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8 **SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**
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10 **WASHINGTON ASSOCIATION FOR**
11 **SUBSTANCE ABUSE AND VIOLENCE**
12 **PREVENTION, a Washington non-profit**
13 **corporation; DAVID GRUMBOIS, an**
14 **individual, GRUSS, INC., a Washington**
15 **corporation,**

16 **Plaintiffs,**

17 **v.**

18 **STATE OF WASHINGTON,**
19 **Defendant.**

20 **and**

21 **JOHN McKAY; BRUCE BECKETT;**
22 **COSTO WHOLESALE CORPORATION;**
23 **THE YES ON 1183 COALITION; MACKAY**
24 **RESTAURANT GROUP; NORTHWEST**
25 **GROCERY ASSOCIATION; SAFEWAY,**
26 **INC.; THE KROGER COMPANY; and**
27 **FAMILY WINERIES of WASHINGTON,**
28 **Intervenor-Defendants**

No. 11-2-01465-8

COURT'S RULING ON
MOTIONS FOR SUMMARY
JUDGMENT

22 The plaintiffs and defendants have each moved for summary
23 judgment. The intervenors have joined in the summary judgment motion of the
24 state.

25 Initiatives must comply with the requisites of our state constitution in the
26 same manner as laws passed by our elected legislators.

27 In approving an initiative measure, the people exercise the
28 same power of sovereignty as the Legislature when enacting a
statute. *Wash. Fed'n of State Employees v. State*, 127 Wash.2d

1 544, 556, 901 P.2d 1028 (1995). This power is subject to the
2 same constitutional restraints placed upon the Legislature when
3 making laws. *State ex rel. Heavey v. Murphy*, 138 Wash.2d 800,
4 808, 982 P.2d 611 (1999). Consequently, even though an
initiative passes by the majority of the voters, it will be struck
down if it runs afoul of Washington's constitution.

5 City of Burien v. Kiga, 144 Wash.2d 819, 824, 31 P.3d 659,
6 662 (2001)

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8 Laws, whether enacted by the legislature or directly by the voters, are
9 presumed to be constitutional. They must be shown to violate our constitution
10 "beyond a reasonable doubt" before they can be declared void. "This standard is
11 met if argument and research show that there is no reasonable doubt that the
12 statute violates the constitution." *Amalgamated Transit Union Local 587 v.*
13 *State*, 142 Wash.2d 183, 205, 11 P.3d 762, 780 (2000)

14
15 The title of I-1183 reads as follows:

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

19 Article II, Section 19 of the Washington Constitution states: "No bill shall
20 embrace more than one subject, and that subject shall be expressed in the title."

21
22 The plaintiffs argue the language of I-1183 violates the Washington
23 Constitution in two respects. First, that it does not comply with the "single
24 subject rule" and second that it is contrary to the "subject in title" requirement.

25 26 **Subject in Title**

27 The purpose of the "subject in title" requirement is simply to make sure that
28 people know what they are voting for or against. The title of I-1183 includes

1 language stating it will "set license fees based on sales". The plaintiffs contend
2 this language creates a new tax rather than a fee, and that voters should have
3 been specifically so notified by the language of the title.

4 I-1183 creates a system of licenses and fees for those licenses. It
5 includes provisions essentially making the licensees guarantors of the amount of
6 revenue collected, and increases their fees if necessary to maintain revenue
7 levels. Revenue from those license fees has, prior to the enactment of the
8 initiative, been used both to regulate the licensees and also, through the Liquor
9 Revolving Fund, to pay for various drug and alcohol related programs at the
10 state and local levels.

11 Very clearly, the system of revenue generation created provides
12 significantly more money than is necessary to regulate the licensees. As such,
13 it is a tax and not a fee.

14 If the primary purpose is to raise revenue used for the
15 desired public benefit, the charges are a tax. If the primary
16 purpose is to regulate the fee payers—by providing them with a
17 targeted service or alleviating a burden to which they contribute—
that would suggest that the charge is an incidental tool of
regulation.

