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

DANA HENNE, an individual taxpayer  
and Washington resident; 1/2 PRICE  
SMOKES, INC., a Washington  
corporation; and RYO MACHINE, LLC,  
an Ohio limited liability company,

Plaintiffs,

v.

BRAD FLAHERTY, in his official  
capacity as Director of the Washington  
Department of Revenue; PAT  
KOHLER, in her official capacity as  
Administrative Director of the  
Washington State Liquor Control Board;  
and the STATE OF WASHINGTON,

Defendants.

No. 12-2-50512-1

**PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION AND  
BRIEF IN SUPPORT THEREOF**

Note for Motion Calendar:  
Monday, June 25, 2012 at 2:00 pm

Oral Argument Requested Over 10 Minutes  
Evidentiary Hearing Requested

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

- I. INTRODUCTION ..... 1
- II. RELIEF REQUESTED ..... 1
- III. EVIDENCE RELIED ON ..... 2
- IV. STATEMENT OF FACTS ..... 2
  - A. Initiative 1053 Mandates a Two-Thirds Requirement for Passage of New Legislation that Raises Taxes ..... 2
  - B. HB 2565 Was Defeated in the Washington Senate When the Tax Bill Failed To Obtain Sufficient Votes to Satisfy Initiative 1053’s Two-Thirds Requirement ..... 4
  - C. The New Taxes Sought to be Imposed by Defendant State Officials Under HB 2565 Unlawfully Threatens Each of the Plaintiffs ..... 5
    - 1. Overview of Roll-Your-Own Cigarettes and the RYO Filling Station ..... 5
    - 2. Dana Henne – Pasco resident and consumer ..... 6
    - 3. 1/2 Price Smokes, Inc. – Kennewick small business retailer ..... 7
    - 4. RYO Machine, LLC – Manufacturer ..... 8
- V. ARGUMENT ..... 9
  - A. Plaintiffs Have a Clear Legal or Equitable Right in Lawful and Constitutional Application of Washington Law ..... 9
  - B. Plaintiffs Have a Well-Founded Fear That Their Rights will be Violated by the Collection of Taxes Under HB 2565 by Defendant State Officials ..... 10
  - C. Plaintiffs Will Likely Prevail on the Merits that HB 2565 is an Unlawful Tax, and Would Suffer Actual and Substantial Injury If Forced To Operate Under an Ultra Vires and Unconstitutional Application of Law ..... 11
  - D. The Balance of Potential Harm Favors Plaintiffs, With the Public Interest Favoring Granting Injunctive Relief Restraining Defendant State Officials From Collecting Unlawful Taxes Under HB 2565 ..... 12

PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF - i

1 E. The Public Interest Favors Granting Injunctive Relief ..... 13  
2 VI. CONCLUSION..... 14  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF - ii

TABLE OF AUTHORITIES

Page(s)

**Cases**

*District Attorney's Office for the Third Judicial District v. Osborne*,  
557 U.S. 52 (2009).....9

*Fritz v. Gorton*,  
83 Wn.2d 275, 517 P.2d 911 (1974).....2

*Kucera v. Wash. Dep't of Transp.*,  
140 Wn.2d 200, 995 P.2d 63 (2000).....9

*League of Education Voters v. State of Washington*,  
No. 11-2-25185-3-SEA (Jan. 13, 2012).....3, 4

*Pierce v. Soc'y of Sisters*,  
268 U.S. 510 (1925).....13

*Save Our State Park v. Hordyk*,  
71 Wash. App. 84, 856 P.2d 734 (1993).....10, 12

*Shields v. Utah I. C. R. Co.*,  
305 U.S. 177 (1938).....12

*State ex rel. Citizens v. Murphy*,  
151 Wn.2d 226, 88 P.3d 375 (2004).....3

*Wash. Fed'n of State Employees v. State*,  
99 Wn.2d 878, 665 P.2d 1337 (1983).....9

*Wash. State Farm Bureau Fed'n v. Gregoire*,  
162 Wn.2d 284, 174 P.3d 1142 (2007).....3, 12

