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No. 87188-4

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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  
Respondent,

and

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

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

The average Washington voter would strongly disagree with the State and Intervenors (“Costco”) that the purpose of Initiative 1183 (“I-1183”) was to comprehensively reform this State’s beverage alcohol laws. The title and body of I-1183 leaves no doubt that its dominant purpose was to get the State out of the business of distributing and selling hard liquor. Costco marketed the ballot measure as a hard liquor privatization bill through the arguments in the voters’ pamphlet and a multi-million dollar media campaign. But what Costco actually sold to the public was a legislative mishmash combining multiple subjects lacking any rational unity either with the dominant purpose of the Initiative or among the individual subjects themselves. Costco deliberately crafted this hodgepodge to overcome opposition to its previous hard liquor privatization initiative and to further its own narrow commercial interests.

In an attempt to prevent the Initiative’s invalidation under both the single subject and subject-in-title rules of the Washington Constitution, Costco and the State have now asked this Court to rewrite the text, title, and purpose of the Initiative; ignore the historical facts surrounding the measure’s promotion to and approval by Washington voters; and overrule long-standing judicial precedents interpreting article II, § 19. I-1183 is unconstitutional under this Court’s controlling case law and must be

invalidated in its entirety. No other outcome will preserve and protect the integrity of the initiative process.<sup>1</sup>

## II. ARGUMENT

### A. The Average Voter Correctly Understood that I-1183 was a Hard Liquor Privatization Measure.

Both the title and body of I-1183 establish that the overwhelming concern of the Initiative was getting the State out of the hard liquor business. Four of the five purposes set forth in the ballot title relate solely to hard liquor privatization. Thirteen of the Initiative's 15 purported benefits pertain only to this subject. CP 127 (I-1183 §§ 101(2)(a)—(o)). In accord with the measure's true impetus, the proponents of I-1183 advertised the measure to the voters as a hard liquor privatization bill. For example, the vast majority of the pro-I-1183 arguments set forth in the voters' pamphlet pertain to hard liquor privatization. 2 CP 244.

The Yes On 1183 Coalition – funded almost entirely by Costco – supplied voters with marketing materials that described I-1183 as the “Liquor Privatization Initiative.” *See, e.g.* “Key Facts about I-1183: The Liquor Privatization Initiative.” 2 CP 289 (DVD, Collaterals & Outreach

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<sup>1</sup> Costco tepidly contends Appellants lack standing to pursue this appeal. Costco Br. at 5 n.2. Because Costco never affirmatively moved for summary judgment on its standing argument, the Court should deem this claim waived. In any event, Costco's argument is without merit. Appellants clearly have standing to challenge I-1183 based on the principles this Court set forth in *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 200-201, 11 P.3d 762, *opinion corrected*, 27 P.3d 608 (2000) (“*ATU 587*”).

Materials folder, file named “Key Facts Q&A”) (emphasis added).<sup>2</sup>

Consistent with the ballot title and body of the Initiative, I-1183’s promoters mentioned the changes the measure made to wholesale wine distribution only as an appended after-thought:

Initiative 1183, a ballot measure proposed for the November 2011 statewide ballot, will privatize the distribution and sale of liquor in Washington state, provide hundreds of millions of dollars in additional revenues to state and local governments and increase consumer choice and convenience — while continuing to strictly regulate the sale of liquor. It also updates some laws regulating the wholesale distribution of wine.

*Id.* (DVD 1, “Key Facts Q&A,” described above) (emphasis added).

The average Washington voter would have understood that the dominant purpose of I-1183 was to end the State’s monopoly on the distribution and package sale of hard liquor. This Court should not allow Costco and the State to rewrite history. It should not permit Costco to disavow the Initiative it actually wrote and marketed to the voters. That Initiative was a hard liquor privatization measure with additional unrelated subjects grafted on to it. As set forth in Appellants’ Opening Brief, there is no rational unity between ending the State’s monopoly with respect to hard liquor and all the Initiative’s other subjects. Appellants’ Br. at 23-30.

