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COURT OF APPEALS
DIVISION II

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No. 91953-5

STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

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DEPUTY

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION II

Case No. 46590-6-II

TILLMAN CARR, individually; CAL FARRER and JENELL FARRER,
a marital community; KUO-YING FRENZEL, individually; JULIE
GANAS, individually; WILLIAM B. MINAGLIA, individually;
DARRYL and ROSE HUDSON, a marital community; KEITH
PETERSON, individually; KATHRYN DEBERNARDI, individually;
KATHERINE MEADE, individually; ROB AND SHARA COFFMAN, a
marital community; and PAMELA SMITH, individually,

Appellants,

v.

THE STATE OF WASHINGTON by and through the WASHINGTON
STATE LIQUOR CONTROL BOARD, a board of the State of
Washington and the WASHINGTON STATE DEPARTMENT OF
REVENUE, a department of the State of Washington,

Respondents.

APPELLANTS' PETITION FOR REVIEW

FILED

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STATE OF WASHINGTON
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TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF PETITIONERS.....	1
II. DECISION TO BE REVIEWED.....	1
III. ISSUES PRESENTED FOR REVIEW.....	1
IV. STATEMENT OF THE CASE.....	2
A. Case Overview.....	2
B. Trial Court Decision.	5
C. Court Of Appeals Decision.	5
V. ARGUMENT	7
A. The Petition Involves An Issue Of Substantial Public Interest.....	7
B. The Court Of Appeals Decision Raises Significant Questions Of Law Under The Washington Constitution.	9
1. The Court Of Appeals Decision Violates The Separation Of Powers Doctrine.....	11
2. I-1183 Made Payment To Prevent Harm A Condition Of The Termination Of The Contracts.....	13
a. Without The Payments Required By RCW 66.24.620, I-1183 Is An Unconstitutional Impairment Of Contract.....	15
b. A Taking Occurred Without Payment Of Just Compensation.....	15
C. The Court Of Appeals Deprived The Contract Liquor Store Owners Of The Right To Seek Recovery Of The Harm Suffered As Directed By The Citizens In 1183.....	17
VI. CONCLUSION	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Amalgamated Transit Union Local 587 v. State,</u> 142 Wn.2d 183 (2000).....	10
<u>Bennett v. Hardy,</u> 113 Wn.2d 912 (1990).....	8
<u>Brown v. Owen,</u> 165 Wn.2d 706 (2009).....	11
<u>Brown v. State,</u> 155 Wn.2d 254 (2005).....	10
<u>Carrick v. Locke,</u> 125 Wn.2d 129 (1994).....	11
<u>City of Fircrest v. Jensen,</u> 158 Wn.2d 384 (2006).....	12
<u>CKP, Inc. v. GRS Const. Co.,</u> 63 Wn. App. 601 (1991).....	14
<u>Community Care Coalition of Washington v. Reed,</u> 165 Wn.2d 606 (2009).....	10
<u>Fedway Marketplace v. State,</u> 183 Wn. App. 860 (2014).....	15
<u>Hale v. Wellpinit Sch. Dist. No. 49,</u> 165 Wn.2d 494 (2009).....	11
<u>McGowan v. State,</u> 148 Wn.2d 278 (2002).....	10
<u>McNeal v. Allen,</u> 95 Wn.2d 265 (1980).....	8
<u>Putman v. Wenatchee Valley Med. Ctr., P.S.,</u> 166 Wn.2d 974 (2009).....	12
<u>State v. Moreno,</u> 147 Wn.2d 500 (2006).....	12
<u>W. Petroleum Imps., Inc. v. Friedt,</u> 127 Wn.2d 420 (1995).....	10

Washington State Bar Ass'n v. State,
125 Wn.2d 901 (1995)..... 11

Statutes

RCW 66.24.620 1, 5, 6, 8, 12, 13, 15
RCW 66.24.620(6)(a) 8, 9
RCW 66.24.620(6)(b)..... 3, 4, 8, 9, 16
RCW 66.24.630(2)(c) 9

Rules

RAP 13.1(b)..... 7

Other Authorities

Washington Cons. Art. 2, sec. 1 10

I. IDENTITY OF PETITIONERS

Appellants Tillman Carr, individually; Cal Farrer and Jenell Farrer, a marital community; Kuo-Ying Frenzel, individually; Julie Ganas, individually; William B. Minaglia, individually; Darryl and Rose Hudson, a marital community; Keith Peterson, individually; Kathryn DeBernardi, individually; Katherine Meade, individually; Rob and Shara Coffman, a marital community; and Pamela Smith, individually (collectively referred to as the “*Contract Liquor Store Owners*”) ask the Supreme Court of Washington to accept review.

II. DECISION TO BE REVIEWED

The Appellants Contract Liquor Store Owners seek discretionary review of the published decision in Tillman Carr, et al. v. The State of Washington, Washington State Court of Appeals Division II No. 46590-6-

II. A copy is attached as **Appendix A**.

III. ISSUES PRESENTED FOR REVIEW

1. Did I-1183 and RCW 66.24.620 create a private cause of action to insure the State followed the explicit directive of the citizens?
2. Does the Court of Appeals’ conclusion that the legislature authorized the Liquor Control Board to determine whether or not it complied with RCW 66.24.620 violate the separation of powers doctrine?
3. Is the State required to avert the harm suffered by Contract Liquor Store Owners as a result of having their contracts taken away?
4. Does RCW 66.24.620 require the State to apply the operating and asset sale revenues to avert harm to the Contract Liquor Store

Owners after “*taking into account present value of issuance of a spirits retail license...*”?

5. Did the State breach I-1183 by failing to provide a claims process for Contract Liquor Store Owners harmed by I-1183?
6. Would the finding that I-1183 does not create a private cause of action render I-1183 unconstitutional?
7. Did I-1183 unconstitutionally impair the Liquor Store Owners’ contracts?
8. Did the State’s failure to provide payment required by I-1183 constitute an unconstitutional taking without just compensation?

