JUDGE STEPHEN M. WARNING
March 2, 2012
9:00 A.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

WASHINGTON ASSOCIATION FOR SUBSTANCE ABUSE AND VIOLENCE PREVENTION, *et al.*,

Plaintiffs,

v.

The STATE OF WASHINGTON,

Defendant,

and

COSTCO WHOLESALE CORP., *et al.*,

Defendant-Intervenors.

No. 11-2-01465-8

PLAINTIFFS' OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The ballot title for Initiative 1183 ("I-1183") leaves no doubt that the primary purpose of the measure was to get the State out of the liquor business by privatizing the

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sale and distribution of hard liquor. I-1183, however, brings about much more than just privatization of the hard liquor business:

I-1183 imposes new taxes on private retailers of hard liquor, the proceeds of which are appropriated to the State's general fund and unrelated public safety programs;

I-1183 deregulates wine distribution by allowing, for example, wine price discrimination, while leaving beer distribution unchanged;

I-1183 changes the rules for beverage alcohol price advertising; and

I-1183 eliminates the fundamental state policy of moderation in alcohol consumption (and the policy of orderly marketing of alcohol) that previously underlay State regulation of liquor.

Such multiple subjects represent a classic case of logrolling prohibited by Article II, § 19's single subject rule. Moreover, I-1183's ballot title fails to identify several of these subjects including, but not limited to, the imposition of new taxes, thus violating Article II, § 19's subject-in-title rule.

Implicitly recognizing the weakness of its position, the State has moved for summary judgment largely on the basis of generalized legal presumptions, and has avoided thorough analysis of what I-1183 actually says and does. The State also misstates the law. (For example, the State asserts that the established legal test for distinguishing a tax from a fee does not apply to the State, ignoring clear Washington Supreme Court precedent to the contrary.) In short, the State's arguments in favor of summary judgment

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disregard the text of I-1183 and well-settled Washington law. Accordingly, the Court should deny the State's motion for summary judgment, and grant Plaintiffs' motion.[1]

II. EVIDENCE RELIED UPON

Plaintiffs' Opposition relies on the papers and pleadings on file with the Court, including the Declaration of Michael C. Subit in Support of Plaintiffs' Motion for Preliminary Injunction (Dec. 7, 2011) ("Subit Decl.") and all attachments thereto, and the Supplemental Declaration of Michael Subit in Support of Plaintiffs' Motion for Summary Judgment (Jan. 20, 2012) ("Supp. Subit Decl.") and all attachments thereto.

III. STATEMENT OF FACTS

Plaintiffs incorporate the Statement of Facts from their Motion for Summary Judgment ("Plaintiffs' Motion" or "Pls. Mot.") in this opposition.

IV. ARGUMENT

A. Both the Plaintiffs and State Agree the Constitutionality of I-1183 Should Be Determined on Summary Judgment

Both the Plaintiffs and the State recognize that the "interpretation of an initiative is a question of law." State's Motion for Summary Judgment, p. 3 ("State's Motion" or "State's Mot."). Indeed, as far as Plaintiffs' legal research has shown, every single Article II, § 19 challenge over the past 100-plus years has been decided as a matter of law, without a trial. That is because Article II, § 19 challenges are to be determined solely

[1] Intervenor-Defendants (collectively "Costco") join in the State's Motion and assert no independent basis for summary judgment. Costco's joinder consists entirely of conclusory and self-serving statements without a single citation to fact or law. Consequently, to the extent Costco's joinder could be read to assert any independent basis for summary judgment, it fails. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975) ("The burden of proving, by uncontroverted facts, that no genuine issue exists is upon the moving party."); CR 56(c).

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upon indisputable facts such as the text and title of the legislative measure at issue. Accordingly, the Court should grant summary judgment on Plaintiffs' Article II, § 19 claims, either in favor or against them, and allow for speedy appellate review of this pure issue of law.

B. The Presumption of Constitutionality Cannot Save I-1183

The State's argument in support of I-1183 relies heavily on generic pronouncements about the presumption of constitutionality of laws, the burden on persons challenging them, and the need to interpret enactments to avoid constitutional infirmities. These truisms aside, not every ballot initiative is constitutional, and courts have struck down numerous bills and initiatives for violating Article II, § 19. Legal presumptions are merely the prelude to this Court's substantive constitutional analysis of I-1183, not the end of the inquiry. The presumption of constitutionality cannot save legislation that is actually unconstitutional. As set forth below, and in Plaintiff's motion for summary judgment, a careful analysis of I-1183 under applicable law leaves no doubt that the measure violates Article II, § 19.