**Statutes**

RCW 7.40.020 .....9

RCW 43.135.031 .....4

RCW 43.135.034 .....1, 10

RCW 43.135.034(1).....2, 3, 10, 11

RCW 43.135.034(6).....2

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF - iii

1 RCW Title 82.....4

2 **Constitutional Provisions**

3 Wash. Const., art. II, sec. 1 .....2, 3, 10, 12

4 Wash. Const., art. II, sec. 22 .....3

5 Wash. Const. art. VII, sec. 5 .....3, 10

6 Washington Constitution .....1, 9, 10

7 **Other Authorities**

8 House Bill 2565 ..... passim

9 <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2565&year=2011#history> .....4

10 <http://www.uselectionatlas.org/RESULTS/statesub.php?year=2010&fips=53021&f=0&of>

11 [f=65&elect=0](http://www.uselectionatlas.org/RESULTS/statesub.php?year=2010&fips=53021&f=0&of) .....2

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PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF - iv

1  
2  
3  
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## I. INTRODUCTION

On July 1, 2012, certain state officials intend to impose an illegal tax on Washington consumers and small business. This suit is brought to protect Plaintiffs' rights by enjoining those officials from taking this unlawful government action. The new tax is illegal.

Pursuant to Initiative 1053, any action by the Washington Legislature that raises taxes may be taken only if first approved by at least two-thirds of both the house of representatives and the senate. RCW 43.135.034. During the last legislative session, HB 2565 proposed to raise taxes on the operation of roll-your-own cigarette machines at retail establishments. HB 2565 failed to pass the Washington Senate, receiving less than the requisite two-thirds majority approval. Undeterred, certain members of the Legislature apparently forwarded the defeated House Bill 2565 to Governor Gregoire. The Governor signed the bill. However, because HB 2565 had been defeated in the Senate, the new taxes lack any basis to be enforced as Washington law. The new taxes are invalid. Any effort by any state officials to impose this new tax on Washington consumers and businesses is ultra vires and should be enjoined.

## II. RELIEF REQUESTED

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Plaintiffs DANA HENNE, 1/2 PRICE SMOKES, INC. and RYO MACHINE, LLC (collectively "Plaintiffs") respectfully request that the Court enter a preliminary injunction enjoining Defendants, BRAD FLAHERTY, in his official capacity as Director of the Washington Department of Revenue; PAT KOHLER, in her official capacity as Administrative Director of the Washington State Liquor Control Board; and the STATE OF WASHINGTON (collectively "Defendant Officials") from taking regulatory enforcement action in a manner contrary to the Washington Constitution, including a prohibition on Defendant Officials from collecting any taxes purportedly based on HB 2565, a tax measure defeated by a vote of the Washington Senate.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF - 1

1 **III. EVIDENCE RELIED ON**

2 Plaintiffs rely on the complaint, and on the declarations of Dana Henne, Gary Alexander,  
3 Phil Accordino, and Christopher N. Weiss. Plaintiffs also request an evidentiary hearing on their  
4 motion to present additional testimony and documentary evidence.

5 **IV. STATEMENT OF FACTS**

6 **A. Initiative 1053 Mandates a Two-Thirds Requirement for Passage of New Legislation**  
7 **that Raises Taxes**

8 Initiative 1053 is the most recent in a series of initiatives, beginning with Initiative 601 in  
9 1993, expressing the will of Washington voters that taxing legislation be passed by a two-thirds  
10 vote of each house of the Legislature. The initiative process is central to our democratic process.  
11 *Fritz v. Gorton*, 83 Wn.2d 275, 279-80, 517 P.2d 911 (1974). Initiative 1053 received  
12 widespread support among Washington voters. In Franklin County, Initiative 1053 was  
13 approved overwhelmingly by 70.67% of the vote.

14 [http://www.uselectionatlas.org/RESULTS/statesub.php?year=2010&fips=53021&f=0&off=65&](http://www.uselectionatlas.org/RESULTS/statesub.php?year=2010&fips=53021&f=0&off=65&elect=0)  
15 [elect=0](http://www.uselectionatlas.org/RESULTS/statesub.php?year=2010&fips=53021&f=0&off=65&elect=0)

16 Initiative 1053's Two-Thirds Requirement became law on November 2, 2010. The Two-  
17 Thirds Requirement provides that

18 any action or combination of actions by the legislature that raises  
19 taxes may be taken only if approved by at least two-thirds  
20 legislative approval in both the house of representatives and the  
21 senate.

