STATE OF WASHINGTON
COWLITZ COUNTY SUPERIOR COURT

WASHINGTON ASSOCIATION FOR SUBSTANCE ABUSE AND VIOLENCE PREVENTION, a Washington non-profit corporation; DAVID GRUMBOIS, an individual; GRUSS, Inc., a Washington Corporation, Plaintiffs, v. The STATE OF WASHINGTON, Defendant, JOHN MCKAY, BRUCE BECKETT, et al., Defendant-Intervenors.	NO. 11-2-01465-8 STATE'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

The State respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment based on their failure to meet the high burden of proving beyond a reasonable doubt that Initiative Measure No. 1183 (I-1183) violates article II, section 19 of the Constitution of the State of Washington. The State further requests that its Motion for Summary Judgment dismissing this lawsuit be granted.

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II. STATEMENT OF FACTS

Plaintiffs challenge I-1183, an initiative to the people, under article II, section 19 of the Washington State Constitution. In their statement of facts, Plaintiffs cite to Ch. 66.08 RCW as creating the "Washington State Liquor Act"[1] of 1934. However, the law enacted in 1934 to create a system of liquor sales, distribution and regulation was much more comprehensive than the single chapter cited by Plaintiffs. The 1934 liquor act, the "Steele Act," carried the title:

> An ACT relating to intoxicating liquors, providing for the control and regulation thereof, creating state offices, defining crimes and providing penalties therefor, providing for the disposition of public funds and declaring that this act shall take effect immediately.

Laws of 1933, Ex. Sess., ch. 62, was codified in Title 66 RCW, which now encompasses thirteen chapters. Title 66 RCW includes chapters that address the creation and composition of the state Liquor Control Board; powers of the Board, including the power to purchase liquor; a declaration of preemption of local regulation of liquor; and creation of the Liquor Revolving Fund. A brief overview of some of the topics covered within Title 66 RCW, (without purporting to be an exhaustive list) includes:

- direction for distribution of funds to various entities and local jurisdictions (Ch. 66.08 RCW);
- the operation of state stores (Chs. 66.08 and 66.16 RCW, including the authorization of Sunday sales in state stores);
- licensing of the distribution (beer and wine) and retail level of sales, including spirits, wine, and beer (Ch. 66.24, 66.28 RCW);
- exemptions from licensing requirements, and requirements for identification cards, including unlawful acts relating to identification cards (Ch. 66.20 RCW);

[1] *See* RCW 66.98.010 for the short title of the 1934 Act.

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- prohibiting (and declaring as crimes) various actions (sprinkled throughout the title and in Ch. 66.44 RCW));
- search and seizure (Ch. 66.32 RCW);
- local option for a vote to disallow any liquor sales in a city, town, or county(Ch. 66.40 RCW); and
- enforcement and penalties (Ch. 66.44 RCW).

Regardless of the history of how liquor laws have been changed over time,[2] including the procedural aspects of whether changes were made in a bill addressing a restrictive title or a broad one, the issue in this case is a purely legal one.

Plaintiffs and Defendant-Intervenors have included lengthy factual expositions relating to the history of the liquor laws in Washington, and the history of I-1183 and other initiatives that would have led to privatization of sales of spirits in Washington, if enacted. Pls. Mot. For Summ. J. at 3-8. Defendant State of Washington respectfully suggests, however, that all of these facts are irrelevant to the determination the court is requested to make in this case: Whether Initiative 1183, as enacted by the voters, passes constitutional muster under article II, section 19 of the state Constitution. The inquiry the court must make under that provision, and the cases interpreting it, does not require a determination of how the liquor laws have been traditionally adopted, modified, or repealed, nor how the Initiative language was developed, nor who drafted it or supported it. The issue is a purely legal question, the facts presented by

[2] Plaintiffs' factual statement repeatedly refers to the "LCB" changing the liquor laws. Pl. Mot. Summ. J. p. 2, l. 17 and 22; p. 4, l. 9-10 and 13-14. Plaintiffs appear to confuse the power of the Board with that of the legislature. As an agency within the Executive Branch of state government, the Liquor Control Board does not enact legislation or create a regulatory licensing system, but only administers what the legislature, or the people, via an initiative, direct it to do. For example, at p. 3, line 17, Plaintiffs assert: "the LCB's earliest regulations treated wine and hard liquor differently." The "treatment" of wine and spirits differently, including who may import and sell these types of liquor, were prescribed by statute. Similarly, the statement at p. 4 line 9-10 that "The LCB inserted the distributor tier" (and purporting to define the reasons for this) should properly refer to the action of the legislature, not the Board. However, Plaintiffs' confusion does not create a material factual dispute.

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Plaintiffs and Defendant-Intervenors are irrelevant, and do not create any material issues of fact that require resolution by the court.

III. STATEMENT OF ISSUES

Whether Plaintiffs have proved beyond a reasonable doubt that Initiative Measure No. 1183 violates article II, section 19 of the Constitution of the State of Washington.

IV. EVIDENCE RELIED UPON

The State relies upon the pleadings and records on file with this Court.

V. LEGAL ARGUMENT

A. Standard for Summary Judgment

"Summary judgment is properly granted where 'there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.'" *Pierce Cnty. v. State*, 150 Wn.2d 422, 429, 78 P.3d 640 (2003); CR 56(c). As with a statute enacted by the legislature, the interpretation of an initiative is a question of law. *Id.*

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). The Washington Supreme Court has succinctly summarized Civil Rule 56:

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on the file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).
>
> In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper. *See Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985). The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact are resolved against the moving party. In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *E.g., Citizens for Clear Air v. Spokane,* 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

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Atherton Condo Assn. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Because of the drastic potential of the motion, the affidavits of the moving party are scrutinized with care, while leniency is indulged with respect to the affidavits presented by the opposing party. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 431 P.2d 216 (1967). The question before the court is, does I-1183 contain a single subject, and is that subject addressed in the title? Even the issue of how the "subject" of I-1183 is defined is a legal question for the court. Summary judgment is an appropriate disposition of this case, as there are no issues of material fact.