C. I-1183 Violates the Single Subject Rule.

1. The Initiative's $10 Million Allocation to General Public Safety Has No Relationship to the Subject of "Reforming the Liquor Laws."

The first clause in Article II, § 19 requires that every bill (including initiatives) contain only a single subject. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000), *opinion corrected*, 27 P.3d 608 (2001) ("*ATU 587*"). When

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an act embraces more than one subject the entire act fails. *Power Inc. v. Huntley*, 39 Wn.2d 191, 198-203, 235 P.2d 173 (1951).

Both the Plaintiffs and the State agree that I-1183 has a general title. Both sides agree that an initiative with a general title must pass the rational unity test. And both sides invoke *City of Burien v. Kiga*, 144 Wn.2d 819, 826, 31 P.3d 659 (2001), as setting forth the applicable rational unity test: an initiative violates the single subject rule if its parts do not have rational unity – that is (1) all matters within an initiative must relate to one general topic and (2) all matters within an initiative must be germane to one another. But the Plaintiffs and the State disagree on the application of these legal principles.

A glaring omission in the State's Motion is the complete lack of discussion of the primary purpose of the single subject requirement. As described fully in Plaintiffs' Motion, the single subject rule prevents logrolling. This evil can be manifested in the form either of attaching an arguably unpopular subject to an unrelated popular subject or attaching two unrelated popular subjects together to guarantee majority support. I-1183 does both. It cobbles together two obviously popular but unrelated subjects, namely, privatization of hard liquor sales and increased state funding for local public safety programs. The Initiative then marries these two subjects with several unrelated subjects of questionable popularity, namely, new taxes, deregulating wine distribution, loosening State restrictions on liquor advertising, and eliminating the State policies of encouraging moderation in drinking and the orderly marketing of alcohol. This classic logrolling violates Article II, § 19.

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The State now contends that the single subject of I-1183 is "reform of the liquor laws" or "reforming the sale and distribution of liquor." State Mot. at 8, 18.[2] The State fails to explain how an appropriation of $10 million of new revenue to generic public safety programs unrelated to the sale, distribution, or consumption of liquor has any relationship to "reforming the liquor laws." As described more fully in Plaintiffs' Motion, this $10 million gift to public safety is a general appropriation that is unrelated to liquor and the impacts of privatization. There is simply no rational relationship between this appropriation and the general topic of "reforming the liquor laws." The $10 million public safety appropriation is clearly a separate subject that *per se* invalidates I-1183. The State all but ignores this fatal constitutional flaw.

2. There is No Rational Unity Among the Provisions of I-1183 that Relate to "Liquor".

The State asserts that any legislation touching upon "liquor" necessarily contains only a single subject because the statutory definition of "liquor" includes hard liquor, wine, and beer. *Id.* State Mot. at 8-9. This assertion is without merit. It is immaterial that "liquor" is defined under RCW 66.04.010(25) to include hard liquor, wine, and beer. I-1183 completely changes the regulatory framework for hard liquor while simultaneously making limited and unrelated changes to wine pricing and distribution. The Initiative does not change the regulatory scheme for beer, which is still regulated under the same three-tier model that governed wine until I-1183's enactment.

[2] In the State's Opposition to Plaintiffs' Motion for Preliminary Injunction the State characterized the subject as "regulation of liquor" (Dkt. No. 21 at 12).

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It is not enough for the single subject requirement that most of I-1183's several subjects (with the exception of the $10 million public safety appropriation) have something to do with "liquor." Those subjects must also have a rational unity to one another for the Initiative to pass muster under Article II, §19. The fact that both hard liquor and wine are part of the statutory definition of "liquor" says nothing about whether I-1183's various provisions are germane to one another. *See, e.g., Kiga*, 144 Wn.2d at 827 (holding multiple subjects of I-722 violated the single subject rule despite the fact that both had to do with the general topic of tax relief); *ATU 587*, 142 Wn.2d at 217 (holding I-695 violated the single subject requirement because it included two subjects, even though both could be categorized under the broad topic of limiting taxes); *Washington Toll Bridge Auth. v. State* ("*Wash. Toll Bridge Auth. II*"), 49 Wn.2d 520, 525, 304 P.2d 676 (1956) (holding an initiative unconstitutional because it contained two subjects, both of which related to toll roads).

