THE HONORABLE STEPHEN M. WARNING
MARCH 2, 2012
9:00 A.M.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

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

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant

and

JOHN McKAY; BRUCE BECKETT; COSTCO WHOLESALE CORPORATION; THE YES ON 1183 COALITION; MACKAY RESTAURANT GROUP, NORTHWEST GROCERY ASSOCIATION, SAFEWAY, INC., THE KROGER COMPANY, and FAMILY WINERIES of WASHINGTON,

Intervenor-Defendants

No. 11-2-01465-8

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The people have decided overwhelmingly to change state liquor regulation. Intervenor-Defendants agree with the State that Initiative No. 1183 ("I-1183") easily satisfies the requirements of Article II, Section 19, of the Washington State constitution on its face. The Initiative title includes only a single general subject, liquor. No second subject is hidden in the text. The Attorney General crafted the title of I-1183 under the supervision of the Superior Court: "Initiative Measure No. 1183 concerns liquor: beer, wine, and spirits (hard liquor)." In addition, the Attorney General specified in the title the main elements addressed within the general subject:

> This measure would close state liquor stores and sell their assets; license private parties to sell and distribute spirits; set license fees based on sales; regulate licensees; and change regulation of wine distribution.

The Court need address no facts to uphold on its face what the people enacted through I-1183, now law. Each challenged provision of the initiative is, on its face, plainly within the general subject and, although not legally required, relates to the main elements identified by the Attorney General and to other provisions. The Initiative does not "hide" any other subjects in its body to deceive voters. Plaintiffs do not contend, nor could they, that there is anything in the Initiative that is unrelated to liquor.

Going beyond the Initiative itself, Plaintiffs rely on factual allegations and innuendos, all disputed, to try to avoid the clear subject stated in the title and the plain language of the provisions in the text. Plaintiffs are incorrect that the history and operation of liquor regulation has made it impossible in fact for "liquor" to be a single subject and that the campaign for I-1183 engaged in "log-rolling" in fact even if not apparent from the face of the initiative. The facts, which if material must be explored at trial, show a history of

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sometimes addressing the liquor subject in a broad way and sometimes narrowly. The people were entitled to rely on that as they invested in the extensive and healthy debate over all material elements of I-1183. Plaintiffs are likewise wrong in claiming that a single retailer unilaterally dictated the drafting of the Initiative and uniquely and exclusively benefits from its terms. In fact, the voters' passage of I-1183 was the culmination of a long, involved, transparent, and widely accessible process of addressing the liquor-related concerns of voters and stakeholders.

II. BACKGROUND

A. Origin of Article II, Section 19

The origin of Article II, Section 19, makes clear that it addresses specific, extreme legislative practices and does not authorize Plaintiffs' "gotcha" word play and policy-driven parsing, much less outlaw compromise or broad legislation within a subject.

The subject rules contained in Article II, Section 19, are found in forty other state constitutions, and they all share a common ancestry. *See* Millard H. Rudd, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389 (1958) (Supplemental Declaration of Ulrike Connelly ("Suppl. Connelly Decl."), Ex. A). Prior to the Nineteenth Century, titles "were usually prepared by the clerk of the house in which the bill first passed, and attracted but little attention from the members." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 141 (1868) (Suppl. Connelly Decl., Ex. B). "[Titles] indicated the clerk's idea of the contents or purpose of the bills, rather than that of the house; and they therefore were justly regarded as furnishing very little insight into the legislative intention." *Id*.

Legislators sometimes abused such bland titles by inserting unrelated and unpopular subjects into a bill. The most notorious example was Georgia's Yazoo Act. Rudd, 42 Minn.

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L. Rev. at 391 & n.10. The Act provided for the bargain sale of public lands to legislators' cronies. The public was outraged that the legislature "smuggled" the provisions under "an innocent and deceptive title." *Id*. Georgia and other states quickly adopted requirements that the real subject be in the title.

The single-subject rule was added to the subject-in-title rule to combat "logrolling" and "riders." Logrolling occurs when minorities trade their support for unrelated proposals by consolidating them to create a majority that would not otherwise exist for either proposal. *Power, Inc. v. Huntley*, 39 Wn.2d 191, 199, 235 P.2d 173 (1951).[1] Riders "push[] legislation through by attaching it to other necessary or desirable legislation." *Brower v. State*, 137 Wn.2d 44, 69, 969 P.2d 42 (1998) (internal citation and quotation omitted). "'[T]here had crept into our system . . . a practice of engrafting upon measures of great public importance foreign matters for local or selfish purposes.'" *State ex rel. Wash. Toll Bridge Auth. v. Yelle,* 54 Wn.2d 545, 550, 342 P.2d 588 (1959) (quoting *Neuenschwander v. Wash. Suburban Sanitary Comm'n*, 187 Md. 67, 48 A.2d 593, 598-99 (1946)).

The subject rules first appeared in Washington in the Organic Act of March 2, 1853, essentially the territorial constitution. When Washington enacted its Constitution in 1889, the Organic Act's language was incorporated as Article II, Section 19, without debate. Roesnow ed., *Journal of the Washington State Constitutional Convention, 1889,* 534 (1962) ("every law shall embrace but one subject, and that shall be expressed in its title") (Suppl. Connelly Decl., Ex. C). The contemporaneous case law from Washington and those states is

[1] The term "logrolling" was first used by Congressman Davy Crockett in 1835, decrying blatant vote-trading. Suppl. Connelly Decl., Ex. D (Davy Crockett, *An Account of Col. Crockett's Tour to the North and Down East* 120 (1835) ("My people don't like me to log-roll in their business, and vote away their pre-emption rights to fellows in other states that never kindle a fire in their own land."). The public agreed. *See, e.g.*, Suppl. Connelly Decl., Ex. E (24 Niles' Weekly Reg. 110, col. 1 (June 7, 1823) (criticizing "'log-rolling'—that is, a buying and selling of votes").

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instructive of how the rules were intended to operate. *See e.g. Johnson v. Harrison*, 47 Minn. 575, 577, 50 N.W. 923, (1891) ("To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other.").

In 1887, Justice Turner of the Territorial Court of Washington, soon to be a delegate to the Washington constitutional convention, first used the Organic Act's subject rules to outlaw the territorial legislature's practice of amending the Code of 1881 with acts whose titles referred to the code section being amended. Justice Turner held that the legislature had to describe the subject of the act in its title to avoid frauds on the public like the Yazoo Act. *Harland v. Territory*, 3 Wash. Terr. 131, 136, 143-44 (1887).

Washington courts have followed Justice Turner, declaring that the purposes of the subject rules are "the prevention of logrolling, or pushing legislation through by attaching it to other necessary or desirable legislation, and general notice to members of the legislature and the public of what is contained in the proposed legislation." *Brower*, 137 Wn.2d at 69 (internal citation and quotation omitted); *accord Marston v. Humes,* 3 Wash. 267, 275, 28 P. 520 (1891) (legislation may contain "any number of subsubjects" without violating the single subject rule, as "any other rule would make legislation practically impossible").

B. History of Washington's Liquor Laws

Viewed in its historical context, it is not surprising that Washington citizens turned to the initiative to change the state's approach to controlling liquor, and I-1183 is neither novel nor unconstitutional in its method or execution. Indeed, I-1183's sponsors and supportive voters were entitled to rely on the broad variety of prior liquor legislation that raised no known concerns under Article II, Section 19.

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Washington has had a long and sometimes turbulent history with the laws regulating liquor. As social norms have evolved, the Legislature, and often the people directly, have frequently and sometimes dramatically altered the balance between access and abuse. This history of regulation has included all forms of liquor, often all in one bill; the public revenues that are generated by allowing access; and wide variations in abuse-control efforts, from prohibition to state stores to prescription sales by drugstores to restricting advertising to increasing prices and penalties.

The history starts not long after statehood and the population explosion following the arrival of the railroads. Saloons were viewed as "the most fiendish, corrupt, and hell-soaked institution that ever crawled out of the slime of the eternal pit." Norman H. Clark, *The Dry Years* 57 (1988).[2] Some Washingtonians sought to ban liquor. Finding the Legislature insufficiently responsive, the "drys" proposed and pushed through the initiative and referendum amendment to the Constitution. *Id*. at xi & 101-04. The "first such question on the ballot addressed the traffic in intoxicating liquors," *id*. at xi & 108, making Washington bone dry even before federal prohibition, Suppl. Connelly Decl. Ex. G (1914 General Election Voters Pamphlet, Initiative No. 3); Laws of 1915, ch. 2. The initiative's title referred to "intoxicating liquors," but its text included "whiskey, brandy, gin, rum, wine, ale, beer and any spirituous, vinous, fermented or malt liquor." *Id*. § 2.[3] The prohibition initiative contained 33 sections and ran over eight dense pages in the voter's pamphlet. Suppl. Connelly Decl., Ex. G. It prohibited intoxicating liquors "except in certain cases,"

[2] Excerpts of the book are included in the Supplemental Connelly Declaration, Ex. F.

[3] Indeed, the first prosecution to reach the Supreme Court under the prohibition initiative involved homemade wine, which the Court held was an "intoxicating liquor." *State v. Fabbri*, 98 Wash. 207, 207-08, 167 P. 133 (1917). Like the Washington initiative, the federal Volstead Act applied to spirits, beer, and wine (if over .5% alcohol). Pub. L. No. 66-66, 41 Stat. 305, § 1 (1919).

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explained only in the text; regulated those uses; provided enforcement mechanisms; and established punishments. *Id*.; *see The Dry Years* at 149.

Prohibition was, of course, a failure. Even before the end of federal prohibition, Washington voters once again used their initiative power, repealing state prohibition by a "landslide." Office of Financial Management ("OFM"), *The Desirability of Continuing Retail Liquor Sales by State Government* 9 (July 1983) (OFM Report)[4]; Suppl. Connelly Decl., Ex. H (1932 Voters Pamphlet, Initiative 61, "An Act relating to intoxicating liquors").

In January 1934, the Legislature followed the repeal with the Washington State Liquor Control Act, or "Steele Act." Laws of 1933, 1st Ex. Sess., ch. 62 ("Steele Act"); Suppl. Connelly Ex. K. The Steele Act both ended prohibition by allowing the sale of liquor (spirits, beer, and wine) and imposed a regulatory structure going forward to "legitimize drinking within the context of an anti-saloon state." *The Dry Years* at 242. The Act "imposed severe restraints on the energies of competition" through licensed sales of wine and beer and a state monopoly for spirits. *Id*. at 243.[5] The difference in regulatory strictness was based on the questionable assumption that spirits were more prone to abuse and that allowing easier access to beer and wine might reduce the use of spirits. Suppl. Connelly Decl. Ex. J (1933 Report of the State Advisory Liquor Control Commission at 3 ("true temperance is best promoted by making widely available intoxicating beverages of low alcoholic content such as beer and light wines")). In addition to those general steps, the Act included very specific restrictions on control of one another by any of the three typical links,

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[4] An excerpt of this report is included in the Supplemental Connelly Declaration, Ex. Y.

[5] State-owned businesses were preferred by the large number of Washington Communists. W.J. Rorabaugh, *The Origins of the Washington State Liquor Control Board*, Pacific Northwest Quarterly 159, 163 (Fall 2009) (few Americans drank wine, and it was "expensive and used little in Washington"). (Attached to the Supplemental Declaration of M. Subit in Support of Plaintiffs' Motion for Summary Judgment, Ex. A).

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or tiers, in the supply chain (producers, wholesalers, and retailers),[6] limits on advertising, and significant license fees and consumer costs. *Id*. at 77, 243. And in addition to repealing existing laws enshrining Prohibition, the newly created Liquor Control Board ("LCB") was endowed going forward with "vast and radical authority," continuing today, to promulgate regulations, issue licenses, and implement further restraints on all aspects of the liquor business. *Dry Years* at 243.

