsored the initiative were attached to more popular provisions privatizing the sale of hard liquor. Hidden additional subjects were attached to I-1183 prohibiting any regulation of price advertising for beer, wine, and hard liquor, and changing important state beverage alcohol regulatory policies, which again are provisions that benefit the large retailers/distributors that sponsored the initiative. The public should have been given an opportunity to vote on each of these subjects separately rather than voting them up or down in one log-rolled package.

Further, I-1183's ballot title did not inform voters that I-1183 imposes new taxes, but instead, disguised those taxes as fees in violation of the subject-in-title requirement. Indeed, I-1183 specifically denies that it imposes any new taxes. The voters have a constitutional right to understand when they are voting to impose new taxes.

Washington Supreme Court precedent establishes there is only one possible remedy where, as here, an initiative contains two subjects in violation of Article II, § 19's single subject rule: "When an initiative embodies two unrelated subjects, it is impossible for the court to assess whether either subject would have received majority support if voted on separately. Consequently, the entire initiative must be voided." *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001) (emphasis added).

This Court's precedents also establish there is only one possible remedy when an initiative violates Article II, § 19's subject-in-title rule and no fact or circumstance supports a presumption as to whether voters would have enacted the measure without its invalid portion: the initiative is void in its entirety. *Swedish Hosp. v. Dep't of Labor & Indus.*, 26 Wn.2d 819, 830, 832-33; 176 P.2d 429 (1947). This remedy is appropriate and necessary in light of I-1183's multiple violations of Article II, § 19.

Accordingly, I-1183's inclusion of multiple, unrelated subjects and the failure of I-1183's ballot title to inform voters that the measure amounted to a tax hike renders I-1183 unconstitutional in its entirety.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding I-1183's \$10 million earmark related to the privatization of hard liquor distribution and sales even though the earmark does not require spending on programs having anything to do with carrying out the initiative's purposes or anything to do with beverage alcohol.
2. The trial court erred in finding I-1183's primary objective to privatize hard liquor distribution and sales related to the separate objective to change fundamentally the distribution system for wine (but not beer) by eliminating uniform pricing and allowing price discrimination on wine sales.
3. The trial court erred in finding I-1183's primary objective related to the separate objective of eliminating the State's ability to restrict retail advertising where the price of beverage alcohol is lawfully advertised.
4. The trial court erred in finding I-1183's primary objective related to the separate objective of eliminating the State's regulatory

policies to encourage moderation in the consumption of beverage alcohol and the orderly marketing of the same.

5. The trial court erred to the extent it concluded that all of I-1183's separate objectives have rational unity with one another.
6. The trial court erred in finding I-1183's ballot title adequately and properly informed voters that the measure itself levied new taxes on the distribution and sale of beverage alcohol.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does I-1183 violate Article II, § 19's single subject rule because the initiative's title and body contain multiple subjects that do not relate to the measure's primary objective or to each other?
2. If the Court finds I-1183 violates Article II, § 19's single subject rule, is the only proper remedy to invalidate the entire initiative?
3. Does I-1183 violate Article II, § 19's subject-in-title rule because the measure's title fails to inform the voters it would increase taxes and instead hides the tax increase by referring to the taxes as "fees"?
4. If the Court holds I-1183's new hard liquor license taxes violate the subject-in-title rule, can the relevant provisions be severed when doing so would cost the State hundreds of millions of dollars in expected revenue?

#### IV. STATEMENT OF THE CASE

##### A. The State's History of Regulatory Control Over Wine and Hard Liquor.

In 1933, the Twenty-First Amendment to the United States Constitution repealed Prohibition and granted states the power to regulate the distribution and sale of beverage alcohol. U.S. Const. amend. XXI. In 1934, Washington adopted the Washington State Liquor Act (the "Liquor Act"), which created a comprehensive control system for the distribution and sale of beverage alcohol. See Chapter 66.08 RCW.<sup>1</sup> The Liquor Act established the Washington State Liquor Control Board (the "LCB"). RCW 66.08.012. The LCB is the State administrative agency empowered to regulate the distribution and sale of beverage alcohol, which is divided into four subcategories: alcohol, hard liquor, wine, and beer. RCW 66.04.010(25).<sup>2</sup>

The State has a long history of regulating wine (and beer) distinctly from hard liquor. Clerk's Papers (CP)<sup>3</sup> 21-22 (HistoryLink.org Essay 9692). The LCB's earliest regulations treated wine and hard liquor

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<sup>1</sup> All citations to the RCW in this brief are to the version of the RCW in effect at the time this lawsuit was filed, prior to portions of I-1183 taking effect.

<sup>2</sup> I-1183 uses the terms "hard liquor" and "spirits" interchangeably. To avoid confusion, Appellants use the term "beverage alcohol" in this brief to include hard liquor (spirits), wine, and beer. Appellants use the term "hard liquor" when referring to spirits.

<sup>3</sup> At least five non-substantive pages (*i.e.*, slip sheets and blank pages) of record were removed when Cowlitz County Superior Court created the Court's Clerk's Papers. This brief cites the Clerk's Papers as it has been produced to this Court, accounting for the missing pages. In the event a supplemental set or renumbering of Clerk's Papers is needed and affects this brief, Appellants will file a corrected brief.

differently. CP 22. Taverns could sell wine by the glass. CP 22. But people could not consume hard liquor in public. CP 22. The LCB licensed grocery stores to sell packaged wine. CP 22. Grocery stores, however, could not sell hard liquor. Washington law only permitted state-operated liquor stores to make such sales. CP 22. The LCB's regulation over the sale of wine has been relaxed over the years; the LCB's control over distribution and sale of hard liquor has remained strict through the years. *Compare, e.g.,* RCW 66.28.280 (permitting private distribution and sale of wine) *with* RCW 66.16.010 (state control of hard liquor distribution and sales).

**B. The State's Regulatory Scheme for Wine Before I-1183.**

Prior to I-1183, the State employed a "three-tier" system for the distribution and sale of wine and beer but not hard liquor. RCW 66.28.280; CP 39-46 (Three-Tier Review Task Force Report); *but see* RCW 66.16.010 (not applying system to hard liquor). This system consisted of the following tiers: manufacturer, distributor, and retailer. CP 42. The distributor tier provided a buffer between the manufacturers and retailers in order to eliminate or reduce undue influence and to provide a mechanism for efficient tax collection. CP 43.

The LCB controlled the three-tier system through a regulatory licensing scheme. CP 43. Participants in each tier must obtain the

appropriate license and comply with its applicable regulations. *See, e.g.*, RCW 66.24.170 (domestic winery license); RCW 66.24.200 (wine distributor license); RCW 66.24.360 (grocery store license for wine). The legislature has recognized that this three-tier-system was a valuable system for the distribution of wine. RCW 66.28.280.

A fundamental aspect of the State's three-tier system for wine required uniform pricing. This meant the producer of a particular wine sold its product to all distributors at the same price, and a distributor resold the particular product to all retailers at the same price. RCW 66.28.170 (manufacturer); RCW 66.28.180(d) (distributor). This structure prevented volume discounting and provided a level playing field for all retailers. *See* RCW 66.28.180.

Further, retailers were prohibited from centrally warehousing wine or making retailer-to-retailer sales. *See* RCW 66.24.185 (preventing warehousing by any person other than a domestic winery, bonded wine warehouse, wine distributor, wine importer, certificate of approval holder, or the LCB). These provisions each worked together to prevent price discrimination, prevent one retailer from exerting influence over another, and contribute to a level playing field among retailers. *See* RCW 66.28.170 (prohibiting price discrimination). The provisions also functioned to eliminate significant geographic disparities, so everyone in

the State had reasonable access to wine at roughly the same price. These provisions also ensured that all wineries, no matter how small, had reasonable access to market their wine and that all grocery stores, restaurants, and other retailers of wine were able to compete with the Costcos of the world on a reasonably level playing field.