B. I-1183 is presumed to be constitutional, and Plaintiffs must prove it unconstitutional beyond a reasonable doubt.

"A statute is presumed constitutional, and the party challenging it must demonstrate its unconstitutionality "beyond a reasonable doubt." *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000); *Wash. Fed'n of State Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995). This standard is met only "if argument and research show that there is no reasonable doubt that the statute violates the constitution." *Amalgamated Transit Union Local 587 v. State (Amalgamated Transit),* 142 Wn.2d 183, 205, 11 P.3d 762 (2000), *opn. corrected by* 27 P.3d 608 (2001).

When words in the title of a bill can be given two interpretations, one which might render the act unconstitutional and the other constitutional, the court adopts the constitutional interpretation. *Wash. Fed'n of State Employees,* 127 Wn.2d at 556 (quoting *Treffry v. Taylor*, 67 Wn.2d 487, 491, 408 P.2d 269 (1965)). Any reasonable doubts are to be resolved in favor of constitutionality, a particularly strong directive when the issue relates to the "constitutional form" and not the personal guarantees of personal rights. *Id.*

In the context of the standard for reviewing a constitutional challenge to a statute, there is a heavy burden on the challengers. They must conclusively show that voters were motivated

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by one asserted "subject" and not another, in addition to proving that all the matters within the initiative cannot appropriately be included within one subject.

"In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature when enacting a statute." *City of Burien v. Kiga*, 144 Wn.2d 819, 824, 31 P.3d 659 (2001). Like legislatively-enacted statutes, a statute enacted through the initiative process is presumed to be constitutional. *Id.* Plaintiffs cannot show beyond a reasonable doubt that I-1183 is unconstitutional, and their motion should therefore be denied.

1. Article II, section 19 must be liberally construed to uphold I-1183.

Article II, section 19 provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." Article II, section 19 must be *liberally construed* in favor of upholding the legislation. *Amalgamated Transit,* 142 Wn.2d at 206; *Wash. Fed'n of State Employees v. State,* 127 Wn.2d 544, 555, 901 P.2d 1028 (1995).

The "single subject" provision of article II, section 19 "is to be liberally construed so as to sustain the validity of a legislative enactment." *State v. Thorne*, 129 Wn.2d 736, 757, 921 P.2d 514 (1996). Article II, section 19 contains two requirements, referred to as the "single subject" rule and the "subject-in-title" rule. *Amalgamated Transit,* 142 Wn.2d at 207; *Patrice v. Murphy,* 136 Wn.2d 845, 852, 966 P.2d 1271 (1998). While the constitutional provision expressly refers only to "bills," it has been held to apply to initiatives as well. *Wash. Fed'n of State Employees*, 127 Wn.2d at 551-554. Plaintiffs claim that I-1183 violates both the "single-subject" and "subject-in-title" requirements of article II, §19. P. Mot for Summ. J., p. 10, l. 19.

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C. Initiative 1183 contains a single subject, and that subject is expressed in the title.

1. I-1183 has one subject.

Read as a whole, it is clear that Initiative 1183 addresses one, albeit broad, subject: reform of the liquor laws.[3] For purposes of this response, the State will only address arguments based on the ballot title for I-1183 being a general title.[4] As Plaintiffs note at page 12 of their Motion for Summary Judgment, "for purposes of these cross-motions for summary judgment, I-1183 will be treated as having a general ballot title." The State agrees: Initiative 1183 has a general ballot title. The title includes both the statement of subject and the concise description.

Legislation bearing a general title is constitutional "even if the general subject contains several incidental subjects or subdivisions. All that is required is that there be some rational unity between the general subject and the incidental subdivisions." *State v. Broadaway*, 133 Wn.2d 118, 126-27, 942 P.2d 363 (1997) (internal punctuation omitted) (quoting *State v. Grisby*, 97 Wn.2d 493, 498, 647 P.2d 6 (1982)).

As the governing statute (RCW 29A.72.050) contemplates, the ballot title for I-1183 begins with a general description of the measure's subject, which in this case is very general. This is followed by a concise description (limited to thirty words) of the initiative's "essential contents." It is the full statement, both the subject and the concise description, which the courts review. Read together, the title reflects the subject of reforming the liquor laws, and indicates the major areas of reform contained in it. This is a general and not a restrictive title, and accurately reflects the single subject of the measure itself. Plaintiffs attempt to narrow the title by arguing that the "primary purpose" of I-1183 was the privatization of the sale and

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[3] Defendant-Intervenors, in their response, advocate that the court view the "subject" of I-1183 as "liquor," an even broader subject that the State proposes. Inasmuch as the title drafted by the proponents begins "AN ACT relating to liquor," the court can reasonably define the subject of I-1183 as "liquor."

[4] The State briefed the issues of whether I-1183's ballot title is general or restrictive in its Mot. for Summary Judgment (see pp. 4-6). The State incorporates this argument for purposes of this Response, and will not repeat it in full here.

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distribution of spirits ("hard liquor", in their parlance) but the "purpose" is not the same as the "subject" of the initiative. Parties can argue about the meaning of the words "purpose," "goal," "intent," etc., ad nauseum, but in attaining any purpose or goal, particularly the reform of the liquor laws, many sections of statute may need to be revised.