With the Depression in full swing, state and local governments prized the revenues generated by allowing access to liquor. Rorabaugh at 163. The Steele Act imposed (separately but within the same law) taxes, fees, and a markup on product sold by state stores and created the liquor revolving fund. Steele Act § 73. The Act allocated the net revenue between local governments and the State, and specified a portion for pension funds – all without restriction that the funds be used to deal with concerns specifically, or even generally, related to alcohol consumption. *Id*. § 78. The Legislature made liquor markup a major part of the state revenue system. *The Dry Years* at 244-45 ("That the LCB could produce such an attractive fraction of [total state revenue, approximately 17%] was a happy signal to the legislature; it increased the LCB profit markup" repeatedly over the years and occasionally shifted the revolving fund distribution ratio between state and local governments).[7]

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[6] Before Prohibition, brewers and distillers controlled many saloons through ownership or by extending them credit that they could not repay unless they engaged in heavy-handed sales techniques they claimed were dictated from above. *See* Rorabaugh at 159 & 164; OFM Report at 7.

[7] The revenue has remained significant to state and local governments. A feared reduction of state and local revenue was the primary factor in reversing Gov. Spellman's intent to privatize the state stores in the 1980s. *The Dry Years* at 274. It was a major factor in the campaigns against the related initiatives the year before I-1183, as discussed *infra* in Part II.C. *See* Suppl. Connelly Decl., Ex. O (collecting I-1100 and I-1105 campaign and media materials).

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The Steele Act was challenged on constitutional grounds including whether it was an amendment within two years of the repeal initiative and whether the fees and markup were "taxes." In upholding the Act, the Washington Supreme Court acknowledged that "the same subject-matter" extended from "prohibition of the sale of intoxicating liquor" to "regulation of the sale thereof." *Ajax v. Gregory*, 177 Wash. 465, 471-72, 32 P.2d 560 (1934). Over one dissent, the Court held that "all moneys from the license fees, permits, and operation of the state stores" were not "taxes" under the constitution and did not need to go "only into the state treasury," rather than the revolving fund. *Id*. at 473. These holdings remain the law.

While the Steele Act was viewed by most as a "happy compromise between prohibition and total repeal of any control," the compromise was neither perfect nor permanent. *The Dry Years* at 246. The changes have tended toward liberalization, as the Legislature and the people revised the liquor laws to respond to "significant social changes" that "demanded a reevaluation of public morality." *Id.* at 249.

In 1948, the people approved Initiative No. 171, the "liquor by the drink" initiative, which repealed the ban barring restaurants and clubs from serving hard liquor by the drink, (but allowing beer and wine). Suppl. Connelly Decl., Ex. I (1948 Voters Pamphlet); Laws of 1949, ch. 5. The title referred only to "intoxicating liquor," although the text specified "beer, wine and spirituous liquor." *Id*. § 1. The initiative created new fees, *id.* § 3, earmarked in part for medical research. The liquor revolving fund was modified, *id.* § 10, with a special set-aside of revenue for certain localities, *id.* § 11, without a requirement that it be dedicated to alcohol-related spending. Music and other entertainment were prohibited without local approval, *id.* § 7, and women were required to sit while drinking, *id.* § 2(e). LCB membership was revised. *Id.* §§ 8-9.

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The Supreme Court upheld Initiative No. 171 against numerous constitutional challenges in *Randles v. Liquor Control Bd.,* 33 Wn.2d 688, 206 P.2d 1209 (1949). Plaintiffs alleged that the ballot title was "defective" because it made no references to "taxes or discounts" that the initiative in fact implemented. 33 Wn.2d at 694. The Court responded: "A title with reference to the regulation and control of the sale of intoxicating liquors by the drink does not need to have mentioned therein the price the licensee must pay to the state for the liquor he is licensed to sell, nor how that price is made up or arrived at." *Id.* at 695.

In 1969, the Legislature passed the most lengthy and comprehensive bill since the Steele Act, entitled "An Act Regarding Intoxicating Liquors," but often called the "California Wine Bill." Laws of 1969, 1st Ex. Sess., ch. 21 (Suppl. Connelly Decl., Ex. Z). The law terminated protections for the domestic wine industry,[8] privatizing sales of out-of-state wine previously available only in state stores. Looking forward, the Act modified the allocation of excess revenue derived not just from wine sales but all sales of spirits (and again not described as taxes). *Id.* § 12(2). The law also allowed winery tasting rooms (*id.* § 7). Combined private and state store sales increased over 50 percent in the first year, and thus created considerably more fees for state and local government. Suppl. Connelly Decl., Ex. L (LCB, Wine Study 1 (Mar. 27, 1996)).

In 1981, the Legislature undertook another major revision of the liquor laws, passing a 31-page, 51-section law that addressed all three types of liquor and ranged broadly in

[8] Like Plaintiffs here, smaller Washington wine producers gloomily predicted that exposing them to competition by larger California competitors would destroy them. Instead, the law rescued the Washington wine industry and allowing it to excel. Suppl. Connelly Decl. Ex. U (Mike Veseth, *The California Bill and the Birth of Washington State Wine*, The Wine Economist (Dec. 2, 2007)). Washington's wine industry is now the second largest in the country and contributes $3 billion to the economy. Suppl. Connelly Ex. V (Washington Wine Commission, *State Facts*).

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revising various aspects of liquor control. "An Act Relating to Intoxicating Liquor," Laws of 1981, 1st Ex. Sess., ch. 5 (Suppl. Connelly Decl., Ex. Z). For example, the Act: (i) expanded the kinds of identification required to buy spirits, wine, or beer at state stores (*id.* § 8); (ii) revised requirements to obtain a retail license for wine or beer (*id.* § 10); (iii) required certain stock sales of licensed corporations to be approved by the LCB (*id.* § 11(2)); (iv) created a new crime that applied to interfering with officers involved with any form of liquor) (*id.* § 27); and (v) increased various fees required to sell, distribute, and import wine and beer (e.g., *id.* §§ 13, 33, 44).

The Legislature has altered RCW Title 66 in nearly every session since 1981 and has not usually limited itself to dealing with only one of wine or beer or spirits in a given law or to always addressing all of beer, wine, and spirits at once. Suppl. Connelly Decl. ¶ __ (collecting cases). Such revisions range broadly within the overarching subject of liquor regulation. Major examples in the dozen years before I-1183:[9]

- Laws of 1999, ch. 281, "An Act Relating to the Administration and designation of liquor licenses" § 1 (revising language in RCW 66.08.180 regarding placement of liquor revolving funds); *id.* § 3 (revising language regarding duty-free importation of liquor); *id.* § 4 (amending amount required for a bond as a bonded wine warehouse); *id.* §§ 5-6 (amending regulations on public houses and private clubs).
- Laws of 2008, ch. 41, "An Act Relating to Alcoholic Beverage Regulation" §§ 6, 8 (increasing the number of retail licenses allowed per microbrewery and domestic breweries); *id.* § 1-3 (revising the definition of "alcohol server" applicable to spirits, beer, and wine and substituting in new term where applicable); *id.* § 4 (allowing wine warehouses to handle bottled wine in addition to storing it); *id.* § 10 (allowing the sale of non-Washington wines in restaurants for off-premise consumption).
- Laws of 2009, ch. 373, "An Act Relating to Alcoholic Beverage Regulation" § 6 (increasing the volume of malt liquor kegs sold by private retailers); *id.* § 4 (permitting wineries acting as distributors to maintain one off-premise

[9] Copies of these Session Laws included in Supplemental Connelly Declaration, Ex. Z.

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> warehouse); *id.* § 10 (allowing transfer of limited volumes of wine between licensed locations under common ownership); *id.* § 11 (allowing the use of credit and debit cards to count as "cash payments" by all private tiers for beer and wine retailers--distributors, manufacturers, and importers).

The Code Reviser presumably did not find any of these to violate the single subject rule, and no subject rule challenges have been reported.

C. History of Initiative 1183

Initiative 1183 is a rare combination of a legislative bill, SB 5933, and then the initiative itself, both drafted to respond to voter concerns with how the liquor subject was handled in prior initiative efforts. A brief overview of its drafting shows that a range of stakeholders, individual citizens, legislators, and government agencies were involved in crafting the liquor reform proposal that the people ultimately enacted as law.

Because it followed the rejection of two similar initiatives the prior year, I-1183 was uniquely suited to address concerns that the electorate had voiced concerning changes in liquor regulation. The effort that produced I-1183 began in late 2010 with the defeat of I-1100 and I-1105, which showed substantial voter support for liquor law reform and galvanized many citizens, interested businesses, media commentators, and legislators to continue these efforts. Declaration of John Sullivan ("Sullivan Decl."), ¶¶ 7-9. Both initiatives are subject to almost all the attacks Plaintiffs make on I-1183. The titles for I-1100 and I-1105 stated the same subject, which was materially identical to that of I-1183: "Initiative Measure No. 1100 [1105] concerns liquor (beer, wine and spirits)." [10] While

[10] As here, the title the Attorney General drafted showed that I-1100 went beyond privatization. "This measure would close state liquor stores; authorize sale, distribution, and importation of spirits by private parties; and repeal certain requirements that govern the business operations of beer and wine distributors and producers." Intervenor-Defendant Costco Wholesale was not responsible for drafting it or filing it with the Secretary of State, although it later supported the measure. Sullivan Decl. ¶¶ 3-4.

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neither initiative passed, there was substantial public interest in major changes to liquor laws, Sullivan Decl. ¶ 8, and there were no known complaints that either contained more than one subject.[11]

I-1183 was first drafted as a legislative bill (SB 5933) and underwent the same process of addressing related legitimate concerns that such bills generally do. *See Id*. ¶¶ 9-31. Some of the largest groups active in the state's liquor market, including wineries, distillers, restaurants, distributors, and retailers, met to discuss drafting a new law to address the major concerns of those voters who had rejected the initiatives. *Id*. Those voters feared that I-1100 and I-1105 did not provide sufficient certainty of (i) preserving the government revenues generated by liquor sales, and (ii) protecting public health and safety from the possible dangers of easier access to liquor. *Id*. ¶ 15.[12]

The reform effort received input and support from many stakeholders, citizens, and members of the legislature. *Id*. ¶¶ 9-31. A draft of the bill was submitted to the Office of the Code Reviser ("OCR") to obtain comments regarding the form, style, and constitutionality of the proposed bill. *Id*. ¶ 26.[13] The reformers also worked with the OFM on the financial impact of the new legislation, exchanging numerous finance models and

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[11] I-1100 was reviewed and certified by the Office of the Code Reviser ("OCR"). Suppl. Connelly Decl. Ex. O (certificate of review). Neither that review nor the pre-election ballot title challenge raised any concerns under Article II, Section 19. *See In Re Ballot Title Challenge for Initiative Measures 1099 & 1100*, CV 10-2-00990-3 (Thurston Cnty. Super. Ct 2010). In fact, although I-1100 included removing beer and wine uniform pricing, the challenger—a board member of Plaintiff organization WASAVP—did not seek to include this aspect in the title, asking the court instead to put voters on notice about limitations to the LCB's advertising power, the removal of the state "mark-up" from its revenue stream, and the fact that beer and wine sellers would be allowed to sell spirits. *Id.*

[12] Plaintiff Grumbois was one of those who complained about the loss of revenue from state store sales. Suppl. Connelly Decl., Ex. M.

[13] The Code Reviser provided several suggestions for improvement but raised no concerns about the scope of the act or a possible single subject rule violation. Sullivan Decl. ¶ 26.

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adjusting the revenue-generating model. *Id.* ¶ 20. The efforts received substantial media coverage, and the proposed bill was available online for anyone to review and comment on even before it was introduced in the legislature—and indeed, one citizen did just that. *Id.* ¶ 21 & Ex. J (collecting news articles). After several months of discussion and drafting, SB 5933 was introduced in the Legislature on April 13, 2011. *Id.* ¶ 31 & Ex. C.

SB 5933, however, did not move out of committee, and as had happened from the opposite perspective nearly one hundred years before, frustrated citizens turned to the initiative process. The reformers modified the bill to fit the form of an initiative and sought further feedback from stakeholders, the Governor's Office, and the LCB. *Id.* ¶¶ 33-34. After revising the draft accordingly, *id.* ¶ 34, the coalition filed I-1183 with the Secretary of State in May 2011. Intervenor-Defendants Bruce Beckett, a director of the Washington Restaurant Association, and John McKay, Executive Vice President of Costco Wholesale, sponsored the initiative. *Id.* ¶ 35.