**C. The State's Regulatory Scheme for Hard Liquor Before I-1183.**

Prior to I-1183, and in contrast to the three-tier regulatory system that applied to wine and beer, the State separately and directly controlled hard liquor distribution and sales. *See, e.g.*, RCW 66.16.010. The State has done so since enacting the Liquor Act in 1934. CP 127 (I-1183 § 101(1)). Washington was one of 18 liquor control states that retained exclusive control over the distribution and sale of hard liquor. CP 96 (LCB 2010 annual report).

Prior to I-1183 the State acted as both the sole distributor and the sole retailer for hard liquor in Washington. CP 99-100. In doing so, the State operated a central facility in Seattle to distribute hard liquor to its state-operated and contract liquor stores for retail sale. CP 99-100. The LCB established approximately 323 state liquor stores in Washington.<sup>4</sup>

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<sup>4</sup> Until June 1, 2012, State liquor stores are operated by the State, or in areas less populated or seasonally popular, operated by private parties under contract with the State. RCW 66.08.050(2); CP 130 (I-1183 § 102(2)). Approximately 164 state-operated liquor stores and 159 contract liquor stores exist in Washington. CP 100 (2010 fiscal report).

CP 100. These state liquor stores were responsible for supplying hard liquor to the various types of licensees who sell hard liquor by the glass, such as restaurants, taverns, and bars. CP 117-125 (final bill report 5942). In addition, and unlike wine, hard liquor in original containers was purchased exclusively from a state liquor store.<sup>5</sup> *See, e.g.,* RCW 66.16.010.

**D. I-1183.**

I-1183 passed in the November 2011 general election. *See* CP 127-186 (I-1183's complete text). It has several important effects:

First and foremost, I-1183 removes the State from the hard liquor business and creates a private license system for hard liquor distribution and sales. CP 127 (I-1183 § 101(1)). The measure requires the closure and sale of the State's liquor distribution center and allows private entities to distribute hard liquor. CP 128 (I-1183 § 101(2)(c)). I-1183 also requires the closure of current state-operated liquor stores and the sale at auction of the right to operate a privately licensed liquor store at the same locations. CP 130 (I-1183 § 102(2)).

Second, I-1183 earmarks \$10 million annually to enhance local public safety programs. CP 185 (I-1183 § 302). Section 302 provides: "An additional distribution of ten million dollars per year from the spirits

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<sup>5</sup> A minor exception to this rule existed for craft distilleries. RCW 66.24.145.

license fees must be provided to border areas, counties, cities, and towns through the liquor revolving fund for the purpose of enhancing safety programs.” CP 185. It is undisputed that I-1183 does not require that such programs must have anything to do with alcohol or carrying out the other parts of the initiative. *See* CP 127-186.

Third, I-1183 fundamentally changes the distribution system for wine (but not beer) by eliminating the current uniform pricing system and allowing for price discrimination on wine sales. CP 160 (I-1183 § 119). Accordingly, citizens in smaller or more remote communities are now likely to face higher prices than those with access to big box retailers such as Costco. I-1183 also allows central warehousing of wine by retailers, as well as sales by off-premises retailers – like Costco – to on-premise retailers like bars and restaurants. CP 135-136, 165-166 (I-1183 §§ 104(2), 123). Costco unsuccessfully challenged in federal court many of the wine distribution regulations that I-1183 repeals. *See Costco Wholesale Corp. v. Hoen*, 522 F.3d. 874 (9th Cir. 2008).

Fourth, I-1183 categorically bars the LCB from regulating alcohol advertising that includes a lawful price. CP 145-146 (I-1183 §§ 107(7), 108). Prior to I-1183, the LCB and its state-operated and contract liquor stores were prohibited from advertising beverage alcohol “in any form or through any medium whatsoever.” RCW 66.08.060 (adopted in 1933). I-

1183 permits the retail advertising of beverage alcohol subject to the LCB's "rules as to the kind, character and location of advertising." CP 146 (I-1183 § 108). I-1183, however, prohibits the LCB from imposing any restriction on beverage alcohol advertising that includes a lawful price. CP 145 (I-1183 § 107(7)).

Fifth, I-1183 implements a change in State policy by eliminating the regulatory objectives of "encouraging moderation in the consumption of alcohol[.]" and the orderly marketing of alcohol. CP 166-167 (I-1183 § 124). The first regulatory objective has been in place since the Liquor Act was first implemented in 1934. CP 41 (Three-Tier Review Task Force Report). Indeed, these long-standing policies were relied upon by the State and the federal courts in upholding the State system in the recent court challenge by Costco. *Costco*, 522 F.3d at 901-04 & n.23. Removing these long-standing public policies is a fundamental shift in the State's approach to regulating beverage alcohol that has nothing to do with getting the State out of the business of selling and distributing hard liquor.

Finally, I-1183 imposes new charges on hard liquor sales. Each retail licensee must pay to the LCB seventeen percent of all hard liquor sales revenue on an annual basis in addition to other taxes collected on hard liquor sales. CP 134 (I-1183 § 103(4)). To obtain a distributor license, I-1183 levies a tiered annual licensing charge. CP 138-139 (I-

1183 § 105(3)). In the first two years of licensure, each hard liquor distributor must pay to the LCB ten percent of total revenue from the licensee's sales of hard liquor. CP 137 (I-1183 § 105(3)(i)). In the third year of licensure and every year thereafter, I-1183 reduces this charge to five percent. CP 139 (I-1183 § 105(3)(ii)).

I-1183's ballot title describes these charges as "fees," as does the measure itself. CP 198 (copy of ballot title); *see also, e.g.*, CP 139 (I-1183 § 105(3)(ii)). The trial court determined these charges on hard liquor licensees are taxes and not fees. CP 1615-1616 ("Very clearly, the system of revenue generation created provides significantly more money than is necessary to regulate the [hard liquor] licensees. As such it is a tax and not a fee.")). In fact, I-1183 § 105(3)(c) requires hard liquor licensees to have contributed a minimum of \$150 million by March 31, 2013. CP 139.

#### **E. Costco's Involvement with I-1183.**

As noted, Costco previously and unsuccessfully attempted to alter the State's pre-I-1183 regulation of wine distribution and sales through the courts. In 2004, Costco filed suit against the LCB. *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1234 (W.D. Wash. 2005), *aff'd in part and rev'd in part*, 522 F.3d. 874 (9th Cir. 2008). The State ultimately prevailed with respect to most of the wine regulations that Costco sought to invalidate. *Id.*

In 2006 Costco lobbied the Legislature against efforts to rewrite wine distribution law. CP 188. In 2009, Costco lobbied the legislature to adopt changes to beverage alcohol laws more broadly. CP 189. In 2010 Costco sponsored Initiative No. 1100, which had similar objectives to that of I-1183. I-1100 was defeated in the November 2010 general election. CP 189, 191-194. In 2011, Costco drafted a bill to privatize hard liquor in a manner similar to I-1183, but it never received a hearing by the Legislature. CP 189.