22 RCW 43.135.034(1). Initiative 1053 further provides:

23 For the purposes of this chapter, 'raises taxes' means any action or  
24 combination of actions by the legislature that increases state tax  
25 revenue deposited in any fund, budget, or account, regardless of  
26 whether the revenues are deposited into the general fund.

RCW 43.135.034(6). Under the Washington Constitution, an initiative may not be amended or  
repealed by the Legislature within a two-year period following such enactment, except that it  
may be amended within that two year period by a two-thirds vote of the Legislature. Wash.

1 Const. art. II, sec. 1(c). Further, under the Washington Constitution, “[n]o tax shall be levied  
2 except in pursuance of law.” Wash. Const. art. VII, sec. 5.

3 The State of Washington specifically endorses the validity of Initiative 1053, stating  
4 “Article II, section 1 expressly authorizes the people to enact laws by initiative, and that is  
5 precisely what the people did when they approved I-1053.” *League of Education Voters v. State*  
6 *of Washington*, No. 11-2-25185-3-SEA (State’s Motion for Summary Judgment at 28) (Jan. 13,  
7 2012). The State further explained:

8 Article II, section 1 provides that “[t]he legislative authority of the  
9 state of Washington shall be vested in the legislature . . . but the  
10 people reserve to themselves the power to propose bills, laws, and  
11 to enact or reject the same at the polls, independent of the  
12 legislature.” It is fundamental, then, that article II, section 1 grants  
13 legislative power to *both* the people and the legislature. The  
14 legislative power of the legislature does not impair the people’s  
15 power to pass laws, any more than the people’s legislative power  
16 impairs the legislature’s power to pass laws. Either body may  
17 exercise its full legislative power, by amending or repealing laws  
18 passed by the other or by passing new laws. The possibility that a  
19 court may subsequently determine that a law enacted by the people  
20 or the legislature is invalid does not mean that it was beyond the  
21 power of the people or the legislature to enact. *Futurewise*, 161  
22 Wn.2d at 411 (2007). Moreover, the power of the legislature, or of  
23 the people, “to enact a statute is unrestrained except where, either  
24 expressly or by fair inference, it is prohibited by the state or federal  
25 constitutions.” *Washington Farm Bureau Fed’n*, 162 Wn.2d at  
26 300-01 (quoting *State ex rel. Citizens v. Murphy*, 151 Wn.2d 226,  
248, 88 P.3d 375 (2004)).

18 *Id.* at 27-28.

19 Article II, section 22, by its plain language, establishes a  
20 constitutional minimum of a simple majority vote for bill passage.  
21 It does not, either expressly or by fair inference, prohibit statutes  
22 that require greater than a simple majority vote for passage. (And,  
23 of course, any bill receiving a supermajority vote has received a  
24 simple majority.) Absent such a limitation, the legislature, or the  
25 people [through the initiative process], are free to express their  
26 legislative policy judgment that certain types of bills warrant  
greater than simple majority consensus for passage. RCW  
43.135.034(1) expresses such a policy judgment—that a two-thirds  
majority vote of each house should be required for passage of bills  
raising taxes.



1 *Id.* at 20-21. As discussed below, HB 2565 clearly failed to meet the “two-thirds majority vote  
2 of each house ... required for passage of bills raising taxes.”<sup>1</sup>

3 **B. HB 2565 Was Defeated in the Washington Senate When the Tax Bill Failed to**  
4 **Obtain Sufficient Votes to Satisfy Initiative 1053’s Two-Thirds Requirement**

5 During the 2012 Session of the Washington Legislature, HB 2565 was introduced in the  
6 Washington House of Representatives proposing amendments to various sections of Title 82 of  
7 the Revised Code of Washington. *See* Compl., ¶ 31. HB 2565 proposed to raise taxes on the  
8 operation of roll-your-own cigarette machines at retail establishments. Under Initiative 1053, the  
9 state Office of Financial Management must identify bills that raise taxes. RCW 43.135.031. The  
10 OFM did exactly that. OFM determined that HB 2565 was a tax increase under the definition of  
11 “raises taxes”. OFM submitted projected tax revenue estimates and fiscal notes. *See, e.g.,*  
12 Washington State Legislature, Fiscal Notes to HB2565, available at  
13 <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2565&year=2011#history>. OFM’s  
14 determination that HB 2565 was a tax increase was accompanied by its 10-year cost projection  
15 on the proposed new tax bill. OFM determined that the final version of the bill, if passed, would  
16 raise taxes at a cost to taxpayers of \$786,000 in additional business and occupation taxes,  
17 \$105,430,000 in additional cigarette taxes, and \$10,807,000 in additional retail sales taxes. *See*  
18 Compl., ¶ 34b.