IV. STATEMENT OF THE CASE

A. Case Overview.

Appellants are former Contract Liquor Store Operators who operated stores located throughout the State. Appellants were small businesses that sold liquor under contracts with the Washington State Liquor Control Board that were for a five-year term. When Initiative 1183 went into effect, Appellants had four years left on their contracts.

Initiative 1183 was legislation by the citizens of Washington to privatize the sale of liquor. The Initiative ended the State’s monopoly over liquor sales and provided that all state liquor stores, including the Contract Liquor Stores, close by June 1, 2012. The Initiative recognized that the Contract Liquor Stores — small, non-government, private businesses — would be significantly harmed by the change. Therefore, the legislation provided specific protections and required payments to insure the Liquor

Store Owners would not be harmed by the Initiative. While the voters wanted the government out of the liquor business, they did not intend for these private small businesses to bear the financial burden of the decision to do so.

Initiative 1183 included specific provisions to account for damages that would be suffered by the Liquor Store Owners. The legislation created a specific pot of money from the sale of liquor store assets and distribution center along with revenue from auctioning off licenses at former liquor store locations that it directed to be used to make sure the Contract Liquor Stores did not incur any harm. Initiative 1183 specifically directed that the accumulated “*operating and asset sales revenues*” be applied to “*avert harm*” to the interests of the “*nonemployee liquor store operators under then existing contracts.*” RCW 66.24.620(6)(b). The Initiative directed that this occur “*without limitation.*” *Id.* The Initiative also recognized it would impact existing contracts by directing that “*[t]he department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.*” Initiative 1183, § 303. Thus, the citizens in 1183 recognized that 1183 would terminate the

contracts and specifically built into the Initiative a compensation fund to provide for payment to address the harm caused to these small businesses.

As a result of Initiative 1183, the Liquor Store Owners were deprived of four years of the contract term, preventing them from obtaining a return on the investments they made in reliance on the term of the contract, along with various other harms which were presented to the Trial Court.

Despite realizing more than \$66,000,000 from its operating and asset sale revenues, the State refused to follow the legislative directive and took the position it did not have to apply any of the revenues to avert the harms suffered by the Liquor Store Owners who had their contracts pulled out from under them. The State also failed to develop rules and procedures to address the Liquor Store Owners' claims that Initiative 1183 impaired contracts with the State and to provide a means for reasonable compensation. Instead, the State simply ignored requests for relief by the Liquor Store Owners and refused to follow the requirements of Initiative 1183.

On November 2, 2012, the Liquor Store Owners filed suit to obtain the relief required by RCW 66.24.620(6)(b) (Initiative 1183). The Liquor Store Owners brought five causes of action against the state: (1) unconstitutional impairment of contracts; (2) violation of RCW 66.24.620(6)(b); (3) violation of Section 303 of Initiative 1183; (4) breach of contract; and (5) inverse condemnation. Appellants sought

partial summary judgment on the issue of liability, leaving damages for a later time. The State sought to dismiss all claims. Notably, the State did not present any evidence that “*operating and asset sales revenues*” were applied to averting harm or that the State took “*into account present value of issuance of a spirits license to the holder of such interest.*”

B. Trial Court Decision.

On November 22, 2013, the Thurston County Superior Court granted the State’s motion despite recognizing the statutory language suggested an intent for compensation to the Contract Liquor Store Owners. The court held that “[a]lthough there is some language that seems to suggest compensation for contract liquor store operators, it is not clear or direct enough to support a private cause of action.” Essentially, the Court held that the State could ignore the directive of the citizens of this State with impunity and without any way for the citizens to hold the State accountable. Holding that the Initiative does not support a private cause of action ignores the express language of the Initiative and renders the voters’ intent meaningless. The result of the ruling would also render 1183 unconstitutional on several grounds. Appellants appealed on December 5, 2013.

C. Court Of Appeals Decision.

The Court of Appeals affirmed the Trial Court decision by ignoring the language of RCW 66.24.620 and § 303 by finding that no private cause

of action should be implied. As a result, there is no way for the Contract Liquor Store Owners to enforce the rights given to them by the voters and no way to enforce the directives the Washington State Liquor Control Board ignored. Despite the Court of Appeals decision finding the Contract Liquor Store Owners were left without any remedy for the violation of RCW 66.24.620, it also found that 1183 was not an unconstitutional impairment of contract and that there was not an unconstitutional taking of the Contract Liquor Store Owners' property.

As discussed below, the Court of Appeals decision violated the separation of powers doctrine by concluding that no private cause of action was implied and interpreting 1183 to give the Liquor Control Board (the executive branch) the "*discretion*" to determine for itself whether it complied with the explicit requirements of RCW 66.24.620. The Court of Appeals' failure to properly interpret the plain language of 1183 and the facts surrounding it are inconsistent with the Washington State Constitution, conflicts with Washington law with regard to statutory interpretation, presents an issue of substantial public interest, and presents significant questions of law under the Constitution of the State of Washington. Accordingly, review should be accepted.

V. ARGUMENT

Review should be accepted if there is a significant question of law under the Constitution of the State of Washington; if the petition involves a substantial public interest that should be determined by the Supreme Court; or if the decision is in conflict with a decision of either the Supreme Court or another Court of Appeals. RAP 13.1(b). Here, each of these exist.

A. The Petition Involves An Issue Of Substantial Public Interest.

The improper interpretation circumvented the People's constitutional right to directly legislate. The Court of Appeals decision rendered the directive of where funds were to be spent and the protections provided specifically for the Contract Liquor Store Owners meaningless. There is significant public interest in having a decision that supports an agency ignoring the directive of the citizens of this State reviewed.

Rather than averting harm to Contract Liquor Store Owners, as expressly directed in Initiative 1183, the State caused severe financial hardships for the Appellant Contract Liquor Store Owners and the owners of the approximately 160 former contract liquor stores throughout the State that were directly harmed by the Initiative. The only relief available to the Contract Liquor Store Owners is through this action. It defies common sense the citizens would specifically provide the Contract Liquor Store

Owners the protections of the statute without intending any way to enforce those rights.