Instead of having a rational unity, I-1183 takes a piecemeal approach to liquor legislation by grafting wine pricing and distribution provisions advantageous to its political and financial sponsors (Costco) to the privatization of hard liquor sales that the voters understood to be the primary goal of the Initiative. The State's divergent historical treatment of hard liquor and wine evidences that the Legislature has long treated these two areas of regulation as separate subjects. *See* Pls. Mot. at 3-6, 17-18. *Compare* Laws of 2011, ch. 62 (wine and beer tasting at farmers markets) *with* Laws of 2011, ch. 186 (hard liquor sampling in state liquor stores).

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The State makes the unsupported and conclusory assertion that "the mere inclusion of more than one variety of liquor has never been thought to include more than one subject" State's Mot. at 9. The State ignores the fact that when the Legislature has addressed hard liquor, wine, and beer in a single bill, the enactment has generally addressed a single aspect of regulation common to all three types of liquor. *See, e.g.,* Laws of 2011, ch. 325 (licensing for all beverage alcohol in VIP airport lounges); Pls. Mot. at 17-18. Such a bill does not violate Article II, § 19. By contrast, I-1183 inconsistently addresses in one Initiative unrelated aspects of hard liquor, wine, and beer regulation.

Contrary to what the State contends, I-1183's various legislative changes are not limited to those "wrought by privatization." By attempting to tie I-1183's disparate provisions to the single subject of "privatization," the State all but concedes the true impetus behind the Initiative was privatization of hard liquor sales and distribution, rather than some generalized intention to "reform the liquor laws." Even under the State's own logic, I-1183 violates the single subject rule because many of I-1183's provisions have nothing to do with privatization.

I-1183's changes to the regulation of wine, such as allowing price discrimination, were not the result of the privatization of hard liquor and no connection to privatization. If I-1183's modifications to wine regulation were actually "wrought by privatization" (which they were not) then privatization would necessarily have also required the same changes to beer regulations. The fact that I-1183 did not also deregulate beer refutes any

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argument that the changes the Initiative made to the distribution of wine were a necessary incident of privatization.[3]

Other subjects within the Initiative, such as the $10 million appropriation for public safety, the restrictions on the State's ability to regulate price advertising, and the elimination of the policies of moderation of consumption and orderly marketing of alcohol, have no conceivable connection to privatization. In *Kiga*, *ATU 587*, and *Wash. Toll Bridge Auth. II*, the Supreme Court found violations of the single subject rule because in each case multiple parts of the initiative at issue were not necessary to implement one another. *Id.* I-1183 is no different than the initiatives struck down in those cases.

The State relies heavily on *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974), in an attempt to save I-1183. The case is inapposite. In *Fritz* the Supreme Court held that I-276, the Public Disclosure Act, did not violate the single subject rule. *Id.* at 275. But the Public Disclosure Act, much like the Steele Act, was comprehensive legislation intended to address a single, broad reaching public problem. *Compare Fritz*, 83 Wn.2d 275 (Public Disclosure Act, adopted to foster openness in government) *with* Chapter 66.08 RCW (the Steele Act, adopted at the end of prohibition to regulate the distribution and sale of beverage alcohol); *see also* Pls. Mot. at 3-4.

As the Supreme Court pointed out in *Fritz*, the single subject rule is violated when an initiative subject does not bear a close interrelationship to the dominant intendment of the measure. *Fritz*, 83 Wn.2d at 290 (holding that I-276 did not violate the single subject

[3] Costco's prior initiative, I-1100, attempted to change beer regulations and failed. Costco removed those changes in I-1183.

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rule because the measure concerned openness in government and its sub-subjects were closely interconnected thereto). Unlike the Steele Act, I-1183 is not comprehensive legislation reforming the State's entire beverage alcohol regulatory framework. Pls. Mot. 6-8. Rather, I-1183's dominant intendment is privatizing hard liquor sales and distribution. Its ballot title emphasizes this dominant intendment and, at the same time, exposes the lack of interconnectedness among the measure's multiple subjects and its ballot title. *See* Pls. Mot. at 17 (discussing five of I-1183's ballot title's stated purposes – four of which concern hard liquor – and the measure's 15 identified benefits – 13 of which concern hard liquor).

