IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

STATE OF WASHINGTON,

Respondent,

and

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

Respondents-Intervenors.

NO. 87188-4

RULING DENYING INJUNCTIVE RELIEF

This matter comes before the court on an emergency motion for injunctive relief pending appeal under RAP 8.3.

The appeal involves a challenge to the constitutionality of Initiative 1183, which was passed by a vote of the people in November 2011, took effect on December 8, 2011, and (among other things) mandates the closure of State liquor stores by June 1, 2012. Appellants Washington Association for Substance Abuse and

Violence Prevention and David Grumbois argue that the initiative violates the single-subject and subject-in-title requirements of the Washington Constitution. The Cowlitz County Superior Court denied a preliminary injunction, and on March 19, 2012, granted summary judgment to respondents, the State and various intervening initiative sponsors and supporters.

Appellants asked that their appeal be accelerated so that it can be heard and decided as soon as possible before June 1, 2012, the final implementation date for transition from a state system to a private system. This court has already retained the case, set an expedited perfection and briefing schedule, and scheduled oral argument for May 17, 2012.

Under the timetable set forth by the initiative and the Liquor Control Board, December 8, 2011, saw two changes to the way wine is sold in this state: wine sold at wholesale now need not be sold at the same price to any purchaser, regardless of volume purchased or location; and grocery stores with wine retailer reseller endorsements can sell wine to restaurants. Distilleries and private distributors began selling hard liquor directly to restaurants starting March 1, 2012. The State is now in the process of auctioning off the right to seek sale licenses for existing State-operated liquor stores and to negotiate leases with store landlords, with the auction tentatively set to conclude April 20, 2012. As of May 4, 2012, the State distribution center will no longer accept deliveries of spirits from distillers and other sellers. May 18, 2012, is the last date the distribution center will ship to State retail stores. By June 1, 2012, the State must close its central distribution center, relinquish its stores, dispose of its retail inventory, and fully implement the transition from the State system to the new private system.

Appellants originally sought an order pending appeal enjoining the State from (1) selling or otherwise disposing of any State assets, (2) issuing any additional

licenses to private entities or persons to distribute or sell at retail hard liquor, (3) accepting any bids for the right to seek a license for any State stores (individually or system-wide), and (4) permitting private distribution and/or retail sale of hard liquor.

In their reply filed April 4, 2012, appellants amended their request in light of the court's decision to hear the appeal on May 17, 2012. They now ask the court to order (1) a 30 day extension of the initiative's requirement that the State remove itself from the sale and distribution of beverage alcohol by June 1, 2012, and (2) an injunction against the further winding down of the State's distribution and sale of hard liquor until the court's resolution of the appeal. Appellants say the injunction should include preventing the State from selling or otherwise disposing of any assets, including hard liquor inventory. It is not immediately clear how this request differs from the earlier one, but appellants' counsel said during oral argument that they are not now seeking to enjoin the bid process discussed above or the issuance of licenses.

INJUNCTIVE RELIEF

This court "has authority to issue orders ... to insure effective and equitable review, including authority to grant injunctive or other relief to a party." RAP 8.3. The court will ordinarily condition the order on furnishing of a bond or other security. *Id.* In order to qualify for injunctive relief, a moving party must demonstrate that the review presents debatable issues and that the injunction is necessary to preserve the fruits of the review if it is successful. *Shamley v. City of Olympia*, 47 Wn.2d 124, 286 P.2d 702 (1955) (involving injunctive relief in aid of the court's appellate jurisdiction). The "debatability" standard contemplates a limited inquiry, not an extensive assessment of the merits. *Id.* at 127; *see also Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956). The "necessity" requirement involves an inquiry into

the equities of the situation. *Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985).[1] The court will exercise this power with caution. *Shamley*, 47 Wn.2d at 126.