“It has long been recognized that a legislative enactment may be the foundation of a right of action.” McNeal v. Allen, 95 Wn.2d 265, 274, 621 P.2d 1285 (1980) (Brachtenbach, J., dissenting). Further, we can assume that the legislature is aware of the doctrine of implied statutory causes of action and also assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Without an implicit creation of a remedy, the statute is meaningless. McNeal, at 277, 621 P.2d 1285 (Brachtenbach, J., dissenting).

Bennett v. Hardy, 113 Wn.2d 912, 919-20 (1990).

In this case, the Court of Appeals ignored the intent of the statute that was found not only in the plain language of RCW 66.24.620, which showed an intent to protect the Contract Liquor Store Owners, but also § 303 and the comments when 1183 was considered. Infra. These all made it clear that the intent was to privatize liquor sales without impacting private businesses.

Implementing a compensatory remedy is consistent with the underlying purpose of 1183. The purpose of 1183 was to eliminate state government from the liquor business while simultaneously averting harm to Contract Liquor Stores who had contracted with the State. As a result, RCW 66.24.620(6)(a) and (b) were included to insure that these small business operations would not carry the burden of the legislation intended to affect only the State. This was done by ensuring a fund was created and available

to avert the financial impacts and harm such store owners were going to suffer by having their contracts terminated. The People included a section in 1183 providing that Contract Liquor Store Owners need not meet the Initiative's new 10,000 square foot retail space requirement. This too was a specific mandate to alleviate the financial impact of the initiative on existing store owners. RCW 66.24.630(2)(c). By providing this relief, the Initiative recognized that giving space concessions or other such administrative assistance to the Contract Liquor Store Owners was necessary. However, it did not stop there. RCW 66.24.620(6)(a) and (b) were enacted to create an "Alleviate Harm Fund." The legislation as a whole confirms that a private cause of action was contemplated and intended by the People as part of the entire statute, to allow store owners to sue the State if they believed that harm aversion was ignored or unreasonable.

Whether citizens of this State should be entitled to have access to the Courts to determine whether a government agency complied with the obligations required by the legislature is an issue of substantial public interest that should be reviewed. As a result, review is appropriate.

B. The Court Of Appeals Decision Raises Significant Questions Of Law Under The Washington Constitution.

When drafting the Washington Constitution, the first power the People reserved for themselves was "*the power to propose bills, laws, and to*

enact or reject the same at the polls, independent of the legislature....”

Washington Cons. Art. 2, sec. 1. The initiative power “*is self-executing, and the legislature’s authority to affect the initiative process is limited to facilitating its operation.*” Community Care Coalition of Washington v. Reed, 165 Wn.2d 606, 612 (2009). When it comes to initiatives, the “*court’s aim is to determine the collective intent of the people who enacted the measure.*” McGowan v. State, 148 Wn.2d 278, 288 (2002) (citing Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 205 (2000)). Doing so requires a court to read initiatives “*as they are written and not as [the court] would like them to be written.*” Brown v. State, 155 Wn.2d 254, 267 (2005). Indeed, courts are to read initiatives “*in [their] entirety, not piecemeal, and interpret the various provisions of [initiatives] in light of one another.*” McGowan, 148 Wn.2d at 288 (quoting W. Petroleum Imps., Inc. v. Friedt, 127 Wn.2d 420, 428 (1995)). The court’s interpretation should “*focus[] on the language as the average well informed voter would understand it.*” Id.

In this case, the Court of Appeals not only ignored the constitutional issues caused by its determination that the Contract Liquor Store Owners lacked any right to bring a private cause of action to enforce the statute enacted to protect them, but it also created an additional constitutional issue by interpreting the Initiative to deprive the judicial branch of oversight. It

held the Initiative provided the executive branch the sole discretion to decide whether the executive branch had complied with the statute.¹ Thus, the opinion raises significant questions of law under the Washington State Constitution.

1. The Court Of Appeals Decision Violates The Separation Of Powers Doctrine.

This is a constitutional case. What it does involve is one of the cardinal and fundamental principles of the American constitutional system, the separation of powers doctrine.

Washington State Bar Ass'n v. State, 125 Wn.2d 901, 903, 890 P.2d 1047, 1048 (1995). “*Our constitution does not contain a formal separation of powers clause.*” Brown v. Owen, 165 Wn.2d 706, 718, 206 P.3d 310 (2009). “*Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.*” Id. (quoting Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

The doctrine “does not depend on the branches of government being hermetically sealed off from one another,” but ensures “that the fundamental functions of each branch remain inviolate.” Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009) (quoting Carrick, 125 Wn.2d at 135, 882 P.2d 173). If “*the activity of one branch threatens the independence or integrity or invades the prerogatives of another,*” it violates the separation of powers. Fircrest, 158 Wn.2d at 394, 143 P.3d

¹ Notably, there was no rulemaking authority provided in 1183 to support such a conclusion.

776 (internal quotation marks omitted) (quoting *Moreno*, 147 Wn.2d at 505–06, 58 P.3d 265).

Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 980, 216 P.3d 374, 377 (2009).

In this case, the Court of Appeals found that no private cause of action should be implied to allow enforcement of RCW 66.24.620, because “[t]he use of the broad term ‘measure’ indicates that the legislature intended to allow the Department to exercise its discretion to determine what measures would be just and reasonable.” The Court of Appeals interpreted the statute to unilaterally prevent review by the judiciary with regard to whether the executive branch complied with the requirements of the Initiative. The Court of Appeals interpreted it to eliminate the judiciary’s role and in a way that granted the executive branch powers not contained within the statute. Indeed, the statute does not provide any rule making authority to the Washington State Liquor Control Board to “determine what measures would be just and reasonable.” The Court of Appeals took the genuine issue of material fact for trial - whether the Liquor Control Board averted harm and weighed the facts to determine no private cause of action should be implied. See **Appendix A**, footnote 5. Then, it incorrectly ruled that the Liquor Control Board could “determine what measure would be just and reasonable.” As a result, the Court of Appeals took away the power of

the judiciary and ruled the Liquor Control Board could self-regulate. There simply was no such authority provided by 1183. The citizens of the State did not put the fox in charge of the hen house. Thus, the Court of Appeals decision violates the separation of powers doctrine and should be reviewed.