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<sup>2</sup> I-1183’s promoters clearly used the term “liquor” to refer only to “hard liquor.” *Id. Cf.* RCW 66.040.010(25) defining “liquor” to include beer, wine, and spirits. Before I-1183 (1) wine and beer were already privatized; (2) wine and beer were sold in packages at retail; and (3) the State did not monopolize the distribution or sale of wine or beer.

**B. The \$10 Million General Public Safety Earmark Has No Rational Unity with the Rest of the Initiative.**

No matter how broadly one conceives I-1183's general topic, the \$10 million general public safety earmark is not germane to the rest of the Initiative. Appellants concur with the Local Government amici<sup>3</sup> that I-1183's \$10 million general public safety earmark represents an allocation of new money to local governments, one that is in addition to, and independent of, the percentage allocations that state law already makes from the Liquor Revolving Fund. *See* Brief of Amicus Curiae Local Government Officials ("Local Govt. Br.") at 4, 17-18. Section 101(2)(k) of the Initiative makes this clear by stating the measure will "dedicate a portion of the new revenue raised from liquor license fees to increase funding for local public safety programs, including police, fire and emergency services." CP 129. The 2011 Voters' Pamphlet thrice describes I-1183's public safety earmark as an "additional \$10 million." 2 CP 242. The earmark's fatal flaw is the undisputed fact local governments will have complete discretion to spend this new money on public safety programs that have no relationship to alcohol or the impacts of I-1183.

The inclusion of a monetary earmark within substantive legislation on an unrelated subject is per se a violation of the single subject rule. *See*

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<sup>3</sup> The Local Government amicus brief was written by attorneys at the law firm of Foster Pepper, which also represents Costco in this matter.

*Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 370-371, 70 P.3d 920 (2003) (“*Neighborhood Stores*”). In *Neighborhood Stores*, the plaintiffs argued that I-773’s earmarking of certain tax revenues from the sale of tobacco products to fund programs to reduce consumption of tobacco lacked rational unity with the remainder of the initiative. *Id.* at 363. This Court rejected that single subject challenge solely on the basis of its determination that “rational unity exists between the sections of the initiative because the tobacco taxes directly relate to the programs they fund and the programs relate to the title.” *Id.* at 371.

I-1183’s \$10 million dollar public safety earmark flunks this same test. “‘Public safety’ is a term that addresses all ‘police power’ activities of governments, including police, fire, public health, building and zoning regulations.” Local Govt. Br. at 20. There is no rational unity between the \$10 million that I-1183 earmarks per year from spirits license fees (or taxes) and such public safety activities as building or zoning regulations. In sharp contrast to I-773, I-1183’s hard liquor license fee earmark does not relate to the programs it will fund and those programs do not relate to I-1183’s ballot title. Thus, I-1183 violates the single subject requirement.

The State and Costco claim I-1183’s \$10 million earmark is related to the remaining provisions of I-1183 and germane to its primary subject because, as no one denies, there can be a connection between “liquor” and

“public safety.” *See* State Br. at 24 (“the nexus between liquor and its potential harm to public safety is well known and well established.”); Costco Br. at 19-20. Appellants agree there would be rational unity between the hard liquor privatization sections of I-1183 and a hypothetical \$10 million earmark that actually targeted the perceived public safety impacts of privatization. *See* State Br. at 22. But it is undisputed that I-1183 does not require a single dollar of its annual \$10 million earmark to be spent on alcohol-related public safety. The true question before this Court is whether there is rational unity between a \$10 million earmark for public safety *unrelated to alcohol* and the remainder of the Initiative. *Neighborhood Stores* compels a negative answer.

In a desperate effort to find the missing link between alcohol and I-1183’s general public safety earmark, Costco contends that the “[r]elationships between liquor and public safety exist throughout Title 66 [and] other laws.” Costco Br. at 22-23. But each example involves public safety issues specifically related to beverage alcohol. *Id.* (citing RCW 46.61.502, relates to driving, boating, or flying under the influence of beverage alcohol; RCW 66.44.010(1), relates to peace officers charging people with violations of the liquor control title; RCW 66.24.600(5), relates to placing restrictions on nightclub licensees – to include no minors on the premises). Costco similarly cites the Liquor Control Board’s

(“LCB”) Mission Statement, which concerns “responsible sale, and preventing the misuse of, alcohol . . . .” *Id.* at 23 (citing 9 CP 1613).