DEBATABLE ISSUES

Article II, section 19 of the Washington Constitution provides that "[n]o bill shall embrace more than one subject, and that subject shall be expressed in the title." As can be seen, this provision contains two distinct requirements. First, a bill must embrace only one subject. This provision is aimed at preventing grouping of incompatible measures as well as preventing "logrolling," the enactment of an unpopular provision by attaching it to a more popular, unrelated one. *Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 368, 70 P.3d 920 (2003); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000), 27 P.3d 608 (2011); *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001). Second, the subject must be expressed in the bill's title. The purpose of this requirement is to notify the legislature and the public of the subject matter of the enactment. *Amalgamated Transit*, 142 Wn.2d at 207. Article II, section 19 applies to initiatives. *Id.* at 206; *Kiga*, 144 Wn.2d at 824-25. Laws, whether enacted by the legislature or the voters, are presumed constitutional. They must be shown to violate the constitution beyond a reasonable doubt, a standard met only if argument and

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[1] Although RAP 8.1(b)(3) applies only to delayed enforcement of trial court decisions, it is instructive by analogy. That rule directs the appellate court to "(i) consider whether the moving party can demonstrate that debatable issues are presented ... and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." Appellants rely upon the "sliding scale" test set forth in *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986), under which the inquiry into the merits of the appeal becomes less important the greater the inequity. But in response to that decision RAP 8.1(b)(2) was amended in 1990 to make clear that that subsection applied to intangible personal property, and subsection (b)(3) was added to address stays of judgments other than money judgments or judgments affecting property. The drafters of RAP 8.1(b)(3) noted specifically that the above standard was adopted to modify the *Sierracin* "sliding scale" test. As the comment explains, the standard was "rewritten to require that the appeal present 'debatable' issues (without regard to the strength of the issues)," and that once that standard is met the relative harm to the parties is then weighed.

research show that there is no reasonable doubt that the statute violates the constitution. *Amalgamated Transit*, 142 Wn.2d at 205.

When determining whether an initiative complies with the single subject rule, the court looks first to the ballot title. *Amalgamated Transit*, 142 Wn.2d at 211-12. Under a statute passed in 2000 changing the way ballot titles are written, a ballot title is to consist of a statement of the subject of the measure, a concise description of the measure, and the question whether the measure should be enacted into law. RCW 29A.72.050. The ballot title of Initiative 1183 reads as follows:

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

The court must determine whether this title is general or restrictive. *Neighborhood Stores*, 149 Wn.2d at 368; *Kiga*, 144 Wn.2d at 825. A general title is broad, comprehensive, and generic as opposed to a restrictive title that is specific and narrow. *Id.* In assessing whether a title is general, it is not necessary that the title contain a general statement of the subject of the act; a few well-chosen words, suggestive of the general subject stated, is all that is necessary. *Neighborhood Stores*, 149 Wn.2d at 368; *Amalgamated Transit*, 142 Wn.2d at 209. A ballot title mentioning more than one type of provision does not create a restrictive rather than a general subject title. *Neighborhood Stores*, 149 Wn.2d at 369; *Amalgamated Transit*, 142 Wn.2d at 183. Instead of looking to whether the ballot title makes specific references to provisions contained in the text of the initiative, the court looks to whether the ballot title suggests a general, overarching subject matter for the initiative.

Neighborhood Stores, 149 Wn.2d at 369; *Amalgamated Transit*, 142 Wn.2d at 209. The court has never favored a narrow construction of the term "subject" as used in article II, section 19. *State v. Waggoner*, 80 Wn.2d 7, 9, 490 P.2d 1308 (1971).

> 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 209-10 (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 33, 377 P.2d 466 (1962)). It follows that a measure may have a unified subject even if it is capable of division.

Here, the title says the initiative concerns liquor: beer, wine, and spirits (hard liquor). The description of the measure refers not only to the privatization of liquor sales, but also to the setting of fees based on sales, the regulation of licenses, and change to the regulation of wine distribution. The title thus suggests an overarching theme of reform of state laws regarding alcohol distribution, sales, and regulation. According to the superior court, the parties agree that Initiative 1183 carries a general rather than a specific title. Such an initiative can embrace several incidental subjects or subdivisions and not violate article II, section 19 so long as they are related. In order for the measure to survive, rational unity must exist among all matters included within the measure and the general topic expressed in the title. Rational unity requires included subjects to be reasonably connected to one another and the ballot title. *Neighborhood Stores*, 149 Wn.2d at 370; *Kiga*, 144 Wn.2d at 826; *Amalgamated Transit*, 142 Wn.2d at 207. The existence of rational unity 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. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 662, 636, 71 P.3d 644 (2003). The court has not

accepted the notion that incidental subjects are germane to one another only if they are necessary to implement each other. *Id.* at 638. Where the title of an 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.