2. I-1183 Made Payment To Prevent Harm A Condition Of The Termination Of The Contracts.

The Court of Appeals failed to recognize the constitutional impact of its decision that there is no private cause of action to enforce the directives of RCW 66.24.620. The Court of Appeals interpreted RCW 66.24.620 to be optional without any enforcement mechanism. Essentially, the Court of Appeals rendered the directives of the citizens meaningless. As a result, genuine issues of material fact existed with regard to Plaintiffs' remaining constitutional claims.

The Court of Appeals read the underlying contracts at issue in a vacuum and ignored material facts. The facts surrounding I-1183 should have been considered. The State did not perform under the contracts because of I-1183. A crucial fact in that regard is that I-1183 specifically contained the condition that the revenues were to be applied to prevent harm to the Contract Liquor Store Owners. The State admitted that it did not "*apply revenues.*" The statute had built into it a mechanism and directive to pay the Contract Liquor Store Owners for the damages they would suffer by

having their contracts ripped out from under them. This made 1183 constitutional and prevented an unconstitutional taking and/or impairment of contract. However, the Court of Appeals rendered this directive meaningless. As a result, genuine issues of material fact remain with regard to whether the Washington Constitution was violated.

The contracts at issue were for a 5-year term. When I-1183 took effect on December 8, 2011, by law, the contracts were terminated effective May 31, 2012. As a result, the breach occurred on December 8, 2011, and everyone understood that the State would not be performing the contract. See CKP, Inc. v. GRS Const. Co., 63 Wn. App. 601, 620 (1991) (An anticipatory breach occurs when one of the parties expressly or impliedly repudiates the contract prior to the time for performance). Consequently, there was no agreement to “*mutually accelerate the termination date*” nor was there a “*mutual amendment*” to the contracts for any valid consideration. Indeed, the Court of Appeals points to actions the State had to take under I-1183 to transition and claims these benefitted these small businesses that had just had their contracts ripped out from under them. The fact is, these contracts died the day the State of Washington passed I-1183. Unfortunately for the Contract Liquor Store Owners, the State refused to provide payment for the harm suffered as it was directed to do by the citizens and 1183.

a. Without The Payments Required By RCW 66.24.620, I-1183 Is An Unconstitutional Impairment Of Contract.

The Court of Appeals' interpretation results in either an impairment of the contracts at issue or an unconstitutional taking of those contracts. The contracts were terminated by I-1183 which required payment to prevent harm. The Court of Appeals read that out of the statute. As a result, the elements for impairment of contract are met.

Unlike Fedway², the legislation that triggered the contract termination required payment. Since the Court of Appeals essentially redlined the statute, the termination did not occur based on the conditions required by 1183, causing an unconstitutional impairment of contracts. The contracts only ended because of I-1183. There is no question that I-1183 impaired the existing contracts. Plaintiffs' prayer for relief included a request for equitable relief which would include addressing this unconstitutional impairment.

b. A Taking Occurred Without Payment Of Just Compensation.

Likewise, the Court of Appeals created the same issue with regard to an unconstitutional taking. The contracts at issue were not terminable at-will. As a result, they constituted a protected property interest. I-1183 required payment of compensation for the harm arising from the taking of

² Cited by the Court of Appeals.

these contracts. The evidence was that the State breached that provision and took the contracts without that payment. As a result, I-1183 was for a public purpose, and it is unconstitutional to allow them to be taken without the payment of just compensation. The only reason there was a termination was because 1183 included a provision for payment to the Contract Liquor Store Owners. The Court of Appeals read that requirement out of the statute. As private citizens, the Contract Liquor Store Owners should not have to carry the burden or the expense of 1183.

When drafting Initiative 1183, the citizens of Washington included specific provisions to account for the harm that would be suffered by Contract Liquor Store Owners when the legislation was enacted. See RCW 66.24.620(6)(b). The statute specifically created a source of funds to do so, a specific protected class, and required the State to take into account the existing contracts and the present value of the retail license held by contract. Id.

The Initiative specifically identified the People's intent to provide payment to the affected Liquor Store Owners. In § 303 of 1183, the voters underscored the intent that the Liquor Store Owners be compensated from the operating and asset sale revenues by requiring:

*[t]he department of revenue [to] develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and **to provide a means***

for reasonable compensation for claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.

The State failed to develop rules and procedures to address unconstitutional impairment of contract claims arising under 1183. The State also failed to provide “*a means for reasonable compensation of claims it finds valid....*” The State simply refused to provide any compensation to Liquor Store Owners or create any type of claims process to do so.

The Court of Appeals entirely ignored the voters’ intent in enacting 1183 and refused to enforce the statute. The initiative process precludes this type of selective incorporation of initiative measures. The People intended to avert harm to Contract Liquor Store Owners caused by Initiative 1183 through compensation and a claims process. Neither of these were facilitated. Accordingly, the People’s constitutional right to directly legislate was impeded, and this Court should grant review to address the constitutional issues.

C. The Court Of Appeals Deprived The Contract Liquor Store Owners Of The Right To Seek Recovery Of The Harm Suffered As Directed By The Citizens In 1183.

The intent to create a private cause of action and protect the Contract Liquor Store Owners is clear from the language of the statute and the history of 1183. When Initiative 1183 was introduced in the State Senate, it was acknowledged that “[c]ontract stores have ancillary businesses that cannot

stand alone and support our local communities.” Senate Bill Report, SB 6204 (January 18, 2010). The Senate Report estimated that passing the Initiative would ultimately lead to *“the loss of nearly 800 family wage jobs”* as contract liquor stores would be unable to compete with bigger businesses for liquor sales. Id. The Senate Committee anticipated that privatizing liquor sales would cause at least *“155 small businesses to be shutdown, without benefits to the employees”* and that the Initiative would be *“the most brutal and unfair to the contract stores.”* Id.

Recognizing that these types of results were unavoidable if 1183 passed, the People intended to avert harm caused to small businesses. The State brazenly refused to follow the directive to spend funds to avert harm as required by the voters and the Court of Appeals failed to enforce the voters’ intent and legislation. The Initiative will continue to have devastating effects without any relief or recourse available to those most affected.