3. The Initiative's Restrictions on the State's Power to Restrict Beverage Alcohol Price Advertising are a Separate Subject.

The State argues that I-1183's changes to the State's authority to regulate beverage alcohol advertising is not a separate subject under Article, II, § 19. For the reasons set forth above, the State's assertion that the advertising provisions are germane to the rest of I-1183 because all parts of I-1183 relate to "liquor" is unavailing. The State's second argument, that I-1183's significant changes to the State's power to regulate liquor price advertising by third parties is not a separate subject because it is merely "declarative of existing law," is incorrect as a matter of law. State's Mot. at 10.

44 Liquor Mart v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996), holds that a state's **complete ban** on truthful price advertising for beverage alcohol violates the First Amendment *Id.* at 504-508. But I-1183 does not just prohibit the State from completely banning truthful liquor price advertising. Rather, I-1183 goes

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further and prohibits the State from enacting **any restriction on** alcohol price advertising. *See* Subit Decl., Ex. E (I-1183 § 107). If the State cannot "restrict" the advertising of lawful prices, it follows that, in the wake of I-1183, the State can no longer exercise any control over the content or placement of the advertising for beverage alcohol, as long as the advertisement contains lawful prices. Nothing in *44 Liquormart* requires the State to repudiate all authority to regulate the time, place, and manner of alcohol price advertising. Accordingly, the price advertising provisions of I-1183 are not merely declarative of existing constitutional law and cannot be dismissed as "immaterial." *See* State Mot. at 10. They are instead a separate subject lacking rational unity with the Initiative's other provisions.

4. The Initiative's Elimination of Two Fundamental State Policies Underlying Beverage Alcohol Regulation is a Separate Subject.

The State argues that I-1183's elimination of the long-standing State policy of encouraging moderation in alcohol consumption does not constitute a separate subject within the meaning of Article II, § 19. The State claims that I-1183 did not change public policy regarding alcohol consumption, and that even if it did, the Court can ignore those changes in deciding whether the Initiative has more than one subject. The State is wrong on both points. I-1183 fundamentally alters the rationale for the three-tier system of liquor regulation in this State.

Prior to I-1183, the Legislature had declared that the three-tier system had four goals: (1) orderly marketing of alcohol; (2) encouraging moderation in the consumption of alcohol; (3) preventing the consumption of alcohol by minors and other abusive

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consumption; and (4) promoting the efficient collection of taxes by the State. RCW 66.28.280 (prior version); *see also* RCW 66.28.180 (version adopted in 1995 codifying prior regulations). I-1183 completely eliminates policy goals (1) and (2) from the State's alcohol beverage laws. RCW 66.28.280 (current version).

The policies of orderly marketing and moderation in the consumption of alcohol constituted two of the fundamental underpinnings of the State's approach to beverage alcohol regulation before I-1183, from Prohibition to the Steele Act to the gradual loosening of regulations on wine and beer. As a result of I-1183's statutory changes, the Liquor Control Board ("LCB") can no longer rely on the orderly marketing of alcohol or on consumption moderation as bases for regulatory enactments relating to the three-tier system. It is not true that the remaining public policy of preventing the "abusive consumption" of alcohol is the same as the policy of "encouraging moderation in consumption." *Cf.* State Mot. at 11. The Legislature obviously didn't think they were the same things when it set them out as separate and distinct policy goals. RCW 66.28.280 (prior version). I-1183 clearly changes the public policy of this State.

The State erroneously contends that, in deciding whether an initiative has more than one subject, a court should ignore any changes that the initiative makes to a statutory scheme's legislative purpose because "a declaration of legislative purpose has no operative force in and of itself." State Mot. at 10. That is not the law. A court may disregard the policy expressions of an initiative only where such expressions are "indisputably void of legal effect." *Pierce County v. State*, 150 Wn.2d 422, 434, 78 P.3d 640 (2003). In *Pierce County*, the Supreme Court disregarded two sections of the

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initiative at issue in analyzing the measure's compliance with the single subject rule because the two sections were mere "policy fluff," that by their very nature were "rhetorical." 150 Wn.2d at 434-35. The initiative at issue in *Pierce County* did not provide for any statute or mechanism to implement the policy statements that were unrelated to the operative provisions of the ballot measure. *Id.* at 435. For that reason, and only that reason, the policy statements did not trigger a single subject violation.

