

NO.

(Franklin County Superior Court No. 12-2-50512-1)

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Respondents,

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

Petitioners.

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**PETITIONERS' MOTION FOR STAY PENDING REVIEW AND  
EXPEDITED HEARING ON THIS MOTION**

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**TABLE OF CONTENTS**

I. IDENTITY OF MOVING PARTY.....1

II. STATEMENT OF RELIEF SOUGHT .....1

III. FACTS RELEVANT TO MOTION .....2

IV. GROUNDS FOR RELIEF .....8

    A. Standard For Granting A Stay.....8

    B. The Issues Presented By This Case Plainly Are  
    Debatable. ....8

    C. On Balance, The Equities Support A Stay Of The  
    Preliminary Injunction Order.....14

    D. Hearing On This Motion Should Be Expedited.....18

V. CONCLUSION .....18

## TABLE OF AUTHORITIES

### Cases

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	10
<i>Booker Auction Co. v. Dep't of Revenue</i> , 158 Wn. App. 84, 241 P.3d 439 (2010).....	12
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	13
<i>Confederated Tribes &amp; Bands of the Yakama Nation v. Gregoire</i> , 658 F.3d 1078 (9 <sup>th</sup> Cir. 2011) .....	9
<i>De Cano v. State</i> , 7 Wn.2d 613, 110 P.2d 627 (1941).....	10
<i>Department of Taxation &amp; Finance v. Milhelm Attea &amp; Bros., Inc.</i> , 512 U.S. 61, 114 S. Ct. 2028, 129 L. Ed. 2d 52 (1994).....	15
<i>Estate of Bunch v. McGraw Residential Center</i> , ___ Wn.2d ___, 275 P.3d 1119 (2012).....	10
<i>Grace Brethren Church</i> , 457 U.S. 373, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982).....	12
<i>Guy F. Atkinson Co. v. State</i> , 66 Wn.2d 570, 403 P.2d 880 (1965).....	11
<i>Kennett v. Levine</i> , 49 Wn.2d 605, 304 P.2d 682 (1956).....	8, 16
<i>Moe v. Confederated Salish &amp; Kootenai Tribes of Flathead Reservation</i> , 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976).....	9
<i>Nat'l Private Truck Council v. Oklahoma Tax Comm'n</i> , 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995).....	12

<i>Purser v. Rahm</i> , 104 Wn.2d 159, 702 P.2d 1196 (1985).....	8
<i>State v. Speaks</i> , 119 Wn.2d 204, 829 P.2d 1096 (1992).....	11
<i>Tyler Pipe Indus., Inc. v. Dep't of Revenue</i> , 96 Wn.2d 785, 638 P.2d 1213 (1982).....	14
<i>Washington State Farm Bureau Fed'n v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007).....	13
<i>Washington v. Confederated Tribes of Colville Reservation</i> , 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).....	15
<i>Weber v. School Dist. No. 7 of Yakima Cy.</i> , 185 Wash. 697, 56 P.2d 707 (1936) .....	11

**Statutes**

28 U.S.C. § 1341.....	12
Laws of 1935, ch. 180, § 82.....	3
Laws of 1935, ch.180, § 83.....	3
Laws of 1972, ch. 157, §1.....	3
Laws of 2012, 2d Sp. Sess., ch. 4, § 2(6).....	9
Laws of 2012, 2d Sp. Sess., ch. 4, § 4 .....	6
Laws of 2012, 2d Sp. Sess., ch. 4, § 13 .....	1
RCW 43.135.034 .....	7, 9
RCW 43.135.034(6).....	9
RCW 82.24 .....	5
RCW 82.24.020(1).....	3, 14, 17

RCW 82.24.030 .....	3
RCW 82.24.040(5).....	3
RCW 82.24.260 .....	3, 14
RCW 82.32.050(1).....	12
RCW 82.32.060(1).....	15
RCW 82.32.060(5).....	15
RCW 82.32.150 .....	1, 7, 11, 12
RCW 82.32.170 .....	14
RCW 82.32.180 .....	11, 14

**Rules**

RAP 8.1(b)(3) .....	1, 8
---------------------	------

**Other Authorities**

<i>Compton Point, Inc. v. Griffith</i> , Civil Action No. 11-C-75, (Circuit Court of Kanawha County West Virginia 2011).....	4
<i>Hyong Kim, dba Smokes 4 Less v. Alaska</i> , Cause No. 3AN-10-9817 CI (Alaska Third Judicial Dist. 2010).....	4
<i>New Hampshire v. N. of the Border Tobacco LLC</i> , Cause No. 09-E-288, (Merrimack Superior Court 2009) .....	4
<i>New Hampshire v. N. of the Border Tobacco</i> , 32 A.3d 548 (N.H. 2011) .....	4

## **I. IDENTITY OF MOVING PARTY**

This motion is filed by the petitioners (defendants below), 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 “the State”).

## **II. STATEMENT OF RELIEF SOUGHT**

The Franklin County Superior Court entered a preliminary injunction enjoining all implementation of 3E2SHB 2565, hereinafter “RYO Cigarette Machine Legislation,” which would otherwise become effective July 1, 2012. Laws of 2012, 2d Sp. Sess., ch. 4, § 13. The court conditioned effectiveness of the order on the posting of security (bond or cash) in the amount of \$200,000.<sup>1</sup> The court entered the order on June 28, 2012, and the State filed its Notice of Discretionary Review the same day.