Appellants all relied on the representations of the State and the terms of the liquor contracts they entered into when making business decisions. For example, the Farrers made the decision to sell their home and invest their entire retirement portfolio into a business based on the contract terms they entered into with the State. Rather than profiting from the endeavor, 1183 caused the Farrers to sell their business at a substantial loss. Appellant Carr was unable fund the cost of inventory in his privatized store due to the

revenue lost since his contract with the State to sell liquor was terminated, forcing him to use his retirement to fund the cost of inventory.

Appellant Coffman's store also experienced a drastic decline in sales. Due to 1183 and the State's denial of compensation, Coffman's business was no longer viable and closed in May 2013. The loss of these business owners' investments and the return upon them are only a portion of the unaddressed harm suffered by the Liquor Store Owners as a result of 1183.

While the Contract Liquor Store Owners suffered and continue to suffer irreparable harm due to the Initiative, the State realized approximately \$31,000,000 in revenue from the auctioning off of the 167 state-run liquor stores, and it was estimated that the State would realize another \$36,400,000 from the sale of the liquor distribution center. Despite realizing more than \$66,000,000 from its operating and asset sale revenues, the Court of Appeals decision claimed the State had discretion whether to apply those revenues to avert the harms suffered.

The devastating impact 1183 could have on Appellants Liquor Store Owners was expected when 1183 was drafted. The People did not intend for small businesses to bear the brunt of the harm caused when the State terminated the liquor contracts. As long as the State's failure to avert harm as directed by the statute is supported by the Court of Appeals' improper

interpretation of the Initiative, the fate of small businesses such as the Liquor Store Owners will hang in the balance.

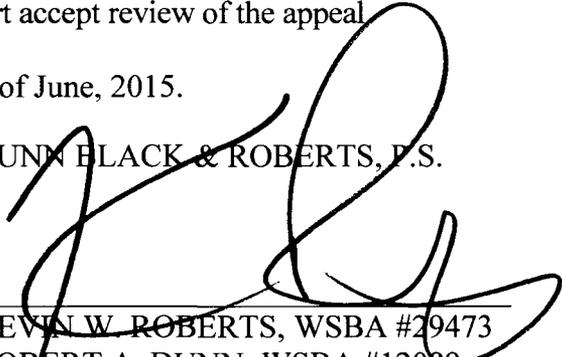
By finding no private cause of action, the Court of Appeals decision gutted a critical part of 1183. If there is no private cause of action, the State would be allowed to ignore the directive of the citizens with impunity. Moreover, the failure to recognize a private cause of action permits the State to effect an unconstitutional taking of the Liquor Store Owners' contract rights. The determination of whether or not 1183 allows for a private cause of action therefore determines its constitutionality, which is a significant issue of law under the Constitution that should be reviewed.

VI. CONCLUSION

For the reasons set forth above, the Contract Liquor Store Owners respectfully request that the Court accept review of the appeal

DATED this 30th day of June, 2015.

DUNN BLACK & ROBERTS, P.S.



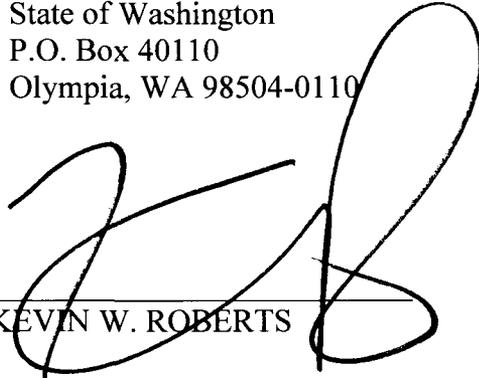
KEVIN W. ROBERTS, WSBA #29473
ROBERT A. DUNN, WSBA #12089
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of June, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

<input type="checkbox"/>	HAND DELIVERY	Charles Zalesky
<input checked="" type="checkbox"/>	U.S. MAIL	Kelly Owings
<input type="checkbox"/>	OVERNIGHT MAIL	Assistant Attorney Generals
<input type="checkbox"/>	FAX TRANSMISSION	State of Washington
<input checked="" type="checkbox"/>	EMAIL	P.O. Box 40123
		Olympia, WA 98504

<input type="checkbox"/>	HAND DELIVERY	Frona Woods
<input checked="" type="checkbox"/>	U.S. MAIL	Assistant Attorney General
<input type="checkbox"/>	OVERNIGHT MAIL	State of Washington
<input type="checkbox"/>	FAX TRANSMISSION	P.O. Box 40110
<input checked="" type="checkbox"/>	EMAIL	Olympia, WA 98504-0110



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION II

BY _____
DEPUTY

No. 46590-6-II

TILLMAN CARR individually; CAL FARRER and JENELL FARRER, a marital community; KUO-YING FRENZEL, individually; JULIE GANAS, individually; WILLIAM B. MINAGLIA, individually; DARRYL and ROSE HUDSON, a marital community; KEITH PETERSON, individually; KATHRYN DEBERNARDI, individually; KATHERINE MEADE, individually; ROB and SHARA COFFMAN, a marital community; and PAMELA SMITH, individually,

Appellants,

v.

THE STATE OF WASHINGTON by and through the WASHINGTON STATE LIQUOR CONTROL BOARD, a board of the State of Washington; and the WASHINGTON STATE DEPARTMENT OF REVENUE, a department of the State of Washington,

Respondents.

PUBLISHED OPINION

LEE, J. — A group of former contract liquor store owners (collectively “the Owners”) appeal the superior court’s order dismissing their complaint against the Washington State Liquor Control Board (Board) and the Washington State Department of Revenue (Department). After Initiative 1183 (I-1183) was adopted, the sale and distribution of liquor in Washington was privatized. As a result, the Board terminated the contracts it had with current liquor store owners. The Owners filed a complaint against the Board and the Department based on the termination of their contracts and alleged violations of RCW 66.24.620 and section 303 of I-1183.