Characterizing the subject of Initiative 1183 as the privatization of the sale of distilled spirits in this state, appellants urge that the initiative contains multiple subjects unrelated to that subject, such as (1) a $10 million yearly earmark from the spirits license fee provided to border areas, counties, cities, and towns for the purpose of enhancing public safety programs; (2) raising new revenue by imposing licensing fees based on sales of hard liquor; (3) deregulation of wine distribution laws, including removal of restrictions on price discrimination; (4) changes in alcohol advertising restrictions, including a ban on regulations of advertising of lawful prices; and (5) the deletion of statutory language referencing the goals of orderly marketing and encouraging moderation in the consumption of alcohol (while retaining the goals of protecting the public interest and advancing public safety by preventing the use and consumption of alcohol by minors and other abusive consumption, and promoting efficient collection of taxes).

But as discussed the initiative plainly has a broader subject than mere privatization of the sale of hard liquor. The initiative title refers to the subject as liquor in three recognized forms, and the description directly contemplates change to regulation of wine distribution, as evidencing a new overall scheme of regulating the sale of alcohol, with significant changes relating to both wine and distilled spirits. Under this scheme certain retailers will be able to sell both wine and distilled spirits, and distribution channels for both will have changed. These are rationally related

subjects, germane to one another. Spirit retailers and distributors will have to pay new annual license fees based on sales, with the fees being deposited in the Liquor Revolving Fund. But these fees are rationally related to the subject of the initiative, which plainly includes the privatization of hard liquor sales, and the fees replace revenues previously available from price markups and surcharges. There is a rational unity among the sections of the measure that change the regulation of various licenses in the liquor industry. The changes made in the regulation of wine and distilled spirits find rational unity in the general purpose of the act and the practical problems of administration, since they align the laws governing the sale and distribution of wine with the laws governing the sale of spirits. *See Amalgamated Transit*, 142 Wn.2d at 209. That same unity extends to the change in advertising restrictions, since changes in the regulation of sales are inextricably intertwined with changes in the regulation of advertising. The provision permitting the advertising of alcohol prices plainly relates to new retail sales of hard liquor, and it is unconstitutional in any event for a state to outright ban the advertising of liquor prices. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). The new regime changes the policies of the State regarding the sale and regulation of wine and distilled spirits, so a change to the stated policies underlying that scheme is plainly germane and related to the subject. Such policy declarations generally have no operative force in any event, and such pronouncements do not introduce a new subject for purposes of article II, section 19. *See Pierce County v. State*, 150 Wn.2d 442, 434-36, 78 P.3d 640 (2003). And even the yearly earmark to enhance local public safety programs has a rational relationship to the control and regulation of alcohol sales, and is a direct product of the newly created spirits licensing fee. Certainly there is a commonsense relationship between beverage alcohol and public safety.