These arguments miss the point: I-1183’s \$10 million general public safety earmark will not fund any of these liquor-related RCWs or the LCB’s Mission Statement.

Costco further asserts that the public safety earmark and beverage alcohol are related because of “the voters’ understanding of the initiative.” *Id.* 23-24 (citing to a collection of campaign media at 2 CP 289). Review of these materials, however, shows that the voters properly understood that there was no connection between the \$10 million general public safety earmark and the effects of hard liquor privatization. *See, e.g.*, 2 CP 289 (DVD 1, video titled “Firefighter,” stating that I-1183 will dedicate funds to essential services because of the State’s budget crisis; DVD 2, “Key Facts Q&A,” stating that “I-1183 dedicates new revenue for public safety programs”; *id.* (I-1183 will “provide hundreds of millions of dollars in additional revenues to state and local governments.”)).

In short, there is no rational unity between a \$10 million general public safety earmark that is unrelated to alcohol or the effects of hard liquor privatization and the remainder of I-1183. For this reason alone, this Court should hold I-1183 violates the single subject requirement.

**C. I-1183's Remaining Subjects Lack Rational Unity.**

**1. It is Necessary But Not Sufficient that All of I-1183's Incidental Subjects Relate to One General Topic; They Must also Have Rational Unity with One Another.**

As set forth in Section A above, the Court should reject as contrary to fact the *ex post facto* claim of the State and Costco that I-1183's actual subject was "liquor" rather than "hard liquor privatization." But even if the Court were to hold that "liquor" is the general topic of I-1183, the measure still violates the single subject requirement because all of its several subjects lack rational unity with one another. *See, e.g., City of Burien v. Kiga*, 144 Wn.2d 819, 827, 31 P.3d 659 (2000); *ATU 587*, 142 Wn.2d at 217; *Wash. Toll Bridge Auth. v. State* 49 Wn.2d 520, 525, 304 P.2d 676 (1956) ("*Wash. Toll Bridge Auth. II*").

Both Costco and the State assert that any combination of disparate legislative provisions that can be crowded under the umbrella of "liquor" will pass muster under the single subject requirement because "liquor" is a single subject under state law. This argument proves far too much and directly conflicts with this Court's article II, § 19 jurisprudence. Under the State and Costco's logic, an initiative with the title "an act relating to Liquor" that (1) required the labels of all wines made in Washington to be green and (2) lowered the drinking age to 18 would comply with the single subject requirement. That is not so.

Respondents' argument flies directly in the face of *Barde v. State*, 90 Wn.2d 470, 584 P.2d 390 (1978). There this Court held that "an act relating to the taking or withholding of property" violated the single subject requirement where its provisions (1) criminalized dognapping and (2) provided for attorneys' fees in civil replevin actions. This Court recognized that all of the act's provisions related to private property, but that was not enough to pass muster under article II, § 19. Whether the topic is "private property" or "liquor," all of the provisions of a legislative enactment must still have rational unity with one another in order to constitute a single subject. As *Barde* demonstrates, where the topic of legislation is a subject as all-encompassing as "private property" (or "liquor"), the Court must take particular care to ensure that incidental subjects within the measure all have rational unity with one another. Otherwise the purpose of the single subject requirement will be defeated.

**2. I-1183's Ballot Title Contains Two Subjects.**

To determine whether an initiative's ballot title expresses a single subject or multiple subjects, the Court reviews the initiative's entire ballot title. See, e.g., *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 633-36, 71 P.2.3d 644 (2003) ("*Citizens*"). As discussed *supra*, I-1183's ballot title has two distinct components: (1) complete

privatization of the sale and distribution of hard liquor and (2) partial modification of existing wholesale wine distribution regulations.