Costco co-sponsored and financially supported I-1183. CP 196-197 (Public Disclosure Commission report). In supporting Costco's intervention in this litigation, Mr. McKay acknowledged that "[a]s part of his role as an Executive Vice President of Costco, [he was] a sponsor of [I-1183] and a Co-Chair of the Yes On 1183 Coalition." CP 277-278 (Declaration of John McKay In Support of Mot. to Intervene ¶ 3). According to the Public Disclosure Commission, Costco donated a record setting \$22.52 million to the "Yes on 1183 Coalition" political action committee (the "PAC"). CP 196-197. The PAC's second and third highest donors contributed \$50,000 each. Its fourth and fifth highest donors contributed \$250 and \$100, respectively. CP 196-197.

**F. Appellants' Challenge of I-1183.**

After I-1183's enactment, Appellants promptly challenged the constitutionality of the measure under Article II, § 19 of Washington's Constitution. CP 3-16 (Complaint). Specifically, Appellants argued that I-1183 violated Article II, § 19's single subject rule in that I-1183 had multiple subjects that lacked rational unity. CP 14-15 (Complaint ¶ 76). Appellants further argued that I-1183 violated Article II, § 19's subject-in-title rule in that the measure's ballot title failed to disclose that the initiative imposed new taxes and I-1183 disguised these new taxes by calling them "fees." CP 15 (Complaint ¶ 77).

On the merits of Appellants' single subject challenge, the trial court initially ruled that I-1183 violated the single subject rule. CP 1622. Specifically, the trial court ruled that the \$10 million earmark for general public safety use in I-1183 was a separate subject unrelated to the remainder of the initiative.<sup>6</sup> CP 1622 ("Section 302 of I-1183 creates a spending requirement which is neither germane nor has any rational unity with the rest of the initiative, no matter how expansive an interpretation is given to the purposes of the initiative"). On reconsideration, the court stated it had made a "mistake" and concluded the \$10 million earmark was

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<sup>6</sup> As to Appellants' arguments that I-1183's other subjects are not germane to the measure's principal subject or each other, *see supra*, Section II Assignments of Error 2-5, the trial court agreed with the State and Costco.

germane to liquor, which it identified as the general topic set forth in I-1183's ballot title. Report of Proceedings (RP) Vol. I, 23:8-20, March 19, 2012 (hearing on motion for reconsideration). The court, however, did not address whether the public safety earmark is germane to any of the other subjects found within the body of I-1183. *Id.*

On the merits of Appellants' subject-in-title challenge, the trial court agreed that the fees assessed in I-1183 were legally taxes and that I-1183's ballot title did not inform the voters that the measure imposes any new taxes. CP 1615-1616. The trial court, however, concluded that characterizing the charges as "fees" instead of "taxes" did not violate Article II, § 19. CP 1615-1616.

## V. ARGUMENT

### A. The Court's Review is *De Novo*.

This Court's review of I-1183's constitutionality is *de novo*. See *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003) ("interpretation of an initiative is a question of law, subject to *de novo* review"). This Court's review of the trial court's ruling denying Appellants' Motion for Summary Judgment is also *de novo*. *Id.*

### B. I-1183 Violates Article II, § 19 of the Washington Constitution.

Article II, § 19 of the Washington Constitution contains two prohibitions: "(1) No bill shall embrace more than one subject [(single

subject rule)]; and the subject of every bill shall be expressed in the title [(subject-in-title rule)].” *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 23 200 P.2d 467 (1948) (*Wash. Toll Bridge Auth. I*). More than 100 years ago, this Court declared that Article II, § 19 is “the most salutary provision in our state constitution.” *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 516, 104 P. 791 (1909). “[W]hen laws are enacted in violation of this constitutional mandate, the courts will not hesitate to declare them void.” *Patrice v. Murphy*, 136 Wn.2d 845, 852, 966 P.2d 1271 (1998); *Wash. Toll Bridge Auth. I*, 32 Wn.2d at 24.

I-1183 violates both the single subject and subject-in-title rules.

**1. Standards for Evaluating Initiatives.**

Courts “do not review initiative measures under more or less scrutiny than legislatively enacted bills.” *Citizens for Responsible Wildlife Mgmt. v. State (Citizens)*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003). Where interpretation of the initiative’s meaning is required, courts focus on the language “as the average informed voter voting on the initiative would read it.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000), *opinion corrected*, 27 P.3d 608 (2001) (*ATU 587*). Additionally, “regardless of what is in the voter’s pamphlet or the history of the initiative, . . . the [court’s] inquiry centers

on what is in the measure itself, i.e., whether the measure contains unrelated laws.” *Id.* at 212.

**2. I-1183 Violates the Single Subject Rule.**

**a) *The Dangers of Logrolling are Paramount with Initiatives.***

The first clause in Article II, § 19 requires every bill (including initiatives) to contain only a single subject. *Id.* at 207. The single subject rule ensures that every legislative proposal passes or fails on its own merits. *See, e.g., Wash. Toll Bridge Auth. v. State*, 49 Wn.2d 520, 525, 304 P.2d 676 (1956) (*Wash. Toll Bridge Auth. II*). Basic democratic principles underlie the requirement that all legislative proposals contain only one subject. *Washington Fed'n of State Employees v. State*, 127 Wn.2d 544, 552, 901 P.2d 1028 (1995) (*Washington Fed'n*).

The purpose of the single subject rule is to prevent “logrolling,” which occurs when a bill or initiative requires a legislator or voter “to vote for something of which he disapproves in order to obtain approval of another unrelated law” or vice versa. *See, e.g., Washington Fed'n*, 127 Wn.2d at 552. The dangers of logrolling are at their pinnacle in the initiative context.

Logrolling is an even greater danger to the democratic exercise of power in the initiative process. What is to prevent an individual or group from including mildly objectionable legislation that is, legislation which might benefit a small group and is mildly disfavored by the

electorate as a whole – in an initiative measure which includes other legislation which has great popular appeal? . . . The legislature can delete parts of a proposal it disfavors; the electorate is faced with a Hobson's choice: reject what it likes or adopt what it dislikes. Only article 2, section 19 preserves the integrity of the initiative process.

*Fritz v. Gorton*, 83 Wn.2d 275, 333 P.2d 911 (1974) (Rosellini, J. dissenting) (reasoning adopted by the Court in *Washington Fed'n*),

The single subject rule is violated whenever the potential for logrolling is established. *ATU 587*, 142 Wn.2d at 212 n.5 (petitioners need not demonstrate logrolling in fact). As described *infra*, I-1183 epitomizes the very dangers of logrolling to the democratic process that Justice Rossellini predicted. I-1183 tied privatization of hard liquor, a subject that almost obtained a majority vote in the prior election, with a popular earmark for general public safety to gain that majority, while including other measures – changing the distribution laws for wine to allow price discrimination, changing state alcohol policy, allowing unlimited alcohol price advertising – that are beneficial to companies with large distribution and retail capacities such as Costco but that might be objectionable to many voters.

Where the challenged legislation is an initiative to the people, courts review the initiative's ballot title, not the legislative title. *Citizens*,

149 Wn.2d at 633 (ballot title is the relevant title because it is the ballot title the voters are faced with when voting). I-1183's ballot title provides:

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 [ ].

CP 198.

When an initiative's ballot title is general,<sup>7</sup> courts

look to the body of the initiative to determine whether a rational unity among the matters addressed in the initiative exists. An initiative can embrace several incidental subjects or subdivisions and not violate article II, section 19, so long as they are related. In order to survive, however, rational unity must exist among all matters included within the measure and the general topic expressed in the title.