It appears that the only time an enactment is struck down entirely for violating the single subject rule is when *both* the title and the body of the legislation embrace two or more unrelated subjects. *See Power, Inc. v. Huntley,* 39 Wn.2d 191, 199-201, 235 P.2d 173 (1951); *see also Kiga*, 144 Wn.2d at 826-27; *Amalgamated Transit*, 142 Wn.2d at 216-17; *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 524, 304 P.2d 676 (1956). Considering the purpose of preventing "logrolling," this makes sense, since, when both the title and the body of an enactment contain two distinct subjects, it is impossible to tell whether either one would have garnered majority support if voted on separately, and thus impossible to determine which one should be upheld and which one voided. *Power, Inc.*, 39 Wn.2d at 198-200. But where the title embraces only one subject, it may be more safely assumed that it was enacted with that subject in mind, especially where initiatives are concerned. *See Amalgamated Transit*, 142 Wn.2d at 217 (recognizing that often voters will not reach the text or explanatory statement of the measure, but will cast their votes based on the ballot title); *see also Washington Fed'n of State Employees v. State*, 127 Wn.2d 544, 554, 901 P.2d 1028 (1995) (same). In that case, the purposes of the single subject rule can be satisfied by severing from the enactment those provisions not related to the subject expressed in the title, as long as the valid and invalid provisions are not inextricably intertwined. *See Power, Inc.*, 39 Wn.2d at 198-200; *see also State v. Broadaway*, 133 Wn.2d 118, 128, 942 P.2d 363 (1997).

It thus appears that the only potentially debatable issue presented by appellants on the single subject question is whether the yearly earmark for public safety programs is sufficiently related to the main subject of Initiative 1183, or must be severed from the rest of the measure. The advertising price issue might be said to place a distant second. But potential severance of those provisions would not entitle appellants to the injunction they seek, which would put on hold the other actions

contemplated by the initiative regarding spirits privatization, which appears to be the true target of the injunction request.

Appellants further suggest that Initiative 1183 violates the subject-in-title requirement of article II, section 19 because the ballot title says the measure will set license fees, whereas the measure actually imposes a tax. This court interprets article II, section 19 liberally in favor of the challenged legislation. *Amalgamated Transit*, 142 Wn.2d at 206. The court interprets the challenged title in accordance with the common and ordinary meaning of its language. *Washington State Grange v. Locke*, 153 Wn.2d 475, 495, 105 P.3d 9 (2005). The court then compares the title to the text of the bill to determine whether there is a subject-in-title violation. *Id.* The purpose of the subject-in-title requirement is to notify legislators and the public of the subject matter of the bill. *Id.*; *Amalgamated Transit,* 142 Wn.2d at 207. The title of a bill complies with the subject-in-title rule if it gives notice that would lead to an inquiry into the body of the bill or indicates to an inquiring mind the scope and purpose of the bill. *Amalgamated Transit*, 142 Wn.2d at 217. The bill title need not constitute an index to its contents, nor need it provide details of the act. *Id.*

As noted, the title of Initiative 1183 says it will "set license fees based on sales." The text of the measure likewise establishes what is called a licensing fee based on sales. The State has for decades imposed a markup on spirits that it sells, and of late has imposed a surcharge on all retail sales of spirits. The initiative partially replaces this state-store revenue stream. The new fee is a charge levied for the privilege of selling liquor. Nonetheless, appellants have a fair argument that the initiative establishes a tax, since it apparently will generate more money than is necessary to regulate licenses. *See Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 371, 89 P.3d 217 (2004). This court in *Amalgamated Transit* held that Initiative 695 violated the subject-in-title rule because the ballot title referenced voter

approval of "any tax increase," while the express definitions in the measure of the term "tax" did not mean "tax" as that term is commonly understood. *Amalgamated Transit*, 142 Wn.2d at 227 ("Nothing about this ballot title gives any notice that would indicate to the voters that the contents of the initiative would include voter approval for charges other than taxes or suggest inquiry into the act be made to learn the broad meaning of 'tax.'"). But as the superior court here reasoned, the voters on Initiative 1183 were told in the title that the licensees would pay a percentage of their sales to the state: "That is a perfectly accurate description of what this law requires." Language in an initiative should be construed as the average informed voter voting on the initiative would read it. *Amalgamated Transit*, 142 Wn.2d at 219. Borrowing again from the superior court, while people of common understanding may not be familiar with the rather complex distinctions our courts have drawn between a tax and a fee, they can certainly appreciate the meaning of paying a percentage of sales to the state.

Thus, appellant's subject-in-title argument does not appear to present a debatable issue.

Of course, these are merely conclusions regarding the "debatability" standard following a preliminary review of the subject, and the court could disagree with any or all of them, either when it decides any motion to modify this ruling or when it considers the merits of the appeal.