Costco would like to replace the ballot title analysis made by courts evaluating a single subject challenge to an initiative with the statutory scheme applicable to the pre-election process of creating a ballot title. Costco Br. at 7 (relying on, *e.g.*, RCW 29A.72.060). Specifically, Costco contends that determining the subject of an initiative requires only a review of a ballot title's first 10 words. *Id.* Costco claims to rely on *Neighborhood Stores*, 149 Wn.2d at 369, but Costco seriously misrepresents the holding of that case. *Neighborhood Stores* did not overrule or modify the principle that a court reviews the entire ballot title in determining the subject(s) of an initiative to the people. Nor did *Neighborhood Stores* suggest that any provision within RCW 29A.72 somehow "streamlined" the court's inquiry. Instead, the *Neighborhood Stores* Court looked at the complete ballot title. *See* 149 Wn.2d at 369. Moreover, RCW 29A.72.050 defines the ballot title to include the entire title not simply the first 10 words.

The State and Costco argue that I-1183's privatization of the wholesale distribution and retail sale of hard liquor necessitated the Initiative's changes to several existing wine wholesale distribution regulations, such as elimination of the prohibitions on volume discounts

and central warehousing. State Br. at 16-19 (claiming I-1183 needed to give the private wine and hard liquor industries the same freedoms enjoyed by the State's prior monopoly on hard liquor); Costco Br. at 25-28 (same). Their contention is demonstrably false.

I-1183 did not change existing wine regulations to make them equivalent to those that would govern hard liquor following privatization. I-1183 requires new spirits retail licensees to have 10,000 square feet of space (other than those who purchase existing state liquor stores). *See* CP 132 (I-1183 § 103(3)(a)). I-1183 does not impose this same square footage requirement on wine (or beer) retailers. I-1183 provides franchise protection – restrictions on a retailer's ability to terminate a supplier's agreement with a wholesale distributor – for private hard liquor distributors. CP 177-178. (I-1183 § 213). The Initiative does not provide this same franchise protection to wine distributors. *Id.* On the other hand, beer distributors do have the same franchise protection as distributors of hard liquor would have under I-1183. RCW 19.126.020 & .040.

Costco and the State gloss over the fact that state liquor stores currently sell hard liquor, wine, *and* beer. The two only changes I-1183 would make to who can sell beverage alcohol in Washington are (1) hard liquor could be sold by the package in private stores and (2) the State could no longer sell beverage alcohol. If the limited changes I-1183

makes to wine distribution regulations were, as Costco and the State claim, a necessary incidence of privatization, then I-1183 would have made the same changes to beer distribution. That I-1183 did not deregulate beer belies the explanation that the changes the Initiative made to the distribution of wine were related to hard liquor privatization. It is no coincidence that Costco unsuccessfully challenged in federal court most of the wholesale wine distribution regulations that I-1183 repeals. *See Costco Wholesale Corp. v. Hoen*, 522 F.3d. 874 (9th Cir. 2008).

The lack of any logical interrelationship between the complete privatization of hard liquor and the selective deregulation of wholesale wine distribution undermines any claim that these two distinct components of the Initiative constitute a single subject. *See Citizens*, 149 Wn.2d at 638. The State argues that “[b]oth address a common perceived value in reducing government involvement (whether through monopoly control or extensive regulation) in liquor sales.” State Br. at 18. This directly contradicts the text of I-1183, which states the Initiative will “continu[e] to strictly regulate the distribution and sale of liquor.” I-1183, § 101(2)(a).

I-1183’s ballot title contains two distinct subjects: complete hard liquor privatization and partial wholesale wine deregulation. Those same two subjects are also found in the body of the Initiative. I-1183 violates article II, § 19 and is void.

### 3. I-1183 Contains Other Unrelated Subjects.

I-1183 eliminates (1) the LCB's authority to regulate beverage alcohol price advertising and (2) the long standing three-tier system policies of encouraging consumption moderation and orderly markets.<sup>4</sup> These changes have no relationship to hard liquor privatization, no rational unity with the other provisions of the Initiative, and no relationship to each other. Neither Costco nor the State tries to reconcile the elimination of the LCB's power to regulate the advertising of beer, wine, and hard liquor prices to the remaining provisions of the Initiative. They argue it is sufficient that this subject relates to "liquor." State Br. at 26; Costco Br. at 30-31. As shown in section C.1 *supra*, it is not.