This case is far removed from *Pierce County*. I-1183 fundamentally alters long-standing public policies regarding alcohol regulation by removing them from an existing RCW section. The Initiative's elimination of "moderation of consumption" and "orderly marketing of alcohol" as goals of the three-tier distribution system do not involve mere "precatory language." In fact, the State relied upon those two policies when defending itself against a challenge to numerous state liquor regulations in *Costco Wholesale Corp. v. Hoen*, 522 F.3d. 874 (9th Cir. 2008).

When state laws are challenged and the issue of state action immunity under *Parker v. Brown* 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), arises--as it did in the *Costco* case--courts look to the two-prong test laid out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105–06, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). The first prong of that test is that the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy." *See Costco*, 522 F.3d at 901-02. The State's own brief to the 9th Circuit in that case stated:

> Additionally, the state's regulatory system challenged by Costco implicates and directly serves the state powers granted under the Twenty-First Amendment. The state demonstrated how the laws clearly relate to the Twenty-First Amendment powers by addressing its interest in *temperance*

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> and controlling the use of beer and wine, in *orderly and stable markets* for beer and wine distribution and sale, and in the efficient collection of revenue from licensed distributors.

Brief of Appellant Liquor Control Board Members, *Costco v. Hoen*, No. 06-35539 at 9 (9th Cir., Nov. 3, 2006) (emphasis supplied). By eliminating these state policies from Washington law, I-1183 makes it exceedingly more difficult for the State to defend liquor regulations from future legal challenges by Costco or others.

Unlike "the policy fluff" at issue in *Pierce County*, the policy changes that I-1183 makes regarding the orderly marketing and consumption of liquor will have very real consequences for the regulation of beverage alcohol in this State. These provisions constitute a separate subject having no rational unity with the other subjects of the Initiative, and an egregious violation of the Constitution's single subject requirement.

D. I-1183 Violates the Subject-in-Title Rule.

I-1183 violates Article II, § 19's subject-in-title rule because it improperly disguises new taxes as licensing "fees." I-1183's ballot title reveals that it will enact licensing "fees," but neither the ballot title nor the measure itself discloses that most of these so-called "fees" are actually "taxes." Subit Decl., Ex. I (ballot title); Subit Decl., Ex. E (I-1183 §§ 103(4)) (retail licensees to pay seventeen percent of all hard liquor sales revenue on annual basis), 105(3)(i)-(ii) (tiered annual licensing "fee" levied on distributor licensees based on revenue); *see also* Pls. Mot. at 7 (describing same).

In *ATU 587*, the Supreme Court held that an initiative violated the subject-in-title rule where its use of the term "tax" broadened the term's traditional meaning by including fees, and that changed definition was not reflected in the ballot title. 142 Wn.2d 183, 225-

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26, 11 P.3d 762 (2000). Here, I-1183 suffers from the inverse constitutional infirmity: the Initiative's use of the term "fees" is broader than the term's traditional meaning because it includes taxes, and that definitional change is not reflected in I-1183's ballot title.

The State does not argue that I-1183's title discloses the new taxes. Rather, the State argues that the initiative imposes only new "fees" and not new "taxes." The test for deciding whether a charge is a tax or a fee is well-established. *See Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995); *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 750, 966 P.2d 1232 (1998).[4] The State does not claim that I-1183's sales-based charges are "fees" under the definitions set forth in *Covell* and *Franks & Son*. Instead, the State attempts to escape from the *Covell* analysis by asserting that the established test for distinguishing between "taxes" and "fees" only applies to the charges that municipalities impose, but not to charges the State imposes. State's Mot. at 15-16.

The law is to the contrary. In *Dean v. Lehman*, 143 Wn.2d 12, 26-27, 18 P.2d 523 (2001), the Supreme Court applied *Covell's* three-part analysis to ascertain whether state-imposed charges – such as those levied by I-1183 – are to be considered a tax or a fee. In that case as class of plaintiffs challenged the validity of RCW 72.09.480, under which the State imposed a mandatory 35 percent deduction on all funds received by prison inmates. *Id.* at 15-16. Applying *Covell*, the Court held the charges to be fees rather than taxes because (1) "the primary purposes of these charges is not to raise revenue but to benefit a

[4] The State attempts to distinguish *Franks & Son* by stating that it "does not hold that the State can enact *only* regulatory fees" and notes that the constitutional provision at issue there was the federal Commerce Clause. State's Mot. at 16. Plaintiffs cite *Franks & Son* only for the commonly understood difference between a tax and fee, not for the former proposition. And the *Franks & Son* Court did not suggest its sharp distinction between taxes and fees applied to only Commerce Clause cases.