2. There is rational unity between the subject of "reforming the liquor laws" and the provisions of Initiative 1183

Legislation bearing a general title, such as I-1183, is constitutional under the single subject rule if there is a "rational unity" between that subject and the various provisions. *City of Burien*, 144 Wn.2d at 825-26. A determination of whether an initiative contains a single subject under article II, section19 does not depend on the complexity of the measure or the number of components discernable within the act. "This court has never favored a narrow construction of the term "subject" as used in constitutional article II, section 19." *State v. Waggoner*, 80 Wn.2d 7, 9, 490 P.2d 1308 (1971). A bill may properly contain one broad subject embracing many sub-subjects or subdivisions, without violating the single subject rule. *Id.* As noted by the court in *Amalgamated Transit:*

> It is hardly necessary to suggest that *matters which ordinarily would not be thought to have any common features or characteristics might, for purposes of legislative treatment, be grouped together and treated as one subject.* For purposes of legislation, "subjects" are not absolute existences to be discovered by some sort of *a priori* reasoning, but are the result of classification for convenience of treatment and for greater effectiveness in attaining the general purpose of the particular legislative act.

Amalgamated Transit, 142 Wn.2d at 209-210 (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 33, 377 P.2d 466 (1962)) (emphasis added).

One way to satisfy the rational unity test is to examine "whether the matters within the body of the initiative are germane to the general title and whether they are germane to one another". *City of Burien*, 144 Wn.2d at 826 (citing *Amalgamated Transit*, 142 Wn.2d at 209-10). The provisions of I-1183 are all germane to the general subject of reform of the *liquor* laws. The closure of state liquor stores, the licensing of private parties to sell and distribute

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spirits, the creation of license fees based on sales, the regulation of such licensees, the changes in the regulation of wine distribution, and the specification of how the revenues generated from taxes and fees on the licensing and sale of liquor shall be distributed are all subsets of the overall subject of the reform of liquor laws.

The Plaintiffs argue that:

> In analyzing whether two parts of an initiative are germane to one another, courts may consider whether the parts are necessary to implement each other. *See Citizens,* 149 Wn.2d at 637-638 (reaffirming this standard as set out in *ATU 587* and *Kiga*). *If one aspect of the initiative is not necessary to implement another that supports the conclusion the measure contains multiple subjects in violation of Article II, §19.*

Pl's Mot. for Summ. J.at 13 (Emphasis added).

The Plaintiffs cite no authority for the proposition italicized in the above quote. This is perhaps unsurprising, inasmuch as the *Citizens* case they cite implicitly *rejects* this proposition.

In *Citizens for Wildlife Mgmt. v. State*, 149 Wn.2d 622, 637-638, 71 P.3d 644 (2003), the Supreme Court stated:

> The second step in the rational unity analysis is to determine if the incidental subjects bear some rational relation to one another. *See Kiga*, 144 Wn.2d at 826; *Amalgamated*, 142 Wn.2d at 216. Citizens claim that the "test for determining whether the dual subjects of an initiative satisfy art. II, §19's 'rational unity' requirement as articulated by the Court in *Amalgamated Transit* and *City of Burien* [*Kiga*] is: 'Does rational unity exist between the two subjects such that they might be considered necessary to implement the other?'
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> In those cases, the subjects were so disjointed as to bear no relation to each other, thus the court's conclusion that they were unrelated because neither was necessary to implement the other.
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> Interestingly, this court, in both *Amalgated* and *Kiga* upon which Citizens rely for their "test" of rational unity, clearly expressed what has long been the true test of rational unity: "the existence of rational unity or not is determined by whether the matters within the body of the initiative are germane to the general title and whether they are germane to one another." *Kiga*, 144 Wn.2d at 826; *Amalgamated*, 142 Wn.2d at 209-10. *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.* This court has not narrowed the test of rational unity to the degree

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> claimed by Citizens. It is more likely that the statements made in *Amalgamated* and *Kiga* in regard to the dual subjects being unnecessary to implement the other were made to further illustrate how unrelated the two were.

(emphasis added)

Like the plaintiffs in *Citizens*, the Plaintiffs are attempting to narrow the test of rational unity by creating a presumption that an initiative violates the single subject rule of article II, section 19 if one aspect of the initiative is not *necessary* to implement another. This is exactly the type of narrowing the Court rejected in *Citizens* and it flies in the face of the rule that a statute is presumed constitutional. Plaintiffs' attempt to narrow the definition of rational unity should be rejected as unsupported by any precedent.

3. The ballot title of I-1183 encompasses its broad subject.

In *Wash. Fed'n of State Employees, supra*, the ballot title for Initiative 134 was challenged as insufficient under article II, section 19. The ballot title read:

> Shall campaign contributions be limited; public funding of state and local campaigns be prohibited; and campaign related activities be restricted?

The Washington Federation of State Employees challenged the initiative on several grounds; one being that the title was inadequate because it failed to mention that I-134 repealed RCW 41.04.230(7), a provision permitting certain public employees to make contributions to political committees through payroll deduction.[5] The Supreme Court found that the ballot title for I-134 adequately served its constitutional purpose because the title "broadly encompassing limitations on campaign contributions, prohibitions on public funding for campaigns, and

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[5] Within the general subject of campaign finance limitation, I-134 included provisions of considerable variety. Initiative Measure 134 to the Legislature (Laws of 1993, ch. 2). For instance, section 11 set time limits during which state officials could solicit or accept campaign contributions, section 16 prohibited the use of agency shop fees as contributions, section 25 limited the franking privileges of state legislators, and section 29 required the Public Disclosure Commission to conduct certain audits. Citizens reading the ballot title for the measure would not necessarily have understood that it contained any of these provisions, although they were on reasonable notice that these and other campaign law changes *might* be covered.