I-1183's end to the State's policies of encouraging moderation and orderly marketing under the three-tier system does have an operative effect, contrary to what the State claims. *See* State Br. at 26-27 (relying on *Pierce County v. State*, 150 Wn.2d 422, 436, 78 P.3d 640 (2003)). The State completely mischaracterizes *Pierce County's* holding. The case held a court may disregard the policy expressions of an initiative only where such expressions are "indisputably void of legal effect." *Pierce County*, 150 Wn.2d at 434. In *Pierce County*, this Court disregarded two sections of the initiative because they expressed mere "policy fluff," that by their

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<sup>4</sup> Costco readily admits that I-1183 causes a departure from the long-standing State policy to encourage moderation in the consumption of beverage alcohol. Costco Br. at 31.

very nature were “rhetorical.” *Id.* at 434-35. The initiative at issue in *Pierce County* did not provide for any statute or mechanism to implement the policy statements that were unrelated to the operative provisions of the ballot measure. *Id.* at 435. For that reason, and only that reason, the policy statements did not trigger a single subject violation.

This case is far removed from *Pierce County*. I-1183 fundamentally alters long-standing public policies regarding alcohol regulation by removing them from an existing RCW section. Unlike “the policy fluff” at issue in *Pierce County*, the policy changes that I-1183 makes regarding the orderly marketing and consumption of liquor will have very real consequences for the regulation of beverage alcohol in this State. *See Costco*, 522 F.3d at 901-02. These provisions constitute separate subjects having no rational unity with the other subjects of the Initiative, and an egregious violation of the single subject requirement.

#### **4. I-1183 is Not Comprehensive Liquor Legislation.**

It is well-established that the 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.” *McQueen v. Kittitas Cnty.*, 115 Wash. 672, 682, 198 P.3d 394 (1921) (emphasis added). The State and Costco unsuccessfully attempt to recast I-1183 as complete beverage alcohol legislation in order to encompass the disparate

provisions found within the measure's body and title. *See, e.g.*, State Br. at 13 (analogizing I-1183 to Initiative 276); Costco Br. at 34-36 (analogizing I-1183 to cases considering comprehensive legislation).

I-1183 is nothing like I-276, which was at issue in *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974). The component parts of I-276 were "necessarily encompassed" by the overall, singular purpose of the initiative to open government to greater public scrutiny. *Fritz*, 83 Wn.2d at 290. For that reason, there was rational unity among the initiative's broad provisions relating to the disclosure of campaign financing and the financial records of public officials, its limitations on campaign spending, its regulation of lobbying activities, and its requirement of the disclosure of public records. Initiative 276 was an all-encompassing effort to eliminate the influence of money in the conduct of state government. All of its provisions were necessary to the accomplishment of its goal and the initiative addressed its subject in a comprehensive manner.

*Kueckelhan v. Federal Old Line Ins. Co.*, 69 Wn.2d 392, 418 P.2d 443 (1966), also involved all-encompassing legislation. The statute provided a "broad comprehensive code to govern the insurance industry in" Washington. *Id.* at 402. The act at issue there was similar in scope to the Steele Act (also referred to as the Liquor Act). It too was comprehensive legislation, designed to create an entire State scheme for

the control and regulation of beverage alcohol after Prohibition. *See* Laws of 1933, Ex. Sess., ch. 62 (codified in Title 66 RCW).

I-1183 has no resemblance to the comprehensive insurance code this Court upheld *Kueckelhan* or to the Steele Act. The overwhelming majority of I-1183's provisions pertain solely to removing the State's monopoly on the sale and distribution of hard liquor. Combining these with (1) limited (but important) changes to the regulatory scheme for wine; (2) no changes to the regulatory scheme for beer; (3) elimination of the LCB's ability to regulate alcohol price advertising; and (4) repudiation of two of the four public policies that previously supported the three-tier system for wine and beer does not make for comprehensive beverage alcohol legislation in the mold of the Steele Act.

