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SUPERIOR COURT OF WASHINGTON
FOR FRANKLIN COUNTY

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; and 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

**DEFENDANTS' OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION**

I. INTRODUCTION

No preliminary injunction should be granted because 3E2SHB 2565, enacted during the 2012 legislative session, does not raise taxes. For decades, the Washington cigarette tax has been imposed on the possession, handling, and consumption of all cigarettes in Washington, including those made with cigarette machines. The 2012 legislation (hereinafter Cigarette Machine Legislation) improves enforcement of existing Washington law by requiring

1 cigarettes produced by cigarette rolling machines in retail establishments to be stamped with a
2 Washington tax stamp, instead of relying on consumers to voluntarily pay the tax due after
3 leaving the store.

4 Because the Cigarette Machine Legislation does not raise taxes, it was not required to
5 pass by a two-thirds vote, and thus it does not conflict with I-1053 (codified at RCW
6 43.135.034). A preliminary injunction would further delay the collection of taxes that
7 currently are due under the law but are being evaded.

8 There are several additional reasons why the Court should deny the preliminary
9 injunction. Plaintiffs are not likely to prevail on the merits. Their case is not ripe because no
10 tax assessment has been issued to any of the plaintiffs, and under Washington law, a tax
11 assessment must be issued before a tax statute can be challenged in superior court, even where
12 the plaintiff raises constitutional arguments. RCW 82.32.150. In addition, Washington
13 Supreme Court has held both that the courts cannot invalidate a statute based on a perceived
14 procedural error by the Legislature, and that an initiative cannot invalidate a statute enacted by
15 a later legislature. Plaintiffs also cannot prevail on the merits because they cannot otherwise
16 show the Cigarette Machine Legislation is, beyond a doubt, unconstitutional. Furthermore,
17 Plaintiffs cannot claim sufficient harm to warrant an injunction if their interest is rooted in
18 continued cigarette tax avoidance. Finally, the State would be irreparably harmed by
19 continued lost revenue in the case of an injunction, while tax refunds would be available in the
20 unlikely event plaintiffs were to ultimately prevail. For all of these reasons, the Court should
21 deny the motion for preliminary injunction.

22 II. FACTS

23 Washington has imposed an excise tax on the sale, use, consumption, handling, or
24 distribution of all cigarettes within its borders since 1935. RCW 82.24.020(1), .026; Laws of
25 1935, ch. 180, § 82. In 1972, the Legislature expanded the scope of the tax to include
26 “possession” of cigarettes. RCW 82.24.020(1), .026; Laws of 1972, ch. 157, §1. The tax is

1 imposed on the first taxable person who first performs a taxable act in Washington. RCW
2 82.24.080(1), (2).

3 For prepackaged cigarettes, the tax is currently collected through tax stamps purchased
4 by licensed cigarette wholesalers at the current rate of \$3.025 per pack. RCW 82.24.030.
5 Once stamped, prepackaged cigarettes can then be sold to licensed cigarette retailers for resale
6 to the public. RCW 82.24.040(5). If, for whatever reason, someone other than a licensed
7 cigarette wholesaler sells, uses, possesses, handles, consumes, or distributes unstamped
8 cigarettes, he or she is personally liable for the cigarette tax. RCW 82.24.020(1), .026, .080,
9 .260. The Department makes available on its website a form through which someone owing
10 the Washington cigarette tax can self-report and pay the tax. Hankins Decl., Ex. G. It is a
11 gross misdemeanor to possess unstamped cigarettes without paying the tax, and violators are
12 subject to a ten-dollar-per-pack civil penalty. RCW 82.24.110(p), .120.

13 Recently, tobacco retail establishments like 1/2 Price Smokes began offering cigarettes
14 made with in-store, commercial, cigarette-making machines. *See* Alexander Decl. at 2, ¶ 5.
15 The retailer sells loose tobacco, cigarette tubes, and the use of a cigarette-making machine. *Id.*
16 at 2, ¶ 8.¹ The tobacco retailers often use pipe tobacco, rather than loose cigarette tobacco, to
17 produce cigarettes in their stores, because doing so avoids a drastically higher federal tax on
18 loose cigarette tobacco.² *See* Hankins Decl., Ex. A (fiscal note) and Ex. B (selected portions of

19 ¹ Defendants do not concede that the facts are as stated in the declarations of Mr. Alexander and Mr.
20 Accordino, nor do defendants concede that the consumer manufactures the cigarettes or that only the consumer
21 possesses or handles the cigarettes for purposes of RCW 82.24. Some other state courts and the federal
22 Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau have concluded that the proprietors who
23 provide access to commercial-cigarette machines manufacture the cigarettes being made in their stores. *New*
24 *Hampshire v. N. of the Border Tobacco LLC*, Cause No. 09-E-288, (Merrimack Superior Court 2009); *New*
25 *Hampshire v. N. of the Border Tobacco*, 32 A.3d 548, 558 (N.H. 2011); *Hyong Kim, dba Smokes 4 Less v. Alaska*,
26 Cause No. 3AN-10-9817 CI (Alaska Third Judicial District 2010); *Compton Point, Inc. v. Griffith*, Civil Action
No. 11-C-75, (Circuit Court of Kanawha County West Virginia 2011); Department of Treasury, Alcohol and
Tobacco Tax and Trade Bureau (TTB) Ruling No. 2010-4, September 30, 2010 (currently stayed pending review
by the Sixth Circuit Court of Appeals). But for purposes of plaintiffs' current motion, defendants are willing to
assume the process for making cigarettes in Mr. Alexander's store is as reflected in his declaration.

² The federal excise tax is \$2.82 cents per pound for loose pipe tobacco, while the federal tax on loose
tobacco for roll-your-own cigarettes is \$24.78 cents per pound. 26 U.S.C. § 5701 (f), (g).

1 the United States Government Accountability Office Tobacco Taxes Report). Until the 2012
2 Cigarette Machine Legislation takes effect, there is no mechanism requiring that the
3 Washington cigarette tax be collected by the cigarette-machine retailer, so the \$3.025 per
4 pack/\$30.25 per carton Washington cigarette tax is not included in the price. A carton of
5 cigarettes from a cigarette-making machine currently averages \$34.50 per carton. In contrast, a
6 prepackaged carton of stamped cigarettes costs an average of \$70.00. DOR fiscal note at 4.