As required under RCW 29A.72.020, "to facilitate the operation of the initiative process," the OCR then reviewed the draft to identify any "necessary and appropriate" recommended changes—including any perceived constitutional issues. *See* OCR, "The Drafting Process" (OCR revises draft legislation to "avoid constitutional conflicts" and to "conform to overriding provisions of the state and federal Constitutions, federal law, regulations of federal agencies, if any, and court cases which interpret them") (Suppl. Connelly Decl., Ex. W); OCR, *Bill Drafting Guide 2011*, Part II (7) (discussing subject rules requirements) (Suppl. Connelly Decl., Ex. W). The Code Reviser did indeed raise a concern about the initiative's constitutionality—but not under Article II, Section 19. The Code Reviser had concerns about the initiative's language regarding the proposed repeal of SB

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5942 (the "private monopoly" bill), as the reference to this bill, which had yet to pass,[14] was required to be very specific to avoid an unconstitutional incorporation by reference. *Id*. ¶ 38. Although clearly attuned to the need for the initiative to pass constitutional muster, the Code Reviser did not, in numerous emails, telephone conferences, and the final certificate of review, raise any concerns about the subject rules. *Id*. ¶¶ 38-39. The sponsors reviewed—and mostly adopted—the recommended changes. *Id*. ¶ 39. The Code Reviser then "issue[d] the statutory certificate of review certifying that he or she has reviewed the measure and that any recommendations have been communicated to the sponsor." RCW 29A.72.020.

The Attorney General's Office then studied the initiative and, pursuant to RCW 29A.72.060, filed its proposed ballot subject and summary with the Secretary of State. The Attorney General's Office raised no constitutional issue. Sullivan Decl. ¶ 40. Pursuant to RCW 29A.72.070, the Secretary of State notified "the chief clerk of the house of representatives, the secretary of the senate, and any other individuals who have made written request for such notification of the exact language of the ballot title and summary." None of the official recipients raised any objection, as they could have under RCW 29A.72.080. Sullivan Decl. ¶ 41.

The lead plaintiff in this case, the Washington Association for Substance Abuse and Violence Prevention ("WASAVP"), filed a challenge to I-1183's ballot title in Thurston County Superior Court. *In Re Ballot Title for Initiative No. 1183*, CV 11-2-01292-9 (Thurston Cnty. Super. Ct. 2011). WASAVP was a member of the Protect our Communities ("POC") coalition against I-1183. Sullivan Decl., Ex. M. Plaintiff Grumbois was an official

[14] SB 5942 passed on June 15, 2011, after the initiative had been finalized. Laws of 2011, 1st Sp. Sess., ch. 45.

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representative and a strong personal supporter, donating over $22,500 to POC. Suppl. Connelly Decl., Ex. M.

WASAVP alleged four deficiencies in the ballot title, including that the ballot title did not indicate that "significant new taxes" would be imposed on hard liquor sales and that the term "spirits" should be clarified because not commonly used. Connelly Decl., Ex. B at 7-14 (Petitioner's Opening Brief). The Court agreed with Petitioners' argument on whether "spirits" could be confusing, and amended the title accordingly. Connelly Decl., Ex. A (Order). The Court rejected WASAVP's arguments regarding "taxes" versus "fees." *Id*. The superior court decision was the final word under RCW 29A.72.080, and the Secretary of State filed the initiative. RCW 29A.72.090.

The title as crafted by the Attorney General and the Superior Court, and submitted to the voters, stated:

> Initiative Measure No. 1183 concerns liquor: beer, wine, and spirits (hard liquor). This measure would close state liquor stores and sell their assets; license private parties to sell and distribute spirits; set license fees based on sales; regulate licensees; and change regulation of wine distribution.

As discussed in more detail in Part V.B.2, the media coverage and campaign were of unprecedented scope for an initiative, and the discussions of the merits, alleged flaws, and impact of I-1183 blanketed the state. The coalition's committee spent approximately $20 million on such efforts, Suppl. Connelly Decl., Ex. P, and the opposition's Protect Our Communities PAC spent $12.2 million,[15] Sullivan Decl. ¶ 46 & Ex. N. The amount and source of funds raised, by both sides, became prominent issues in the campaign. Indeed, obviously believing that the voters could make up their minds about the process as well as

[15] The dominant contributor to Protect Our Communities was not any community member but a national association, the Wine & Spirits Wholesalers of America, Inc. Sullivan Decl., Ex. N.

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the policy merits, the opposition urged that Costco's financial support alone was reason for people to vote "no." Declaration of Brett Noble ("Noble Decl."), DVD 3, "Opposition: Don't Let Costco Buy This Election" (campaign ad, included in courtesy copy DVD); Suppl. Connelly Decl., Ex. P (mailers).

III. STATEMENT OF ISSUES

1. Have Plaintiffs established that that they have standing to seek summary judgment?

   No. Plaintiffs lack standing as a matter of law and have failed to establish that there are no disputed facts as to whether they are harmed by the features of the law claimed to be unconstitutional. See Part V.A, pgs. 17 to 21.

2. Have Plaintiffs established that their factual allegations on the merits are not genuinely in dispute?

   No. Plaintiffs attempt to bring in facts beyond the initiative's text, and Intervenor-Defendants dispute them. To the extent the Court finds these facts material, a trial is required. See Part V.B, pgs. 21 to 32.

3. Have Plaintiffs established that I-1183 is unconstitutional beyond a reasonable doubt?

   No. Plaintiffs fall far short of this burden of proof, and an analysis of the initiative reveals that summary judgment is proper against Plaintiffs. See Part V.C, pgs 32 to 51.

IV. EVIDENCE RELIED ON

Intervenor-Defendants rely on the pleadings and papers on file with the Court, as well as the Supplemental Declaration of Ulrike Connelly and the Declaration of John Sullivan, filed concurrently.

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V. ANALYSIS

A. Plaintiffs are not entitled to summary judgment because they lack standing.

As parties seeking summary judgment, Plaintiffs must establish each and every element of their claims, including their standing to bring them. Standing protects the judiciary from unnecessarily having to consider whether to deny the will of the majority. *See, e.g., High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). Plaintiffs lack standing to seek summary judgment in their favor.

1. Plaintiffs lack standing to pursue any claims.

To have standing to challenge a law's constitutionality, plaintiffs first must assert an interest within the zone of interests protected by the constitutional guarantee in question. *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.2d 419 (2004). Secondly, the Court must determine whether "the party seeking standing" has suffered from an "injury in fact, economic or otherwise." *Id.*

As to the first prong, Plaintiffs allege only that their interests fall within the zone of interests *affected by I-1183*, Complaint ¶ 9, and that is insufficient. That prong requires being within the zone of interests protected by the "statute or constitutional guarantee" asserted as *the basis for a challenge* (here, Article II, Section 19), not the law targeted by the challenge (here, I-1183). *See* RCW 7.24.020; *Grant Cnty.*, 150 Wn.2d at 802 (fire districts did not have standing to assert constitutional violation); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 414-15, 27 P.3d 1149 (2001) (trade show dealer that suffered only economic harm from statute did not fall into its protected zone, as its goal was to protect the public from fraudulent or abusive practices).

Article II, Section 19, does not protect any interests that Plaintiffs allege. As applied to initiatives, it protects "legal voters" and allows suit if they have "an identifiable interest in

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challenging a misleading ballot title." *See In re Ballot Title for Initiative 333*, 88 Wn.2d 192, 197, 198, 558 P.2d 248 (1977) (addressing standing to challenge ballot title). But Plaintiffs "are *not* asserting their interests as taxpayers or generic voters to establish their standing." Pls.' Opp'n. to Defs. Mot. to Dismiss or Transfer 11 (Dkt. No. 25) (emphasis added).[16] They no doubt make this disavowal because the only possible voter, Mr. Grumbois, worked for the opposition campaign and argued eloquently and extensively (and no doubt voted) against privatization, the element that Plaintiffs suggest was so popular that it could carry "riders" to victory. *See* Connelly Ex. H (Grumbois article); Suppl. Connelly Ex. M (Grumbois article and contributions to Protect Our Communities).

Plaintiffs also fail the second prong, requiring injury in fact. Although on notice since the preliminary injunction hearing that their factual allegations were disputed, Plaintiffs have made no effort in their summary judgment motion to show that there is no genuine dispute.

WASAVP does not allege *any* concrete injury, and it is clear that it is only "dissatisf[ied] with the general framework of the ordinance." *State v. Lundquist*, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). While this is an "admirable interest," it is "not one that is alone sufficient to establish the personal injury required for standing." *Godfrey v. State,* 752

[16] Plaintiffs argued earlier that *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000) ("*Amalgamated*"), supports their position as to the first prong and the commercial standing of Grumbois and Gruss. Pls.' Reply In Supp. of Mot. for Prelim. Inj. ("P.I. Reply") at 11 (Dkt. No. 33). The Supreme Court in that case, however, explicitly refused to "consider the issue" of standing (and the related question of justiciability). 142 Wn.2d at 203. In a footnote, the Court mused that "most" of the plaintiffs likely had standing, *id.* at 203 n.4, but the plaintiffs there were varied, including voters and taxpayers, and had claims beyond Article II, Section 19. *Amalgamated* does not state, much less hold, that Article II, Section 19, confers standing "precisely because of the economic injuries that the initiative would cause the union's members." P.I. Reply at 11. That quotation is discussing *mootness*, not standing, and even were it discussing standing it would not necessarily relate to Article II, Section 19; to plaintiffs similar to those here; or to the *first* prong of the standing analysis.

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N.W.2d 413, 424 (Iowa 2008) (citizen did not have standing under Iowa's single subject rule); *accord Kadoranian by Peach v. Bellingham Police Dep't*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) ("the harm must be more than a general dissatisfaction with the statute, it must be 'actual damage or injury'") (footnote and citations omitted).

Plaintiffs Grumbois and Gruss argue that their economic interests satisfy the second prong, but in this context those interests are insufficient as a matter of law. Prohibition made clear that the government can totally ban liquor and that those privileged to sell, such as Gruss, and those that benefit indirectly from legal sales, such as Grumbois, have no right to continue to do so. *Randles*, 33 Wn.2d at 694 ("There is no natural or constitutional right to sell or engage in the business of selling or dispensing intoxicating liquor."); *Ajax*, 177 Wash. at 469 (noting the "well-established" proposition that state may "either prohibit entirely" or "regulate" the sale of intoxicating liquors, and this "is a matter of legislative policy")); WAC 314-12-010 ("issuance of any license by the board shall not be construed as granting a vested right in any of the privileges so conferred").

Plaintiffs have not, in any event, actually proven injury in fact, and Defendant-Intervenors contest their allegations. Grumbois leases space to a state store and will lose that tenant, but he agreed to that in his lease and must have assumed he could find a replacement. Declaration of David Grumbois, Ex. A (Dkt. No. 4). He has acknowledged that landlords stand to *gain an economic windfall* from the closure of state stores. Suppl. Connelly Decl., Ex. M (Grumbois article). He certainly has not shown that he will be unable to find a replacement, especially because his location is now grandfathered. I-1183, § 105(5); *see* Sullivan Decl., Ex. O (articles discussing out-of-state liquor retailers looking for Washington locations). Gruss contends that its stores cannot benefit as much as can larger retailers from reduced restrictions on wine distribution (allowing more price

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competition) and retailing (allowing central warehousing and sales to other retailers). But as shown in the preliminary injunction pleadings, those contested facts do not show a net detriment from I-1183, and in any event can only be resolved at trial. *See* Intervenor-Defs' Opp'n. to Mot. for Prelim. Inj. ("P.I. Opp. Mot.") at 6-10 (Dkt. No. 51).[17]

2. Plaintiffs lack standing to bring their subject-in-title claim.

Beyond general standing, Plaintiffs lack standing to pursue their subject-in-title claim. A party whose injuries-in-fact would not be addressed by invalidating parts of an initiative lacks standing to challenge such provisions. *State v. Broadaway*, 133 Wn.2d 118, 124, 942 P.2d 363 (1997) (inmate who was not in the class of inmates affected by the statutory sections alleged not to have been disclosed in title did not have standing to bring subject-in-title claim); *Ajax*, 177 Wash. at 475, 476 (invoking, in challenge to initiative ending Prohibition, "the unquestioned rule that a person cannot invoke a constitutional objection to a part of a statute not applicable to his own particular case"; "[u]nless a person's rights are directly involved, courts will postpone inquiry into constitutional questions which are separable therefrom"). Plaintiff's injury in fact must stem from "the particular feature of the statute which is claimed to be unconstitutional." *Kadoranian,* 119 Wn.2d at 191.