I-1183's disjointed approach is inconsistent with the State's historic treatment of legislation related to beverage alcohol. *Contra* Costco Br. at 15-18. Indeed, when prior legislation affected each type of beverage alcohol (hard liquor, wine and beer) at the same time, it generally did so uniformly. *See, e.g.*, Laws of 1949 ch. 5 (uniformly regulating the sale of hard liquor, wine, and beer for retail sale by the drink in bars and restaurants); Laws of 1969, ch. 21, sec. 12(2) (privatizing sales of out of state wine and allocating revenue only from wine sales, not beverage alcohol in general as Costco contends (Costco Br. at 16)); Laws

of 1999, ch. 129 (creating motel liquor license, regulating each type of beverage alcohol the same); Laws of 2004, ch. 160 (regulating beer and wine representatives, hard liquor not included); Laws of 2008, ch. 41 (uniformly regulating service of beverage alcohol).

Even more to the point, the Legislature has never combined significant modifications to the State's control system for hard liquor with unrelated changes to three-tier private regulatory system for wine and beer. The Legislature understood that the regulation of private market conduct is a fundamentally different subject than a state monopoly. *Compare* Laws of 2005, ch. 151 (regulating contract liquor stores but not wine and beer stores) *with* Laws of 2005, ch. 152 (uniformly regulating employee instruction for beer, wine, and spirits sales); *compare* Laws of 2011, ch. 62 (wine and beer tasting at farmers markets) *with* Laws of 2011, ch. 186 (hard liquor sampling in state liquor stores) *and* Laws of 2011, ch. 235 (act uniformly regulating provision of each type of beverage alcohol at VIP airport lounges); *see also* Laws of 2011, Sp. Sess, Ch. 45 (enacting legislation regarding hard liquor warehousing and distribution but not affecting beer or wine).

In sum, I-1183 is not a comprehensive liquor reform law and it differs dramatically from any prior beverage alcohol legislation proposed or enacted in this State. Its marriage of hard liquor privatization with

unrelated changes to wholesale wine distribution and other separate subjects violates the single subject rule.

**D. Because I-1183 Violates the Single Subject Rule, the Entire Initiative is Void.**

Because I-1183, “embodies [multiple] unrelated subjects, it is *impossible* for the court to assess whether [any of its subjects] would have received majority support if voted on separately. Consequently, the entire initiative must be voided.” *Kiga*, 144 Wn.2d 825 (emphasis supplied). Severability is not an option where an initiative to the people embodies more than one subject. *See* Appellants’ Br. at 32-42. Respondents have not pointed to a single case where this Court has remedied a single subject violation by severing out some subjects and leaving others in place if the challengers to the legislation requested total invalidation. All the cases the State cites where this Court invoked severability did so in the context of a restrictive title and/or subject-in-title violation, not a general title single subject violation. State Br. at 31-34; *accord* Costco Br. at 25 n.17.

The State concedes this Court struck down the entire measure at issue in *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 23 200 P.2d 467 (1948) (“*Wash. Toll Bridge Auth. I*”), even though the second subject was expressed only in the body of the legislation. State Br. at 30. The State nevertheless argues that if the Court finds that the limitations on the LCB’s authority to restrict price advertising or the

elimination of the two state alcohol regulatory policies are separate subjects, the Court can uphold the remainder of I-1183. State Br. at 33.

This position is unavailing. If the Court determines that the general topic of I-1183 is “hard liquor privatization,” as Appellants claim, then the Court must strike down the entire initiative because wholesale wine distribution deregulation would be a separate subject expressed in the title. If, on the other hand, the Court determines that the general topic of I-1183 is “liquor,” as the State and Costco suggest, then the liquor price advertising and liquor public policy subjects would be separate subjects that **are** expressed in the title and not severable, even under the State’s legally erroneous view of severability law. *See* State Br. at 29-30.