7 The cigarette-making machines can produce a carton of cigarettes (200 cigarettes, or
8 ten packs containing 20 cigarettes per pack) in less than eight minutes. *See*
9 <http://www.ryofillingstation.com/about.php> (last visited June 20, 2012) and Hankins Decl., Ex.
10 C (RYO filling machine webpage); *see also* Accordino Decl. at 2, ¶ 10. Given the volume of
11 sales of commercial cigarette-making machines into Washington, Accordino's Decl. at 2, it
12 became apparent that high volumes of unstamped cigarettes were being manufactured in
13 Washington, for which consumers were not voluntarily paying the cigarette tax. If
14 Washington's 95 machines, for example, operated at capacity for ten hours in a day producing
15 a carton every ten minutes, they could produce up to 5,700 cartons of cigarettes, or 57,000
16 packs of cigarettes *per day* (six cartons per hour x ten packs per carton x ten hours x 95
17 machines). *See* Accordino Decl. at 2. The tax rate per pack of cigarettes is \$3.025. Even if the
18 machines operate at less than full capacity and only make 50,000 packs per day, the tax due
19 from consumers would be over \$150,000 *per day*. The Department lacks the resources and
20 manpower to attempt to enforce the cigarette tax due from individual consumers by assessing
21 all of the individual consumers using the commercial cigarette-making machines. Thronson
22 Decl. at 2. Indeed, the Department currently has no way to even identify the consumers
23 purchasing cigarettes in this manner. *Id.*

24 As a result, the Washington Legislature enacted the Cigarette Machine Legislation,
25 3E2SHB 2565, and the Governor signed it into law. Laws of 2012, 2d sp. sess., ch. 4. The
26 legislation created a stamping system through which the existing cigarette tax would be

1 collected. Laws of 2012, 2d sp. sess., ch. 4, §§ 2 (6), 4(3). Pursuant to the Cigarette Machine
2 Legislation, cigarette-making machine retailers must purchase stamps from the Department
3 and affix them to packages that consumers must use to transport their cigarettes out of the
4 store. *Id.* As Mr. Alexander's declaration acknowledges, while the stamps will be purchased
5 by the retailers, the retailers will recoup the cost of the stamps because it will be added to the
6 price of the cigarettes ultimately purchased by the consumer. Alexander Decl. at 4. The
7 Legislature also included other elements in the legislation to aid enforcement, such as the
8 requirement that the machines contain accurate meters. Laws of 2012, 2d sp. sess., ch. 4, §
9 4(4). Significantly, the act also allows an offset to the cigarette tax stamp price in the amount
10 of \$.05 per cigarette to account for the amount of state tobacco products tax paid by
11 distributors on the tobacco used to make the cigarettes (which is presumably passed down the
12 chain of commerce to the retail establishments and eventually to consumers). After the RYO
13 Cigarette Legislation takes effect on July 1, 2012, the estimated cost of a carton of stamped
14 cigarettes made with a commercial cigarette machine will increase to an average of \$67.60 per
15 carton. DOR fiscal note at 3.

16 The Office of Financial Management (OFM), in conjunction with the state agencies
17 affected by the Cigarette Machine Legislation, created a fiscal note for the bill. OFM also
18 identified the bill as one requiring a ten-year cost projection as required by RCW 43.135.031
19 (Initiative 960). *See* Smith Decl. In response to a Point of Inquiry in the House of
20 Representatives, the Speaker of the House ruled that the bill simply established an enforcement
21 and regulatory system for cigarettes already subject to tax. Hankins Decl. Ex. J (House
22 Journal) at 33. Although the bill was substituted and amended several times, the House of
23 Representatives passed it by a vote of 66 to 32. *See* Hankins Decl., Ex. D (final bill report).
24 When the Senate considered the bill, the President of the Senate determined, in a ruling on a
25 point of order, that the proposed bill did not increase tax revenues, and therefore it did not
26 trigger RCW 43.135.034's two-thirds vote requirement. *See* Hankins Decl., Ex. E. The Senate

1 passed the bill by a vote of 27 to 19. *See* Hankins Decl., Ex. D. The Speaker of the House, the
2 President of the Senate, and the Governor all signed Third Engrossed Second Substitute House
3 Bill 2565, which takes effect July 1, 2012. *See* Hankins Decl. Ex. F.

4 The Department of Revenue has been taking steps to implement the Cigarette Machine
5 Legislation. Thronson Decl. at 2. The Department has contracted with vendors who have
6 created sheets of self adhesive stamps, which the Department has purchased and stands ready
7 to sell to retailers. *Id.* The Department has accommodated the concerns of retailers by creating
8 sheets of stamps that can be sold in small quantities. *Id.* The Department has developed a
9 secure system through which stamps will be purchased and delivered. *Id.* The Department has
10 notified various stakeholders, like the cigarette-machine owners, about the new law, and has
11 informed them how it will be implemented. *Id.*

12 As a collateral matter, plaintiffs rely in part upon the Attorney General Office's briefing
13 in *League of Educ. Voters v. State of Wash.*, King County Cause No. 11-2-25185-3. Plaintiffs
14 correctly state that in that case the King County Superior Court held RCW 43.135.034
15 (Initiative 1053) is unconstitutional. The State is seeking direct review by the Washington
16 Supreme Court and has filed a motion seeking a stay of the superior court ruling. The Supreme
17 Court Commissioner denied the State's motion for a stay but referred the motion to the full
18 Court which will consider the motion on July 11.

19 Just days before the Cigarette Machine Legislation is to take effect, the plaintiffs have
20 brought this action and motion seeking a preliminary injunction to prevent implementation.
21 Based upon the amended complaint, the plaintiffs have been identified as 1) Dana Henne, a
22 taxpayer who purchases cigarettes made with commercial cigarette-making machines, 2) 1/2
23 Price Smokes, Inc., a Washington corporation that operates a retail store that sells loose
24 tobacco and makes available a cigarette-making machine, and 3) RYO Machine, LLC, an Ohio
25 manufacturer of a cigarette-making machine sold in Washington. Amended Complaint at 2-3.
26

1 **III. ARGUMENT**

2 Plaintiffs seek a preliminary injunction to enjoin implementation of the Cigarette
3 Machine Legislation. To obtain a preliminary injunction in a tax case, each plaintiff must
4 show:

5 (1) that he has a clear legal or equitable right, (2) that he has a well-grounded
6 fear of immediate invasion of that right, and (3) that the acts complained of are
either resulting in or will result in actual and substantial injury to him.