*Kiga*, 144 Wn.2d at 825-26 (emphasis added). Stated differently, courts apply a two-part test to determine whether "rational unity" is satisfied: (1) all matters within an initiative must relate to one general topic and (2) all matters within an initiative must be germane to one another. An initiative fails this test when a subject within the measure does not bear a close interrelationship to the measure's primary objective. *Fritz*, 83 Wn.2d at

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<sup>7</sup> All parties agree I-1183's ballot title is general. CP 1617. (March 2, 2012 Order); *See also ATU 587*, 142 Wn.2d at 207 (describing general versus restrictive ballot titles).

290. An initiative fails also when its separate “subjects [are] unrelated to [each] other.” *Kiga*, 144 Wn.2d at 827.

In *Kiga*, this Court considered Initiative 722 (“I-722”), an initiative that had two subjects: a tax refund and changes to the assessment process including a cap on property taxes. The Court concluded I-722’s provisions each related to “the general topic of tax relief.” 144 Wn.2d at 827. The Court nevertheless unanimously held the initiative violated the single subject rule. *Id.* Specifically, the Court held the refund provision was unrelated to the changes to property tax assessments in that the provision encompassed much more than property taxes in general. *Id.* (This “kind of logrolling of unrelated measures embodied [within an initiative] violates the fundamental principle embedded in Article II, § 19.”).

Likewise, in *ATU 587*, this Court analyzed a single subject challenge to Initiative 695 (“I-695”). 142 Wn.2d at 215-17. The Court found I-695’s ballot title was general and the initiative embraced two subjects – (1) setting license tabs at \$30 and (2) providing a method for approving future tax increases – that both fell under the general topic of taxes. *Id.* at 217. This Court nonetheless invalidated the initiative in its entirety because the purposes of the two subjects were unrelated to each other.

In *Barde v. State*, 90 Wn.2d 470, 584 P.2d 390 (1978), this Court struck down a legislative enactment that provided criminal sanctions for “dognapping” and the recovery of attorneys’ fees in civil replevin actions. The Court agreed that there was a “nexus” between the two subjects as both related to personal property. *Id.* at 472. The general title of the enactment was “an act relating to the taking or withholding of property.” The Court nevertheless determined the two subjects had no rational unity to one another and the law violated the single subject rule. *Id.*

Similarly, in *Wash. Toll Bridge Auth. I*, the Supreme Court held chapter 266, Laws of 1945 violated the single subject rule based on a second subject found within the body of the act but not in its title. 32 Wn.2d at 27. The act concerned (1) toll bridges and (2) ferries. *Id.* at 23. The act’s title referred to toll bridges and “connections to ferries” but not to ferries themselves. *Id.* at 19. In evaluating the act, the Court determined that these two subjects, although both means of transportation, did not have a rational unity. The introduction of the second subject in the body of the legislative measure created a single subject violation, and the Court struck down the entire initiative. *Id.* at 27.

As *Kiga*, *ATU 587*, *Barde*, and *Wash. Toll Bridge Auth. I* reinforce, the ability to lump I-1183’s multiple subjects into one general topic is necessary but not sufficient for its validity under Article II, § 19. “An

initiative can embrace several incidental subjects or subdivisions and not violate article II, section 19, so long as [the incidental subjects] are related” to one another, *Kiga*, 144 Wn.2d at 826, and the ballot title’s general topic, *Citizens*, 149 Wn.2d at 636-37. I-1183 does not, however, satisfy this rational unity test. Its multiple subjects lack rational unity with any one topic and there is no rational unity among those subjects.

**b) *The Public Safety Earmark is a Separate Subject.***

To prevail in this case, it is sufficient for Appellants to establish merely that I-1183 contains two subjects that are not germane to each other. As the Superior Court initially held, I-1183 violates the single subject requirement by unconstitutionally earmarking \$10 million annually to enhance public safety programs such as police and fire that have no necessary connection with beverage alcohol. I-1183 is not a “public safety” initiative; rather, it is a “hard liquor privatization” initiative. The earmark does nothing to carry out I-1183’s primary objective to privatize hard liquor distribution and sales. Indeed, the public safety earmark has no connection with liquor whatsoever, other than the fact the \$10 million must come from the State liquor fund. That is not a sufficient nexus to satisfy the single subject requirement.

The annual \$10 million earmark is a gift to communities to spend on general public safety with unfettered discretion. Indeed, I-1183

allocates the \$10 million to local governments “giving them the discretion to use it as they see fit.” CP 696 (Costco Opp. to Plaintiffs’ Mot. for Summary Judgment). To name just a few examples, communities could use their portion of the earmark to advance their tsunami warning systems; encourage earthquake preparedness; reinforce dilapidated bridges; increase immigration security in border areas; or enhance surveillance outside banks to prevent robberies. But none of these important public safety issues has the remotest connection to alcohol or any rational unity with the remainder of I-1183.

Costco all but admits the earmark’s purpose was to attract votes. CP 662-663. Indeed, Costco admits the earmark was especially important to reduce the opposition to liquor privatization from police and firefighters that helped defeat Costco’s prior liquor privatization initiative I-1100. CP 696.

This Court’s precedents establish that an earmark or appropriation within a substantive legislative measure must independently satisfy the “rational unity” test. *Wash. Ass’n of Neighborhood Stores v. State*, 149 Wn.2d 359, 371, 70 P.3d 920 (2003) (applying rational unity test to earmark); *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 38, 377 P.2d 466 (1962) (*Wash. Toll Bridge Auth. IV*) (appropriation); *accord State v. Acevedo*, 78 Wn. App. 886, 891, 899 P.2d 31 (1995), *review*

*denied*, 128 Wn.2d 1014, 911 P.2d 1343 (1996) (appropriation). The reason is obvious: the prevention of logrolling. Linking dedicated funding for what might be a popular program (enhanced public safety) to other substantively unrelated subjects is classic logrolling that violates Article II, § 19. *Kiga*, 144 Wn.2d at 827-828. If such logrolling is not soundly rejected, initiative sponsors will have every incentive to include financial giveaways in future ballot measures simply to garner votes.

The Superior Court's conclusion on reconsideration that the earmark is not a subject separate subject because there is admittedly some relationship in the abstract between "public safety" and "liquor" is fatally flawed. *See* RP Vol. I, 23:8-20, March 19, 2012 (hearing on motion for reconsideration). As this Court recognized in *Barde*, there is some nexus between dognapping and attorneys' fees in civil replevin actions in that both relate to personal property. 90 Wn.2d 472. That didn't save the law at issue in *Barde* from invalidation under the single subject rule. There is certainly some relationship between an apple and an orange. Both are fruits. *Id.* But that fact wouldn't save an initiative that makes the apple the official state fruit and that bans the importation of oranges treated with pesticides. Such an initiative would violate the single subject rule because there is no rational unity in the measure's treatment of apples and oranges.

That is exactly the problem with I-1183's public safety earmark. It has no rational unity with the remaining provisions of the initiative.

c) ***Privatizing the Sale and Distribution of Hard Liquor to Increase Competition is a Separate Subject from Deregulating the Private Distribution of Wine to Reduce Competition.***

I-1183 also violates Article II, § 19 because privatizing hard liquor distribution and sales is an entirely separate subject from significantly deregulating the distribution of wine. I-1183's ballot title emphasizes this lack of connection. It cites four purposes related to the privatization of hard liquor (close state liquor stores and sell their assets; license private parties to sell and distribute hard liquor; set license fees based on sales; regulate licensees) and identifies one unrelated purpose: change the regulation of wine distribution. CP 198 (ballot title).