For its part, Costco takes the remarkable position that logrolling cannot occur in the initiative context. Costco Br. at 37 n.26 & 38. Costco’s position is directly contrary to this Court’s precedents. In *Kiga* this Court unanimously held that logrolling is a serious danger when it comes to initiatives to the people. 144 Wn.2d at 828. Unfortunately, I-1183 presents the very circumstances that led the framers of the Washington Constitution to enact the single subject requirement and this Court to apply it to initiatives. The single subject requirement prevents the combining of two issues supported by less than a majority to obtain the passage of both. *Wash. Fed’n of State Employees v. State*, 127 Wn.2d

544, 552, 901 P.2d 1028 (1995). I-1183 was drafted by Costco and almost entirely funded by Costco.<sup>5</sup> Costco obviously thought adding in the \$10 million general public safety earmark was “pivotal” to overcoming prior opposition to its earlier hard liquor privatization initiative or else they wouldn’t have included that provision. *Cf.* Costco Br. at 42. Severing out the \$10 million general public safety earmark would reward Costco’s machinations and irreparably undermine the single subject requirement.

**E. I-1183 Violates the Subject-in-Title Rule by Falsely Describing New Taxes as “Fees Based on Sales.”**

**1. The Statutory Pre-election Ballot Title Procedure under RCW 29A.72 has no Impact on a Post-election Subject-in- Title Challenge under Article II, § 19 of the Constitution.**

It is well settled that article II, § 19’s subject-in-title rule applies to initiatives. Contrary to Costco’s baseless claim, pre-election statutory ballot title challenges do not preclude post-election subject-in-title challenges to initiatives. Specifically, Costco contends that pre-election review of a ballot title under RCW 29A.72.080 is the final review of a ballot title and that “there is no room for post-election reprise.” Costco Br. at 44. Essentially, Costco contends RCW 29A.72.080 makes it legally impossible for a party to establish a subject-in-title violation under article

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<sup>5</sup> Costco does not dispute that it contributed record funding to the support of I-1183 or that, conveniently, I-1183’s changes are uniquely designed to be leveraged by its business model to the detriment of small businesses who cannot achieve the same economies of scale. *See generally* Costco Br.; *but see* Appellants’ Br. at 13-14, 28-30.

II, § 19 post-election. *Id.* (relying on, e.g., *State v. Broadaway*, 133 Wn.2d 118, 126, 942 P.2d 363 (1997)).

Neither *Broadaway* nor any other Washington decision suggests that by enacting a statute permitting pre-election initiative ballot title challenges, the Legislature had the power to limit post-election subject-in-title challenges under the Constitution. Costco does not explain how a recent change to ballot title legislation could alter requirements of the Washington Constitution that were established in 1889. Cases where this Court denied review of superior court decisions under RCW 29A.72 say nothing about the ability of Appellants to bring a post-election challenge to I-1183's title under article II, § 19. *Contra* Costco Br. at 44.

Costco erroneously contends that because WASAVP participated in a statutory ballot title challenge to I-1183 both it and Mr. Grumbois are collaterally estopped from now litigating their subject-in-title claim. *Id.* at n.30. Costco relies on two general collateral estoppel cases that have nothing to do with the relationship between article II, § 19 and RCW 29A.72. *Id.* (citing cases). Ballot title challenges are special proceedings conducted on an expedited schedule for the sole purpose of hearing objections to the Attorney General's suggested ballot title and from which there is no appeal. *See* RCW 29A.72.080 (providing finality only for

purposes of pre-election challenges). Such a proceeding has no preclusive impact on a post-election constitutional challenge to an initiative's title.

**2. I-1183's So-Called "Fees on Sales" are Legally "Taxes"**

Costco's novel arguments notwithstanding, it is still the law that the subject of an initiative must be expressed in its title. *ATU 587*, 142 Wn.2d at 207. Although Costco disagrees, Costco Br. at 42-43, the purpose of this requirement is "to notify members of the Legislature and the public of the subject matter of the measure." *Id.* (citing, e.g., *Broadaway*, 133 Wn.2d at 124). If I-1183 enacts new taxes and failed to inform the voters of this fact, a subject-in title violation has occurred.