7 *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (copy
8 attached). To obtain an injunction, all of the listed criteria must be satisfied. *Id.* In
9 examining the first factor, a court must consider whether the party seeking the injunction is
10 ultimately likely to prevail on the merits. *Id.* at 793. The Court in *Tyler Pipe* also explained
11 that because “injunctions are addressed to the equitable powers of the court, the listed criteria
12 must be examined in light of equity, including balancing the relative interests of the parties
13 and, if appropriate, the interests of the public.” *Id.* at 792. In tax cases, this involves
14 weighing society’s interest in the efficient collection of taxes against the harm potentially
15 suffered by the taxpayer. *Id.* at 796.

16 Plaintiffs cannot satisfy the first of the *Tyler Pipe* criteria for obtaining an injunction
17 because they cannot show they are likely to prevail as a matter of law. In addition, they
18 cannot show an immediate risk of actual and substantial harm, and when considering the
19 balance of equities they are not entitled to a preliminary injunction.

20 **A. Plaintiffs Cannot Establish A Clear Legal Or Equitable Right Because They**
21 **Cannot Show They Are Likely To Prevail On The Merits.**

22 As a matter of law, plaintiffs are not entitled to injunctive relief for several reasons.
23 First, they ignore the stringent statutory restrictions imposed by the Legislature on obtaining
24 injunctive relief in tax cases, restrictions that, at this point in time, they cannot overcome.
25 Second, even if they were to navigate that first hurdle, plaintiffs are not likely to prevail
26 because the Cigarette Machine Legislation does not raise taxes and does not implicate RCW

1 43.135.034. Third, even if this Court were to conclude that the legislation raises taxes, the
2 enrolled bill doctrine prevents a court from declaring a statute invalid based on an alleged
3 procedural infirmity that occurred in the Legislature. Fourth, the Washington Supreme Court
4 has recognized that an initiative cannot bind a future legislature. And finally, the Cigarette
5 Machine Legislation does not violate either of the identified Washington constitutional
6 provisions.

7 **1. As a threshold matter, plaintiffs' claims are barred by RCW 82.32.150.**

8 The manner by which citizens may sue the State of Washington is circumscribed by the
9 Washington Constitution. Article II, section 26 provides: "The legislature shall direct by law,
10 in what manner, and in what courts, suits may be brought against the state." Washington
11 courts have long explained that the right to sue the State or a state agency must be derived from
12 statute, and the Legislature can establish conditions that must be met before that right may be
13 exercised. *Nelson v. Dunkin*, 69 Wn.2d 726, 729, 419 P.2d 984 (1966). This principle applies
14 in actions challenging an excise tax: "Since a right has been granted to plaintiffs to recover
15 any overpayment of tax, the right must be exercised in the manner provided by the statute."
16 *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965).

17 Through RCW 82.32.150 and RCW 82.32.180, the Legislature has authorized direct
18 superior court review of excise taxes. In general, taxpayers must first pay the disputed tax
19 before asking a court for relief. RCW 82.32.180 provides in pertinent part:

20 Any person . . . *having paid any tax as required* and feeling aggrieved
21 by the amount of the tax may appeal to the superior court of Thurston county,
22 within the time limitation for a refund provided in chapter 82.32 RCW or, if an
23 application for refund has been made to the department within that time
24 limitation, then within thirty days after rejection of the application, whichever
time limitation is later. In the appeal the taxpayer shall set forth the amount of
the tax imposed upon the taxpayer which the taxpayer concedes to be the
correct tax and the reason why the tax should be reduced or abated. . . .

25 . . .
26 At trial the burden shall rest upon the taxpayer to prove that the tax as
paid by the taxpayer is incorrect, either in whole or in part, and to establish the
correct amount of the tax. In such proceeding the taxpayer shall be deemed the
plaintiff and the state, the defendant. . .

1 ...
2 ... no court action or proceeding of any kind shall be maintained by the
3 taxpayer to recover any tax paid, or any part therefore, except as herein
4 provided.

5 (Emphasis added). Through RCW 82.32.180, the “legislature created a cause of action for
6 taxpayers ‘feeling aggrieved by the amount of the tax’ paid.” *Lacey Nursing Ctr., Inc. v. Dep’t*
7 *of Revenue*, 128 Wn.2d 40, 50, 905 P.2d 338 (1995). RCW 82.32.150 provides:

8 All taxes, penalties, and interest shall be paid in full before any action
9 may be instituted in any court to contest all or any part of such taxes, penalties,
10 or interest. *No restraining order or injunction shall be granted or issued by any*
11 *court or judge to restrain or enjoin the collection of any tax or penalty or any*
12 *part thereof, except upon the ground that the assessment thereof was in*
13 *violation of the Constitution of the United States or that of the state.*

14 (Emphasis added). Under these statutes, a taxpayer may seek an injunction preventing the
15 collection of a tax (1) only if the Department has issued an assessment against the taxpayer and
16 (2) the injunction may be granted only if the assessment somehow violates the state or federal
17 constitution. Otherwise, RCW 82.32.150 bars an action to enjoin the collection of a tax.

18 Division Three of the Court of Appeals recently applied these provisions to hold the
19 Department’s instructions to a taxpayer to pay a certain tax in the future did not trigger the
20 taxpayer’s ability to challenge those instructions in superior court. *Booker Auction Co. v.*
21 *Dep’t of Revenue*, 158 Wn. App. 84, 241 P.3d 439 (2010). The court held: “According to the
22 plain language of this statute, the *sole time* when collection of a tax can be prospectively
23 enjoined is when *a tax assessment* violates the federal or state constitution.” *Id.* at 88
24 (emphasis added).

25 The Department may issue a tax assessment when it has found an additional amount of
26 tax to be due. RCW 82.32.050(1). In this case, it is undisputed that no tax assessment has
been issued against any of the plaintiffs for the failure to pay cigarette tax. Plaintiffs’
anticipatory action is precisely what RCW 82.32.150 and *Booker Auction* prohibit. Plaintiffs’
claims, regardless of their merits, simply are not ripe until an assessment has been issued. Even
where plaintiffs present vague constitutional arguments in their motion, the superior court

1 lacks authority to issue the injunction at this time. *See id; accord AOL, Inc. v. Dep't of*
2 *Revenue*, 149 Wn. App. 533, 547-49, 205 P.3d 159 (2009).