19 The Washington Attorney General’s office likewise determined that HB 2565 was a tax  
20 increase under the definition of “raises taxes”. The Attorney General stated that “[r]etailers with  
21 RYO cigarette-making machines are not currently required to pay or collect cigarette taxes ...  
22 [and] [t]his measure will require such retailers to pay cigarette taxes on RYO cigarettes produced  
23 in their establishment, regardless of who inputs the tobacco into the cigarette-making machine.”  
24 *See id.*, ¶ 34d.

25 \_\_\_\_\_  
26 <sup>1</sup> Although the trial court in *League of Education Voters* ruled that Initiative 1053 is  
unconstitutional, that ruling has been stayed pending an appeal.

1           The Senate thereafter declined to pass the proposed legislation. The Senate defeated of  
2 HB 2565, with a vote of 27 Yeas and 19 Nays, short of the Two-Thirds Requirement. *See id.*  
3 ¶ 35 Undeterred, certain members of the legislature passed the defeated bill onto the Governor.  
4 On or about May 2, 2012, notwithstanding the fact that the Senate had voted down the new-tax  
5 bill, Governor Gregoire signed the third engrossed second substitute House Bill 2565. *See id.*,  
6 ¶ 36; Declaration of Christopher N. Weiss, at Ex. A.

7           Various state officials have since provided notice to retailers and consumers that use  
8 RYO Machines that they intend to start imposing new taxes under HB 2565 on July 1, 2012.

9           **C. The New Taxes Sought to be Imposed by Defendant State Officials Under HB 2565**  
10           **Unlawfully Threatens Each of the Plaintiffs**

11           **1. Overview of Roll-Your-Own Cigarettes and the RYO Filling Station**

12           For many years, American consumers have enjoyed the right to bypass pre-packaged  
13 cigarettes and to “roll” their own cigarettes, using paper and loose tobacco purchased from  
14 retailers. *See Compl.*, ¶ 15. Originally, “rolling” a cigarette meant sprinkling tobacco on a flat  
15 piece of paper and rolling it up by hand; however, in the 1930s, consumers saw the introduction  
16 of pre-assembled paper tubes, which combine cigarette paper, filter and tipping paper. *See id.*,  
17 ¶ 15. The devices used by consumers to insert tobacco vary in complexity and speed of  
18 production, ranging from manual to electronic machines. *See id.*, ¶¶ 17-19.

19           Plaintiff RYO Machine, LLC (“RYO Machine”) sells self-service cigarette tube filling  
20 machines (known as “RYO Filling Stations”) for consumers to produce cigarettes for their  
21 personal use. *See id.*, ¶ 7. RYO Machine sells the RYO Filling Stations throughout the United  
22 States to authorized retailers through distributors, including Plaintiff 1/2 Price Smokes, Inc. (“1/2  
23 Price Smokes”). *See id.*, ¶¶ 6-7. Under the terms of RYO Machine’s commercial agreements,  
24 distributors and retailers are required to follow all federal, state and local laws applicable to the  
25 machines and their use. *See id.*, ¶ 22; Declaration of Phil Accordino, ¶ 12. Under such  
26 agreements, retailers are strictly prohibited from selling finished cigarettes produced by the

1 machines to consumers. *See* Compl., ¶ 22. Retailers are also prohibited from using the  
2 machines to produce cigarettes for consumers. *See id.* Consumers are required to operate the  
3 machines on their own, using a user interface similar to an automatic teller machine, and the  
4 retailer's involvement is limited to maintenance and repairs. *See id.*

5 Consumers pay the retailer for the use of the RYO Filling Station. *See id.*, ¶ 19. The  
6 consumer operates the machine on his or her own. *See id.*, ¶ 22. The consumer cannot buy pre-  
7 produced cigarettes from the retailer. *See id.* Consumers are permitted to produce cigarettes  
8 using the RYO Filling Station only for their personal use. *See id.*, ¶ 23.