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restrictions on campaign related activities" was sufficient to give notice what the measure might contain. *Wash. Fed'n*, 127 Wn.2d at 557. The court upheld the measure's constitutionality under article II, section 19, although it was found to unconstitutionally impair contracts.

Given this case law, the question is not whether the title to Initiative 1183 would inform the voters about all of the measure's contents. The question is whether the measure's title gave fair notice that the subject of I-1183 *was* changes to the liquor laws, and that any number of possible provisions relating to that subject might be contained within the measure's text. Article II, section 19 must be liberally construed, in favor of upholding I-1183, when determining whether it complies with the single subject rule.

In the *Amalgamated Transit* case, the court quoted from *Kueckelhan v Fed. Old Line Ins.,* 69 Wn.2d 392, 418 P.2d 443 (1966), as follows:

> Under the true rule of construction, the scope of the general title should be held to embrace any provision of the act, directly or indirectly related to the subject expressed in the title and having a natural connection thereto, and not foreign thereto. Or, the rule may be stated as follows: 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.

Amalgamated Transit, 142 Wn.2d at 209, *quoting Kueckelhan,* 69 Wn.2d at 403, 418 P.2d 443 (in turn quoting *Gruen v. State Tax Comm'n,* 35 Wn.2d 1, 22, 211 P.2d 651 (1949)).

As set out above, our Supreme Court has held that the single-subject rule is to be construed liberally, in favor of upholding the statute. For instance, in *City of Burien v. Kiga*, 144 Wn.2d 819, 824, 31 P.3d 658 (2001), the court began its analysis by determining whether I-722 violated the single subject clause of article II, section 19. Thus, in response to Plaintiff's Motion for Summary Judgment, the State will first address why Plaintiffs have not shown beyond a reasonable doubt that I-1183 embraces more than a single subject.

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4. Legislator's historical choices to address changes to certain aspects of the liquor laws in separate bills do not create a rule of law that one piece of legislation cannot address an entire statutory scheme.

The Plaintiffs argue that the State has historically differentiated between, and treated separately, various aspects of the liquor laws. Pl's Mot. for Summ. J. at 3-6, 17-18. They particularly emphasize the differentiation between the "hard liquor" and wine regulatory schemes. *Id.* at 17. They note:

> The State has preserved strict control over distribution and sale of hard liquor, while relaxing regulations for wine and beer.
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> The Legislature has acted consistently with this differentiation. For example, in 2011, the Legislature enacted legislation related to pilot projects that allowed sampling of beverage—wine and beer at farmers markets and hard liquor in state liquor stores. But instead of putting all of these changes into one bill, the Legislature drafted and passed two separate bills in the same session. *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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> Further, in 2011 the Legislature also passed a bill amending the Liquor Act to allow VIP airport lounge operator to sell or provide hard liquor, wine and beer for on-premises consumption. Laws of 2011, ch. 325.

Id. at 17-18.

The Plaintiffs apparently see in the existence of these three bills an example of a legislative policy of treating different aspects of liquor regulation separately. However, Plaintiffs have chosen to ignore a simple answer to the question of why three separate bills were enacted. The bills that resulted in Laws of 2011, chs. 62 and 186 originated in the House and had two entirely different sets of sponsors.[6] The bill that resulted in Laws of 2011, ch. 325

[6] The bill which became Laws of 2011, ch. 62 was HB 1172, sponsored by Reps. Kenney, Hasegawa, Maxwell, Finn, Ryu, Reykdal and Upthegrove. The bill which became Laws of 2011, ch. 186 was ESHB 1202, sponsored by Reps. Hunt, Taylor and Moscoso. Supp. Decl. of Tennyson, Exs. A and B.

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originated in the Senate.[7] See Supplemental Declaration of Mary M. Tennyson (Supp. Decl. of Tennyson), Exs. A-C.

Far from representing a conscious legislative policy of differentiating the various aspect liquor regulation, the three bills cited by the Plaintiffs resulted from the separate concerns of three entirely separate sets of bill sponsors. Thus, on closer inspection, the "State's historic differentiation" (Pl's Mot. for Summ. J. at 17) between "the hard liquor and wine regulatory schemes" (*Id.*) proves to be an optical illusion.

Plaintiffs have cited no authority for their apparent position that the Legislature or the drafters of an initiative are precluded from addressing matters in a single bill that can with equal propriety be addressed separately. The only requirement is the title of the single bill must comport with article II, section 19. As the Supreme Court has said: "[T]he legislature may adopt just as comprehensive a title as it sees fit, and if such title when taken by itself relates to a unified subject or object, it is good, however much such unified subject is capable of division." *Marston v. Humes*, 3 Wn. 267, 276, 28 Pac. 520 (1891), *overruled on other grounds, In re Shilshole Ave.*, 101 Wn. 136, 172 P. 338 (1918).

Kueckelhan v. Federal Old Line Ins. Co., 69 Wn.2d 392, 418 P.2d 443 (1966), presents an example of legislation that related to a unified subject even though the unified subject was capable of division. *Kueckelhan* involved an article II, section 19 challenge to ch. 79, Laws of 1947. The title to ch. 79 was:

> **An Act** to provide an Insurance Code for the State of Washington; to regulate insurance companies and the insurance business; to provide for an Insurance Commissioner; to establish the office of State Fire Marshall; to provide penalties for the violation of the provisions of this act; to repeal certain existing laws and to amend section 73 of chapter 49, Laws of 1911 as last amended by section 1 of chapter 103, Laws of 1939.

69 Wn.2d at 402.

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[7] The bill which became Laws of 2011, ch. 325 was SB 5156, sponsored by Sens. Kohl-Welles, King, Keiser, Delvin and Conway. Supp. Decl. of Tennyson, Ex. C.