APPENDIX A

Under our recent decision in *Fedway Marketplace West, LLC v. State*, 183 Wn. App. 860, 336 P.3d 615 (2014), *review denied*, 182 Wn.2d 1013 (2015), we hold that the superior court properly dismissed the Owners' contract claims. And, the superior court properly determined that there were no private causes of action created under RCW 66.24.620 or section 303 of I-1183. Accordingly, we affirm the superior court's order granting summary judgment and dismissing the Owners' complaint.

FACTS

Tillman Carr, Cal and Jenell Farrer, Kuo-Ying Frenzel, Julie Ganas, William Minaglia, Darryl and Rose Hudson, Keith Peterson, Kathryn Debernardi, Katherine Meade, Rob and Shara Coffman, and Pamela Smith ("the Owners") all owned contract liquor stores. The Owners entered into new, identical, five-year contracts with the Board, effective June 30, 2011. Under the contracts, the Owners sold liquor on behalf of the Board in exchange for a base rate compensation and commission based on monthly net sales. The contracts contained the following provisions governing termination of the contract:

6.5 TERMINATION BY MUTUAL AGREEMENT

The [Board] and the Contractor may terminate this Contract in whole or in part, at any time, by mutual agreement.

.....

6.9 TERMINATION FOR WITHDRAWAL OF AUTHORITY

In the event that the [Board's] authority to perform any of its duties relating to this Contract is withdrawn, reduced, or limited in any way after the commencement of this Contract and prior to normal completion, the [Board] may terminate this Contract in whole or in part, by seven (7) calendar day's written notice to Contractor. Contractor shall have no right of appeal when this clause is exercised by the [Board].

Clerk's Papers (CP) at 148-49.

In November 2011, the people of Washington State passed I-1183, an initiative privatizing the sale of liquor. I-1183 required the Board to close all state liquor stores by June 1, 2012. LAWS OF 2012, ch. 2 § 102 (codified at RCW 66.24.620(2)). To comply with I-1183, the Board offered the Owners a contract amendment that changed the contract termination date to May 31, 2012. All of the Owners, except Carr and Farrer, signed the contract amendment. The contract amendment also allowed the Owners to sell liquor to licensees (primarily bars and restaurants) at the Board's discounted rate and allowed the Owners to solicit licensee accounts prior to June 1, 2012. And, the contract amendment allowed the Owners to make deliveries directly to licensees.

In February 2012, the Board presented another contract amendment that allowed the Owners to purchase their current liquor inventory from the Board. All the Owners signed the second contract amendment.

As a result of I-1183, many owners lost licensee accounts because they were required to pay a higher percentage of their sales to the State. Additionally, overall sales dropped considerably, and some owners closed or sold their stores.

On November 9, 2012, the Owners filed a complaint against the Board and the Department. The Owners alleged that (1) the Board breached its contract with the Owners, (2) I-1183 unconstitutionally interfered with the owner's contracts with the Board, (3) the termination of their contracts was an unconstitutional taking, (4) the Board failed to "avert harm" from the privatization of liquor as required by RCW 66.24.620(2),¹ and (5) the Department failed to comply with the

¹ RCW 66.24.620(6)(b) states:

The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to

requirement under section 303 of I-1183 to create rules addressing claims that I-1183 unconstitutionally impaired contracts.²

The Department and the Board moved for summary judgment. The Owners filed a cross motion for partial summary judgment on all issues except damages. The superior court granted the Department's and the Board's motion for summary judgment, and dismissed all of the Owners' claims. The Owners appeal.³

ANALYSIS

The Owners argue that the superior court improperly granted the Department's and the Board's motion for summary judgment. We review the superior court's ruling on a motion for summary judgment de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517; 210 P.3d 318 (2009). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one on

avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

² Laws of 2012, ch. 3, section 303 states:

The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.

³ The Owners originally appealed directly to our Supreme Court. Our Supreme Court denied direct review and transferred the Owners' appeal for consideration by this court.

which the outcome of the litigation 'depends' in whole or in part. *Dania, Inc. v. Skanska USA Bldg. Inc.*, 185 Wn. App. 359, 365, 340 P.3d 984 (2014). "[W]e consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Here, there was no genuine issue of material fact.

A. CONTRACT CLAIMS

The Owners make three claims related specifically to the termination of their contracts with the Board. First, the Owners argue that the Board breached its contracts by terminating the contracts prior to the expiration of the five-year term. Second, the Owners argue that I-1183 unconstitutionally impaired the Board's contracts with the Owners. Third, the Owners argue that the early termination of their contracts is an unconstitutional taking.

Recently, we addressed nearly identical arguments in *Fedway Marketplace*, 183 Wn. App. 860. In *Fedway Marketplace*, landlords sued the Board for breach of its leases with the landlords of its state-run liquor stores. *Id.* at 865-67. After I-1183 passed, the Board terminated its leases with the landlords based on a lease termination clause that terminated the leases if the Board lost the authority to continue to sell liquor. *Id.* at 866. The landlords claimed that (1) the Board breached the terms of the lease, (2) I-1183 unconstitutionally impaired the Board's contracts, and (3) the termination of the leases constituted an unconstitutional taking. *Id.* at 866-67. We affirmed the trial court's order dismissing the landlords' claims. *Id.* at 868, 873, 874. Our holdings in *Fedway Marketplace* control the owner's contract claims here.

1. Breach of Contract Claim

In *Fedway Marketplace*, the leases contained a specific termination clause, providing that each lease would terminate upon the enactment of any law that prevented either party from carrying out the lease terms. *Id.* at 868. We held that the termination clause in each lease was triggered when I-1183 passed and the Board was no longer permitted to sell liquor. *Id.* at 869-70. Therefore, the Board complied with the express terms of each lease and did not breach the contract. *Id.* at 870. Because the Board complied with the express terms of the leases, the Board did not breach the terms of each lease between the landlords and the Board. *Id.* The same situation exists here.

The contracts between the Board and the Owners contain an express provision stating that the contract can be terminated by the Board if “the [Board’s] authority to perform any of its duties relating to this Contract is withdrawn, reduced, or limited in any way.” CP at 149. And, the contract contains a provision allowing the contract to terminate based on mutual agreement. Here, many of the Owners agreed to amend the contract and establish a termination date of May 31, 2012. Therefore, those contracts were terminated under the express provision allowing termination by mutual agreement. The remaining owners’ contracts were terminated by the provision allowing the Board to terminate the contract if its authority to sell liquor was withdrawn. Therefore, the contracts were terminated under the express, unambiguous termination provisions contained in the contracts.