3 Such restrictions on the ability to prospectively challenge taxes support society's strong
4 interest in their collection and prevents tax disputes from delaying payment of excise taxes into
5 the public treasury (perhaps for many years). *Tyler Pipe*, 96 Wn.2d at 793-94, 796; *see also*
6 *California v. Grace Brethren Church*, 457 U.S. 393, 410 n.23, 102 S. Ct. 2498, 73 L. Ed. 2d 93
7 (1982) (acknowledging the danger inherent in needless disruption of tax streams into state
8 treasuries); *Booker Auction*, 158 Wn. App. at 89 (referring to the catastrophic effects on state
9 government if this rule were not upheld). Allowing only assessed parties to challenge the
10 constitutionality of a tax assures that only truly interested parties are able to do so.³ It also
11 limits constitutional challenges to those based on a particular taxpayer's facts, which also
12 promotes the policy of protecting tax streams by not allowing extended litigation to delay
13 collection.

14 The same is also true for the requested declaratory relief. The phrase "restraining order
15 or injunction" in RCW 82.32.150, properly read, should be interpreted to include declaratory
16 relief. *See Grace Brethren Church*, 457 U.S. at 407-08 (construing the phrase "enjoin, suspend
17 or restrain" in the federal Tax Injunction Act, 28 U.S.C. § 1341, to include declaratory relief);
18 *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 591, 115 S. Ct.
19 2351, 132 L. Ed. 2d 509 (1995) (quoting *Grace Brethren Church* for the proposition that "there
20 is little practical difference between injunctive and declaratory relief"). Allowing declaratory
21 judgment actions would completely undermine the policy underlying RCW 82.32.150 and
22 RCW 82.32.180, the public's interest in not disrupting tax streams into the state treasury.

23 _____
24 ³ Significantly, as a manufacturer of cigarette-making machines, plaintiff RYO Machine, LLC will have
25 no tax payment or collection obligation under the Cigarette Machine Legislation that could lead to an assessment,
26 nor would it be assessed civil penalties for failing to comply with RCW 82.24. As a result, unless RYO Machine
becomes a Washington retailer with a cigarette-making machine, it will never be able to fulfill the statutory
requirements for bringing suit based on an assessment for cigarette taxes.

1 *Booker Auction*, 158 Wn. App. at 89 (affirming dismissal of taxpayer’s challenge to
2 Department’s instructions on how to report taxes).

3 The Legislature has specifically prescribed the methods for adjudicating cigarette tax
4 disputes in RCW 82.32.150 and .180. None of the plaintiffs has shown that they have a clear
5 legal or equitable right to a preliminary injunction because they do not meet the clear statutory
6 requirements for seeking injunctive or declaratory relief in a tax case. For this reason alone,
7 the preliminary injunction should be denied.

8 **2. Plaintiffs are not likely to prevail on the merits because the Cigarette
9 Machine Legislation does not raise taxes and, therefore, it does not violate
10 RCW 43.135.034’s two-thirds requirement.**

11 The Cigarette Machine Legislation passed by a constitutional majority vote in both
12 houses of the Legislature. It does not implicate I-1053, codified at RCW 43.135.034, because
13 it does not “raise taxes” as that term is defined in RCW 43.135.034(6).

14 **a. Roll-your-own cigarettes have always been subject to Washington’s
15 cigarette tax; the Cigarette Machine Legislation merely creates a
16 collection and enforcement mechanism.**

17 Plaintiffs cannot plausibly argue that the cigarettes created by the commercial cigarette-
18 making machines are not “cigarettes” for purposes of Washington’s Cigarette Tax Statute,
19 RCW 82.24, because the cigarettes are “roll[s] for smoking made wholly or in part of tobacco .
20 . . [with] a wrapper or cover made of paper” Washington’s cigarette tax is currently
21 imposed upon “the sale, use, *consumption, handling, possession*, or distribution of all
22 cigarettes.” RCW 82.24.020 (emphasis added). The tax is “imposed at the time and place of
23 the first taxable event and upon the first taxable person within this state.” RCW 82.24.080(2).
24 Thus, under current law, any person who purchases, handles, possesses, or consumes
25 unstamped cigarettes is personally liable for the cigarette tax. RCW 82.24.260(3). Plaintiffs
26 may debate whether the RYO machine retailer or the consumer is the first person to handle or
possess the cigarettes in the RYO retail establishments. But if, for the sake of argument, the
facts as stated in Mr. Alexander’s declaration are accepted—that the cigarette-making machine

1 retailers do not manufacture or handle the cigarettes—then, at the very least, consumers like Ms.
2 Henne are personally liable for the cigarette tax on the unstamped cigarettes they possess,
3 handle, or consume in Washington. RCW 82.24.020, .260.

4 While the cigarette tax is due from consumers who purchase cigarettes from cigarette-
5 making establishments like 1/2 Price Smokes, collection currently depends on voluntary
6 reporting and payment of the tax. The Cigarette Machine Legislation applies a more reliable
7 cigarette tax enforcement mechanism, tax stamps, so that the preexisting tax can be properly
8 collected and ongoing evasion of the tax can be eliminated. Laws of 2012, ch. 4, § 2(6).

9 Retailers will have to purchase tax stamps and apply them to containers that their customers
10 must use to transport their cigarettes from their stores. Laws of 2012, ch. 4, § 2(6).

11 Significantly, the Cigarette Machine Legislation did not amend RCW 82.24.020, the portion of
12 the cigarette tax statute that imposes the tax. As the Speaker of the House recognized, the
13 Cigarette Machine Legislation established an enforcement and regulatory system. Hankins
14 Decl., Ex. J at 33. The Cigarette Machine Legislation simply did not increase anyone’s tax
15 obligations and did not raise taxes under RCW 43.135.034(1).⁴

16 Plaintiffs may argue, if we assume the facts as they present them, *see supra* note 1, the
17 Cigarette Machine Legislation creates a new requirement for the cigarette machine retailers.
18 They will have to purchase tax stamps and affix them to packages that consumers must then
19 purchase for transporting the cigarettes from the store. Laws of 2012, ch. 4, § 2(6). However,
20 imposing a collection obligation does not impose a tax. Even in situations where the retailer
21 may itself be entirely exempt from the tax, such as tribal retailers on an Indian reservation,
22 courts have approved a requirement that the retailer collect the tax from customers as a

23
24 ⁴ When ruling on whether 3ESHB 2565 required a two-thirds vote, the President of the Senate engaged in
25 a slightly different, but equally valid analysis. The President ruled that the Legislature was merely clarifying that
26 an existing tax already applied to a recently developed technology. Hankins Decl., Ex. E (ruling). Such
clarifications involve no change in substantive rights or obligations, they merely make clear an existing right or
duty. *E.g., Loeffelholz v. Univ. of Wash.*, 162 Wn. App. 360, 368-69, 253 P.3d 483 (2011).