The harm alleged by the commercial Plaintiffs arises from the clearly-disclosed elements of ending state liquor stores (Grumbois, Complaint ¶ 4) and modifying wine regulations (Gruss, *id*. ¶ 5), not the fee challenged on subject-in-title grounds. *See infra* at Part V.A. In light of its alleged interests, *id*. ¶ 3, WASAVP also objects at most to

[17] Plaintiff Gruss, Inc. owns and operates two Red Apple markets and has not shown actual injury from the revisions to wine regulations. P.I. Opp'n. Mot. at 7. Plaintiffs' "concerns" about reduced profits were both speculative and exaggerated. *Id.* at 7-8. These smaller markets have competed with larger retailers for years on the bulk of their inventory and their wine prices were already higher prior to I-1183. *Id.* at. 7. Furthermore, stores similarly situated to these Red Apple markets supported such reforms to wine regulations, which would remove underpricing by state stores, undermining the claim that such regulation in fact damages profitability. *Id.* at 8-10.

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privatization and perhaps eased wine regulations, but certainly not to maintaining government revenues.

B. The Court should deny Plaintiffs' motion for summary judgment and grant the State's motion.

Plaintiffs "rely on the [preliminary injunction and summary judgment] Declaration[s of] Michael Subit … and all attachments thereto, as well as the pleadings and papers filed in this action," Plts.' Mot. for Summ. J. ("Motion") at 2-3 (Dkt. No. 63), in an attempt to carry their burden of demonstrating that reasonable people would all reach the same factual conclusions when presented with the evidence and its reasonable inferences. *McKee v. Am. Home Prods. Corp.,* 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). They have not met this burden, and doubts regarding the existence of genuine issues of material fact are resolved against them. *Atherton Condo. Apartment-Owners Ass'n. Bd. of Dirs. v. Blume Dev. Co.,* 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Plaintiffs have crafted their claim and Motion based on five disputed factual issues:

(1) the social and legislative history of state liquor control laws, Motion at 3-6 (arguing that I-1183 modifies different kinds of liquor contrary to "a long history in Washington of wine being regulated distinctly from hard liquor"); Complaint ¶¶ 14-47, 76(b) (same) (Dkt. No. 1);

(2) the presence in fact of logrolling and other alleged abuses, Motion at 1, 16, 18, 19-23; Complaint ¶ 76(a);

(3) the role of Costco in making the initiative serve its "special interests," Motion at 6 (arguing that I-1183 was drafted solely to benefit Costco); Complaint ¶¶ 63-70 (same);

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(4) the understanding and alleged misconceptions of voters, Motion at 22-23 (arguing that defective ballot title deceived voters); Complaint ¶¶ 76, 77 (same); and, as discussed above, and

(5) whether Plaintiffs have injury in fact for standing, Complaint ¶ 9.

Intervenor-Defendants (and the State) have already denied these factual allegations in their Answer, and do so again here. *See* Intervenor-Defs Answer to Complaint ¶¶ 14-47, 63-68, 70, 76-77 (attached as Exhibit A to Motion to Intervene as Defendants, Dkt. No. 29).

As discussed in the State's motion and *infra* at Part V.B.(1)-(4), the Court should reject the materiality of these allegations (other than as to standing). Plaintiffs try to have it both ways. They pick isolated bits of history and campaign facts to argue, for example, that "liquor" cannot mean more than spirits but then argue that no trial is necessary. Even though not all the issues Plaintiffs raise involve percipient witnesses, the sponsors are entitled to defend the Initiative, their actions, and the public understanding. Even the matters that might be resolved by judicial notice are contested, and should be resolved at trial in light of the complexity and importance of this case.[18]

1. Intervenor-Defendants dispute Plaintiffs' distorted view of the history and operation of Washington liquor laws.

Plaintiffs allege that the plain language of the stated subject, "liquor," and its typical meaning should not control because facts show that not all liquor and not all liquor laws are considered to be within a single broad subject. They allege that people in fact consider wine a totally separate subject from "liquor," that lawmakers treat wine and spirits in separate enactments, and that every aspect of liquor regulation, from revenue issues, to relationships

[18] The two cases Plaintiffs cite on page 9 of their Motion are not to the contrary. They find that constitutional interpretation is a legal issue, but do not deny that application of legal principles can involve factual issues, much less require acceptance of Plaintiffs' factual allegations on their face.

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between links in the supply chain, to alcohol advertising have always been understood as different subjects and treated in separate enactments by legislators. Complaint ¶¶ 1, 21, 22, 36, 38, 42, 59, 76(b); *see* Motion at 3.

Plaintiffs' characterization of the facts is incorrect, and indeed they now largely abandon to innuendo what their Complaint alleged as specific facts. They prove no facts as to what the public actually understood, on wine versus spirits or one type of regulation versus another. Plaintiffs admit that "Washington law defines 'liquor' to include spirits, wine and beer," Motion at 2 n. 1, and all of the provisions challenged by their Motion fall within one RCW title. As discussed in Part II.B, reasonable voters, lawmakers, administrators, and courts have always treated alcoholic beverage control as a single subject, even though different elements were regulated differently and those regulations were sometimes changed at different times. This is reasonable beyond doubt, as spirits, wine, and beer are all regulated for the same reason, their capacity to intoxicate. There is no difference in the type of alcohol each contains, Suppl. Connelly Decl., Ex. T, only the percentages, which was the basis for the pre- I-1183 "significantly different approach when it comes to the distribution and retail sale of wine and beer." Complaint ¶ 22.

The liquor law title (RCW 66 et seq.) contains 259 separate sections, and the Legislature frequently enacts, modifies, or repeals various of its provisions. It is misleading to rely, as Plaintiffs do, on only three narrow examples from the 2011 legislative session and ignore nearly 80 years of history. Motion at 17-18. The fact that some bills address a narrow slice of a subject hardly proves that each slice is a separate subject unto itself. For generations Washington's people and lawmakers have understood the regulation of liquor to be one subject, and, from time to time, have revised regulations ranging broadly within the field of liquor control and directed to some or all forms of liquor. *See supra* Part II.B.

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Particularly because of the burden Plaintiffs face, it is not sufficient for Plaintiffs to show that past laws or understandings were sometimes narrow; they must show that *no reasonable person* could think liquor includes all forms of beverage alcohol or that liquor laws include all or any types of regulatory provisions. *See McKee,* 113 Wn.2d at 705 (for summary judgment, all doubts must be resolved against moving party).

But this history relied on by Plaintiffs is much more devastating to their position than that. For example, although Plaintiffs invoke the Steele Act, Motion at 3, they fail to note that it was a single statute that was one-third longer than I-1183 and that regulated spirits and wine (and beer) (§ 3); created state stores (§ 4) while licensing private sales of wine and beer (§ 8); provided for license fees from all three forms of alcohol (§ 23) to go to a revolving fund (§ 73), part of which would be distributed to local governments (§ 78); regulated advertising (§ 43); authorized further regulations as to spirits, wine, and beer (§ 79); imposed control restrictions on the three tiers (§ 90); and provided for local option elections that would decide *in a single vote* in each local jurisdiction whether to authorize this broad and varied approach (§§ 84-88). Suppl. Connelly Decl., Ex. K (Steele Act).

Plaintiffs also recite a few of the many aspects of the regulatory regime as it evolved in the 78 years since the Steele Act. Motion at 2-6. But among the important points they ignore are that all involved a single agency, the LCB, under a single statutory authority, and that laws revising these regulations often combined many into a single statute, with no reported single subject challenge.

The Legislature has not in fact subscribed to Plaintiffs' narrow view of "subjects" within the liquor laws. Contrary to Plaintiffs' claim, Motion at 3, the Legislature has

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historically passed single bills that regulated more than one kind of liquor.[19] And the Legislature has not felt constrained to address in separate bills each provision similar to those attacked by Plaintiffs. In fact, tracing the history of each of the RCW provisions also amended by I-1183 reveals that many single acts amended numerous of the same provisions.[20]

And in fact, the public knew that wine is part of liquor and that I-1183 affected both. Voters heard about the planned changes to wine regulations, including the elimination of uniform pricing and the expanded retail rights of certain stores (what Plaintiffs call a "fourth tier"), from both sides of the campaign.[21] Proponents of I-1183 were not trying to "hide" the changes to the wine industry. Below are excerpts from a television ad aired throughout the state and a flyer widely mailed to voters by the Yes on 1183 campaign:

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[19] *E.g.,* Laws of 2011, ch. 119; Laws of 2009, ch. 373; Laws of 2005, ch. 152; Laws of 1981, 1st. Ex. Sess., ch. 5; Laws of 1975, 1st Ex. Sess., ch. 173; Laws of 1945, ch. 48; *see also* Suppl. Connelly Decl. ¶ 27 (setting forth specific sections in each law that discuss the various forms of liquor).

[20] *E.g.*, Laws of 2011, ch. 119; Laws of 2005, ch. 151; Laws of 2003-04, ch. 160; Laws of 1981, 1st Ex. Sess., ch. 5; Laws of 1969, 1st. Ex. Sess., ch. 21; *see also* Suppl. Connelly Decl. ¶ 28 (setting forth specific sections in each law that discuss which section of I-1183 also modified this regulation).

[21] This included television, Noble Decl., DVD 1, "Campaign: Winery" (included on courtesy DVD); radio spots, Suppl. Connelly Decl., Ex. P (stating that "[I-1183] would allow retailers to sell to retailers, creating another wholesale tier"); web commentary, *see, e.g., id.* (NO on 1183: Protect Our Communities Facebook Page) (promoting a blog post about "the negative impact" on "hundreds of small wineries in out state"); and flyers, *see, e.g., id*. (Protect Our Communities, Flyer: Still Too Risky for Washington Breweries, Beer Distributors, Consumers and Public Safety ("If 1183 passes…price discrimination on wine will crowd brewers and small wineries off the shelves."); Yes on 1183, Flyer: Fact Sheet: Wineries ("1183 finally allows Washington wineries flexibility to set the price of their products . . . 1183 also finally allows retailers to sell wine directly to other retailers, including restaurants and licensed retail, grocery and wine stores.")).

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Narration: 1183 also gets rid of Washington's outdated price-setting regulations on wine. These changes will give local wineries, like our family business, more flexibility on pricing … and help us stay competitive.

How Initiative 1183 Benefits Washington Wineries

Initiative 1183 ends the state's outdated liquor store system, allows consumers to buy liquor at licensed grocery and retail stores, strengthens liquor laws and updates outdated price-setting regulations on wine. 1183 also provides millions in new revenues for schools, health care and public safety in communities across Washington.

YES on 1183 eliminates outdated price-setting regulations on wine

1183 finally allows Washington wineries flexibility to set the price of their products. And 1183 eliminates costly price documentation requirements for wineries. Wineries and wine distributors can offer volume discounts on the wholesale price of wine to retail stores and restaurants, and factor delivery costs into their pricing. These changes provide the pricing flexibility Washington wineries need in a competitive marketplace.

YES on 1183 updates wine distribution laws

1183 ends the prohibition against central warehousing of wine. By allowing deliveries of wine to a central warehouse, rather than to individual stores in a retail chain or individual restaurants, 1183 will save wineries time and money. And, because wine consolidated in a retailer's warehouse can be sold to out-of-state purchasers, central warehousing could open new markets for Washington wineries.

YES on 1183 ends the ban on retail-to-retail sales

1183 also finally allows retailers to sell wine directly to other retailers, including restaurants and wine shops. This can provide wineries with more convenient access to smaller retailers. And, wineries retain the right to sell directly to restaurants and licensed retail, grocery and wine stores.

See also Suppl. Connelly Decl., Ex. Q (2011 Voters Pamphlet at pgs. 7, 9 (discussing changes to wine regulation and creation of "fourth tier")). There was further discussion of

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changes affecting wine in press coverage and editorials,[22] including the fact that the state stores had benefited by being excluded from restrictions repealed by I-1183.[23]

2. Intervenor-Defendants dispute Plaintiffs' allegations about the existence in fact of practices at which Article II, Section 19, is directed.