As in *Fedway Marketplace*, the Board complied with the express terms of the contract. Therefore, under *Fedway Marketplace*, the Board did not breach its contracts with the Owners. 183 Wn. App. at 870.

2. Unconstitutional Impairment of Contracts

Like the Owners here, the landlords in *Fedway Marketplace* argued that I-1183 unconstitutionally impaired the State's existing contract obligations. *Id.* at 864. Article 1, section 23 of the Washington Constitution and article I, section 10 of the United States Constitution prohibit any legislative action from impairing an existing contractual obligation. In *Fedway Marketplace*, we determined that the landlords' contracts were not impaired because, based on the express provision terminating the lease upon a change in the law, "the parties' rights and expectations remained the same as before the new law was passed." *Id.* at 875.

Here, the contracts between the Owners and the Board contained express provisions addressing the effect of a change in the law. I-1183 triggered the termination provision in the contracts, but it did not change the terms of the contracts. Therefore, like the landlords in *Fedway Marketplace*, the Owners' rights and expectations under their contracts with the Board did not change when I-1183 was passed. *Id.* at 875. Consequently, I-1183 did not unconstitutionally impair the Board's contract with the Owners.

3. Unconstitutional Taking

Like the Owners here, the landlords in *Fedway Marketplace* also argued that the Board's termination of their leases resulted in an unconstitutional taking. We held in *Fedway Marketplace* that the landlords had not shown a total taking because they retained their fundamental property rights, specifically the right to possess and dispose of their property, to exclude others, and make an economic use of the property. *Id.* at 877. Because the landlords could not show a total taking, they had to show that I-1183 "goes beyond preventing real harm to the public[,] which is directly caused by the prohibited use of the property and instead imposes on those regulated the

No. 46590-6-II

requirement of providing an affirmative public benefit.” *Guimont v. Clarke*, 121 Wn.2d 586, 603, 854 P.2d 1 (1993), *cert. denied*, 510 U.S. 1176 (1994). We determined that I-1183 does not go beyond preventing public harm, and that its purpose is at “the heart of the State’s police power.” *Fedway Marketplace*, 183 Wn. App. at 878. Therefore, the Board’s termination of the leases did not constitute a taking. *Id.*

Here, the Owners appear to argue that the “property” that was taken was the potential future earnings under their contracts. Their claim fails.

Like in *Fedway*, there is not a total taking because the Owners retained their fundamental rights to possess and dispose of their property, exclude others from their property, and make economic use of their property. Because there was not a total taking, the Owners must show that the regulation “goes beyond preventing real harm to the public[,] which is directly caused by the prohibited use of the property[,] and instead imposes on those regulated the requirement of providing an affirmative public benefit.” *Guimont*, 121 Wn.2d at 603. In *Fedway Marketplace*, we determined that the purpose of I-1183 was directed at preventing a public harm—the “proliferation of private liquor stores.” *Fedway Marketplace*, 183 Wn. App. at 878. Because the Owners cannot demonstrate a total taking, and I-1183 does not go “beyond preventing real harm,” the Board terminating the Owners’ contracts was not an unconstitutional taking. *Guimont*, 121 Wn.2d at 603; *Fedway Marketplace*, 183 Wn. App. at 877-78.

Thus, the enactment of I-1183 triggered an existing termination provision in the Owners’ contract, and the contracts were terminated under their express terms; the Board did not breach the contracts. Because the contracts were terminated under their express terms, I-1183 did not unconstitutionally impair the contracts. And, I-1183 did not result in an unconstitutional taking.

Therefore, the superior court did not err in granting the motion for summary judgment on the Owners' contract claims.

B. PRIVATE CAUSE OF ACTION UNDER I-1183

The Owners also argue that they are entitled to monetary damages based on the Board's alleged violation of RCW 66.24.620(6)(b)⁴ and the Department's alleged violation of Laws of 2012, chapter 3, section 303. To be entitled to monetary damages under either provision of I-1183, the Owners must show that the I-1183 provisions create a private cause of action. Here, neither provision of I-1183 creates a private cause of action that entitles the Owners to relief.

When a statute does not explicitly create a private cause of action, "a cause of action may be implied from a statutory provision when the legislature creates a right or obligation without a corresponding remedy." *Schatz v. Dep't of Soc. & Health Servs.*, 178 Wn. App. 16, 29, 314 P.3d 406 (2013) (quoting *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 703, 222 P.3d 785 (2009)). We consider three factors to determine if a private cause of action is implied in a statutory provision: "(1) whether the plaintiffs are within the class of persons for whose benefit the statute was enacted, (2) whether legislative intent supports, creating or denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose of the legislation." *Id.* at 30.

1. RCW 66.24.620(6)(b): Aversion of Harm

The Owners claim that RCW 66.24.620(6)(b) creates a private cause of action that entitles them to monetary damages for the losses suffered as a result of the privatization of liquor sales. RCW 66.24.620(6)(b) states:

⁴ LAWS OF 2012, ch. 2, § 102(6)(b).

The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

Here, the Owners are nonemployee liquor store owners, as referenced in the statutory provision, and so are within the class for whose benefit the statute was created. However, creating a private cause of action is not supported by either the legislative intent or the underlying purpose of the legislation. Therefore, RCW 66.24.620(6)(b) does not entitle the Owners to sue the Department for monetary damages.

When determining whether legislative intent supports creating a private cause of action we employ principles of statutory construction and interpretation. See *McCandlish Elec., Inc. v. Will Constr. Co.*, 107 Wn. App. 85, 94-95, 25 P.3d 1057, review denied, 145 Wn.2d 1012 (2001). Statutory interpretation is a question of law we review de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To determine legislative intent, we begin by looking at the plain language of the statute. *Id.* When looking at the plain language of the statute, we must consider “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)) (internal quotation marks omitted). Only “if the statute is ambiguous, [may] ‘this court . . . look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.’” *Id.* at 527 (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

As an initial matter, there is no explicit legislative intent to create a private cause of action under RCW 66.24.620(6)(b). Instead, the Owners rely on the terms “applying operating and asset sale revenues of the board” and “avert harm” to argue that the provision creates an implied private cause of action for monetary damages based on economic loss resulting from privatization. However, looking at the provision as a whole and within the context of the entire legislation, a plain reading of the provision does not support the conclusion that the legislature intended to create a private cause of action for monetary damages under RCW 66.24.620(6)(b).