1 minimal burden to prevent such purchasers from avoiding payment of a concededly lawful tax.
2 *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483
3 (1976); *see also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 658 F.3d
4 1078, 1088-89 (2011) (recognizing that a cigarette tax *collection* obligation on retailers who
5 are not liable for the tax themselves imposes only a minimal and permissible burden on those
6 retailers). A collection obligation does not impose a new tax on the cigarette-machine retailers.

7 Plaintiffs may also assert that the tobacco products tax imposed under RCW 82.26 is
8 paid on the tobacco used to make the cigarettes in an RYO machine retail store, and somehow
9 the cigarette tax cannot also be due on the final product. But RCW 82.26.030 explicitly states
10 that payment of the tobacco products tax does not relieve the taxpayer from paying any other
11 excise tax due. And nothing prevents taxation of both the tobacco used to make the cigarettes
12 and the cigarettes themselves—the tax falls on two different events—the purchase of the loose
13 tobacco and the possession of the unstamped cigarette. *See Mayflower Park Hotel, Inc. v.*
14 *Dep’t of Revenue*, 123 Wn. App. 628, 98 P.3d 534 (2004) (no double taxation occurs when
15 there are different events or transactions). Moreover, the Cigarette Machine Legislation allows
16 a credit of \$.05 per cigarette to account for the tobacco products tax already paid.

17 In sum, the Cigarette Machine Legislation does not create a new tax obligation.
18 Instead, it puts in place an enforcement mechanism to deter ongoing evasion of taxes already
19 due, regardless of the enactment of the legislation.

20 **3. Considering RCW 43.135.034 in its entirety, the term “raising taxes” does**
21 **not extend to an enforcement mechanism that prevents ongoing revenue**
22 **losses by preventing evasion of a tax already due.**

23 Plaintiffs may argue that even if the Cigarette Machine Legislation does not impose a
24 new tax, it still qualifies as “raising taxes” under RCW 43.135.034(6) because the stamping
25 mechanism will likely result in increased revenues. Subsection (6) defines “raising taxes” as
26 “any action or combination of actions by the legislature that increase state tax revenue
deposited in any fund, budget, or account, regardless of whether the revenues are deposited

1 into the general fund.” Plaintiffs will likely argue that under this definition, any legislative
2 action that has the effect of increasing *amounts collected* requires a two-thirds vote, even if it
3 does not involve an increase in the *amount of taxes imposed or due*.

4 If the facts in Mr. Accordino’s declaration are correct, the number of unstamped
5 cigarettes that consumers possess in Washington has significantly increased in recent years.
6 Accordino Decl. at 2. As many as 57,000 unstamped packs of cigarettes *per day* (six cartons
7 per hour x ten hours x 95 machines x ten packs per carton) are being handled, possessed, and
8 consumed. *See id.* The tax due from consumers on just 50,000 packs is more than \$150,000
9 *per day*. If most consumers are like Ms. Henne and do not self-report the cigarette tax, *see*
10 Henne Decl. at 2, there is significant and ongoing evasion of cigarette taxes that are due under
11 existing law. Requiring tax stamps as an enforcement mechanism to deter ongoing evasion of
12 the cigarette tax cannot be reasonably understood as an “increase in state tax revenue.” RCW
13 13.135.034. Instead, stamping serves merely to realize revenue already due to the State. And
14 the phrase “deposited in any fund, budget, or account, regardless of whether the revenues are
15 deposited into the general fund,” simply makes it clear that the substantive requirements of the
16 statute were intended to apply, regardless of where the revenue is directed.

17 To read subsection (6) to make RCW 43.135.034’s two-thirds vote requirement apply
18 *whenever* proposed legislation would result in increased *amounts collected*, regardless of
19 whether it also increases the amount of tax due, would obviously create absurd results. *E.g.*,
20 *Estate of Bunch v. McGraw Residential Center*, ___ Wn.2d ___, 275 P.3d 1119, 1123 (2012)
21 (duty to avoid absurd results). Legislative acts completely unrelated to tax increases, like the
22 allocation of funding in the budget to the Department for additional auditors or for targeted
23 taxpayer education, would likely increase tax amounts collected and would, under this theory,
24 require a two-thirds vote. Legislatively approved tax amnesty programs would also trigger the
25 two-thirds vote requirement. Even legislation intended to stimulate the state’s economy
26 through tax *cuts* could ultimately increase business and occupation taxes collected because of

1 an increase in business activity. Would tax *cut* legislation then be subject to the two-thirds
2 vote requirement because it ultimately results in more taxes collected? Nothing in the Voters'
3 Pamphlet for Initiative 1053 suggests that the voters would have understood they were
4 imposing the two-thirds vote requirement on anything other than an increase in taxes *due*. The
5 information provided to voters never indicates a mere increase in the amount collected would
6 trigger the two-thirds requirement. Hankins Decl., Ex. H (Voter's Pamphlet) at 1 (referring
7 consistently to "tax increases," without mentioning an increase in collections).

8 Furthermore, the ballot title of I-1053 is "Initiative Measure No. 1053 concerns tax and
9 fee increases imposed by state government." Pursuant to Article II, section 19 of the
10 Washington Constitution, the subject of an initiative expressed in the title fixes a limit on the
11 scope of the act. "Words in a title must be taken in their common and ordinary meanings, and
12 the legislature cannot in the body of an act impose another or unusual meaning upon a term
13 used in the title without disclosing such special meaning [in the title]." *Amalgamated Transit*
14 *Union Local 587 v. State*, 142 Wn.2d 183, 226, 11 P.3d 762 (2000) (quoting *De Cano v. State*,
15 7 Wash.2d 613, 626, 110 P.2d 627 (1941)). An increase in collections without an increase in
16 taxes due is not a "tax increase" as the term would be commonly understood. Courts must,
17 wherever possible, interpret statutes to avoid constitutional questions or infirmities. *E.g.*, *State*
18 *v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992). Therefore, RCW 43.135.034(6) should
19 be interpreted to apply only to increases in taxes due.