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Chapter 79 was challenged on the ground that it embraced two distinct and separate subjects—(1) regulation of insurance and (2) establishment and duties of the State Fire Marshall. *Id.* The Supreme Court found that the primary import of ch. 79 "was to establish a broad comprehensive code to govern the insurance industry in this state." *Id.* Further, it found that the various components of ch. 79 possessed "rational unity":

> Such unity exists in an act which creates a comprehensive insurance code, establishes the combined offices of Insurance Commissioner and Fire Marshall, and defines the duties and responsibilities of the respective offices. The relationship between fire insurance regulation and rating, fire loss, fire prevention, and fire investigation is rational and reasonable.

Kueckelhan, 69 Wn.2d at 403-404.

Thus, even though it contained elements that were capable of division, ch. 79 was found to be in compliance with the single-subject requirement of article II, section 19. Likewise, the drafters of I-1183 decided to address the unified subject of reforming the liquor laws in a single bill even if it contained elements that arguably *could have been* divided and dealt with separately.

5. Section 302 is germane to the rest of I-1183

In their Motion for Summary Judgment, Plaintiffs argue for the first time that "I-1183 violates the single subject requirement by unconstitutionally containing both substantive changes to law and an appropriation unrelated to carrying out those changes." Pl's Mot. Summ. J. at 14, lines 22-24. The alleged "appropriation" is contained in the last sentence of section 302 of I-1183, which states, in relevant part:

> An additional distribution of ten million dollars per year from the spirits license fees must be provided to border areas, counties, cities and towns through the liquor revolving fund for the purpose of enhancing public safety programs.

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Plaintiffs contend that the language cited above is an "appropriation proviso" and, as such, violates the single subject rule if it does not rationally relate to the purposes of the substantive bill.[8]

Plaintiffs go on to assert that "courts have interpreted this rational relationship to require that the appropriation be targeted at carrying out the principal purposes of the bill." Pl's Mot. for Summ. J. at 15, lines 9-11. In support of this proposition, the Plaintiffs rely on *State v. Acevedo*, 78 Wn. App. 886, 891, 899 P.2d 31 (1995), *review denied*, 128 Wn.2d 1014, 911 P.2d 1343 (1996) and *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 38, 377 P.2d 466 (1962). *Id.* at 15-16. In essence, Plaintiffs interpret *Acevedo* and *Yelle* as holding that the existence of rational unity is determined solely on the basis of the *purpose* for which an appropriation is to be *spent*.

Acevedo and *Yelle* do not support Plaintiffs' interpretation. Admittedly, both cases did find a rational unity *when an appropriation was targeted at the principal purposes of the act.* However, *Acevedo* and *Yelle* did not hold that to be the *only* way in which an appropriation could be found to be rationally related to the rest of an initiative. Plaintiff's extrapolation of a rule of law from these cases is unwarranted. Simply because these cases found the appropriation did support the purposes of the acts that were challenged in those cases does not create a rule, as Plaintiffs propose, that the "appropriation" must "provide a targeted service or alleviate a burden to which the payers contribute." Pl Mot. for Summ. J. p. 22, l. 17-18.

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[8] The State questions whether the portion of section 302 relied upon by the Plaintiffs is actually an "appropriation." It appears to be language of a general and continuing nature mandating the disbursement of funds and is not limited to a specific fiscal biennium. The Court of Appeals has held that "legislation that is of a general and continuing nature usually cannot be deemed an appropriation." *State v. Perala*, 132 Wn. App. 98, 117, 130 P.3d 852 (2006). The Court of Appeals also noted that although a statute may create a mandatory obligation to disburse funds, "this statutory duty is not of itself an appropriation." *Id.*

In a case involving the question of whether an initiative contained an appropriation that violated the single biennium bar of article VIII, section 4 of the Washington Constitution, the Supreme Court held that "merely earmarking funds is not enough to signify an appropriation...there must also be express legislative authorization for the payment of funds from the state treasury." *Neighborhood Stores v. State*, 149 Wn.2d 359, 367, 70 P.2d 920 (2003). The portion of section 302 relied upon by the Plaintiffs contains no express legislative authorization for payment of funds; presumably any implementation of the provisions of section 302 would require a legislative appropriation in the biennial budget. Section 302 is also not properly seen as an appropriation because it is not limited to a single biennium. article VIII, section 4 requires that payments pursuant to an appropriation be made within one month of the biennium in which the appropriation is made. 149 Wn.2d at 366.

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In this case, rational unity exists between the last sentence of section 302 of I-1183 and the rest of the initiative based on the *source* of the funds to be distributed as directed by section 302. Those funds are the product of spirits license fees newly created by sections 103 and 105 of I-1183. They are a direct product of the liquor laws and, as such, are germane to the general title and purpose of I-1183. Thus, determining how funds derived from liquor are allocated is rationally related to the overall purpose of I-1183, i.e., the reform of the liquor laws.

a. Even if section 302 is found to violate article II, section 19, it is severable.

With respect to the question of whether a portion of an initiative that has been found to violate article II, section 19 can be severed from the rest of the initiative, the Supreme Court has held that an objectionable provision can be severed if two criteria are met:

> Where proposed legislation with a single subject title has multiple subjects, those matters not encompassed within the title are invalid but the remainder is not unconstitutional if (a) the objectionable portions are severable in a way that a court can presume the enacting body would have enacted the valid portion without the invalid portion, and (b) elimination of the invalid part would not render the remainder of the act incapable of accomplishing the legislative purpose. *See Municipality of Metro. Seattle v. O'Brien*, 86 Wn.2d 339, 348-349, 54 P.2d 729 (1976); *Swedish Hosp. v. Dep't of Labor & Indus.*, 26 Wn.2d 819, 832, 176 P.2d 429 (1947).