The plain language of RCW 66.24.620(6)(b) requires the Department to take “measures” to avert harm. RCW 66.24.620(6)(b) does not use the term “compensation”; instead, RCW 66.24.620(6)(b) uses the much broader term “measures.” “Measures,” as used in RCW 66.24.620(6)(b), is not the equivalent of “compensation.” Compensation would be a very specific measure that the Department could take to avert harm. The use of the broad term “measure” indicates that the legislature intended to allow the Department to exercise its discretion to determine what measures would be just and reasonable. The term measure can encompass all of the non-monetary actions taken by the Department during the transition to privatization.⁵

Further, “avert harm” is not the equivalent of “compensate for economic damages” as the Owners suggest. “Avert” means to anticipate and ward off. WEBSTER’S THIRD INTERNATIONAL DICTIONARY 151 (1969). The term avert is, by definition, anticipatory and proactive. It is not reactive. By requiring the Board to take “just and reasonable measures to avert harm” the statute

⁵ For example, the Department allowed the Owners to purchase their existing inventory of state-owned liquor at a reduced price. The Department also allowed the Owners to solicit licensee accounts prior to the effective date of privatization and deliver liquor to licensee accounts. And, the Department allowed the Owners to begin storing liquor at off-site locations.

No. 46590-6-II

contemplates that the Board take into consideration the possible effects of privatization and take action to help mitigate the possible resulting harm. RCW 66.24.620(6)(b). It does not contemplate waiting until after the harm has been suffered and then compensating the party for the resulting harm. And, the proactive nature of the provision implies that the legislature did not intend for the provision to allow for full compensation for any harm suffered. Therefore, a plain reading of the language of the statute does not support the conclusion that the legislature intended RCW 66.24.620(6)(b) to create a private cause of action.

Additionally, creating a private cause of action is not consistent with the underlying purpose of the statute. The people were very specific regarding their intent in enacting I-1183:

The people of the state of Washington, in enacting this initiative measure, find that the state government monopoly on liquor distribution and liquor stores in Washington and the state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine are outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers. Therefore, the people wish to privatize and modernize both wholesale distribution and retail sales of liquor and remove outdated restrictions on the wholesale distribution of wine by enacting this initiative.

LAWS OF 2012, ch. 2, § 101(1). The people listed 15 things the initiative was intended to do. Among other things, the initiative specifically noted that one purpose of the initiative was to “provide increased funding for state and local government services.” LAWS OF 2012, ch. 2, § 101(2)(a). And, the people were clear that the purpose of privatizing liquor distribution was to allow “the state to focus on the more appropriate government role of enforcing liquor laws and protecting public health and safety concerning all alcoholic beverages.” LAWS OF 2012, ch. 2, § 101(2)(b). Nothing contained in the stated purpose of privatizing liquor distribution indicates that the underlying purpose of the initiative is consistent with using proceeds from the transition from

a state-run system to a privatized system to compensate former contract liquor store owners for all economic damages suffered from the enactment of I-1183.

Creating a private cause of action from RCW 66.24.620(6)(b) would be contrary to the legislative intent and the underlying purpose of I-1183. Therefore, the Owners do not have a cause of action for monetary damages as a result of the Board's alleged violation of RCW 66.24.620(6)(b). The superior court properly granted the Board's motion for summary judgment on the Owners' claim that they are entitled to compensation under RCW 66.24.620(6)(b).

2. LAWS OF 2012, ch. 3, § 303: Department of Revenue Rulemaking

The Owners also assert that they are entitled to monetary damages for the Department's failure to engage in rulemaking under Laws of 2012, chapter 3, section 303. The text of Laws of 2012, chapter 3, section 303 states:

The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.

However, "[a]n administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power." *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974). After the people enacted I-1183, the Department recognized this limitation on its authority and issued a special notice stating, in relevant part:

Because the Department lacks the authority to carry out the intent and purpose of I-1183 § 303, the Department will not develop rules or procedures concerning issues of constitutional impairment. The Department's instruction in all cases of alleged constitutional impairment of contract related to I-1183 is for the claimant to file its claim directly with a court of competent jurisdiction.

CP at 112. By issuing the special notice, the Department took the only step that was within its authority to take. The Department cannot be expected to engage in rule making on topics that are outside of the scope of the Department's authority.

Moreover, there is no precedent for establishing a private cause of action for an agency's failure to engage in rule-making. Chapter 35.04 RCW provides the appropriate mechanism for challenging an agency's action or failure to act. The remedies available are expressly limited by RCW 34.05.574. "The court may award damages, compensation, or ancillary relief only to the extent *expressly authorized* by another provision of law." RCW 34.05.574(3) (emphasis added). Laws of 2012, chapter 3, section 303 does not provide for damages or compensation based on the Department's failure to engage in rule making.

The Owners also seem to argue that Laws of 2012, chapter 3, section 303 creates a private cause of action requiring the Department to pay them compensation for the termination of their contracts. However, to the extent that Laws of 2012, chapter 3, section 303 creates a claim for compensation, it is limited to a claim that I-1183 unconstitutionally impairs contracts. For the reasons explained above, I-1183 did not unconstitutionally impair the Owners' contracts with the Department. Therefore, they would not be entitled to compensation under Laws of 2012, chapter 3, section 303.

The Owners do not have a private cause of action for monetary damages under either RCW 66.24.620(6)(b) or Laws of 2012, chapter 3, section 303. Therefore, the superior court properly granted the Department's and the Board's motions for summary judgment based on the alleged violations of specific provisions of I-1183.

No. 46590-6-II

We affirm.



Lee, J.

We concur:



Johanson, C.



Maxa, J.