Plaintiffs contend that evaluating the constitutionality of I-1183 requires assessing "the voters' understanding of the initiative at the time of the vote" (Complaint ¶ 75), which allegedly was that it would only privatize state distribution and retailing of spirits (*id*. ¶ 76(a), Motion at 2); thus, say Plaintiffs, voters were surprised or deceived by the scope of I-1183 (*id.* ¶ 73; P.I. Motion at 16-17, Motion at 1-2). These are factual allegations, and

[22] *E.g.*, Suppl. Connelly Decl., Ex. N (Bryn Myrick, *Say No to State Liquor Stores and Vote Yes on I-1183*, pnwlocalnews.com ("I-1183 will also reform the state's distribution and sales laws for wine, improving the market for hundreds of small and medium-sized wineries in Washington."); Tim Owens & Jim Cooper, *Pro & Con: Initiative 1183 in Privatizing Alcohol Debated*, The Columbian (Oct. 2, 2011) ("Under I-1183 restaurants and retailers can buy liquor and wine directly from manufacturers, and restaurants can buy liquor from licensed retail stores. Yes on I-1183 also removes outdated restrictions on the wholesale pricing and distribution of wine.") (Cooper is President of Plaintiff WASAVP, and he also signed the opposition statements in the Voters Pamphlet, which further discussed the imposition of taxes,); Jordan Shrader, *State's Liquor-Privatization Showdown Pits Big Business vs. Big Business*, The News Tribune & The Olympian (Oct. 8, 2011) ("I-1183 would leave the [price] bans in place for beer, but would remove them for wine, and wouldn't extend them to the new private market in hard liquor.")). As explained further below, these changes had the effect of putting private sellers of wine in the less restricted position that the State had occupied as a seller of wine and a competitor to the private sector. *See infra*, Part V.C.3(c)(ii).

[23] The disparity between the state liquor stores and private wine stores has been a point of contention for years, and a public dialogue has existed about it that would also have served to notify the public that liquor law reformation, even if limited just to privatization (as Plaintiffs claim), would include repercussions in the wine industry. *See, e.g.,* Sullivan Decl., Ex. P (Danyelle Robinson, *Wineries Dealt Sour Grapes*, Spokane Daily Planet (Nov. 20, 2000) (discussing impact on Washington wineries from state liquor stores); Letter, Doug Henken, Washington Food Industry to Retail Liquor Sales Task Force Members (Oct. 25, 2000); Dave Pavelchek, *A Comparison of Wine Prices: State Liquor Stores and Liquor Grocery Chains* at 2 (2003)). Furthermore, I-1100 also contained provisions that would have altered the competitive balance for the wine industry, and these changes received widespread campaign and media attention. Sullivan Decl., Ex. E.

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they are not just unproven but wrong. *See supra*, Part V.B.(2)-(4) (discussion of voter materials); Part II.B. (discussion of collaborative drafting of I-1183).

There is no deceived electorate in this case. As discussed above, I-1183 underwent a very public process of drafting and an unusually intense public debate. Part II.C. Both campaigns spent millions of dollars to reach all corners of the state and educate voters. Suppl. Connelly Decl., Ex. P (campaign contribution reports).

Thanks to the public process required for initiatives, and the interest in this initiative, the evidence shows a robust public debate that provided voters ample information to help them understand the elements of I-1183 and the opponents' arguments about its scope. Noble Decl. (collecting media available to voters). The Court in *Fritz v. Gorton* recognized that "[w]ith improved means and methods of communication there is little reason to doubt that a substantial percentage of the public is better informed" than ever before—a statement even more true nearly thirty years later, as voters today have access to a remarkable amount of information beyond the traditional voters pamphlet. 83 Wn.2d 275, 284, 517 P.2d 911 (1974). Especially in response to Plaintiffs' own factual claims that voters had no notice of the scope of I-1183, the availability and content of the publicly available (and much discussed) information must be taken into consideration. *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 573-74 (1995) (Talmadge, J., concurring in part and dissenting in part).

Plaintiffs contend voters were primarily attracted by the reforms addressed to liquor, not wine, even though wine is now much more popular than it was at the time of the Steele Act. *E.g.*, Motion at 2 ("The principal subject of I-1183 is the privatization of the sale and distribution of hard liquor in the State."); *id*. at 6 ("First, I-1183's primary purpose is to get the state out of the hard liquor business by privatizing Washington's system of hard liquor

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distribution and sales."); P.I. Motion at 16 (alleging that voters who wanted one part of the initiative were forced to vote for all); P.I. Reply at 6 ("A voter's support of getting the State out of the business of distributing and selling hard liquor suggests nothing about the voter's support for ending uniform wine pricing or generally preserving the scheme for beer.").

But voters were clearly aware from the generality of the subject and from the five main elements in the title that the initiative contained other provisions. All of the material "subjects" that Plaintiffs allege were "hidden," Motion at 18, were addressed and discussed as part of this election: (1) the fees (alleged "taxation") to replace the state's revenue stream from the sale of liquor, Complaint ¶ 77(a); (2) changes to the wine industry, including eliminating the uniform price provisions and allowing retail-to-retail sales (alleged "fourth tier"), *id.* ¶¶ 55, 56, 77(b); and (3) changes to the state regulation of advertising, *id.* ¶¶ 57, 58, 77(b). All of these issues are central to resolving the particular case that the Plaintiffs have pleaded, and their failure of proof must lead to denial of their motion for summary judgment.

3. Plaintiffs misstate the role of Costco Wholesale in the initiative process.

Plaintiffs have repeatedly called I-1183 a "Costco initiative" and argue that this was drafted only to further Costco's own business interests and either snuck past voters or rammed down their throats. *See* Motion at 8 (alleging that I-1183 "was drafted to serve Costco's special interest); P.I. Motion at 8-9, 16 (same); P.I. Reply at 9-10 (same); Complaint ¶¶ 63-70 (same). This assertion is factually incorrect. Sullivan Decl. ¶¶ 47-54.

A coalition of drafters wrote an initiative—reviewed by the Secretary of State, the Attorney General, and the Code Reviser—that built on lessons learned from the public response to previous initiatives. *Id.* ¶¶ 14-41. I-1183 is an extensive revision of the liquor laws, but none of the changes were developed "in secret" or "hidden" from the public. *See*

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supra, Part II.C; *contra* Motion at 18. As discussed above, I-1183 was drafted with the input of many constituencies, including distillers, wineries, distributors, retailers, and legislators. Sullivan Decl. ¶¶ 9-41. Drafts of the initiative were widely distributed for comments and ideas.[24] *Id.* Furthermore, the text of the entire initiative was set forth in the voters pamphlet—and thus any "hidden" provisions were hidden in plain sight of the voter and of the vigorous opposition. Suppl. Connelly Decl., Ex. Q (Annotated Voters Pamphlet). "In short, [there is] no evidence of the evils which the constitutional provision was designed to avoid." *Kueckelhan v. Fed. Old Line Ins. Co.*, 69 Wn.2d 392, 404, 418 P.2d 442 (1966) (upholding the 366-page act that established the Insurance Code against an Article II, Section 19, challenge).

4. Voters were not misled by I-1183's use of the term "fees" instead of "taxes."

The ballot title clearly stated that the initiative would establish a mechanism ("license fees based on sales") to continue the significant state revenue stream, *in addition to* taxes untouched by the initiative. This responded to voter concern about I-1100 and I-1105, and thus was germane by the ultimate test—voters' own assessment. It also accords with terminology used historically, which separated out the taxes from the "mark-ups" and fees. *See* Suppl. Connelly Decl., Ex. X (LCB materials differentiating between markup and taxes).

Yet Plaintiffs' primary allegation is that voters were misled and did not know that the initiative imposed a "tax." Complaint ¶ 77(a). In addition to the voters pamphlet, which

[24] Plaintiffs' assertion is also belied by the text of the initiative, which contains provisions that Costco Wholesale and other retailers actually opposed, such as the franchise protections for distributors. *See also* Sullivan Decl. ¶¶ 47-48. Voters supported I-1183 despite the opposition's attack on Costco Wholesale, and a large association of its competitors and customers supported it, such as the Washington Restaurant Association, which co-sponsored it.

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lays out the new mechanism in detail, Suppl. Connelly Decl., Ex. Q (Annotated Voters Pamphlet at pgs. 2-4, 7-10), an overwhelming amount of the opposition's campaign materials and news coverage focused on the revenue issue. There is no allegation in the Complaint, nor could there be, that voters did not understand that, whatever the label on the revenue mechanism, that mechanism would result in additional cost embedded in the price of spirits.

At least 175 news items, reaching every county in the state, mentioned the fact the initiative was creating a new license system and, most often, the tax/fee debate.[25] In addition, almost all of the opposition campaign materials included a statement that I-1183 would raise taxes. For example, one of the television ads aired in the state by Protect Our Communities focuses on the "new tax":

[25] *See, e.g.,* Connelly Decl. Ex. J (Bruce Ramsey, *Does I-1183 Add a 27% Tax?*, Seattle Times, Sept. 22, 2011 (anti-I-1183 "ad is dishonest"); Jim Camden, *The Battle Over Booze*, The Spokesman-Review, Nov. 1, 2011, at 1A ("Opponents contend consumers will be hit with a new 27 percent tax on liquor, which is true, but ignores some of the mechanics of the new system the initiative would set up. I-1183 removes the current state markup on liquor, replacing that cost to consumers with a series of new taxes, both for wholesalers and retailers - and most taxes are ultimately passed to consumers."); *Costco Is Trying to Fix a Liquor Problem That Doesn't Exist,* The Olympian, Oct. 26, 2011, *available at* 2011 WLNR 21965831 ("The No on I-1183 forces counter with a weak rebuttal that consumers, in effect, will pay an added 27 percent tax on spirits."); Chris Grygiel, *Analysis: State Could Make $ From Privatized Booze Measure*, Seattle Post-Intelligencer, Aug. 10, 2011, *available at* 2011 WLNR 15879213 (discussing fiscal impact of I-1183, including discussion of how these could be described as "taxes")).

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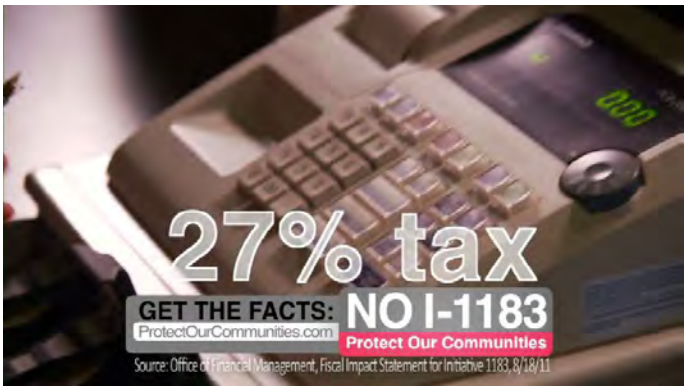

> *Narration:* [T]he big corporations say [1183] increases funding for government programs, but they don't pay for it out of their corporate profits. Instead, you and I pay…with a brand new 27% tax … [T]he last thing we need is higher taxes.

Noble Decl., DVD 1, "Opposition: Alice" (video) (included on courtesy DVD).

C. <u>Initiative 1183 does not violate Article II, Section 19; it addresses a single subject.</u>

The Court should deny summary judgment to Plaintiffs because their issues of fact, explicit or otherwise, are in dispute, but should grant summary judgment to Defendants because those disputed facts are insufficient as a matter of law for Plaintiffs to prevail.

1. Plaintiffs must overcome the presumption of constitutionality; the narrow scope of Article II, Section 19; and the historical reluctance to invalidate democratic acts.

a. Plaintiffs must overcome a demanding burden of proof.

As the Court is aware, the presumption of constitutionality means that "[a]ny reasonable doubts are resolved in favor of constitutionality." *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (hereinafter *Citizens*). "[T]he burden rests upon the attacking party to clearly establish its invalidity." *Gruen v. Tax Comm'n*, 35 Wn.2d 1, 6, 211 P.2d 651 (1949).