20 Plaintiffs also rely heavily on statements made in the fiscal note, arguing that OFM and
21 the Department have already determined that the Cigarette Machine Legislation is a tax
22 increase under RCW 43.135.034. *See* Plaintiffs' Corr. Motion at 4, 11. First, OFM issued the
23 ten-year fiscal analysis required by RCW 43.135.031 (I-960), but OFM's determinations
24 whether to perform such an analysis occur very quickly as OFM must evaluate every iteration
25 of every bill in a legislative session (more than 2000 analyses were done in the 2012 session).
26 Smith Decl. 2. OFM's decision to issue an analysis is not binding on the Legislature or the

1 courts, nor is it intended to be a final legal determination of the question whether the
2 legislation includes a tax or fee increase. *Id.* Finally, because RCW 43.135.031 is a notice
3 statute, OFM’s practice is to err on the side of performing and disclosing the analysis to fulfill
4 the underlying purpose of I-960. *Id.*

5 Second, when the Department’s fiscal note is read in its entirety, it becomes abundantly
6 clear that the Department did not believe the Cigarette Machine Legislation imposed a new tax.
7 The Department described the bill as a “way to effectively collect the state cigarette tax on
8 RYO cigarettes.” DOR fiscal note at 3. Notably, the fiscal note also explains that the general
9 fund would realize \$12 million in 2013 “that would not otherwise be collected if the bill were
10 not enacted. *However, these are revenues that would likely be lost without this bill.*” DOR
11 fiscal note at 3 (emphasis added). The bill does not raise taxes; it prevents losses occurring
12 because of the evasion of existing taxes.

13 Because the Cigarette Machine Legislation does not “raise taxes,” it did not trigger
14 RCW 43.135.034’s two-thirds vote requirement. It validly passed with a simple majority. If
15 the Court agrees that the legislation did not “raise taxes,” it should conclude that plaintiffs are
16 not likely to prevail and deny their motion for preliminary injunction without further analysis.

17 **4. Plaintiffs are not likely to prevail because the enrolled bill doctrine**
18 **prevents invalidation of the Cigarette Machine Legislation based on**
19 **perceived procedural error by the Legislature.**

20 The core of plaintiffs’ complaint is that the President of the Senate allowed the
21 Cigarette Machine Legislation to proceed to the Governor for signature with simply majority
22 approval in the Senate. Amended Complaint, ¶ 36. Based on separation of powers principles,
23 the Washington Supreme Court has declined to rule on the validity of internal legislative
24 functions surrounding the passage of a bill, including a ruling of the President of the Senate on
25 a point of order involving a two-thirds majority requirement. *Brown v. Owen*, 165 Wn.2d 706,
26 720, 206 P.3d 310 (2009). This is true even when the constitutionality of the Legislature’s
procedures is challenged. *Id.* at 722.

1 Known as the enrolled bill doctrine, this rule is based on the principle that the separate
2 branches of state government are coequal, and no branch is entitled to look beyond the
3 properly certified record of another to determine whether it has complied with procedural
4 restrictions, even constitutional ones. *Citizens Coun. Against Crime v. Bjork*, 84 Wn.2d 891,
5 897 n.1, 529 P.2d 1072 (1975). This is because each branch must answer to the people who
6 elect them. *Id.* Therefore, where an enrolled bill is on file with the Secretary of State and has
7 been duly signed by the President of the Senate, the Speaker of the House, and the Governor,
8 and the statute is otherwise facially valid, the courts will take this as conclusive evidence that
9 the bill's enactment was proper and in accordance with constitutional principles. *Id.* The
10 Washington Supreme Court has applied this rule, for example, when asked to determine
11 whether a bill was properly re-passed after a gubernatorial veto. *Id.* (listing cases).

12 The Washington Supreme Court has already applied the enrolled bill doctrine to decline
13 to review a ruling from the President of the Senate on the necessity of a two-thirds vote, and
14 this Court should do the same. *Brown*, 165 Wn.2d at 720. The Cigarette Machine Legislation
15 is not facially invalid; plaintiffs claim instead a defect in the Legislature's procedure. Whether
16 a two-thirds vote was required in either house is a question of legislative process that is left to
17 the Legislature whose President and members are independently accountable to the people.

18 **5. Plaintiffs are not likely to prevail on the merits because the Washington**
19 **Supreme Court has already held that an initiative cannot itself restrict**
20 **future legislatures.**

21 Even if this Court were to conclude that the Cigarette Machine Legislation raises taxes
22 for purposes of RCW 43.135.034, the statutory two-thirds vote requirement cannot, by itself,
23 invalidate the Cigarette Machine Legislation. The Washington Supreme Court has explained
24 that one enactment, even an enactment by initiative, cannot bind future legislatures. *Wash.*
25 *State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007). In *Farm*
26 *Bureau*, the plaintiffs argued that a bill enacted by the 2005 Legislature exceeded the fiscal
year expenditure limit established under the terms of Initiative 601 and therefore was invalid

1 until it complied with a voter approval requirement adopted in the initiative. *Id.* The Court
2 upheld the legislation, reasoning that it is a fundamental principle of our system of government
3 that each duly elected legislature is fully vested with the plenary power to enact laws, except as
4 limited by our state and federal constitutions. *Farm Bureau*, 162 Wn.2d at 290. “No
5 legislature can enact a statute that prevents a future legislature from exercising its law-making
6 power. . . . To reason otherwise would elevate enactments of prior legislatures to
7 constitutional status and reduce the current Legislature to a second-class representative of the
8 people.” *Id.* These principles are likewise true for initiatives because when the people pass an
9 initiative, they are exercising a legislative power that is coextensive with the Legislature’s. *Id.*
10 “A law passed by initiative is no less a law than one enacted by the Legislature. Nor is it more.
11 A previously passed initiative can no more bind a current legislature than a previously enacted
12 statute.” *Id.* at 290-91 (footnotes omitted).

13 The Court’s holding in *Farm Bureau* was explicit: a prior statute (whether enacted by
14 the Legislature or by initiative) cannot prospectively invalidate a later statute. Therefore,
15 RCW 43.135.034 cannot itself prospectively invalidate the Cigarette Machine Legislation.

16 **6. Plaintiffs are not likely to prevail because the Cigarette Machine**
17 **Legislation does not violate the Washington Constitution.**

18 Because earlier-enacted legislation cannot bind a later legislature, plaintiffs can prevail
19 in this case only if they can overcome all of the legal hurdles discussed above, and they can
20 show that the Cigarette Machine Legislation violates the state or federal constitution. *See*
21 *Farm Bureau*, 162 Wn.2d at 290 (recognizing that only the constitution can invalidate a
22 statute). When evaluating the constitutionality of a statute, courts must presume the statute is
23 constitutional, and a challenger must prove a statute is unconstitutional beyond a reasonable
24 doubt. *E.g., Bostain v. Food Exp.*, 159 Wn.2d 700, 717, 153 P.3d 846 (2007).