A enactment dealing comprehensively with a broad subject area is constitutional. *See, e.g., Kuekelhan v. Federal Old Line Ins. Co.*, 69 Wn.2d 392, 418 P.2d 443 (1966) (creating a statutory scheme to provide an entire insurance code for Washington, which permitted a varied set of provisions to attach to that comprehensive legislation); *Fritz*, 83 Wn.2d 275 (Public Disclosure Act, adopted to foster openness in government); *McQueen v. Kittitas Cnty.*, 115 Wash. 672, 682, 198 P.3d 394 (1921) (single subject rule does not "prevent the enactment of a complete law on a given subject, even though the provisions of the law may be numerous

and varied”) (emphasis added). In contrast, a legislative enactment that deals with two discrete parts of a larger subject in a hodgepodge fashion violates the single subject requirement. *E.g., Wash. Toll Bridge Auth. II*, 49 Wn.2d at 525 (holding measure unconstitutional because it contained two subjects, both of which related to toll roads, but the measure was not a comprehensive enactment).

I-1183 is not a comprehensive enactment. Like the measure struck down in *Wash. Toll Bridge Auth. II*, the text of I-1183 itself reinforces that the initiative was drafted to address two separate issues with different scopes: the “state government monopoly on [hard] liquor distribution and liquor stores in Washington,” and “state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine.” CP 127 (I-1183 § 101(1)). And the initiative prescribes at least two separate actions to address each of those two distinct problems: “the people wish to privatize and modernize both wholesale distribution and retail sales of [hard] liquor,” and “[the people wish to] remove outdated restrictions on the wholesale distribution of wine.” CP 127 (I-1183 § 101(1)). Of the 15 identified benefits of the Initiative (I-1183 §§ 101(2)(a)—(o)), only the last two have anything to do with wine. And those two benefits have nothing to do with the prior thirteen.

Moreover, I-1183's amalgamation of a hodgepodge of changes to hard liquor control and the wine regulatory scheme is inconsistent with the State's historic differentiation between those schemes. Up until now, the State has exercised a public monopoly on hard liquor sale and distribution, while having a three-tier system of regulation for the private sale and distribution of wine and beer. *Compare, e.g.*, RCW 66.28.280 (three-tier system for wine and beer) *with* RCW 66.16.010 (State's complete control over distribution and sale of hard liquor).

Rather than allowing separate consideration of (1) hard liquor privatization and (2) significant modifications to the laws governing the distribution of wine, I-1183 in one stroke changes these substantively separate beverage alcohol regulatory schemes in conflicting ways. Hard liquor distribution and sales are entirely privatized to remove the state monopoly and allow for greater competition. Private wine pricing and distribution are altered in a manner that allows large retailers with distribution centers to exercise greater market power at the expense of smaller retailers, such as grocery stores, corner liquor stores, and boutique wine shops — none of which can achieve sufficiently competitive economies of scale without uniform pricing. I-1183's changes to wine distribution regulation will thus reduce competition, exactly the opposite of what voters intended by privatizing the distribution and sale of hard

liquor. Not surprisingly, Costco is one of the large retailers/distributors of wine and will benefit most from the new wine regime.

For example, I-1183 § 104(2) provides for a wine retailer reseller endorsement, which enables a grocery store licensee (like Costco) to become a distributor to smaller retailers (like restaurants) selling wine for on-premise consumption. *See* CP 136. I-1183 § 104(8) enables a retail reseller (like Costco) to leverage its reseller endorsement by obtaining unlimited quantities of wine at volume discount (I-1183 § 101(n)). Costco then can centrally warehouse that wine in its numerous warehouses for resale under its reseller endorsement. *See* CP 127, 137. Moreover, by eliminating the traditional separation among the three-tiers of the system for distribution and sale of wine, I-1183 allows Costco to become a wine distributor in addition to a retail reseller.

These dramatic changes to wine regulation foster price discrimination and disrupt what has long been a level playing field in Washington's wine industry. And Washington citizens in more remote areas who do not have access to a Costco will end up paying more than citizens who live, for example, in the Puget Sound area. Moreover, Costco is now in a position to become the supplier of wine to these smaller retailers in addition to being their competitor. Each of these changes undermines the entire purpose of the three-tier system that has long

promoted an even playing field in an effort to prevent one tier, or one entity within a single tier, from dominating the marketplace and exerting undue influence over other members of the industry, or consumers.

I-1183 was designed to facilitate Costco's and other large retailers/grocery chains domination of Washington's retail wine market. Indeed, before I-1183, Costco possessed the means to dominate the wine market -- numerous warehouses throughout Washington, a distribution network, and financial strength -- but not the legal right. I-1183 solved that problem for Costco.

To benefit the private interests of its sponsors, I-1183 artificially grafted controversial changes to the wine distribution system onto an initiative whose primary objective was privatizing hard liquor. A voter's support of getting the State out of the business of distributing and selling hard liquor says nothing about the voter's support for ending uniform wine pricing, competitively disadvantaging small retailers, and reducing competition within the wine market. I-1183 impermissibly forced voters to make an up or down decision on these distinct topics in a single vote.

*d) I-1183 Also Comprises Other Unrelated Subjects.*

Prior to I-1183, the LCB had the power to regulate and restrict price advertising for hard liquor, wine, and beer in a manner consistent with the U.S. Constitution. *See 44 Liquor Mart v. Rhode Island*, 517 U.S.

484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996) (only a state's complete ban on truthful price advertising for beverage alcohol violates the First Amendment). In contrast to *44 Liquor Mart*, which held only that a State cannot ban all alcohol price advertising, I-1183 § 107(7) prevents the LCB from enacting any restrictions on lawful price advertising.

Prior to I-1183, the Legislature had declared that the three-tier system applicable to beer and wine had four goals: (1) orderly marketing of alcohol; (2) encouraging moderation in the consumption of alcohol; (3) preventing the consumption of alcohol by minors and other abusive consumption; and (4) promoting the efficient collection of taxes by the State. RCW 66.28.280 (prior version); *see also* RCW 66.28.180 (version adopted in 1995 codifying prior regulations). I-1183 completely eliminates policy goals (1) and (2) from the State's alcohol beverage laws. RCW 66.28.280 (current version).

These are significant policy changes to Washington law that should have been addressed in separate legislation. I-1183 thus contains hidden subjects that are unrelated to each other, to the privatization of hard liquor distribution and sales, or to the initiative's changes to Washington's wine distribution and pricing scheme.

In short, I-1183's multiple subjects are neither germane to one another nor germane to one general subject. It therefore lacks rational

unity. *Kiga*, 144 Wn.2d at 828. Voters were forced to enact the entire initiative and all of its disparate subjects in order to pass any one of the subjects in one up-or-down vote. But as this Court has held, voters must “have an opportunity to cast a vote that clearly demonstrate[s] their support for either or both subjects. In order to do so, the [separate] subjects [need] to be voted on separately.” *Id.* Accordingly, I-1183 violates the single subject rule in Article II, § 19.

**3. An Initiative That Violates the Single Subject Rule is Void in Its Entirety.**

*a) This Court has Voided Every Initiative That Violated the Single Subject Requirement.*

“When an initiative embodies two unrelated subjects, it is impossible for the court to assess whether either subject would have received majority support if voted on separately. Consequently, the entire initiative must be voided.” *Kiga*, 144 Wn.2d at 825 (emphasis added). The rationale for this rule is simple: a court cannot “be certain voters were not required to vote for an unrelated subject of which the voters disapproved in order to pass a law pertaining to a subject of which the voters were committed.” *Id.* at 826 (emphasis added). “Because we cannot know if either subject of [the initiative] would have garnered popular support standing alone, we must declare the entire initiative void.” *Id.* at 828. Thus, in *Kiga*, having determined I-722’s two provisions

lacked rational unity, the Court struck down the initiative in its entirety. *Id.* at 828.