State v. Broadaway, 133 Wn.2d 118, 128, 942 P.2d 363 (1997).

The single sentence of section 302 challenged by the Plaintiffs is eminently severable. With respect to the first criterion, whether the enacting body (the voters) would have enacted the valid portions of I-1183 without the allegedly invalid sentence, the Supreme Court has noted:

> A savings clause may *indicate* legislative intent that the remainder of the act would have been enacted without the invalid portions.

Id. at 128, citing *Swedish Hosp. v. Dep't of Labor & Indus.*, 26 Wn.2d 819, 833, 176 P.2d 429 (1947).

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I-1183 contains just such a savings clause. Section 304 of I-1183 states:

> If any provision of this act or its application to any person or circumstance is held invalid, the remainder of this act or the application of the provision to other persons or circumstances is not affected.

In addition to the existence of the savings clause, a review of I-1183 as a whole indicates that the sentence of section 302 to which Plaintiffs object is not a major element of I-1183—it is simply the allocation of a relatively modest sum of money to border areas, counties, cities, and towns for public safety purposes. I-1183 was passed by a margin of 59%; the State respectfully contends that the court can safely presume that the absence of the last sentence of section 302 would not have led an electorate which passed I-1183 by such a wide margin to vote it down. Although Plaintiffs argue that some representatives of law enforcement supported I-1183 but did not support I-1100, the two measures proposed very different schemes. Even if true that the last sentence of I-1183 was an attempt to curry favor with law enforcement or local governments, Plaintiffs have made no showing that the absence of some support by some of these interests would have resulted in the failure of the initiative, or that the existence of such support was an absolute necessity to its passage.

(1) Elimination of the last sentence of section 302 of I-1183 would not prevent it from accomplishing the legislative purpose.

The second criterion in determining whether the last sentence of section 302 is severable is whether its elimination "would not render the remainder of the act incapable of accomplishing the legislative purpose." *State v. Broadaway,* 133 Wn.2d at 128. Since the last sentence of section 302 merely designates where a portion of the spirits license fees deposited into the Liquor Revolving Fund is to be distributed, its elimination would not otherwise render the remainder of I-1183 incapable of accomplishing its overall purpose of reforming the liquor laws of Washington.

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If the court concludes that, because of section 302, Initiative 1183 taken as a whole lacks rational unity and therefore is inconsistent with article II, section 19, it does not necessarily follow that the entire measure must be struck down. Where the great majority of the Initiative relates directly to changes in who can sell and distribute spirits, beer and wine under our state laws, and where the Initiative itself instructs the court to sever its sections if necessary to preserve as much of the Initiative as may be constitutional, this court should follow the express will of the people and sever only that portion of the law (if any) that actually offends the constitution. The remainder should be upheld and implemented as passed by the large majority of the voters.

6. There is rational unity among the sections of I-1183 that change the regulation of various licensees in the liquor industry.

Plaintiffs argue that I-1183's changes to the liquor laws that allow grocery stores to sell wine to other retailers,[9] eliminating the uniform pricing requirements for wine, and allowing retailers to store wine they purchase in a warehouse approved by the Board. Plaintiffs allege that changes that eliminate barriers to competition in the liquor industry are separate subjects, because Plaintiffs narrowly construe the "purpose" of I-1183 as only the privatization of spirits sales. They base this argument on their assertion that "liquor" has traditionally been parsed by the state into beer, wine, and spirits. Plaintiffs have not proven this to be the case, nor have they shown, even if true, that there is any prohibition on a law addressing several forms of "intoxicating liquor" in one piece of legislation. Simply because the state has, until the passage of I-1183, been the only legal seller of spirits to licensed retailers and permit holders, and because spirits manufacturers and their representatives could only legally sell their

[9] Section104(2) allows a grocery store licensee to obtain a wine reseller's endorsement that allows the grocery store to sell up to 24 liters of wine per sale to a retailer licensed to sell wine for consumption on the premises, such as restaurants. Spirits retail licensees who were formerly contract liquor stores do not have a limit on how much wine may be sold to an on-premises licensee for resale to its customers.

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products to the Liquor Control Board, many changes to the individual sections of Title 66 RCW were necessary for the new law to work effectively.

The Liquor Control Board has a warehouse from which it distributes the products it sells to its retail outlets. Section 104 allows spirits retail licensees that have more than one retail location to enjoy this same privilege, while section 123 allows them to store their wine in the same warehouse. The Board was the only legal retailer for packaged spirits, thus there was no need for a law that required the suppliers or distributors to sell to various retailers at the same price, and I-1183 imposes none. The Liquor Control Board also sells wine in its stores, and the uniform pricing requirements of the former laws did not apply to sales to the Board. Section 119 of I-1183 does not provide for volume discounts, specifically, but does modify RCW 66.28.170 to allow manufacturers and distillers to base their price on competitive conditions, costs of serving a particular customer, efficiencies in handling goods, and other bona fide business factors. This section still contains a prohibition on price discrimination for non-business or competitive reasons. Changes to allow central warehousing for licensees in all three tiers is related to reforming the liquor laws, in light of removing the state's monopoly on spirits sales, and the state's ability to sell wine without complying with restrictions imposed on other retailers.

7. Removal of portion of a policy statement enacted in 2009 does not alter state policy of encouraging moderation in liquor consumption, nor is it an "additional subject".