COMPARISON OF INJURIES

Appellants seek to enjoin privatization of hard liquor sales, even though they acknowledge privatization as a subject—or, in their estimation, *the* subject—of Initiative 1183. They contend that if this court does not enjoin Initiative 1183 the State will close its liquor stores, sell its assets, issue licenses for private parties to sell hard liquor, and effectively transfer the last of Washington's alcohol beverage industry to

the private system by June 1, 2012.[2] But the question now is whether an injunction should issue before the court decides the case.[3] The court is scheduled to hear oral argument on May 17, 2012, and could well decide the case by order (with opinion to follow) or by opinion before June 1. Before then an injunction preventing further implementation of the initiative would likely force the State to incur additional costs without alleviating any identified harm to appellants. The State may lose tax revenues and license fees, and might have to spend funds for leasing of stores locations, offices, and employee salaries, benefits, and other costs. Private retailers, distributors, distillers, restaurants, and bars have undoubtedly made changes to facilitate the transition to the new regime, and private spirit distributors have reportedly hired employees, leased buildings, bought equipment, and purchased inventory. They all might be harmed by an injunction, though it is impossible to gauge the extent of that potential harm from the materials provided by the parties. By contrast, appellants nowhere explain how *they* might be harmed by the denial of an injunction. Nor do they mention the furnishing of a bond, though one is usually required when an appellate court issues an injunction. RAP 8.3. Appellants invoke the interests of the State and the Liquor Control Board, but they do not demonstrate that there is a true point of no return beyond which the State could not put the old system back in place. Appellants' request was initially tied to the April 20, 2012, closure of the auction of the right to apply for sales licenses at existing store locations (though that may have

[2] As noted, as of their reply appellants seem no longer to seek to enjoin the bid process or the awarding of licenses.

[3] Both sides suggest that Washington could end up a "dry state" if the court does not rule appropriately on the injunction request. Appellants suggest this will happen if the court ultimately rules in their favor but has not enjoined the State from exiting the hard liquor market by June 1, since the State will not have enough liquor on hand to meet the needs of State stores and the public. The State disputed this during oral argument, stating that contingency plans insure that store shelves will not be empty as of May 31, 2012. Respondent intervenors suggest that if the injunction issues but the court upholds the initiative after June 1, the State would immediately be out of the liquor business and there would be no licensed private distributors or retailers and no private inventory or sales logistics.

changed with the filing of their reply). But closure of the auction will not automatically result in the sale of the right to seek a license, will not grant a license, and will not require the State to close a store on any particular date. The current award date is April 30, but the Liquor Control Board could change that date. And winning bidders must still apply for licenses. The board need not sell its assets other than liquor inventory by June 1, 2012, but by June 1, 2013, with any assets remaining after that date to be disposed of by the Department of Revenue.

Appellants do not demonstrate that an injunction must issue before the court hears the case.

CONCLUSION

As the proponents of Initiative 1183 point out, an injunction of the sort requested by appellants is in reality the suspension of an initiative, delaying the date selected by the voters to put their chosen policies into effect. This court must be circumspect in the exercise of that power. The court has acted swiftly to ensure that the appeal will be heard before June 1, 2012, and any real or lasting harm in failing to grant an injunction before oral argument seems unlikely. Thus, I am not convinced that this is one of those rare occasions calling for an injunction under RAP 8.3. Accordingly, the emergency motion for injunctive relief is denied.

Appellants may move to modify this decision, RAP 17.7, and if they do so the decision of the justices of this court will be de novo. But because of the time limits involved and the relief requested appellants' motion to modify shall be served and filed not later than noon on April 10, 2012. Respondents' answers shall be served and filed not later than noon on April 12, 2012, and appellants' reply, if any, shall be served and filed not later than noon on April 13, 2012. No extensions of time will be granted. In deciding any motion to modify the court will also have access to the

original pleadings filed by the parties on the emergency motion for injunctive relief.

COMMISSIONER

April 6, 2012