9 **2. Dana Henne – Pasco resident and consumer<sup>2</sup>**

10 Plaintiff Dana Henne is a resident of Pasco. She is a smoker. Ms. Henne prefers to roll  
11 her own cigarettes because they are less expensive and because it allows her to use tobacco that  
12 has no additives. 1/2 Price Smokes, Inc. in Kennewick, Washington allows Ms. Henne to rent a  
13 RYO Filling Station to produce her own cigarettes using loose tobacco and tubes that she  
14 purchases at 1/2 Price Smokes. Ms. Henne previously rolled her own cigarettes by hand. She  
15 now prefers to use the RYO Filling Station because her arthritis makes it difficult to produce her  
16 own cigarettes by hand.

17 Ms. Henne understands that, earlier this year, the Washington Legislature considered a  
18 new tax measure, House Bill 2565, that *if it had passed* would have imposed *additional* taxes on  
19 cigarettes produced by the RYO Filling Station at a rate of \$30.25 per 200 cigarettes. She has  
20 heard that the State will attempt to collect new taxes on July 1, 2012. If the State is allowed to  
21 enforce this new tax, Ms. Henne will stop using the RYO Filling Station. The increased cost  
22 makes this method of producing cigarettes too expensive. Instead, Ms. Henne will probably  
23 return to producing her own cigarettes at home, although her arthritis will make this difficult.

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26 <sup>2</sup> The facts in this section are supported by the Declaration of Dana Henne In Support of  
Plaintiff's Motion for Preliminary Injunction.

1           **3.       1/2 Price Smokes, Inc. – Kennewick small business retailer<sup>3</sup>**

2           1/2 Price Smokes, Inc. (“1/2 Price Smokes”) is a small retailer business owned by Gary  
3 Alexander, a Washingtonian who serves as its president. 1/2 Price Smokes operates a retail store  
4 in Kennewick, Washington. 1/2 Price Smokes operates a second store in Tacoma, Washington.  
5 1/2 Price Smokes also has leased space to open a third store in Franklin County, Washington,  
6 starting July 2012. 1/2 Price Smokes provides 18 jobs to Washington residents and will employ  
7 7 to 11 more workers when it opens its new Pasco store in July. At its two current store  
8 locations, 1/2 Price Smokes makes available cigarette rolling equipment to customers for their  
9 use on the premises of its stores, known as an “RYO Filling Station.” 1/2 Price Smokes makes  
10 this equipment available to customers for a fee.

11           If Defendant Officials were to impose a new tax, it will substantially raise the price of  
12 such consumer-produced cigarettes – by about \$30.00 per 200 cigarettes – thereby discouraging  
13 consumers from using RYO Filling Stations and patronizing 1/2 Price Smokes. This will result  
14 in lost sales.

15           If Defendant Officials were to attempt to force 1/2 Price Smokes to comply with HB  
16 2565, 1/2 Price Smokes will be forced to expend large sums of money for tax stamps. 1/2 Price  
17 Smokes will also be forced to charge its customers substantially more money for the use of the  
18 RYO Filling Stations to the point that 1/2 Price Smokes will lose all or most of those customers.  
19 Defendant Officials’ attempt to enforce the taxes will cause 1/2 Price Smokes to lose the  
20 goodwill it has established among roll-your-own consumers.

21           Mr. Alexander believes that the attempt to impose increased taxes will so adversely  
22 impact sales that the new taxes will cause 1/2 Price Smokes to discontinue its operations. By  
23 putting the company out of business, the new tax will force Mr. Alexander to lay off workers and  
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25 \_\_\_\_\_  
26           <sup>3</sup> The facts in this section are supported by the Declaration of Gary Alexander In Support  
of Plaintiff’s Motion for Preliminary Injunction.

1 to negotiate with landlords to close up stores. This, in turn, could adversely impact adjoining  
2 small businesses that benefit from the flow of customers that patronize 1/2 Price Smokes stores.

3 **4. RYO Machine, LLC – Manufacturer<sup>4</sup>**

4 RYO Machine, LLC is based in Girard, Ohio. RYO Machine manufactures and sells a  
5 cigarette rolling machine known as the “RYO Filling Station.” Working through distributors,  
6 RYO Machine sells the RYO Filling Stations to authorized retailers throughout the United  
7 States, including in Washington. RYO has sold 95 machines in Washington. RYO Machine has  
8 created approximately 5,000 jobs nationwide and approximately 250 jobs in Washington.