The result in *Kiga* is in accord with a long line of cases where this Court has struck down laws that have violated the single subject rule. *See, e.g., ATU 587*, 142 Wn.2d at 216-17 (voiding I-695); *Barde*, 90 Wn.2d at 472 (striking down chapter 114, Laws of 1972, 1st Ex. Sess.); *Wash. Toll Bridge Auth. II*, 49 Wn.2d at 526 (striking down chapter 268, laws of 1955); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 204, 235 P.2d 173 (1951) (striking down chapter 10, Laws of 1951, Ex. Sess.); *Wash. Toll Bridge Auth. I*, 32 Wn.2d at 33 (striking down chapter 266, Laws of 1945). Accordingly, because I-1183 violates the single subject requirement of Article II, § 19, I-1183 must be invalidated in its entirety.

The State and Costco do not dispute that I-1183 must be struck down should the Court find the privatization of hard liquor and changes in the rules for distribution and pricing of wine are two separate subjects, because both of those disparate subjects are expressed in the ballot title. The State and Costco argued below, however, that an initiative that violates the single subject rule should not be completely invalidated where the second subject is not expressed in the ballot title. They argued that the trial court's initial conclusion that the \$10 million earmark was an unconstitutional second subject should not result in the entire initiative

being invalidated.

This Court has never adopted a rule limiting invalidation of measures that contain two or more unrelated subjects to cases where the subjects were found in both the title and body of the act. Indeed, this Court has completely invalidated legislation where the second subject was expressed only in the body of the act but not in the title. In *Wash. Toll Bridge Auth. I*, the Court held chapter 266, Laws of 1945 violated the single subject rule based on a second subject found within the body of the act but not its title. 32 Wn.2d at 27. As discussed above, the act concerned (1) toll bridges and (2) ferries. *Id.* at 23. The act's title referred to toll bridges and "connections to ferries" but not to ferries themselves. *Id.* at 19.

In evaluating the act, the Court made clear that the body of the act at issue was the touchstone for analyzing compliance with the single subject requirement. *Id.* The question is "whether the term 'bridges or ferries' as used in the body of the legislative act, connotes one subject or two subjects, when tested by the mandate of Art. II, § 19 . . . ." *Id.* at 23 (emphasis added). After engaging in this inquiry, the Court held as follows:

We are of the opinion that the body of the 1945 act embraces more than one subject, viz., toll bridges and ferries, and that, when the act is read as a whole, it cannot

be fairly said that embraces but a single subject or that its dual subject comprehends any such broad appellation as a 'transportation system.' . . . [I]n other words, the 1945 act, while purporting, both in its title and in its body, merely to amend the 1937 act by adding a new section thereto, in fact introduced an entirely new and additional subject when it brought in the matter of ferries.

*Id.* at 27 (emphasis added). While the subject of "ferries" did not appear in the title of the legislative act, the single subject rule was violated because the body of the initiative contained two unrelated subjects. *Id.* The Court voided the challenged law in its entirety.

The State and Costco may rely on ambiguous dicta in *Power, Inc.*, 39 Wn.2d at 199-204, to argue complete invalidity is appropriate only where the second subject is set forth in both the body and the title of the measure. It is true that the second subject in *Power, Inc.* was set forth in both the title and the body of the act, and the Court considered that fact in its analysis. But this Court did not purport to establish a rule that total invalidation is required *only* where a second subject is set forth in the title as well in the body of the legislation. Such a rule would have been flatly inconsistent with the Court's decision in *Wash. Toll Bridge Auth.* I just three years earlier. Indeed, this Court made clear in *Kiga* that *Power, Inc.* does not limit total invalidity to only those cases where the second subject is expressed in both the body and title when it cited *Power, Inc.*, as standing for the proposition that "when an initiative embodies two

unrelated subjects . . . the entire initiative must be voided.” 144 Wn.2d at 825 (citing *Power, Inc.*, 39 Wn.2d at 200) (emphasis added). I-1183 clearly embodies multiple unrelated subjects.

*Kiga* constitutes this Court’s most recent and controlling precedent on the remedy for an initiative that violates the single subject requirement. Nothing in *Kiga* suggests that the remedy of total invalidation depends on the expression of the second subject of the initiative in the title as well as in the body of the measure. *Wash. Toll Bridge Auth. I* establishes that invalidation is required for a single subject violation even where the second subject is expressed only in the body but not in the title of the measure at issue.

Voiding an initiative to the people in its entirety for single subject rule violations is the only remedy that prevents logrolling. Paramount within the single subject rule is its purpose “to prohibit enactment of an unpopular provision pertaining to one subject by attaching it to a more popular provision whose subject is unrelated.” *Kiga*, 144 Wn.2d at 825. To refuse to void an initiative that contains two subjects would invite initiative proponents to include minor giveaways in an initiative to garner the votes necessary to get over 50 percent knowing that at worst the Court would strike the giveaway and not the core of the initiative.

In Washington, no one can make an Article II, § 19 single subject

challenge to an initiative prior to an election to prevent this type of logrolling. *E.g., Coppernoll v. Reed*, 155 Wn. 2d 290, 303-04, 119 P.3d 318 (2005). By the time the voters can bring such a challenge, the initiative will have already been enacted. At that point, the drafters will have “logrolled” their way to victory. The initiative drafters may not care if a court later severs the unrelated subjects because the drafters will have achieved their desired legislation. Without the deterrence remedy of total invalidation, initiative drafters will have an incentive to place unrelated subjects within a ballot measure to achieve majority support.

As set forth above, I-1183 joined the privatization of liquor with several unrelated subjects including a popular \$10 million earmark for public safety programs with no connection to alcohol. This Court should not reward Costco by upholding the portions of I-1183 that Costco has labored for years in the legislature and the courts to put into law (the privatization of hard liquor and the deregulation of wine distribution), while striking down a portion of the law (i.e., the \$10 million earmark) that Costco added in simply to garner enough votes to achieve its goals. This Court’s severing out of any of the unrelated portions of I-1183 would vitiate the purpose of the single subject rule and eviscerate its prohibition on logrolling. If I-1183 is not voided in its entirety – and it should be – logrolling will be fostered rather than denounced in the initiative context.

For all these reasons, this Court should reject severability as a possible remedy for I-1183's violation of the single subject rule.<sup>8</sup>

I-1183's severability clause does not save the initiative. "[A] severability clause is not necessarily dispositive on the question of whether the legislative body would have enacted the remainder of the act." *ATU 587*, 142 Wn.2d at 228. Indeed, in *ATU 587*, the fact that I-695 contained a severability clause did not prevent this Court from holding the initiative unconstitutional in its entirety. *Id.* at 257. *Accord Power Inc.*, 39 Wn.2d at 203 (severability clause will not save an act with two unrelated subjects). Because I-1183 contains more than one subject in violation of Article II, § 19, the Court must strike it down.