Plaintiffs argue that section 124 of the Initiative introduces an unrelated subject because it contains "a change in state policy eliminating as a regulatory objective 'encouraging moderation in the consumption of alcohol.'" Pl's Mot. for Summ. J. at 14, 18.[10] The change to the language of RCW 66.28.080 does not demonstrate an intent to change any policy of the

[10] This argument appeared for the first time in Plaintiffs' Reply in Support of Motion for Preliminary Injunction and is not contained in the Complaint. In in their Motion for Summary Judgment, plaintiffs now call this a "hidden" subject. This supposed "subject" is not even a change in the law.

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state. Plaintiffs' argument also fails because section 124 does not change, let alone materially, any legally enforceable obligation or requirement of law; it modifies a legislative "recognition" and "finding" justifying why the 2009 changes to the three-tier system of liquor regulation were consistent with state policy.

Our courts have long held that such a declaration of legislative purpose has no operative force in and of itself, nor does it give rise to enforceable rights and duties. *Food Servs. of Am. v. Royal Heights, Inc.*, 123 Wn.2d 779, 784, 871 P.2d 590 (1994); *Aripa v. Dep't of Social & Health Servs.*, 91 Wn.2d 135, 139, 588 P.2d 185 (1978) overruled on other grounds, *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999). Changes of such provisions do not introduce a second subject for purposes of article II, section 19. *Pierce Cnty. v. State*, 150 Wn.2d 422, 434-436, 78 P.3d 640 (2003).

> Allowing initiative opponents to extract additional "subjects" from an initiative's pure policy expressions—expressions that, by their very nature, are expansive and rhetorical—would not only be contrary to the aim of article II, section 19, but would undermine all but the most tightly worded initiative.

Id. at 435.[11]

Plaintiffs' assertion that I-1183 marks a change in the State's policy to encourage moderation in alcohol consumption is not supported by the language of the initiative. Other sections of law, including sections changed or enacted by I-1183 clearly show the state policy of supporting moderation in sales and consumption of alcohol is retained. I-1183 leaves untouched the overlapping concern with abuse preventions and protection of the public health and

[11] *See also In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249, 257 (Colo. 1999) (provision in state initiative regarding labeling of genetically engineered foods, authorizing general assembly to make changes consistent with the intent of the initiative so long as the changes furthered the purpose of the initiative, did not violate single-subject requirement by allegedly introducing the second subject of limiting the general assembly's power to legislate because the provision was precatory).

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safety. In addition to the sections of I-1183 referenced in the State's Motion for Summary Judgment at p. 11, and repeated in footnote below,[12] I-1183 does not change:

- RCW 66.44.200 (prohibiting sales of liquor to apparently intoxicated persons);
- RCW 66.24.371(limiting the serving size of samples provided by beer/wine specialty shops);
- RCW 66.24.420(4) (limiting the number of licenses to be granted to sell liquor by the drink for spirits, beer and wine restaurants and nightclubs);
- RCW 66.28.040 (giving away of liquor prohibited);
- RCW 66.28.160 (prohibiting certain promotional activities at colleges and universities);
- RCW 66.44.100 (prohibiting opening or consuming liquor in a public place).

8. Changes to state's power relating to regulation of liquor advertising is not a separate subject, and the changes are germane to the other reforms of liquor regulation made by I-1183.

Plaintiffs allege that the Liquor Control Board's authority relating to advertising of liquor is "another subject" that was not revealed in the ballot title.[13] However, the only changes that section 108 of I-1183 made to the Board's authority to regulate the advertising of liquor was to remove the provisions of RCW 66.08.060 that prohibited *the Board* from advertising liquor. That language is deleted because the Board may no longer offer liquor for sale after May 31, 2012. The language of RCW 66.08.060(3) remains unchanged, reading: "The board shall have power to adopt any and all reasonable rules as to the kind, character, and location of advertising of liquor."

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[12] I-1183 states an intent (section 101(2(a)) to continue to "strictly regulate the distribution and sale of liquor"; section 101(2)(b): getting the state out of the liquor business so it can focus on the "more appropriate government role of enforcing liquor laws and protecting public health and safety"; section 101 (2)(e) and (j) (and sections 103 and 105): replacing the state's high markup on spirits with substantial license fees; section 101(2)(f) and (g): limiting the number of stores that can sell spirits to those larger than 10,000 square feet, with minor exceptions; and section 101(2) (l) and (m): increasing training for employees who sell spirits and increasing penalties for sales to minors.

[13] At p. 23 of Plaintiff's Motion, they reference "altering the LCB's *regulations* regarding alcohol advertising". The Initiative does not change the Liquor Control Board's regulations, or its substantive authority to regulate the advertising of liquor.

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The only change to the power of the Board to regulate the advertising of liquor *by others* is the addition of a statement in section 107 that the Board may not prohibit the lawful advertising of liquor *prices*. *See* Initiative 1183, § 107, p. 20, modifying the Board's general powers contained in RCW 66.08.050. This clearly is a provision relating to liquor, as it relates to the Board's powers in regulating all aspects of liquor within the state. Accordingly, there is rational unity between it and both the subject and the remainder of I-1183. It is immaterial in any event as it is declarative of existing law. Under *44 Liquor Mart v. Rhode Island,* 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711(1996), it is unconstitutional for a state to prohibit the lawful advertising of liquor prices, as it unlawfully limits the free speech of potential advertisers of liquor.

9. The creation of a licensing fee based on sales does not create a tax, and has rational unity with the other sections of I-1183.

I-1183 creates spirits retail licenses and spirits distributor licenses. Initiative 1183, §§ 103 and 105. Spirits retail licensee and spirits distributor licensees must pay annual license issuance fees. *Id.* at §103(4) and §105(3). The fees are based on the licensees' sales and are to be deposited into the Liquor Revolving Fund. *Id.* Ch. 66.08 RCW creates a system whereby liquor license fees, taxes and penalties collection by the Board are distributed to various state and local agencies for alcoholism and drug abuse research, (*e.g.,* RCW 66.08.190(1)(a) and various social programs related to the consumption of liquor (RCW 66.08.190 (1)-(4).[14] Distributions from the Liquor Revolving Fund to the state, counties, and cities are addressed in RCW 66.08.180 through .220 (*See* Attach. D to State's Mot. for Summ. J.).