9 RYO Machine’s revenues come exclusively from the sale of RYO Filling Stations, from  
10 fees paid by distributors and retailers for the use of the RYO Filling Stations, and from service  
11 and other fees associated with the RYO Filling Stations. RYO Filling Stations enable a  
12 consumer to make 200 cigarettes in about 10 minutes. RYO Filling Stations are not nearly as  
13 efficient as the commercial machines used in state and federal-licensed factories. The most  
14 advanced machines used in factories today produce about 20,000 cigarettes per minute.

15 Defendant Officials’ public statements that they intend to collect taxes under defeated  
16 House Bill 2565 already have interfered with RYO Machine’s business, curtailing machine sales  
17 to retailers in Washington. If Defendant Officials attempt to collect a new tax under defeated  
18 House Bill 2565, their acts will further interfere with RYO Machine’s ability to sell additional  
19 RYO Filling Stations in Washington. Defendant Officials’ actions have caused and will continue  
20 to cause RYO Machine to lose the goodwill it has established among retailers in Washington. If  
21 Defendant Officials attempt to raise taxes under defeated HB 2565, RYO Machine will also lose  
22 revenues through fewer machine rentals, leading to fewer royalties to RYO Machine. Defendant  
23 Officials’ attempt to collect new taxes under defeated HB 2565 will cause most Washington  
24 retailers to shut down use of the RYO Filling Stations entirely. The remaining RYO Filling  
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26 <sup>4</sup> The facts in this section are supported by the Declaration of Phil Accordino In Support  
of Plaintiff’s Motion for Preliminary Injunction.

1 Stations will be used less frequently because of the higher taxes consumers will be forced to pay  
2 when they use the machines. Defendant Officials' attempt to collect the new taxes threatens to  
3 put retailers throughout Washington out of business, which will damage RYO Machine's  
4 business irreparably.

## 5 V. ARGUMENT

6 Under Washington law, the standards governing a party's right to a preliminary  
7 injunction are well-settled. *See, e.g., Kucera v. Wash. Dep't of Transp.*, 140 Wn.2d 200, 209-10,  
8 995 P.2d 63 (2000). A preliminary injunction preserves the *status quo*. *Id.* The moving party  
9 must show:

10 (1) that he has a clear legal or equitable right, (2) that he has a  
11 well-grounded fear of immediate invasion of that right, and (3) that  
12 the acts complained of are either resulting in or will result in actual  
13 and substantial injury to him. ... [and] since injunctions are  
14 addressed to the equitable powers of the court, the listed criteria  
15 must be examined in light of equity including balancing the  
16 relative interests of the parties and, if appropriate, the interests of  
17 the public.

18 *Id.*; RCW 7.40.020 (grounds for preliminary injunction). Although the court typically examines  
19 whether the moving party is likely to prevail on the merits, Washington courts caution that a  
20 court should not undertake a full adjudication of the rights of the parties when deciding whether  
21 to issue a preliminary injunction, *See, e.g., Wash. Fed'n of State Employees v. State*, 99 Wn.2d  
22 878, 888, 665 P.2d 1337 (1983).

### 23 A. Plaintiffs Have a Clear Legal or Equitable Right in Lawful and Constitutional 24 Application of Washington Law

25 Rights guaranteed by constitutional provisions are legally protected interests. *See*  
26 *generally Wash. Const.; see also District Attorney's Office for the Third Judicial District v.*  
*Osborne*, 557 U.S. 52, 63 (2009) ("Our cases have frequently recognized that protected liberty  
interests may arise from the Constitution itself, by reason of guarantees implicit in the word  
liberty, or it may arise from an expectation or interest created by state laws or policies.")

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF - 9

1 (internal citations and quotations omitted). The protectable interests at issue in this matter are  
2 rooted in the Washington Constitution. Under Washington law, “[t]he first power reserved by  
3 the people is the initiative.” Wash. Const., art. II, §1. An initiative may not be amended or  
4 repealed by the Legislature within a two-year period following such enactment, except that it  
5 may be amended within that two year period by a two-thirds vote of the Legislature. Wash.  
6 Const. art. II, sec. 1(c). “The right of the people to initiate laws is fundamental.” *Save Our State*  
7 *Park v. Hordyk*, 71 Wash. App. 84, 93, 856 P.2d 734 (1993).