***b) Severability is an Option Only in Circumstances Not Present Here.***

This Court's precedents establish that severability is not an option in single-subject challenges to general title initiatives like I-1183. In *Power, Inc.*, the Court noted that Article II, § 19 contains two separate

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<sup>8</sup> In a case decided before *Kiga*, the court of appeals improperly severed out a portion of a legislative act (not an initiative) that violated the single subject rule because the second subject was set forth only the body of the act and not the title. *State v. Thomas*, 103 Wn. App. 854, 862, 14 P.3d 800 (2000). *Kiga* establishes a blanket rule of total invalidation for initiatives that embody more than one subject. Moreover, the *Thomas* court erroneously relied on cases involving restrictive titles and subject-in-title violations, where severance is an option, in support of its incorrect holding that severance is a permissible remedy where a measure has a general title and actually violates the single subject rule. *Thomas* also completely overlooked *Wash. Toll Bridge Auth. I. Thomas* is the only Washington case that has severed out part of a legislative measure that actually had two subjects and is inconsistent with Washington Supreme Court precedent.

provisions: (1) the single subject rule and (2) the subject-in-title rule. 39 Wn.2d at 198. The Court then noted that it has “in some cases dealing with the second prohibition declared unconstitutional so much of the act as dealt with subjects not covered by the title, and upheld that portion of the act the subject of which was expressed in the title.” *Id.* (emphasis added).

Severability is a well-established option where the court finds that a measure has a single subject but there is nevertheless a subject-in-title violation. *See, e.g., id.* Thus, severance may often be an appropriate remedy in cases of laws that have restrictive ballot titles. But here, I-1183 has multiple unrelated subjects and is a general ballot title initiative.

This Court’s precedents have considered severability as a potential remedy for an article II, § 19 violation only in the context of subject-in-title claims, but not alleged single subject violations. For example, in *ATU 587* the plaintiffs brought (1) a single subject challenge to the initiative as a whole and (2) a discrete subject-in-title challenge to the ballot title’s description of the effect of section 2 of the initiative. 142 Wn.2d at 227-228. The plaintiffs did not claim that section 2 of I-695 in and of itself contained more than one subject. The Court discussed severability as an option only with respect to the discrete subject-in-title violation regarding section 2. *Id.* The Court did not discuss severability as a remedy for the single subject violation and, in accordance with settled law, struck down I-

695 in its entirety.

In *ATU 587* the Court did note, however, that severability may be an appropriate option in cases involving challenges to initiatives having a restrictive ballot title: “A restrictive title will not be regarded as liberally as a general title, and provisions not fairly within it will not be given force.” 142 Wn.2d at 210. Instead, where an act has a restrictive title, “the body of the act must be confined to the particular portion of the subject which is expressed in the limited title. The courts cannot enlarge the scope of the title.” *Charron v. Miyaraha*, 90 Wn. App. 324, 331, 950 P.2d 232 (1998); *Citizens*, 149 Wn.2d at 633 (courts will allow only those initiative provisions that are fairly expressed within the restrictive title to survive single subject scrutiny).

All of the Article II, § 19 cases in which this Court has actually considered severability as a remedy involved subject-in-title violations and/or restrictive titles, not single subject violations in initiatives with general titles. See *Patrice*, 136 Wn.2d at 851; *State v. Broadaway*, 133 Wn.2d 118, 126, 128, 942 P.2d 363 (1997); *State v. Thorne*, 129 Wn.2d 736, 758, 921 P.2d 514 (1996); *Municipality of Metropolitan Seattle v. O'Brien*, 86 Wn.2d 339, 349, 544 P.2d 729 (1976); *Swedish Hosp.*, 26 Wn.2d at 830-33; *Potter v. Whatcom Co.*, 138 Wash. 571, 576, 245 P. 11 (1926); *State ex rel. Henry v. McDonald*, 25 Wash. 122, 126, 64 P. 912

(1901); *Percival v. Cowychee & Wide Hollow Irrig. Dist.*, 15 Wash. 480, 482, 46 P. 1035 (1896). No Washington court has severed out any portion of an initiative to the people that violated the single subject requirement of Article II, § 19, or ever suggested severability was an option in such a case. It would be unprecedented for this Court not to strike down all of I-1183 if it finds a single subject violation.

*Price v. Evergreen Cemetery Company of Seattle*, 57 Wn.2d 352, 354, 357 P.2d 702 (1960), does not support a different result. In that case, the plaintiff requested the court invalidate only one portion of the challenged act and did not seek invalidation of the entire bill on the basis that it contained two subjects. This Court granted the plaintiff the full relief requested. Both *Flanders v. Morris*, 88 Wn.2d 183, 186-188, 558 P.2d 769 (1977), and *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 54 Wn.2d 545, 552, 342 P.3d 588 (1959) ("*Wash. Toll Bridge Auth. III*"), involved substantive measures included in unrelated appropriations bills in violation of the single subject requirement. No party requested invalidation of the legislative measures in their entirety. This Court allowed the appropriation sections of the bills to stand and struck down the challenged substantive provisions. Literal application of the holdings of *Flanders* and *Wash. Toll Bridge Auth. III* to this case would result in

invalidation of the substantive provisions of I-1183 and maintenance of the \$10 million earmark for public safety.

But as *Kiga* holds, in the case of an initiative to the people that embodies more than one subject, it is impossible for the court to determine whether any one subject would have received majority support on its own. 144 Wn.2d at 825. Therefore, the Court must invalidate I-1183 in its entirety.

#### **4. I-1183 Violates the Subject-in-Title Rule.**

The second clause in Article II, § 19 requires that an initiative's ballot title express the subject of the initiative. *Washington Fed'n*, 127 Wn.2d at 552. The purpose of this prohibition is to notify members of the Legislature and the public of the subject matter of the measure." *ATU 587*, 142 Wn.2d at 207 (citations omitted). I-1183 imposes new taxes on the sale of liquor. But I-1183 goes out of its way to disclaim that it is in fact raising taxes and is instead imposing a fee. Because I-1183 failed to notify members of the public that they were voting on new taxes, it violates the subject-in-title rule.

One of the issues addressed in *ATU 587* was whether I-695's ballot title adequately reflected the subject of the initiative. *Id.* at 192. I-695's ballot title contained the word "tax," and the initiative's text provided a definition for the term "tax." *Id.* at 227. In comparing I-695's definition

of “tax” to that of the term’s commonly understood traditional meaning, the Court concluded that the I-695 definition was broader. *Id.* Because I-695’s ballot title did not inform voters that the initiative actually redefined the common meaning of the term “tax,” the court held that I-695’s ballot title did not adequately reflect the contents of the initiative. *Id.*

Here, I-1183’s ballot title contains a similar deficiency. It states that the initiative will “set license fees based on sales.” CP 198 (ballot title). While I-1183 does impose annual license fees, it also imposes taxes on all hard liquor licensees as a percentage of sales. But I-1183’s ballot title only identifies those charges as fees, not taxes. *See, e.g.*, CP 134 (I-1183 § 103(4)). In fact I-1183 tries to fool the voters by expressly disclaiming it is imposing new taxes. CP 185 (I-1183 § 301, “[t]his act does not . . . create any new tax”) (emphasis added).

It is well-established that initiative drafters do not have the luxury of giving new meaning to words within an initiative unless the measure and its title adequately inform voters of such a change. *ATU 587*, 142 Wn.2d at 227. Failing to inform the voters that a “yes” vote will result in new taxes is significant. *See id.*; *see also Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995) (discussing the important differences that distinguish taxes from fees). Indeed, in *Covell*, the Court

set out a comprehensive analytical framework in which to determine whether a charge is a tax or a fee. 127 Wn.2d at 879.

A tax is a levy made for the purpose of raising revenue for a general governmental purpose. See *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 750, 966 P.2d 1232 (1998). By contrast, a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation. *Id.* This Court has set out three factors for determining whether a charge is considered a tax or a regulatory fee:

[W]hether the primary purpose . . . is to accomplish desired public benefits which cost money, or whether the primary purpose is to regulate;

. . .  
[W]hether the money collected must be allocated only to the authorized regulatory purpose; [and]

. . .  
[W]hether there is a direct relationship between the fee charged and the service received . . . or between the fee charged and the burden produced by the fee payer.