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The heavy presumption of constitutionality is reinforced here by the extensive involvement of legislators, code revisers, the executive branch, and the Superior Court; all have already reviewed the initiative and did not raise concerns about I-1183's constitutionality, single subject unity or otherwise. *See* Part II.C. "Furthermore, judicial deference is appropriate when difficult social, political, and medical issues are involved. Courts should not step in when legislators have made policy choices among conflicting alternatives … 'and courts should be cautious not to rewrite legislation ….'" *Nat'l Org. for Reform of Marijuana Laws v. Bell,* 488 F. Supp. 123, 137 (D.D.C. 1980) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)); *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 537 n.10, 520 P.2d 162 (1974) (reaffirming the "principle of deference to the legislature in matters of economic regulation enacted under this state's police power"). Where, as here, liquor control has long been considered a single subject, even if many different aspects of liquor are controlled in many different ways, it is inconceivable how Plaintiffs can carry that burden.

b. Article II, Section 19, applies only to narrow abuses and must not interfere with the necessarily flexible power to legislate.

Courts are appropriately wary that a too-literal or too-liberal application of Article II, Section 19, would interfere with the democratic process. As discussed above, this approach was announced nearly contemporaneously with the adoption of the constitution. *See supra* Part II.A; *McQueen v. Kittitas Cnty.*, 115 Wash. 672, 682, 198 P. 394 (1921) (single subject rule is not meant "to prevent the enactment of a complete law on a given subject, even though the provisions of the law may be numerous and varied"). The single-subject provision is "to be liberally construed so as not to impose awkward and hampering restrictions" upon the legislature or people exercising legislative power. *Kueckelhan*, 69

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Wn.2d at 403 (citing *DeCano v. State*, 7 Wn.2d 613, 110 P.2d 627 (1941)); *accord Wash. Fed'n of State Emps.*, 127 Wn.2d at 555 (legislation is to be "liberally construed" in favor of upholding it).

Courts must be careful to respect the difference, in practical and constitutional terms, between the commendable (indeed indispensable) process of legislative compromise and the abuse of logrolling.[26] "The necessity of compromise is inherent in the legislative system, and we cannot conceive that the framers of the constitution intended to forbid the resolution of differences." *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 179, 492 P.2d 1012 (1972). "Indeed, there is a difference between impermissible logrolling and the normal compromise which is inherent in the legislative process. A diverse and complex enactment … is likely to result from compromise and negotiation among the members of the General Assembly. The presence of such legislative compromise does not mean that the Act violates the single subject rule." *Wirtz v. Quinn*, 2011 IL 111903, 953 N.E.2d 899, 911, 352 Ill. Dec. 218 (Ill. 2011) (citing *Defenders of Wildlife v. Ventura*, 632 N.W.2d 707, 713-15 (Minn. Ct. App. 2001)).

The *Defenders* court explained:

> The practice of bundling controversial, volatile provisions with germane and less-controversial laws is not impermissible

[26] This Court is bound by the Supreme Court's assumption that Article II, Section 19, applies to initiatives, but Intervenor-Defendants preserve their argument that the assumption is incorrect or that the judicial application of this section to initiatives must be even more deferential than its application to conventional legislation. In addition to the far greater time and opportunity for voters to learn about the substance of initiatives, it is unlikely traditional logrolling can even take place in the initiative context. *See e.g.*, Robert D. Cooter & Michael D. Gilbert, *Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687, 699 (2010) ("While direct democracy can suppress legislators' bargains, it cannot replace them with political bargains that come directly from the people. This is because the initiative process suffers from the 'confusion of the multitude': Tens of thousands of citizens cannot negotiate with one another, lending support on one proposal in exchange for others' support on a second proposal.").

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> logrolling. Rather, it is the nature of the democratic process where you have major and minor political parties, partisan politics, and an independent executive branch. The negotiations and the constant give and take are historical, purely legal, and purely permissible; there is no impermissible logrolling provided that the independent provisions in a bill ultimately signed into law are not *so wholly unrelated* to each other that not even a common thread can be found.

Id. at 714-15. Legislative compromise must be permissible, the court reasoned, because without it, if "every single provision of a larger bill had to be able to pass both houses of the legislature and obtain the governor's signature on its own merits, little if any legislation would ever be signed into law." *Id*. at 714.[27]

And indeed, Washington courts have used this constitutional power sparingly in deference to democracy. Since 1891, the Washington Supreme Court has struck down only eleven measures—legislation and initiatives—under Article II, Section 19. Suppl. Connelly Decl. ¶ 29 (collecting cases).

2. The initiative does not violate the single subject rule because it contains only one subject: liquor.

Article II, Section 19, also only requires that a general title identify a subject, and the law's provisions need only be within or rationally related to that subject. Plaintiffs concede, as they must, that I-1183's title is general, and thus the least restrictive interpretation of the

[27] Courts are also reluctant to find single-subject violations because the subjectivity inherent in determining what is a subject creates risk of, and subconscious pressure for, judicial policy preferences to trump democratic preferences. Daniel Lowenstein, *Initiatives and the Single Subject Rule*, Elec. L. J. 35, 47-48 (2002). Research reveals that "decisions in single subject cases are heavily influenced by a judge's partisan inclination," because the contours of what defines a "subject" and what is germane thereto "is infinitely elastic" and is heavily influenced by an individual's view of the world—and of that subject. Richard L. Hasen & John G. Matsusaka, *Aggressive Enforcement of the Single Subject Rule*, 9 Elec. L. J. 399, 400, 416 (2010) (analyzing 150 subject rule cases from five states, including Washington). The antidote is to apply the standard "deferentially" and exercise "restraint." *Id.* at 416.

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title and its elements applies. Motion at 12; *see City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001).

For initiatives, courts examine the Attorney General's ballot title. *Wash. Fed'n of State Emps.*, 127 Wn.2d at 555. That ballot title is controlled by a statute, RCW 29A.72.050, whose constitutionality is unchallenged. The Legislature revamped the title law in 2000 to assist both drafters and the courts and make invalidation less likely. Suppl. Connelly Decl., Ex. R (Senate Bill 2587 Report (Feb. 24, 2000)). To help ensure that a fair and appropriate title is crafted, the law charges the Attorney General and then the Superior Court—not the initiative sponsors—with crafting a title that is a "true and impartial description of the measure's essential contents, clearly identif[ies] the proposition to be voted on, and [does] not, to the extent reasonably possible, create prejudice either for or against the measure." RCW 29A.72.050.

Where a law's title is facially restricted to one or a few subcategories of a subject, it signals that the voter need not read the text to understand all the purposes and likely impacts. A different subcategory from the general subject in the text is invalid, either because it is a subject not in title or a second subject when compared to the focused one disclosed in the title.

Where the title is general, as here, the reasonable voter is on notice that there are more elements than could fit in the ten-word subject, or even the thirty-word "concise description," *see* RCW 29A.72.050, and that the proposed law might balance competing purposes and reach even incidental subjects in the course of more broadly addressing the general subject. Any subjects that fit *only* within a different general category, without any discernible connection to the general subject voiced in the title, are second subjects. *See, e.g., Power, Inc. v. Huntley,* 39 Wn.2d 191, 235 P.2d 173 (1951) (including an appropriation

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for state salaries and a corporate excise tax); *Barde v. State*, 90 Wn.2d 470, 584 P.2d 390 (1978) (criminal penalties for dog-napping and civil replevin fees). Any "incidental" subjects are not truly separate if, in the context of the particular proposal, they overlap with the identified subject. If the drafters "adopt[ed] a broad and comprehensive general title," the court will "liberally construe the initiative to embrace any subject within the initiative's body that is reasonably germane to the initiative's title." *State v. Stannard,* 134 Wn. App. 828, 835, 142 P.3d 641 (2006) (citing *Amalgamated*, 142 Wn.2d at 207).

a. The initiative's challenged provisions are obviously within its general subject.

The title here specifies the subject:

> Initiative Measure No. 1183 concerns liquor: beer, wine, and sprits (hard liquor).

After I-1183's title states the general subject of liquor, it explicitly describes its five "essential contents" within that general subject:

> [1] close state liquor stores and sell their assets; [2] license private parties to sell and distribute spirits; [3] set license fees based on sales; [4] regulate licensees; and [5] change regulation of wine distribution.

(Numbering added). But the title statute is clear that such a summary, while intended to be helpful to the voter, does not change the previously defined subject. The Court must construe the statute to avoid constitutional issues, and thus it must refuse to allow Plaintiffs to use the summary to narrow the subject or introduce a second subject.

Each of the five elements is explicitly within the general subject, and is connected with, and not inimical to, the others. Each is implemented in the body through a variety of provisions, as a reasonable voter would expect. But each is also within the general subject, and relates to a purpose within the general subject: Thus, to close state stores (purpose 1),

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which sold both spirits and wine, a licensed private system for spirits had to be established (purpose 2) and the licensees regulated (purpose 4). That would still leave the question of whether to transfer to the existing licensed private wine businesses the freedoms that the state store system enjoyed in distribution and retailing of wine (purpose 5), since a significant player in the wine business was being eliminated (purpose 1). And in closing state stores that were generating money for various state and local purposes, and to address concerns expressed by the electorate the prior year, a choice had to be made to forego or to replace that revenue, and fees based on sales is a logical method to replace the markup on sales (purpose 3).

3. The Court should reject Plaintiffs' efforts to obscure the plain language and meaning of the initiative.

a. Article II, Section 19, cannot be invoked through judicial atomization of legislation and does not invalidate "piecemeal" legislation.

Plaintiffs admit that it is constitutional for "comprehensive enactments" to cover a "multifaceted subject." P.I. Motion at 14. Yet they argue that the initiative is a "conglomeration of a hodge-podge of changes." Motion at 17.

I-1183 is no "hodge-podge." As shown above, it makes major but related changes to the liquor laws. And Plaintiffs' talismatic invocation of "hodge-podge" does not excuse their lack of analysis. The Constitution does not require that a broad law address every element or alter or repeal every provision of the existing statutory regime governing the subject. "Hodge-podge" change within a single subject is still within that subject. "To hold otherwise would ignore modern day realities." *Kueckelhan*, 69 Wn.2d at 404. "The Legislature is free to approach a problem piecemeal and to learn from experience." *State v. Shawn P.*, 122 Wn.2d 553, 567, 859 P.2d 1220 (1993) (citation omitted). "'A State may

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direct its law against what it deems the evils as it actually exists without covering the whole field of possible abuses ….'" *Seeley v. State*, 132 Wn.2d 776, 806, 940 P.2d 604 (1997) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 468 (1950)); *State v. Dickamore*, 22 Wn. App. 851, 854, 592 P.2d 681 (1979) (legislature may "'conclude that half a loaf is better than none'") (quoting *United States v. Kiffer,* 477 F.2d 349, 355 (2d Cir. 1973)). "Failure to address a certain problem in an otherwise comprehensive legislative scheme is not fatal to the legislative plan." *Nat'l Org. for Reform of Marijuana Laws,* 488 F. Supp. at 137.

The people in I-1183 decided to address mainly the state's control of wine and spirits. Law reform may take a "step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla. Inc.,* 348 U.S. 483, 489 (1955). The courts recognize that "hodge-podge" legislation is a "pragmatic means of effecting needed reforms, where a demand for completeness may lead to total paralysis" and leave much-needed reforms undone. 2 Laurence H. Tribe, *American Constitutional La*w § 16-4 at 997 (2d ed. 1988).

In enacting I-1183, the people exercised their discretion to reform much of the existing liquor system to reflect their current values, and they were not forced to choose between reforming either just one or every possible aspect of state control, or addressing just one or all types of liquor. Plaintiffs' "hodge-podge" approach would have the Court tell the people that unless they change everything in Title 66 they must split their desired liquor reforms into numerous pieces. But the single subject constitutional provision neither "require[s] legislation be piecemeal," nor prevents it from broadly addressing a subject. *SunBehm Gas, Inc. v. Conrad*, 310 N.W.2d 766, 772 (N.D. 1981); *see* Thad Kousser & Matthew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct*

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Democracy, 78 S. Cal. L. Rev. 949, 961 (2005) (separate votes on possibly related elements can lead to poor lawmaking).

The Steele Act itself both repealed existing law (Prohibition) and established an ongoing, complicated system with many different regulations and levels of control for spirits, beer, and wine. It has been, over nearly eighty years, the subject of frequent legislation and initiatives making changes, large and small, broad and narrow. *See* Part II.B (examples of different liquor legislation). The result is an RCW title that has grown by over 250 percent from the Steele Act. By passing I-1183, voters chose to address many of the issues and provisions of that title, and such modifications necessarily trigger questions about revising other related or parallel provisions.

b. Plaintiffs misread the main cases upon which they rely.