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small group of individuals, the inmates themselves and crime victims;" (2) the funds are used "only for the purpose of enhancing and maintaining correctional industries work programs;" and (3) "the total deductions authorized by the statute may not exceed the cost of the inmate's incarceration, thus tying the deductions to the actual benefits received or burden imposed by the inmate." *Id.* at 27-30.[5]

In contrast to the charges in *Dean*, *Covell*'s three-part analysis establishes that the charges at issue in this case are taxes not fees: (1) the primary purpose of the sales-based "fees" is to raise revenue to provide for general public benefit; (2) some of this new revenue will be generally used to enhance local public safety programs that need not relate in any way to carrying out I-1183's principal purposes or combating any harm the Initiative might cause; and (3) the goal of these "fees" is not to provide a targeted service or alleviate a burden to which the payers contribute. *See* Pls. Mot. at 19-23. The State admits that I-1183's sales-based charges will go "to the State general fund and to local governments" and that those charges need not be "dedicated solely to alleviating the 'harms' of allowing liquor sales in the state." State's Mot. at 17-18. In fact, the charges are required in part to pay for the $10 million appropriation I-1183 makes to public safety programs, which are not required to have any connection with beverage alcohol. The

[5] *Dean* also cited positively Ninth Circuit precedent for the proposition that, consistent with *Covell*, determining whether a charge is a tax or a fee depends on "whether the funds collected are expended for general purposes or for the regulation or benefit of the parties on whom" the charge is imposed. 143 Wn.2d at 27 (citing *Wright v. Riveland*, 219 F.3d 905 (9th Cir. 2000)).

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charges imposed by I-1183 share none of the characteristics of a fee. They are taxes, in fact and in law. *See Covell*, 127 Wn.2d at 879.[6]

The State's argument to the contrary relies on the novel and untenable notions that the State possesses plenary power to classify charges as "fees" regardless of their true nature and that courts must defer to the State's mischaracterization. The State erroneously contends that *Covell's* analysis is limited to "regulatory fees" and asserts that the State may enact "fees" that are not "regulatory fees". The State also suggests that it has unlimited authority to impose a "fee" on an activity, and then redirect that revenue to any purpose of its choice, without such revenue being deemed a tax as a matter of law. *See* State's Mot. at 15-16, 17-18.

The State cites no authority supporting this extreme and unprecedented position. The single case the State relies upon, *Emwright v. King County*, 96 Wn.2d 538, 637 P.2d 656, 658 (1981), says nothing about the types of fees the State may charge. In *Emwright*, the Supreme Court held that a statutory amendment "eliminated the right to refunds of jury fee deposits" that had previously been allowed under statute and court rule. *Id.* at 540. In so doing, the Court noted that the Legislature has power over revenue and taxation. *Id.* at 543. But the Court did not address the types of fees (as opposed to taxes) the State may impose, or in any way imply that the State may impose any charges it likes and call them "fees". In any event, the jury deposit fee at issue in *Emwright* would qualify as a "fee" under the *Covell* test in that it went to fund the costs of the jury system. *Id.* at

[6] In view of the foregoing case law, the dictionary definitions offered by the State are of no value to the analysis appropriate in this case. *See* State Mot. at 14. In any event, a common definition for "tax" is "a charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." *Black's Law Dictionary* (9th ed. 2009). That is exactly what I-1183's charges accomplish.