8 **B. Plaintiffs Have a Well-Founded Fear That Their Rights will be Violated by the**  
9 **Collection of Taxes Under HB 2565 by Defendant State Officials**

10 As set forth in the Statement of Facts (above) and the supporting declarations, Dana  
11 Henne, 1/2 Price Smokes, Inc., and RYO Machine, LLC each have detailed the imminent harm  
12 that will be imposed upon them by the imposition of the new taxes under HB 2565.

13 Under the Washington Constitution, “[n]o tax shall be levied except in pursuance of  
14 law.” Wash. Const. art. VII, sec. 5. Washington voters, utilizing their first power of initiative,  
15 have overwhelmingly expressed their will in Initiative 1053, a Washington law requiring  
16 legislation raising taxes to be passed by a two-thirds vote of each house. The current Two-  
17 Thirds Requirement became law on November 2, 2010, and is codified at RCW 43.135.034.  
18 Initiative 1053 may not be amended or repealed by the Legislature within a two-year period  
19 following such enactment, except that it may be amended within that two year period by a two-  
20 thirds vote of the Legislature. Wash. Const. art. II, sec. 1(c).

21 At the time of this motion, Initiative 1053 has not been amended or repealed by the  
22 legislature, and the two-year period following its enactment continues until November 2, 2012.  
23 With Initiative 1053 still being in effect, HB 2565 is valid if and only if it was “approved by at  
24 least two-thirds legislative approval in both the house of representatives and the senate.” RCW  
25 43.135.034(1). HB 2565 was voted on in the House on April 11, 2012, receiving a two-thirds  
26 majority vote of 66 to 32. The bill, however, died in the Senate, failing to garner the required

PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF - 10

1 two-thirds votes, receiving a vote of 27 to 19. Nevertheless, proponents of the bill took the  
2 measure to Governor Gregoire, who signed the bill on May 2, 2012.

3 Notwithstanding its invalidity, Defendant Officials have advised that they will seek to  
4 impose new taxations in Washington under HB 2565 on July 1, 2012. The fear is real and the  
5 time for judicial relief is waning, and absent judicial relief, Plaintiffs' constitutional rights will be  
6 violated.

7 **C. Plaintiffs Will Likely Prevail on the Merits that HB 2565 is an Unlawful Tax, and**  
8 **Would Suffer Actual and Substantial Injury If Forced To Operate Under an Ultra**  
9 **Vires and Unconstitutional Application of Law**

10 Plaintiffs have clear legal rights to prevent and enjoin enforcement of HB 2565. The bill  
11 is legislation that raises taxes which was not passed in compliance with Washington law.  
12 Enforcement of such ultra vires legislation will result in actual and substantial injury to  
13 Plaintiffs, for which no adequate remedy at law exists.

14 First, HB 2565 is an "action or combination of actions by the legislature."

15 Second, HB 2565 has the effect of increasing the tax revenue of the State. As discussed  
16 in the Statement of Facts (above), the Office of Financial Management determined that HB 2565  
17 was a tax increase under the definition of "raises taxes," and submitted projected tax revenue  
18 estimates and fiscal notes. The Washington Attorney General likewise stated that HB 2565  
19 would impose new taxes on RYO produced cigarettes.

20 HB 2565 was not passed by a two-thirds majority of the Legislature. The bill failed to  
21 pass the Senate, receiving a vote of 27 to 19, therefore failing to fulfill the Two-Thirds  
22 Requirement of Initiative 1053. RCW 43.135.034(1). Accordingly, because HB 2565 was not  
23 properly enacted, the law is invalid and unenforceable. *See id.*, ¶ 35.



1 **D. The Balance of Potential Harm Favors Plaintiffs, With the Public Interest Favoring**  
2 **Granting Injunctive Relief Restraining Defendant State Officials From Collecting**  
3 **Unlawful Taxes Under HB 2565**

4 There can be no more arbitrary exercise of governmental power than the exercise of such  
5 power in the absence of authority or in contradiction to such authority. The constitutional harm  
6 to Plaintiffs of having to operate under an unconstitutional and ultra vires law vastly outweighs  
7 any harm to Defendant Officials if an injunction is granted. Defendant Officials always retain  
8 the right to change the law at issue by complying with Initiative 1053 and Article II, Section 1 of  
9 the Washington Constitution. In fact, they may even do so during the pendency of this litigation.  
10 *See Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 306, 174 P.3d 1142 (2007)  
11 (“The legislature has plenary power to enact, amend, or repeal a statute, except as restrained by  
12 the state and federal constitutions.”).