Plaintiffs rely on three cases in support of their argument that I-1183 is unconstitutional. Motion at 12-14 (discussing *Amalgamated*, 142 Wn.2d 183, *Kiga*, 144 Wn.2d 819, and *Wash. Toll Bridge Authority v. State*, 49 Wn.2d 520, 304 P.2d 676 (1956)). All three are inapplicable. The three cases involve initiatives written before the title statute was revised to intercept early the type of title flaws the Court found in them.

Moreover, the courts in *Amalgamated* (adjusting or repealing *certain* existing *vehicle* taxes; and establishing system for future voter approval of *all* proposed tax increases); *Kiga* (repealing *certain* existing *vehicle* taxes; and establishing limit on *all* future *property* tax increases); and *Wash. Toll Bridge* (fixing route and dedicating portion of existing tax revenues to assist in financing for a *certain* approved toll road; and establishing framework for acquisition, construction, improvement, extension, maintenance, and operation of *all* future toll roads by authority to be created) did not criticize, much less overrule, any of the

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cases approving multi-component reforms (such as campaign finance and insurance). The general rule thus remains:

> Where the title of a legislative act expresses a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will, or may, facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title.

Kueckelhan, 69 Wn.2d at 403.

Further, they were based on a necessity test that the Supreme Court has since abandoned. Though recognizing that even separate subjects can be related to each other in a particular context, the Supreme Court in those three cases looked to see if one was not just "incidental" to the other but *necessary* to the other's implementation.[28]

Here, a close nexus exists among the challenged provisions. They are not merely incidental to the subject of liquor laws but are squarely within that very subject. They "bear[] a close interrelationship to the dominant intendment of the measure." *Fritz*, 83 Wn.2d at 290. But even if they were incidental subjects, in *Citizens* the Court explicitly limited the "necessity" language used in the prior cases, stating that "an analysis of whether the incidental subjects are germane to one another does not necessitate a conclusion that they are necessary to implement each other, *although that may be one way to do so*." 149 Wn.2d at 637-38 (emphasis added). Instead, the test under the single subject rule for general

[28] The legislation in two of the cases was found to violate at least one other substantive constitutional provision besides the procedural single-subject rule. *Amalgamated*, 142 Wn.2d at 191-92 (finding I-695 to violate four separate constitutional prohibitions); *Wash. Toll Bridge*, 49 Wn.2d at 525 (discussing five additional constitutional infirmities). In the third case, the trial court found four other constitutional violations, but the Supreme Court did not reach those. *Kiga*, 144 Wn.3d at 824. It is not surprising that the courts are less deferential to single subject issues where there are other grounds for invalidation and the Article II, Section 19, discussion might guide any future legislative effort allowed by the other infirmities.

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title legislation now is whether the "matters within the body of the initiative are germane to the general title" and any incidental subjects are germane to elements within the main subject. *Id.*[29]

c. Article II, Section 19, does not allow Plaintiffs' attacks on specific provisions, but even then, all are within the single subject.

Plaintiffs' attempt to splinter the initiative into individual provisions is a practice not approved by the courts and would prevent the passage of any modestly complex legislation. The "sections" that Plaintiffs argue are incongruous fall within the liquor law subject and, even if they did not, easily relate to it in the context of this legislation.

From the start, the Court has often upheld lengthy substantive acts without looking individually at some or all provisions. *E.g., Marston v. Humes,* 3 Wash. 267, 28 P. 520 (1891) (upholding entire code of civil procedure). In *Kueckelhan*, the Supreme Court held that the 366-page insurance code bill did not violate Article II, Section 19. 69 Wn.2d at 402. The Court at no point entertains the idea that the Act must be examined at a granular level. *Id.* at 402-04.

Similarly, the lengthy initiative in *Fritz v. Gorton* concerning campaign disclosure laws was upheld, 83 Wn.2d 275, even though I-276 contained fifty separate sections (and, if you break the initiative into the sub-sections, as Plaintiffs do here, there are a total of 263 elements), Laws of 1973, ch. 1. The initiative challengers alleged that it contained at least six separate subjects: "(1) disclosure of campaign financing; (2) limitations on campaign

[29] Despite knowing that the "necessary" language no longer states a required test, Plaintiffs imply otherwise. Motion at 13 ("courts *may* consider whether the parts are necessary to implement each other" (emphasis supplied)) & 19 (arguing that "none of the subjects in I-1183 are necessary to implement the other"). Thus, Plaintiffs argue that the court "may consider" whether the elements are necessary to each other—but even though the Court may *not* consider only that factor, Plaintiffs ignore the obvious relatedness and fact that the provisions deal directly with "liquor."

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spending; (3) regulation of lobbying activities; (4) regulation of grass roots educational activities; (5) disclosure of financial affairs of elected officials; and (6) public inspection of records." *Fritz*, 83 Wn.2d at 290. The Supreme Court again "easily" rejected the assertion that there was a single subject violation. *Id*. "[E]ach of the subtopics of Initiative 276 bears a close interrelationship to the dominant intendment of the measure." *Id*. In *Washington Federation of State Employees,* the Court upheld initiative (I-134), another campaign reform measure that stretched over ten pages and contained thirty-three sections (with a total of 188 sub-sections altogether). 127 Wn.2d 544.

Plaintiffs seem to find new subjects within the initiative with each new pleading or hearing, but in brief, the following parts of I-1183 are alleged to be separate "subjects," each requiring its own legislation or initiative to pass muster under Article II, Section 19:

(i) including an "appropriations" for $10 million separate from the substantive provisions, Motion at 14-16;

(ii) "modification of the existing wholesale distribution and pricing model for wine", Motion at 16-18, Complaint ¶ 76(a); and "creation of a new fourth tier of wine and hard liquor sales," P.I. Motion at 15, Complaint ¶ 76(a)*;*

(iii) "imposition of a new tax on hard liquor," Motion at 18, P.I. Motion at 15, Complaint ¶ 76(a);

(iv) "revisions to State regulation of beer, wine and hard liquor advertising," Motion at 18, P.I. Motion at 15, Complaint ¶ 76(a); and

(v) changing the state's policy regarding alcohol by removing the goal of promoting "temperance" from policy section of RCW 66; Motion at 18; P.I. Reply at 3.

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Motion at 2. Plaintiffs speculate, but do not prove, that privatizing state liquor distribution and retailing was the "attraction" and that voters here had to choose between that and the "other subjects." Motion at 18; Complaint ¶ 76(a). But all of the above are within and relate to the single subject. These were all within the state system that was being modified (which included wine in addition to spirits), and all had statewide impact and involved liberalizing distribution and retailing of alcoholic beverages. There were interrelated policies to balance access and concern with abuse. Each part is germane to the others and to the general subject of liquor.

(i) Determining use of a part of revolving fund revenues is not a separate subject.

The initiative does not include an "appropriation" in I-1183, § 302, that is impermissibly tied to substantive law. *Contra* Motion at 13-14. Plaintiffs again misunderstand the applicable legal standard. First, there is no separate test for appropriations under Article II, Section 19. The test articulated in the main case[30] relied on by Plaintiffs makes it clear that the "appropriation" must only be rationally related to the general subject of the title. *State v. Acevedo*, 78 Wn. App. 886, 889, 899 P.2d 31 (1995) ("A bill that contains appropriations and substantive provisions is not unconstitutional unless … it violates the rational unity test.") (internal citations omitted).

The connection between the Liquor Revolving Fund ("LRF"), *see* I-1183 § 302, and distributions to cities, towns, and border areas is as old as the LRF itself. The Steele Act created the LRF, Laws of 1933, 1st Ex. Sess., ch. 62, § 73, and allocated 20 percent of the "excess" revenue from the LRF to county old age pensions and 50 percent to "the counties

[30] *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 38, 377 P.2d 466 (1962) is no more relevant. It involved an actual appropriations bill that was found to violate the constitutional provision that limits appropriations to one year, and for that reason also violated Article II, Section 19. The Court severed the ongoing appropriations rather than striking the entire bill.

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and incorporated cities and towns of the state." *Id.* § 78 (1). Nothing in that section or elsewhere in the Steele Act ties this money specifically to alcohol-related programs; the connection comes from the fact that these monies are generated by the license system established by the Act. Similarly, the "border areas" in the state, defined in RCW 66.08.195, have received distributions from the LRF since 1988. LRF distributions have never all been specifically related to alcohol, although some LRF allocations have related to liquor, such as funding grape research at Washington State University. RCW 66.08.190 (no reference that allocation must be spent on alcohol-related programs).

I-1183 does nothing novel or unconstitutional in allocating an additional $10 million to local governments and giving them the discretion to use it as they see fit "to augment and maintain existing levels of police protection in such areas and to alleviate the impact of such added burdens." Laws of 1988, ch. 229, § 2. Plaintiffs' argument (Motion at 16) that the increased funding was simple "vote-buying" is offensive.[31] Protecting against the unintended consequences of reform is hardly a legislative abuse and has never been viewed as a target of Article II, Section 19. Indeed, this was just one of the ways in which I-1183 addressed major concerns voiced by public safety personnel during the 2010 initiative drive. It also bars smaller stores from spirits sales by imposing a square-footage requirement and doubles fines for selling to minors, and initiates a new retailer compliance program.

(ii) I-1183 validly chooses how to regulate the liquor market in light of the void created by ending the state stores.

Plaintiffs contend that I-1183 modifies "the existing three-tier wholesale distribution and pricing model for wine" by allowing retailers to warehouse wine centrally and

[31] Moreover, Plaintiffs' alleged facts are incorrect. Plaintiffs contend that no public safety officials supported I-1100, but former Whatcom County Sheriff Dale Brandland supported the initiative and appeared in campaign ads. Suppl. Connelly Dec. ¶ 16.

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eliminating the uniform distributor pricing requirement. Complaint ¶ 55. Another alleged subject raised by Plaintiffs concerns the fact that grocery stores with a license to sell wine may now obtain an additional endorsement that would permit them to sell to other retailers (e.g., restaurants or bars). Complaint ¶¶ 56, 76(b) (citing I-1183, § 104(8)). More generally, Plaintiffs insist that the changes to wine regulations generally and to the remaining three-tier system for wine also rise to the level of a new "subject." *Id.* at ¶ 76(a). The primary argument consists of looking to legislative history, Motion at 16-17, claiming that the "changes to the hard liquor and regulatory schemes is inconsistent with the State's historic differentiation between those schemes," *id.* at 17.[32] As discussed in Part II.B, the Legislature has in fact legislated in the past across the tiers of production and across the varying types of alcohol, and there is substantial overlap not just in the legislation, but in the real-life execution of those laws in everyday liquor commerce.

Plaintiffs' argument, here and generally, is contrary to the rule that words in a title must be given their common and ordinary meaning. It is Plaintiffs that attempt to impose a special meaning and unusual limitation on "liquor" in order to exclude wine. Even were that not improper on its face, the Initiative's stated subject specifies that wine is included within liquor, and the "concise description" identifies wine regulation as subject to modification. The challenged provisions address the void left by the state's exit from the marketplace and are similar to the many other exceptions to the three-tier system, all of which have been created through "liquor" laws.

[32] Apparently this argument is also the reason that Plaintiffs have repeatedly described the three-tier system for each kind of liquor differently, although the legislative scheme is nowhere near as differentiated as such a description indicates.

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The State had exempted itself from the limitations on competition imposed on other retailers and the distributors that serve them, allowing the State significant cost savings and competitive advantage—thereby increasing its sales volume, or revenue generated by sales, or both. *See* Suppl. Connelly Decl., Ex. S (Letter, LCB to Office of Governor (Feb. 27, 1975) ("If the move to take the state out of the wine business is successful, the consumer will pay higher prices for wine …. The wholesaler as the middleman, and his pricing methods are the major causes of the difference between supermarket and liquor store wine prices.")); *id.* (LCB, Fact Sheet on House Proposed Measure 586 ("state liquor stores sell wine cheaper than grocery stores and still make a profit … to help support state and local government")). The extension of this condition to the private market—allowing warehousing, distributor price competition, and sales to other retailers—is a valid legislative choice in how to structure the private system replacing the state's retail presence. *See* Sullivan Decl. ¶ 52. It is within the general subject and the "essential contents," one of which was to revise wine regulations.