[14] Although taxes on spirits collected pursuant to RCW 82.08.150, are also first deposited into the Liquor Revolving Fund, they are transferred to the "liquor excise tax fund" or the general fund, pursuant to RCW 82.08.160. The state currently collects the excise and liter taxes on spirits at the time of the retail sale, but when the state is taken out of the sales process, I-1183 transfers the tax collection responsibility to the spirits retail licensee, and the administration of the taxes to the Department of Revenue.

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a. The license fees based on sales are accurately characterized as fees, and not taxes.

Plaintiffs contend that the "license fees based on sales" referred to in the ballot title are actually a "tax" rather than a fee, and should have been described as such. Therefore, they conclude that the subject-in-title rule is violated "because the initiative's body embraces multiple subjects not embraced in its title." Compl. at 13, lines 10-11; Pl's Mot. for Summ. J. at 19-23. For decades, the State has imposed a markup[15] on spirits that it sells, which brought revenue to the state that was used for particular purposes and redistributed to local governments pursuant to statutes that remain unchanged.[16] The State does not consider the imposition of the markup a tax, and does not call it that. The license fees replace the revenues that the State now collects via the markup, imposing a fee on the privilege of obtaining the sales and distribution rights. The license fee based on sales is not a tax simply because the value of the privilege is set based on the amount of sales the licensee makes.

b. The court should look to how the terms are used in the statute, to determine whether it is properly reflected in the title.

Courts examining titles in the context of the subject-in-title rule have historically focused their article II, section 19 analysis on whether terms used in the ballot title are defined within the body of the act differently from what an average voter would assume. *See Amalgamated Transit*, 142 Wn.2d at 219-27; *DeCano v. State*, 7 Wn.2d 613. 626, 110 P 2d 627 (1941). Nothing here shows that the use of "fees" in the brief description violated the expectations of the voters. Contrary to Plaintiffs' contention,[17] the plain and ordinary

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[15] Ex. C to the Decl. of Michael Subit in Support of Mot. For Prelim. Inj. is a copy of the Liquor Control Board's 2010 annual report; Pages 20 through 23 describe the distribution of liquor revenues.

[16] In addition to the markup set by the Board, in 2005 the following requirement was added to RCW 66.16.010: "Effective no later than July 1, 2005, the liquor control board shall add an equivalent surcharge of $0.42 per liter on all retail sales of spirits.... The intent of this surcharge is to raise revenue for the general fund-state for the 2003-2005 and 2005-2007 bienniums. The board shall remove the surcharge June 30, 2007."

[17] In Plaintiffs' Motion for Summary Judgment at pp 22-23, they assert that I-1183 failed to inform voters that it was creating a broader definition of the term "fee" than is generally understood. I-1183 did not create a broader definition of "fee," rather, Plaintiffs are attempting to narrow the definition of fee from its plain and ordinary meaning.

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definition of fee does not concern itself with the use to which fee revenues will be put. The license fee established by I-1183 clearly meets the dictionary definition of a fee; it is a charge levied for the privilege of selling liquor, a privilege that is under the control of the State of Washington.

c. Plaintiff's assertion that the state may not enact a regulatory fee is without merit.

The State addressed Plaintiff's argument that the license fees based on sales must be viewed as taxes in its Motion for Summary Judgment, pp. 12-13 and 15-18. The State incorporates those arguments by reference here, for purposes of this Response. The "subject" of the fees was clearly included in the ballot title of I-1183.

10. Plaintiffs' arguments about drafting to serve special interests of Costco are irrelevant

Plaintiffs devote a portion of their Motion (at pp. 8-9) to arguing that because certain retailers participated in the drafting and sponsorship of I-1183, it was drafted to serve only their interests. Even if true, this allegation is irrelevant to whether a statute enacted into law is unconstitutional under article II, section 19. Inquiry into the reasons for including certain provisions in an initiative is not part of the court's proper inquiry in such a challenge, unless there is a need to interpret the language because it is ambiguous. Even if ambiguous, the court looks to the Voter's Pamphlet, not advertising which may or may not have been viewed by the voters. *Thorne*, 129 Wn.2d at 763. Plaintiffs have not alleged that any section of the initiative is ambiguous in this regard, or that the court needs to interpret any particular section of I-1183 in order to reach a decision on its constitutionality. These gratuitous statements should be disregarded.

VI. CONCLUSION

The question of whether I-1183 is constitutional, or whether it violates article II, section 19, is a question of law, and may properly be decided on cross-motions for summary

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judgment. In interpreting I-1183, the court must adopt the interpretation that upholds the constitutionality of the statute, not an interpretation that defeats it.

The sections of I-1183 relate to its general subject of reforming the liquor laws, and to each other. The requirement of rational unity does not require the sections of a law to be "necessary" to each other, to pass constitutional muster. With the removal of the state from liquor sales, allowing those newly licensed to sell and distribute spirits to exercise privileges similar to those formerly enjoyed by the state, while preserving the State's revenues from liquor sales, are rationally related to one another.

Statutes are presumed to be unconstitutional. Plaintiffs have not met their burden to prove, beyond a reasonable doubt, that I-1183 violates the constitutional provisions of article II, section 19. The State requests the court deny Plaintiff's Motion for Summary Judgment, grant the State's motion, and find I-1183 to be constitutional.

DATED this 9th day of February, 2012.

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