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545. *Emwright* provides no support for the State's claim that it can label as "fees" charges that do not meet the definition of a "fee" under *Covell*, *Dean,* and *Franks & Son.*

The State's reliance on statutes governing fees paid for specialty license plates actually supports Plaintiffs' analysis. State Mot. at 17. The fees set out in RCW 46.17.220 and apportioned under RCW 46.68.420, 46.68.425, and 46.68.430 operate much like the fees discussed in *Dean*, 143 Wn.2d at 27-28. For example, a person might purchase a specialty plate to support the group "Ski & Ride Washington". RCW 46.17.220(q) (setting out the costs for that plate type). The fee paid to obtain the specialty plate serves to reimburse the State for the plate's cost and the remaining amount is deposited into the "Ski & Ride Washington" account, subject to conditional use. RCW 46.68.420 (funds may be used to "[p]romote winter snowsports, such as skiing and snowboarding, and related programs, such as ski and ride safety programs, underprivileged youth ski and ride programs, and active, healthy lifestyle programs"). Thus, the specialty plate fees (1) benefit a small group of individuals, (2) are used to pay for a service or benefit received and for enhancing and maintaining programs, and (3) are tied to the group of individuals who are paying for and benefiting from the fees. *Cf. Dean,* 143 Wn.2d at 27-28. Unlike I-1183's sales-based charges, the specialty license plate fees do not go to the general fund and may not be used for any generic purpose such as "public safety."[7]

[7] Moreover, the fact that such charges are imposed by an existing statute sheds no light on the question whether inclusion of such charges in a ballot title under the rubric "fees" would be constitutional under the subject-in-title test.

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The State's additional arguments that I-1183's sales-based charges are fees rather than taxes also fail. The State claims that the charges cannot be taxes because the Initiative designates them as "fees" and the ballot title indicates some charges are "based on sales." State Mot. at 15. But an initiative cannot ignore the established meaning of the terms "tax" and "fee" set forth in *Covell, Dean,* and *Franks & Son*, label the "tax" as a "fee", and *ipse dixit* turn the "tax" into a "fee." That the ballot title indicates that some fees are based on sales is a red herring. The critical criterion for determining whether is charge is a "tax" or a "fee" is not the method by which the charge is assessed (although that may inform the analysis), but the use to which the charge is put. I-1183's ballot title in no way informs voters that the Initiative disguises as a "fee" a tax that collects revenue for general purposes.[8]

Finally, the fact that the State has charged a mark-up on its own retail sales of hard liquor for decades and did not itself consider that a tax is beside the point. *See* State Mot. at 13. I-1183 takes the State out of the hard liquor retail business. In its place, I-1183 creates a new license for private parties, and those private parties are responsible for paying a sales-based charge, the proceeds of which go to general purposes. That this new charge on private parties replaces a revenue stream that was available to the State before I-1183 was enacted is irrelevant to whether the new charge is a tax or fee. This percentage-

[8] The State's suggestion that I-1183 survives constitutional scrutiny because the Thurston County Superior Court revised the ballot title in a ballot title challenge in which Plaintiff Washington Association for Substance Abuse and Violence Prevention ("WASAVP") took part is without merit. Ballot title challenges are special proceedings conducted on an expedited schedule for the sole purpose of hearing objections to the Attorney General's suggested ballot title and from which there is no appeal. RCW 29A.72.080. This special proceeding was not a full hearing on the merits that adjudicated the constitutional questions or WASAVP's legal claims and has no preclusive impact.

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charge is no more a "fee" for the privilege of selling liquor than the state sales tax is a "fee" for the privilege of selling other goods or the state B&O tax is a "fee" for the privilege of engaging in a business in Washington State.

Levying taxes under the guise of "fees" without adequately explaining that fact to the voting populous within the ballot title violates the subject-in-title rule. *See ATU 587*, 142 Wn.2d at 225-26; *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 371, 89 P.3d 217 (2004) (governments cannot be allowed to "impose charges in the name of fees that are, in fact, taxes in disguise"). I-1183 suffers from this very same constitutional failing.

V. CONCLUSION

I-1183 violates both Article II, § 19 prohibitions. The presumption of constitutionality that I-1183 enjoys does not provide an antidote for its actual constitutional infirmities. This Court should deny the State's Motion for Summary Judgment and grant Plaintiffs' Motion.

RESPTCTFULLY SUBMITTED this 10th day of February, 2012.

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CERTIFICATE OF SERVICE

I, Susan Zimmerman, certify and state as follows:

1. I am a citizen of the United States and a resident of the state of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104.

2. I caused to be served upon counsel of record at the addresses and in the manner described below, on February 10, 2012, the following document: PLAINTIFFS' OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT

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I hereby declare under the penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 10th day of February, 2012.

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