13 “The right of the people to initiate laws is fundamental.” *Save Our State Park*, 71 Wn.  
14 App. at 93. Failure to grant an injunction, thereby countenancing the constitutional violations  
15 and legislative legerdemain in HB 2565 would damage not only Plaintiffs, but all citizens of the  
16 State of Washington.

17 The evidence also shows that enforcement of HB 2565 would bring criminal prosecutions  
18 and/or the destruction of the businesses of 1/2 Price Smokes and RYO Machine. Under such  
19 circumstances, it is plainly appropriate to invoke the equity powers of the Court to enjoin such  
20 enforcement. This is shown, for example, by decisions of the United States Supreme Court.  
21 With respect to prosecutions, the Court has said:

22 Equity jurisdiction may be invoked when it is essential to the  
23 protection of the rights asserted, even though the complainant  
24 seeks to enjoin the bringing of criminal actions.

25 *Shields v. Utah I. C. R. Co.*, 305 U.S. 177, 183 (1938) (emphasis added). Clearly, the situation  
26 here merits a *preliminary* injunction. To enjoin enforcement of HB 2565 only *after* a decision on  
the merits would obviously leave 1/2 Price Smokes and/or its officers and employees exposed to

1 criminal prosecution in the interim, with all the attendant and unrecoverable expense of  
2 mounting a defense as well as the potential loss of liberty and property.

3 With respect to the destruction of businesses, the Court has also provided guidance  
4 supportive of Plaintiffs:

5 The injunctions here sought are not against the exercise of any  
6 proper power. Plaintiffs asked protection against arbitrary,  
7 unreasonable and unlawful interference with their patrons and the  
8 consequent destruction of their business and property. Their  
9 interest is clear and immediate, within the rule approved in [many]  
cases where injunctions have issued to protect business enterprises  
against interference with the freedom of patrons or customers.

10 The suits were not premature. The injury to [plaintiffs] was present  
11 and very real, not a mere possibility in the remote future. If no  
12 relief had been possible prior to the effective date of the Act, the  
13 injury would have become irreparable. Prevention of impending  
injury by unlawful action is a well recognized function of courts of  
equity.

14 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535-36 (1925) (citing  
15 cases) (emphasis in original). Again, the situation merits a  
16 preliminary injunction. Efforts to recover damages for monetary  
17 losses to 1/2 Price Smokes and RYO Machine – where that harm  
is caused by state actors – would be especially problematic (e.g.,  
potential immunity defenses, sufficiency of legislative  
appropriations to pay any judgments).

18 *Id.*

19 In sum, the harms to be suffered by Plaintiffs if no injunction is issued greatly outweighs  
20 any conceivable harm that Defendant Officials might assert from a continuation of the status  
21 quo.

22 **E. The Public Interest Favors Granting Injunctive Relief**

23 The public interest weighs in favor of an injunction. This is so for several reasons: First,  
24 the injunction preserves consumer access to roll-your-own equipment, an option that many  
25 consumers find valuable. Promoting consumer choice – and competition in the marketplace – is  
26

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND BRIEF IN SUPPORT THEREOF - 13

1 in the public interest. Second, many jobs have been created by the RYO Filling Station and  
2 similar devices. The injunction preserves for these workers valuable employment opportunities  
3 and a resulting source of income tax revenues. And third, since the public voted in favor of  
4 Initiative 1053, it is in the public interest that its limitation on raising taxes be given full force  
5 and effect. Failing to enjoin HB 2565 would be tantamount to allowing Initiative 1053 to be  
6 suspended in its operation. Such a step would directly contradict the public interest.

7 **VI. CONCLUSION**

8 For the reasons discussed, Plaintiffs ask this Court to declare the recent amendments in  
9 HB 2565 to Title 82 of the Revised Code of Washington unenforceable under Washington law  
10 and to issue a preliminary injunction preventing Defendant Officials from enforcing the  
11 amendments, pending the trial on the merits of this action and for such further relief as the Court  
12 deems reasonable.

13  
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Respectfully submitted,

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