1 Plaintiffs point first to the first sentence in article VII, section 5 of the Washington
2 Constitution, which provides, in part: “No tax shall be levied except in pursuance of law.”⁵
3 Presumably, plaintiffs intend to argue that a tax enacted in violation of an existing statute
4 would also violate this constitutional provision. But cases that actually apply this sentence
5 suggest a more common sense reading of article VII, section 5. For example, under this
6 provision, Washington courts have invalidated *local* taxing provisions because they fall outside
7 of the confines of the Legislature’s delegation of taxing authority to the local government.
8 *E.g., Lane v. City of Seattle*, 164 Wn.2d 875, 886-87, 194 P.3d 977 (2008); *Sheehan v. Central*
9 *Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 797-800, 123 P.3d 88 (2005). It makes
10 sense to read the provision to require all taxes to be enacted only by those with proper legal
11 authority, either granted by the constitution or properly delegated by the Legislature.

12 Interpreting article VII, section 5 more broadly as plaintiffs suggest would invade the
13 fundamental plenary power of each legislature to enact its own laws because it would elevate a
14 statute to constitutional status without actually amending the constitution. *See supra Farm*
15 *Bureau*, 162 Wn.2d at 290. In other words, article VII, section 5 cannot be used to convert a
16 statutory procedural requirement (like a requirement for a two-thirds vote) into a constitutional
17 one.

18 Plaintiffs also point to article II, section 1(c), which provides in part that no initiative
19 approved by the people “shall be amended or repealed by the legislature within a period of two
20 years following its enactment.” Under the plain language of this provision, the Cigarette
21 Machine Legislation cannot violate article II, section 1(c) *unless* it “amends or repeals” RCW

22 ⁵ In numerous decisions construing article VII, including some specifically addressing section 5, the
23 Washington Supreme Court repeatedly held that article VII applied only to property taxes. *E.g., Standard Oil v.*
24 *Graves*, 94 Wash. 291, 304, 162 P. 558 (1917)(holding that it was well-settled that article VII applied only to
25 property taxes and not to other taxes, including excise taxes); *State v. Clark*, 30 Wash. 439, 71 P. 20 (1902); *State v.*
26 *Sheppard*, 79 Wash. 328, 329-31, 140 P. 332 (1914) (article VII, section 5 inapplicable to license fees on peddlers
because it relates only to a tax upon property). While the Court has since applied article VII, section 5 in cases
involving excise taxes, the Court did so without discussion and without explicitly overruling the long line of cases
applying article VII only to property taxes. *See Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003).

1 43.135.034. Nothing in the Cigarette Machine Legislation explicitly amends or even addresses
2 RCW 43.135.034. And, in fact, when defining what an amendment is, the Supreme Court has
3 explained that an act is amendatory in character, rather than complete, only “if it changes the
4 scope or effect of a prior statute.” Nothing on the face of or in the substance of the Cigarette
5 Machine Legislation, which merely imposes a tax enforcement mechanism for cigarettes made
6 in commercial cigarette-making machines, in any way alters the future scope or effect of RCW
7 43.135.034.

8 Plaintiffs may argue that the passage of the Cigarette Legislation without a two-thirds
9 majority in the Senate ignored RCW 43.135.034, and thus legislation somehow impliedly
10 amended or repealed RCW 43.135.034. But Washington’s appellate courts discourage lower
11 courts from finding amendment or repeal by implication, and statutes must be harmonized
12 wherever possible. *E.g., Misterek v. Wash. Mineral Products, Inc.*, 85 Wn.2d 166, 168, 531
13 P.2d 805 (1975); *State v. Putnam*, 60 Wash. 386, 387-88, 111 P. 239 (1910). As explained
14 above, RCW 43.135.034 and the Cigarette Machine Legislation may be harmonized because
15 the Court can easily conclude that the legislation did not “raise taxes.” Alternatively, this
16 Court could easily recognize that there is no direct conflict between the substance of the
17 Cigarette Machine Legislation and RCW 43.135.034.

18 What plaintiffs really take issue with are the circumstances of the Cigarette Machine
19 Legislation’s enactment, in particular the President of the Senate’s determination that a two-
20 thirds vote was not required. But as explained above, the enrolled bill doctrine prevents this
21 Court from invalidating a statute based on a perceived procedural error by the Legislature.
22 And nothing about the substance of the Cigarette Machine Legislation amends or repeals RCW
23 43.135.034. Plaintiffs simply cannot show unconstitutionality beyond a reasonable doubt.

24 In sum, plaintiffs are not likely to prevail for all of the following reasons as a matter of
25 law: (1) RCW 82.32.150 requires an assessment before plaintiffs can challenge a tax statute in
26 superior court even if they make constitutional arguments, (2) the cigarette tax is already due

1 from consumers possessing, handling, or consuming any unstamped cigarettes in Washington,
2 and therefore the Cigarette Machine Legislation does not raise taxes, (3) the enrolled bill
3 doctrine prevents this Court from invalidating a statute based on perceived procedural error, (4)
4 RCW 43.135.034 cannot itself invalidate the Cigarette Machine Legislation, and (5) the
5 legislation does not violate the Washington Constitution. If the Court finds plaintiffs are not
6 likely to prevail for any one of these reasons, it must decline grant the preliminary injunction.

7 **B. Plaintiffs Will Not Suffer Actual Or Substantial Injury Or Harm, And On**
8 **Balance, The State Would Be More Seriously Harmed By A Preliminary**
9 **Injunction Than Plaintiffs Would Be Harmed By the Lack Of One.**

10 Even if the Court believes that plaintiffs are likely to prevail on the merits, plaintiffs
11 cannot obtain an injunction unless they prove they will suffer an actual or substantial injury or
12 harm. “Payment of the tax in and of itself does not constitute the actual and substantial injury
13 required for issuance of an injunction,” because the taxpayer may always obtain a refund of
14 taxes paid in the unlikely event the legislation were to be declared invalid. *Tyler Pipe*, 96
15 Wn.2d at 794-95.