18 *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wash.2d 359,
19 371, 89 P.3d 217, 223 (2004)

20
21 The determination that the initiative creates a tax and not merely a fee
22 does not end the inquiry. The constitutional question to be answered is simply if
23 the voters were accurately informed of the effect of the initiative. They were told
24 that the licensees would pay a percentage of their sales to the state. That is a
25 perfectly accurate description of what this law requires. "Language in an initiative
26 should be construed as the average informed voter voting on the initiative would
27 read it." *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 219,
28 11 P.3d 762, 787 (2000)

1 While it is understandable that the initiative sponsors wanted to avoid the
2 potential pejorative connotation of the term "tax", they were still able to accurately
3 tell the voters what they were voting for or against. The constitution requires
4 nothing more. While people of common understanding may not be familiar with
5 the rather complex distinctions our courts have drawn between a tax and a fee,
6 they can certainly appreciate the meaning of paying a percentage of sales to the
7 state. Washington voters do just that with almost every purchase they make. I-
8 1183 does not violate the subject in title requirement of Article II, Section 19.

9 10 **Single Subject**

11 All parties are in agreement that I-1183 carries a general, rather than a
12 restrictive title. Given that, Art. II, Sec. 19 requires only that there be a "rational
13 unity" between the various provisions of the initiative.

14 An initiative can embrace several incidental subjects or
15 subdivisions and not violate article II, section 19, so long as they
16 are related. In order to survive, however, rational unity must exist
17 among all matters included within the measure and the general
18 topic expressed in the title." Rational unity requires included
19 subjects to be reasonably connected to one another and the ballot
20 title.

21 Washington Ass'n of Neighborhood Stores v. State, 149 Wash.2d
22 359, 370, 70 P.3d 920, 925 (2003)

23 the existence of rational unity or not is determined by
24 whether the matters within the body of the initiative are germane
25 to the general title and whether they are germane to one another.

26 Citizens for Responsible Wildlife Management v. State. 149
27 Wash.2d 622, 636, 71 P.3d 644, 652 (2003)

28 The court in the Citizens case made clear that the test is not one of
necessity.

1 There can be no question that the dominant theme of I-1183 was the
2 privatization of the sales of distilled spirits in the state. Like most comprehensive
3 pieces of legislation it contains a number of sections addressing many specifics.
4 Do the sections complained of bear a rational unity to this dominant purpose?

5 The plaintiffs claim I-1183 violates the single subject rule in several
6 respects. Each will be addressed in turn.

7 I-1183 eliminates the three tier system for the distribution and sale of
8 wine and removes restriction on the pricing of wine. Much has been made of
9 various definitions of liquor regarding this issue. What is being regulated (or
10 more accurately deregulated) is sales of various forms of alcohol. While the
11 initiative only changes the law regarding two of the three major forms of
12 alcohol, this is not fatal to the single subject requirement. As has been pointed
13 out all three forms of alcohol were originally regulated together in the Steele
14 Act, but have been regulated in different manners as time has progressed.
15 Washington has long recognized the issues and problems common to various
16 forms of alcohol. The manner of deregulation contained in I-1183 differs for
17 distilled spirits and wine, but the manner of their regulation differed before the
18 initiative, even though both were supervised by the Liquor Control Board. The
19 change in regulation of both distilled spirits and wine have a rational unity with
20 each other, even if the extent of the change differs, "the unity being found in
21 the general purpose of the act and the practical problems of efficient
22 administration." ATU @ 209

23 The plaintiffs have pointed out multiple occasions where the legislature
24 had addressed more than one form of alcohol in a single bill. This would seem
25 to bolster the argument that addressing both distilled spirits and wine in a single
26 initiative does not violate the single subject requirement.

27 The two topics are germane to one another and their inclusion in the
28 initiative does not violate the single subject rule.

1 The plaintiffs claim a separate subject is contained in the changes made to
2 the power of the state to regulate the advertising of liquor.

3 There is nothing in this day and age that is more central to the sale of any
4 product than the advertising of that product. I cannot ignore the realities of the
5 market in making an analysis of "rational unity". The Supreme Court has
6 recognized the need to consider such circumstances. "The relationship between
7 fire insurance regulation and rating, fire loss, fire prevention, and fire
8 investigation is rational and reasonable. To hold otherwise would ignore modern
9 day realities." *Kueckelhan v. Federal Old Line Ins. Co.(Mut.)*. 69 Wash.2d 392,
10 403-404, 418 P.2d 443 (1966)

11 The plaintiffs argue that I-1183 in effect will prohibit the state from any
12 regulation of liquor advertising. While some aspects of the state's ability to
13 regulate advertising do change, the state may continue to control the time, place,
14 and manner of that advertising. Even if the deregulation of advertising is as
15 broad as the plaintiffs claim, the result is the same.

16 Changes to the manner in which the state may regulate sales of alcohol are
17 irretrievably intertwined with the manner in which the state may regulate the
18 advertising of that same product. The two could not be more germane to each
19 other. There is no violation of the single subject rule.