Costco and the State contend that voters understood how I-1183's new spirits license "fees" would function. Costco Br. at 46; State Br. at 40. Both contend that dictionary definitions for the term "fee" are sufficient to uphold its use in the Initiative. State Br. at 37; Costco Br. at 47. Both disregard this Court's well-settled precedents as to what constitutes a fee versus what is a tax. *See* Appellants' Br. at 43-45; *see also Dean v. Lehman*, 143 Wn.2d 12, 26-27, 18 P.2d 523 (2001). *Ajax v. Gregory*, 177 Wash. 465, 476, 32 P.2d 560 (1934), says nothing about whether charges on private licensees are taxes or fees. *Cf.* Costco Br. at 48. It held only that alcohol license fees are not *property taxes* under article VII, § 6 of the Constitution. *Randles v. Liquor Control Board*, 33

Wn.2d 688, 694-95, 206 P.2d 1209 (1949), did not suggest that a measure that deliberately conceals the fact that it raises taxes by mislabeling the taxes as “fees” in the title of the act comports with article II, § 19.

Recognizing this Court will likely determine the “fees” at issue are legally taxes, Costco and the State next claim such a conclusion is irrelevant because the Initiative consistently uses the term “fees” to describe the charges levied. State Br. at 38; Costco Br. at 47. This argument is a red-herring. If a charge is legally a tax, repeatedly calling it a “fee” does not thereby convert the charge from a tax to a fee. The critical criterion for determining whether a charge is a “tax” or a “fee” is not the method by which the charge is assessed but the use to which the charge is put. I-1183’s ballot title in no way informed voters the Initiative disguised as a “fee” a new tax that will collect revenue for general purposes. See Appellants’ Br. at 44-47. Voters have a right under article II, §19 to know up-front when they are voting to increase taxes.

It makes no difference that the State previously charged a mark-up on its own retail sales of hard liquor without considering that charge a “tax.” *Contra* State Br. at 41. I-1183 creates a new spirits license for private parties who are responsible for paying a sales-based charge that goes to general revenue purposes. That this new charge on private parties replaces a different revenue stream available to the State before I-1183’s

enactment has no impact on whether this new charge is a tax or a fee. The percentage charge at issue here is no more a fee for the privilege of selling liquor than the state sales tax is a “fee” for the privilege of selling other goods or the state B&O tax is a “fee” for the privilege of engaging in a business in Washington State.

In sum, because I-1183 levies new taxes in guise of “fees” without identifying that fact within the ballot title for voters the measure violates the subject-in-title rule. *See ATU 587*, 142 Wn.2d at 225-26.

**3. Respondents Do Not Contest that I-1183’s Subject-in-Title Violation Cannot be Remedied by Severance.**

In contrast to a single subject violation, a subject-in-title violation can under appropriate circumstances be remedied by severing the provisions that fall outside of the title from the remainder of the legislation. *ATU 587*, 142 Wn.2d at 227-28. Appellants argued in their Opening Brief that severance was not a permissible remedy in this case because elimination of I-1183’s unconstitutional tax provisions (§§ 103, 105) would completely undermine the voters’ purposes in enacting the measure. *See Appellants’ Br.* at 48-49 (describing financial implications of severing these sections). Indeed, the measure’s anticipated (but mislabeled) tax revenue is so intertwined with the rest of the Initiative that severing these offending sections would render the remainder of I-1183

useless to accomplish its purpose. *See ATU 587*, 142 Wn.2d at 227-228. In short, there is every reason to believe the voters would not have enacted I-1183 without revenue raised by the unconstitutional sections.

Costco and the State do not dispute that, if the Court finds a subject-in-title violation, I-1183's taxes-in-the-guise-of-fees provisions cannot be severed and the entire Initiative must be voided. Therefore, they have abandoned any argument respecting this issue. *E.g., Pappas v. Hershberger*, 85 Wn.2d 152, 153, 530 P.2d 642 (1975) (per curiam).

### III. CONCLUSION

Every legislative enactment, regardless of its popularity or wisdom, must comply with the Constitution. A court cannot save an unconstitutional law by rewriting it. *State v. Groom*, 136 Wn. 2d 679, 692-93, 947 P.2d 240 (1997); *Miller v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998). This Court should strike down I-1183 in its entirety.

RESPECTFULLY SUBMITTED this 7th day of May 2012.

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