(iii) I-1183 does not create or impose new "taxes" by replacing the State's revenue from its sale of spirits.

As the Thurston County Superior Court already decided, I-1183 does not create or impose new "taxes." Connelly Decl., Ex. A (Order). Plaintiffs resurrect their failed ballot title argument and claim that the license fees established in I-1183, § 103(4) & § 105(13)(b), actually impose taxes incorrectly designated as "fees." Furthermore, Plaintiffs claim, the creation of this "tax" is a separate subject from the main "subject" of the initiative, privatization of liquor sales. Complaint ¶ 76(a). As discussed in more depth *infra* in Part V.C.4(b), I-1183 does not misrepresent the character of the fees imposed on new spirits retail and distributor licenses. Moreover, whether it is a fee or a tax, whether and how to

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extract government revenue from allowing a privilege to sell liquor is within the subject of liquor.

(iv) There are no substantive changes to the LCB's power to regulate liquor advertising, and the changes that were made are within the liquor subject.

Plaintiffs claim that "I-1183 eliminates State restrictions on retailer advertising of beverage alcohol including an absolute ban on any restrictions on advertising price," P.I. Motion at 8, and such a change should have been enacted in separate legislation. Motion at 18-19; *see* Complaint ¶¶ 57, 58. Besides being factually incorrect about the extent of the changes made to the LCB's power to regulate advertising, Plaintiffs cannot elevate these minor revisions to the status of a "subject."

LCB retains its power under RCW 66.08.060 to "adopt any and all reasonable rules as to kind, character, and location of advertising of liquor." I-1183, § 108. The Plaintiffs' claim to the contrary is false. Motion at 14, 18; P.I. Motion at 8 (claiming "I-1183 eliminates State restrictions on retailer advertising of beverage alcohol").

I-1183 does eliminate the restriction that the LCB "shall not advertise liquor in any form or any medium whatsoever." I-1183, § 108 (repealing RCW 66.08.060(1)) and adds language to RCW 66.08.050 that explicitly states that the LCB has "no authority…to restrict advertising of lawful prices." I-1183, § 107(7). But Plaintiffs' argument that I-1183 thus "strips the LCB of its authority to restrict price advertising" is incorrect. Complaint ¶¶ 11, 72, 76(b). First, the LCB will no longer sell liquor—and hence has no need for a restriction on its power to advertise liquor. Second, the LCB does not currently restrict price advertising. *See* WAC 314-52-005 to -130 (advertising rules).[33] The United States Supreme

[33] The only mention of price advertising prohibits retail licensees from misleading advertising that encourages over-consumption. WAC 314-52-110(2); *see* WAC 314-52-005.

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Court has held that such restrictions violate the First Amendment. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). The change in I-1183 does not take away any real authority; it only makes clear that the authority does not go beyond constitutional bounds. Thus I-1183 does not enact an actual change in that law; instead it eliminates unnecessary provisions and clarifies the statute. It is at most precatory and thus outside Article II, Section 19. *See infra* at Part V.C.3(c)(v). Certainly it does not constitute an entirely different legislative "subject."

(v) Liquor policy language is within the liquor subject, and policy is not a separate "subject."

Plaintiffs also allege that tightening the existing policy language in Section 124 of I-1183 creates a new "subject" that required notice to the voters. P.I. Reply at 3. But removing "encouraging moderation in consumption of alcohol" from RCW 66.28.280 hardly signals a major policy shift when the objective of protecting safety and preventing abuse remains. Even if policy had changed, that is certainly within the liquor subject—specifically, how strict the liquor law should be. Moreover, the Supreme Court has ruled that policy statements in initiatives do not constitute subjects.[34] *Pierce Cnty. v. State,* 150 Wn.2d 422, 435-36, 78 P.3d 640 (2003); *accord Food Servs. of Am. v. Royal Heights, Inc.,* 123 Wn.2d 779, 788, 871 P.2d 590 (1994) (holding that declaration of legislative purpose has no operative force in and of itself).

4. The Initiative Does Not Violate the Subject-In-Title Rule

Plaintiffs separately argue that I-1183's title is insufficient under Article II, Section 19. The subject-in-title portion of Article II, Section 19, states that the single

[34] In any event, no precedent or policy requires that after-the-fact judicial findings of tertiary transgressions against the single subject rule are grounds for wholesale repudiation of the will of the voters.

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subject discussed above "shall be expressed in the title." "Any 'objections to the title must be grave and the conflict between it and the constitution palpable before we will hold an act unconstitutional.'" *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 372, 70 P.3d 920 (quoting *Nat'l Assn of Creditors v. Brown*, 147 Wash. 1, 3, 264 P. 1005 (1928)). By definition, if there are no separate subjects under the single-subject analysis above, *see supra* Part IV.3, the title is valid.

Initiative 1183 not only meets but exceeds Section 19's constitutional requirements for titles. RCW 29A.72.050 specifies that the subject be expressed first, in ten words or less (in addition to the reference to the initiative by number), and here it was: "liquor," with most of the remaining eight words used to avoid any possible confusion by explaining that "liquor" includes "beer, wine, and spirits" and that spirits are sometimes called "hard liquor."

> Initiative Measure No. 1183 concerns liquor: beer, wine, and spirits (hard liquor).

The subject portion of the ballot title describes the subject generally, consistent with the Constitution, and succinctly, as required by state statute. General titles such as this are liberally construed. *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 26, 200 P.2d 467 (1948); *see also First v. Attorney General*, 437 Mass. 1025, 774 N.E.2d 1094, 1096 (2002) (finding that the Attorney General's judgment about what constitutes a fair and concise summary of the initiative is entitled to deference). Plaintiffs nonetheless contend that I-1183 violates the subject-in-title rule because the title fails to specify each of the five elements attacked as separate subjects. Motion at 23. However, Plaintiffs make no argument to support that except as to the contention that the initiative really imposes a "tax" and not a "fee based on sales."

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a. There is no constitutional requirement to go beyond the general subject in the title.

Plaintiffs complain that the 10-word statement of subject or 30-word "concise description" of "essential contents" in the title, RCW 29A.72.050(1) (imposing both limits), did not identify all of the specified provisions, much less all of the similar provisions in a 32-page measure. But there is no requirement that the title of an act "be an index to the contents of the legislation that follows . . . [or] express in detail every phase of the subject which is dealt with by the enactment. *Wash. Toll Bridge*, 32 Wn.2d at 25-26; *accord*, *Amalgamated*, 142 Wn.2d at 217. Rather, the statement of subject must "give[] such notice as should reasonably lead to an inquiry into the body of the act itself, or indicate[], to an inquiring mind, the scope and purpose of the law." *Wash. Toll Bridge*, 32 Wn.2d at 26.

In fact, the improved 2000 ballot title statute goes beyond the Constitution and directs the Attorney General to provide not just the subject but a "concise description" of the "essential contents" of the initiative. That was done here, and each provision highlighted by Plaintiffs falls not just within the single general subject but also within one or more of the five general elements, as shown above. *See supra* Part V.C.3(d). A reasonable voter had more than adequate notice of the scope of I-1183.

b. The ballot title is not misleading in its use of the word "fees."

Plaintiffs' only serious subject-in-title allegation, repeated from the failed ballot title challenge in Thurston County Superior Court, is that the title is deceptive in using "fees" because the body of I-1183 describes the details of those fees in a fashion that Plaintiffs say make them taxes for the purposes of certain unrelated statutes. Complaint ¶ 77(b).[35]

[35] The State's Motion for Summary Judgment describes at pages 15-17 how the contexts covered by the technical definitions of "tax" relied upon by Plaintiffs are irrelevant in this case.

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Plaintiffs cannot dispute that the body of the initiative is consistent in calling the "fee" a "fee," that voters understood that I-1183 imposed a financial charge—whether a fee or a tax—on those who sought the privilege of selling spirits, that it was based on sales, and that it was intended to replace the state's revenue stream generated by its sale of liquor. *See* Part V.B.4 (compiling media coverage regarding "taxation" imposed by I-1183).

Further, I-1183's *title* explicitly makes clear that these license *fees* are based upon *sales*. So if that connection is what makes something a tax in Plaintiffs' minds, they were on notice that this fee was tax-like.[36] A reasonable reader would be put on notice to review the specific contents of the initiative, which provide substantial detail on how money is charged for licenses based on *sales*, as clearly indicated by I-1183's title. Furthermore, the initiative is clear (as were the campaigns) that the purpose of the license fees was to replace (or exceed) the current revenue the state generates from its "mark up" on liquor—a charge that from the very beginning of the liquor system was held not to constitute a tax. *Ajax*, 177 Wash. at 465. The terms used to describe the liquor revenue stream have historically never included the word "taxes." Suppl. Connelly Decl. Ex. X (LCB report uses term "mark up" and separates it from taxes collected). For example, a common flyer posted at state liquor stores explains to customers how the state earns money from the sale of liquor, and it clearly separates the "mark-up" from the "taxes." *Id*.

A reasonably informed Washington voter would take that knowledge with them to the ballot box. To argue now, as Plaintiffs' do, that voters would have relied on a purely

[36]A Florida court rejected a challenge to an initiative's title based on the argument that the "fee" imposed was actually a tax, holding: "[T]he initiative 'imposes a levy—whether characterized as a fee or tax….' There is no confusion relative to who pays, how much they pay, how long they pay, to whom they pay, and the general purpose of the payment." *Advisory Op. to Attorney Gen.*, 681 So. 2d 1124, 1128-29 (Fla. 1996) (citation omitted).

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legal test applied in certain municipal contexts offends common sense.

I-1183 is also easily distinguished from cases in which courts have found subject-in-title violations. Unlike *Amalgamated* and *DeCano*, I-1183's use of fee in its title is faithful to a common and ordinary usage of the word. "Fee" is commonly understood to include "a sum paid or charged for a service" or privilege. *Merriam Webster's Collegiate Dictionary* (10th ed. 1993). For the *privilege* of selling alcohol in Washington, interested parties must pay money, in the form of fees. I-1183, § 103. That usage is also consistent throughout the initiative. In *DeCano v. State,* the Court found that "the *title* . . . [gave] no intimation whatsoever that the *body* of the act contain[ed] an amended definition of the word 'alien' which br[ought] within its purview a whole new class of persons who are not in fact aliens in common understanding." 7 Wn.2d 613, 624, 110 P.2d 627 (1941) (emphasis added). Similarly, the *Amalgamated* Court found that the *title* of the initiative did not adequately reflect "the *contents* of the initiative" because the body redefined the term to have a "broader meaning than its commonly understood, traditional meaning." 142 Wn.2d at 223, 227 (emphasis added).

Here, there is no redefinition of "fee" in the body of the initiative. The body merely provides more detail on what the reader already knew: that fees charged for license privileges are based on sales to replace the state store markup. Indeed, by its own terms, I-1183 does not "*increase* any tax, *create* any new tax, or *eliminate* any tax." I-1183, § 301 (emphasis added). The Attorney General agreed that I-1183 "would not change the existing taxes on spirits" but instead would "require spirits retailers and distributors to pay license fees to the state . . . of seventeen percent of gross revenues from spirits sales under the license, plus an annual $166 fee." Suppl. Connelly Dec. Ex. Q (Annotated Voters Pamphlet, p. 20). And the Thurston County Superior Court has heard this identical argument and

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rejected it. Connelly Decl., Ex. A (Order). Where a reasonable jurist has already ruled against them, Plaintiffs must do more than rehash their argument to meet a requirement that they prove their case beyond a reasonable doubt.[37]

VI. CONCLUSION

The people have exercised their right to legislate directly and reform Washington's liquor laws. Plaintiffs, part of the very vocal opposition to the initiative, try to unravel it in the courts after voter rejected their arguments. This is an abuse of Article II, Section 19. To the extent the Court considers Plaintiffs' factual allegations, they must be resolved at trial. Plaintiffs' attempts to splinter the initiative into its smallest parts, ignore common meanings and plain language, and impose a new standard for titles fall far short of meeting their heavy burden, and Intervenor-Defendants respectfully request that the Court uphold I-1183 as a matter of law.

[37] Plaintiffs are bound by the "final" decision of the Thurston County Superior Court on the issues they did raise there, and should have exhausted all their arguments in that proceeding, before the sponsors, supporting voters, and even opponents relied on that review of the title in the campaign and vote on I-1183.

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