20 I-1183 struck statutory language contained in RCW 66.28.280. That statute
21 describes policy reasons for the adoption of the three-tier system of liquor
22 distribution. Since the effect of I-1183 is to eliminate that three-tier system as to
23 wine, removal of the purposes for its adoption have a rational unity with the topic
24 at hand.

25 Further, I would agree with the State in the assertion that the statement of
26 goals contained in RCW 66.28.280, while laudable, are merely a declaration of
27 purpose, without independent legal force in the absence of the distribution
28 system they support.

1 The plaintiffs may well be correct in their assertion that the adoption of I-1183
2 may mark a change in public policy. However that doesn't make it a subject
3 divorced from the main topic of I-1183. The adoption of the initiative was a major
4 change, made by the public, in how we deal with alcohol in this state. That
5 change is certainly germane to the policies behind the three-tier system as the
6 initiative eliminates that same system, at least as to wine. The removal of the
7 language describing the purposes of the three-tier system is not a separate
8 subject.

9 Lastly, the plaintiffs argue that Section 302 of I-1183 is a separate subject
10 from the rest of the initiative.

11 Section 302 states in part as follows; "An additional distribution of ten million
12 dollars per year from the spirits license fees must be provided to border areas,
13 counties, cities and towns through the liquor revolving fund for the purpose of
14 enhancing public safety programs." The initiative gives no definition of what
15 constitutes a "public safety program". It is clear though, that the definition is not
16 limited to programs dealing with alcohol or regulation of the hard liquor, wine, or
17 beer industries. None of the parties make any claim that the language is so
18 limited.

19 The plaintiffs claim this language creates an appropriation within a
20 substantive bill and therefore violates the single subject requirement. However, a
21 substantive bill may carry with it an appropriation so long as the purpose of the
22 appropriation is to carry out the purpose of the act. The standard to be met is the
23 same standard for all single subject analysis, is there a rational unity between the
24 subjects?

25 There is no rational reason for automatically voiding a
26 substantive bill that contains appropriations, so long as the
27 legislation complies with the rational unity test.

28 State v. Acevedo, 78 Wash.App. 886, 890-891, 899
P.2d 31, 1995)

1 Each of the parties have made various suggestions for what the
2 court should consider as the actual subject of I-1183. The broadest
3 suggestion, made by the intervenors and endorsed by the state, is that
4 the subject of I-1183 is "liquor". This is the subject listed in the title of
5 the initiative. However, even that all encompassing definition of the
6 subject of the initiative does not cast a net sufficiently broad to
7 encompass the notion of a \$10 million contribution to undefined and
8 unnamed public safety programs.

9 The state and the intervenors contend that the rational unity exists between
10 Section 302 and the rest of the initiative because the funds being spent by this
11 provision are generated by the rest of the initiative. Under such a "source of
12 funds" analysis, the initiative could have also funded a new basketball stadium in
13 Seattle, a new bridge across the Columbia River, or any other project imaginable,
14 so long as the funds to support that project were generated by revenue from
15 liquor sales.

16 This is an extraordinarily expansive definition of rational unity and of the
17 concept of the single subject standard. It is one which is not supported by any
18 case law cited. It also seems to embrace the very worst of the problems
19 associated with "log rolling". Adopting this criteria would mean any project or
20 program could be placed in a bill, so long as the bill produced the money to be
21 spent on the project.

22 The court in Acevedo rejected such an all-inclusive standard and made
23 clear that an appropriation, just like any other substantive provision, must bear
24 a rational unity to the rest of the legislation. Given the opportunity to do so, the
25 court did not forego that rational unity test for the "source of funds" concept
26 advanced here in support of the language of Section 302.

1 Our Supreme Court has also declined to abandon the requirement
2 that "rational unity" amount to something more than simply a "source of
3 funds" test.

4 Respondent further contends that the inclusion of an
5 appropriation in chapter 9 is, likewise, a violation of the double-
6 subject prohibition of the constitution. Of course, this
7 appropriation is not of a continuing nature, and its object is to
8 carry into execution the principal purposes of the act.

9 State ex rel. Washington Toll Bridge Authority v. Yelle 61
10 Wash.2d 28, 38, 377 P.2d 466, 472 (.1962)

11 It has also been argued that the Liquor Revolving Fund has
12 traditionally been used to pay for various programs unrelated to liquor,
13 and that Section 302 merely continues that tradition. The legislature
14 commonly takes funds from one source and chooses to spend them on
15 an unrelated topic. There is nothing that would prohibit the use of
16 money generated by I-1183 from being used for public safety programs
17 having nothing to do with liquor, but that is not the issue here. The
18 question of whether the direction of \$10 million per year from state
19 coffers to public safety programs bears a rational unity to liquor. It does
20 not.