*Covell*, 127 Wn.2d at 879 (internal citations and quotation marks omitted).

This Court has since confirmed that “[t]he analysis under the three factors is vital because there are different restrictions for imposing taxes versus imposing fees and legislative bodies may impose charges in the name of fees that are, in fact, taxes in disguise.” *Arborwood*, 151 Wn.2d at 371.

Under the first factor, “[i]f the primary purpose is to regulate the fee payers – by providing them with targeted service or alleviating a

burden to which they contribute – that would suggest the charge is an incidental tool of regulation.” *Id.* Under the second factor, “for a charge to be considered a fee under *Covell*, this Court has “found it ‘essential’ that the money collected be segregated and ‘allocated *only* to the authorized regulatory purpose.”” *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 809-10, 23 P.3d 477 (2001) (emphasis supplied). Under the third factor, the determinative consideration “is whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.” *Arborwood Idaho, L.L.C. v. City of Kennewick (Arborwood)*, 151 Wn.2d 359, 372-373, 89 P.2d 217 (2004).

*Covell's* analytical framework is important because otherwise initiative drafters “may impose charges in the name of fees that are, in fact, taxes in disguise.” *Arborwood*, 151 Wn.2d at 371. New taxes are generally an anathema to voters. This is exactly what occurred in I-1183.

One of the prime concerns about I-1183’s privatization of hard liquor sale and distribution was whether the change would result in a loss of revenue to the State. As such, the I-1183 sponsors needed to find a way to raise comparable or greater state revenue in conjunction with privatization. Revenues generated from State store sales were dedicated not just for paying the costs of the State system, but also generated

moneys distributed to both the state general fund and local cities and counties. RCW 66.08.190. Thus, the primary purpose of the percent-based charges is to raise revenue for the state general fund, for local cities and counties, and provide for general public benefit, not to regulate or provide services to the payer. CP 129 (I-1183 § 102(k), initiative will “[m]aintain current distribution of liquor revenues to local governments”); *see also* RCW 66.08.190 (ordering disbursement of excess funds into the state general fund).

As noted above, the fees at issue are also required to generate \$10 million in revenue to be directed to enhance local public safety programs, but without any requirement that such programs relate in any way to carrying out I-1183’s principal purposes or redress the potential harm from any increased hard liquor sales caused by I-1183. CP 185-186 (I-1183 § 302, promising \$10 million of additional revenue to support enhanced safety programs). Consequently, the goal of these “fees” is not to provide a targeted service or alleviate a burden to which the payers contribute. Rather the purpose is to raise general revenue to provide general support for local police and fire services, among other things. Thus, under *Covell*, the charges imposed by I-1183 share none of the characteristics of a regulatory fee and are, in fact, taxes. *See* 127 Wn.2d at 879.

Similar to I-695 in *ATU 587*, I-1183 uses a term in the ballot title for which the text of the initiative provides a different meaning than would be understood by the average voter. *See* 142 Wn.2d at 220. Here, by masquerading the charged taxes as “fees,” I-1183 has unlawfully subsumed the term tax under the definition of fees, which is not inconsistent with the term’s common, traditional meaning. *See Covell*, 127 Wn.2d at 879 (discussing the common meaning of the term “fee” versus that of “tax”). Indeed, I-1183 goes as far as to expressly and erroneously disclaim that it raises taxes. CP 185 (I-1183 § 301, self-serving disclaimer that the initiative does not raise taxes). It is on this basis that the sponsors of the initiative succeeded in obtaining a ballot title that references an increase in “fees,” not taxes. CP 198 (ballot title).

That the ballot title and the initiative use the term “fees” and not “taxes” does not save the initiative. If a charge is actually a tax, calling it a “fee” does not thereby convert the charge from a tax to a fee. Initiative proponents understand that raising new taxes is an anathema to voters. To allow this initiative to stand would simply encourage initiative proponents to disguise tax increases as “fees.” That result runs contrary to the notice requirements of Article II, § 19. Because I-1183 failed to inform the voter of these taxes, I-1183 violates Article II, § 19’s subject-in-title rule.

I-1183's disguised taxes are not severable. A legislative act is unconstitutional in its entirety when (1) the invalid provisions are not severable<sup>9</sup> in a way that a court can presume the enacting body – voters – would have approved the valid portion to the exclusion of the invalid portion; or (2) the “elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes.” *ATU 587*, 142 Wn.2d at 227-28.

First, it cannot be presumed that voters would have enacted I-1183 without the taxes and without the hundreds of millions in government revenue it promised. The purpose of I-1183 was not to enact a measure that would undoubtedly deprive the State of needed revenue in these of serious budgetary shortfalls. And such a result is completely counter to the express promises of I-1183 to deliver a net financial gain to Washington by switching from a state-controlled hard liquor monopoly to a private license system. Even if voters understood or were on notice as to how the challenged charges would function in general (*i.e.*, to generate revenue), no fact or circumstance supports any presumption as to whether they would have enacted I-1183 with its “fees” presented for what they are: taxes. *See Id.* (citing *Swedish Hosp.*, 26 Wn.2d at 832-33). Thus I-1183 is void in its entirety.

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<sup>9</sup> That I-1183 § 304 contains a severability clause is not dispositive as to whether the voters would have enacted the valid portion of I-1183. *ATU 587*, 142 Wn.2d at 228.

Similarly, severing I-1183's unconstitutional tax provisions (I-1183 § 103, 105) would stifle the measure as a whole. I-1183 § 302 expressly provides that the new taxes on hard liquor licensees must yield no less revenue to the state than it received under the state-controlled system. CP 185. Washington's Office of Financial Management forecasts these taxes will generate revenues that meet and exceed I-1183's revenue requirements by \$400 million over I-1183's first six fiscal years.<sup>10</sup> I-1183, moreover, requires hard liquor distributor licensees to pay \$150 million of this revenue by March 31, 2013. CP 139 (I-1183 § 105(3)(c)). In short, severing I-1183's taxes on hard liquor licensees (I-1183 §§ 103, 104) would cripple I-1183's financial objectives and render its remaining valid portion useless to accomplishing the measure's objectives. *See id.* (I-1183 § 101(2)(a), initiative will "privatize . . . sales of liquor in Washington . . . in a manner that will reduce state government costs and provide increased funding" to the state).

Because I-1183's provisions for hard liquor licensee taxes cannot be severed without doing violence to the entire initiative and the voters' intent, severability is not an option for its violation of the subject-in-title requirement.

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<sup>10</sup> <http://www.ofm.wa.gov/initiatives/2011/1183.pdf> (estimating increase in revenues based on transition from state-controlled hard liquor market to private licensee market).

## VI. CONCLUSION

I-1183 represents a subversion of the integrity of the initiative process. The initiative epitomizes logrolling. It attaches an unrelated but popular \$10 million earmark for public safety in order to garner votes. It attaches unrelated and potentially unpopular provisions that allow price discrimination for wines with more popular provisions for hard liquor privatization. It contains hidden subjects that benefit the big retailers/distributors that sponsored the initiative that may have been rejected if voters had the opportunity to vote separately on each of the subjects in the initiative. I-1183 also violates the basic requirement of fair notice to the voters. It intentionally disguises the fact that the initiative imposes a new tax. The voters have a right to notice that they are voting on imposing new taxes.

I-1183 violates the edicts of Article II, § 19. The only appropriate remedy for the Court to preserve the integrity of the initiative process is to strike down I-1183 in its entirety.

RESPECTFULLY SUBMITTED this 13th day of April, 2012.

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