16 Ms. Henne complains that on July 1, 2012, the cost of cigarettes will increase because it
17 will include the cost of the state tax stamp. Henne Decl. at 2. But she should be paying the
18 cigarette tax under current law. RCW 82.24.020, .260. She cannot validly claim harm where
19 implementation of the law will simply stop her from continuing to evade the tax.

20 RYO Machines and 1/2 Price Smokes complain that the stamping requirement will
21 impact their businesses, but any impact on RYO Machines will be only indirect, and it has
22 offered no more than mere speculation that but for the Cigarette Machine Legislation,
23 additional machines would soon be purchased in Washington. Accordino Decl. at 3. 1/2 Price
24 Smokes will be required to purchase tax stamps, but it will recoup that money from its
25 customers. Henne Decl. at 2; Alexander Decl. at 4. That 1/2 Price Smokes’ business model
26 relies on its and its customers’ continued ability to evade existing state and federal taxes does
not support a finding of harm.

1 Plaintiffs also claim “actual and substantial injury” to support a preliminary injunction
2 based on possible exposure to criminal prosecution if the Cigarette Machine Legislation is
3 enforced while a challenge to its validity is ongoing. Plaintiffs’ Corr. Motion at 12-13 (citing
4 *Shields v. Utah I. C. R. Co.*, 305 U.S. 177, 183 (1938)). This argument lacks merit because it
5 is entirely speculative and based on the unrealistic assumption that the moment the legislation
6 goes into effect on July 1, criminal prosecutions will follow. A claim for declaratory relief is
7 not ripe for adjudication if it rests upon “contingent future events that may not occur as
8 anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300-301
9 (1998). Similarly, an injunction is an extraordinary equitable remedy, and its purpose is not to
10 protect a plaintiff “from mere inconvenience or speculative and insubstantial injury.” *Tyler*
11 *Pipe*, 96 Wn.2d at 796; *Kucera v. Dep’t of Transportation*, 140 Wn.2d 200, 221, 995 P.2d 63
12 (2000).

13 In *Kucera*, the trial court entered a preliminary injunction limiting the speed of a
14 passenger-only ferry along a passage between Seattle and Bremerton where property owners
15 alleged that the vessel’s wake was damaging the shoreline and shoreline structures. *Id.* at 207.
16 On direct review, the Supreme Court reversed the preliminary injunction because the trial court
17 had failed to find that the vessel operations more likely than not caused the alleged
18 environmental harm or to find “in a factually specific way” that the criteria for injunctive relief
19 had been met. *Id.* at 219-221. Under *Kucera* and *Tyler Pipe*, the mere fact that options for
20 enforcing a statute include criminal penalties does not support the issuance of a preliminary
21 injunction merely because a plaintiff contends the statute is invalid. Plaintiffs do not allege or
22 offer evidence that they have been targeted for criminal enforcement actions. Until that status
23 changes, the Court should not consider this hypothetical alleged harm.

24 Moreover, the *Tyler Pipe* Court explained that in addition to evaluating harm, the Court
25 must also balance relative interests of the parties and the interests of the public. *Tyler Pipe*, 96
26 Wn.2d at 792. In tax cases, this includes weighing society’s interest in the efficient collection

1 of taxes against the harm potentially suffered by the taxpayer. *Id.* at 796. “Society’s strong
2 interest in the collection of taxes has led to a long-standing public policy which disfavors the
3 issuance of injunctions.” *Id.* Business practices that rely on tax evasion should not be given
4 weight in balancing these equities.

5 Finally, remedies ameliorating any harm to taxpayers exist if injunctive relief is not
6 granted. Such taxpayers may seek administrative or court refunds in the unlikely event the
7 Cigarette Machine Legislation is held invalid. RCW 82.32.170 and .180. In contrast, if
8 implementation of the Cigarette Machine Legislation were delayed, the current tax evasion
9 scheme would continue, and the State would continue to lose up to \$150,000 per day in
10 cigarette tax revenue properly due. Until tax stamps are implemented, these taxes likely will
11 never be collected. As such, society’s interest in efficient and fair tax collection would be
12 thwarted by a preliminary injunction. *Id.* at 796. The amendments to the cigarette tax statute
13 do precisely that, they promote efficient tax collection. A preliminary injunction should not
14 issue in this case.

15 **C. Even If This Court Grants A Preliminary Injunction, It Can Apply Only To These**
16 **Plaintiffs, And Plaintiffs Must Post Security.**

17 Plaintiffs’ proposed order asks the Court to enjoin the State from enforcing the
18 Cigarette Machine Legislation against anyone. But absent a certified class action, such an
19 order would be inappropriate. If the Court is convinced by plaintiffs’ arguments, only these
20 plaintiffs are entitled only to an injunction preventing enforcement against them because only
21 their purported harm will have been evaluated under the *Tyler Pipe* standard.

22 In addition, before an injunction may be issued, the applicant must provide security as
23 required under CR 65(c). The Rule provides, subject to certain exceptions not pertinent here:

24 [N]o restraining order or preliminary injunction shall issue except upon the
25 giving of security by the applicant, in such sum as the court deems proper, for
26 the payment of such costs and damages as may be incurred or suffered by any
party who is found to have been wrongfully enjoined or restrained.

1 The purpose of CR 65(c) is to provide indemnification for parties who are wrongfully
2 restrained or enjoined. *Cedar-Al Products, Inc. v. Chamberlain*, 49 Wn. App. 763, 765, 748
3 P.2d 235 (1987).

4 Defendants assume this case will take approximately one year to resolve. Thus, before
5 an injunction can be entered, the Court should order plaintiffs to provide security in the amount
6 of the cigarette tax due on the total amount of cigarettes produced by 1/2 Price Smokes'
7 machine(s) in a calendar year. This amount may be estimated by determining total cigarettes
8 produced by the machines in the 2011 calendar year. If the Court is inclined to grant an
9 injunction preventing *all* enforcement, then plaintiffs should be required to provide security in
10 the amount of the total cigarette tax that will be avoided for a year by all cigarette-machine
11 retailers in the state, estimated by using the information provided in plaintiffs' declarations (95
12 machines statewide, six cartons per hour).

13 In sum, if the Court were inclined to grant a preliminary injunction, it should apply
14 only to these plaintiffs, and security must be provided under CR 65.

15 IV. CONCLUSION

16 For all of the foregoing reasons, Defendants respectfully request that the Court deny
17 plaintiffs' motion for a preliminary injunction.

18 DATED this _____ day of June, 2012.

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