21 Section 302 of I-1183 creates a spending requirement which is
22 neither germane to nor has any rational unity with the rest of the
23 initiative, no matter how expansive an interpretation is given to the
24 purposes of the initiative. While such funding may be for a laudable
25 purpose, it is a subject separate and wholly unrelated to liquor regulation
26 or deregulation, the privatization of hard liquor sales, licensing, or liquor.

27 Section 302 of I-1183, beyond a reasonable doubt, violates Article
28 II, Section 19 of the Washington Constitution.

1 **Severability of Section 302**

2 The State, in its responsive pleadings, suggests that Section 302 is
3 severable from the balance of I-1183.

4 The rule is that, if a portion of a statute is found to be invalid,
5 the entire statute will not be struck down unless the invalid portion
6 is unseverable and it cannot be reasonably believed that the
7 legislature would have passed the one without the other, or unless
8 the elimination of the invalid part would render the remainder of the
9 act incapable of accomplishing the legislative purpose. . . .

10 Municipality of Metropolitan Seattle v. O'Brien, 86 Wash.2d 339,
11 349, 544 P.2d 729, 734 - 735 (WASH 1976)

12 The elimination of Section 302 would not render the remainder of the
13 initiative incapable of accomplishing its purpose. Section 302 has been
14 described in argument as merely “the tail on the dog”. I would agree with that
15 assessment. The second requirement of severability is satisfied.

16 There is a presumption of severability, and courts determining
17 severability “ ‘should refrain from invalidating more of the statute than is
18 necessary’ ” so as not to frustrate the intent of the Legislature.

19 State v. Harris. 123 Wash.App. 906, 918, 99 P.3d 902, 907 (2004)

20 The question then, is whether I can at this point determine the intent of the
21 legislative body, in this case the voters of the state, and whether they would have
22 passed I-1183 without the inclusion of extra money for enhanced public safety
23 programs.

24 Power, Inc. v. Huntley 39 Wash.2d 191, 235 P.2d 173, 178 (1951) has
25 been cited for the proposition that I cannot consider Section 302 as severable
26 from the rest of the initiative. However, Section 302 is not mentioned in the title
27 of the initiative. It is only where an initiative contains multiple titles that the court
28 must void the entire initiative.

 But if the title to the act actually indicates, and the act itself
 actually embraces, two distinct objects, when the constitution says

1 it shall embrace but one, the whole act must be treated as void,
2 from the manifest impossibility in the court choosing between the
3 two, and holding the act valid as to the one and void as to the other.

4 As the supreme court of Pennsylvania said in Yardley Mills
5 Co., Inc., v. Bogardus, 321 Pa. 581, 185 A. 218, it is impossible to
6 select arbitrarily one of several unrelated subjects included in the
7 title and say that it is constitutional to the exclusion of the others.

8
9 Power, Inc. v. Huntley (supra) @ 199-200

10 The State says that I can "safely presume" the initiative would still have passed,
11 given that 59% voted in favor.

12 The plaintiffs in turn say that much emphasis was placed on this enhanced
13 public safety funding in the advertising in support of I-1183. They point to law
14 enforcement and fire fighter support of I-1183 which did not exist for the two prior
15 privatization initiatives, which did not contain this increased funding. To what
16 extent this provision was in the mind of the voting public, and how it impacted
17 their decision making, is a question of fact. The record before me does not
18 answer that question, nor even suggest an answer at a level which establishes
19 that there is no material issue of fact.

20 **Standing**


21 The intervenors argue that the plaintiffs have not established their standing
22 to challenge I-1183. I would find that they have established sanding in several
23 respects. It is un rebutted that plaintiff Grumbois is a registered voter. While the
24 economic loss complained of by plaintiffs is speculative, there can be no question
25 that there will be an economic impact. I believe all plaintiffs have established
26 their standing to bring this action.

27 //

28 //

1 The issues relating to severability of Section 302, specifically whether or
2 not I-1183 would have been passed by the voters without that provision, and
3 who has the burden of proof on this issue should be set for trial and additional
4 argument.

5
6 March 2, 2012

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9 Stephen M. Warning
10 Cowlitz County Superior Court
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