The State requests a stay of the trial court’s preliminary injunction order pending ultimate resolution of this Court’s review, as authorized by RAP 8.1(b)(3). This case presents several debatable issues, including but not limited to, whether the RYO Cigarette Machine Legislation indeed “raises taxes” and whether the trial court had jurisdiction to enter a preliminary injunction in the first instance in light of the plain language of RCW 82.32.150. More importantly, if the trial court’s preliminary injunction remains in effect, the State stands to continue to lose between

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<sup>1</sup> Although the required security has not yet been posted, we assume that it will be and are moving to stay immediately because time is of the essence.

\$32,000 and \$150,000 per day in cigarette tax that is already owed by consumers who are currently simply evading the tax. These losses far outweigh any potential harm to respondents, especially given the remedies available to consumers who have paid the tax if respondents ultimately prevail in this case. Simply put, respondents' articulated potential injuries are (1) payment of the cigarette tax that is already owed on all cigarettes handled, possessed, or consumed in Washington, and (2) an inability to continue to enjoy an advantage over other small businesses whose business model does not depend on their customers' willingness to evade the cigarette tax. Such interests should not outweigh the State's clear interest in collecting thousands of dollars per day in cigarette tax that would otherwise be evaded, especially where there is no practical way for the State to recoup the tax that will be lost until this case is resolved.

The State also respectfully requests an expedited hearing on this motion and entry of stay before July 1, 2012. Alternatively, the State respectfully requests a temporary stay until such date as the Court may rule upon this motion.

### **III. FACTS RELEVANT TO MOTION<sup>2</sup>**

On June 28, 2012, the trial court entered a preliminary injunction in this matter. The court's order, the incorporated oral ruling, and the

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<sup>2</sup> This motion is supported by the Declarations of Stuart Thronson, Justin Nordhorn, Julie Murray, and Rebecca Glasgow submitted with this motion.

State's notice of discretionary review are attached to the Declaration of Rebecca Glasgow as Exhibits A, B, and C.<sup>3</sup>

This case presents a challenge to the RYO Cigarette Machine Legislation, which amended Washington's cigarette tax statutes. For decades, the cigarette tax has been imposed on the first person who sells, uses, *consumes, handles, possesses,* or distributes a cigarette in Washington. RCW 82.24.020(1), .260; Laws of 1935, ch. 180, § 82; Laws of 1972, ch. 157, §1. Since 1935, the term "cigarette," for purposes of the cigarette tax statute, has included "*any* roll for smoking made wholly or in part of tobacco . . . [with] a wrapper or cover made of paper . . . ." Laws of 1935, ch.180, § 83 (emphasis added).

For prepackaged cigarettes, the tax is currently collected through tax stamps purchased by licensed cigarette wholesalers at the rate of \$3.025 per pack. RCW 82.24.030. Once stamped, prepackaged cigarettes can then be sold to licensed cigarette retailers for resale to the public, and the cost of the stamp is passed down to consumers. RCW 82.24.040(5).

Recently, tobacco retail establishments like 1/2 Price Smokes began offering cigarettes made with in-store, commercial, cigarette-making machines. The retailer sells loose tobacco, cigarette tubes, and the use of a cigarette-making machine. Glasgow Decl., Ex. E.<sup>4</sup> Until the

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<sup>3</sup> Plaintiffs' Corrected Motion for Preliminary Injunction, Defendants' Opposition to Motion for Preliminary Injunction, and Plaintiffs' Reply In Support of the Motion for Preliminary Injunction are attached to the Declaration of Rebecca Glasgow as Exhibits G, H, and I.

<sup>4</sup> Petitioners do not concede that the facts are as stated in the declarations of Mr. Alexander and Mr. Accordino, nor do defendants concede that the consumer manufactures the cigarettes or that only the consumer possesses or handles the cigarettes

2012 RYO Cigarette Machine Legislation takes effect, there is no mechanism requiring that the Washington cigarette tax be collected, so the \$3.025 per pack/\$30.25 per carton cigarette tax is not included in the price. A carton of cigarettes from a cigarette-making machine currently averages \$34.50 per carton. In contrast, a prepackaged carton of stamped cigarettes costs an average of \$70.00. Glasgow Decl., Ex. F.

The cigarette-making machines can produce a carton of cigarettes (200 cigarettes, or ten packs containing 20 cigarettes per pack) in less than eight minutes. See <http://www.ryofillingstation.com/about.php> (last visited June 20, 2012). Given the volume of sales of commercial cigarette-making machines into Washington, Glasgow Decl. Ex. D, it became apparent that high volumes of unstamped cigarettes were being manufactured in Washington, for which consumers were not voluntarily paying the cigarette tax. The State lacks the resources and manpower to attempt to enforce the cigarette tax due from individual consumers by assessing all of the individual consumers using the commercial cigarette-making machines. Thronson Decl., ¶¶ 4, 5. Indeed, the State currently has no way to even identify the consumers purchasing cigarettes in this manner. Nordhorn Decl., ¶ 4.

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for purposes of RCW 82.24. Other state courts have concluded that the proprietors who provide access to commercial cigarette machines manufacture cigarettes. *New Hampshire v. N. of the Border Tobacco LLC*, Cause No. 09-E-288, (Merrimack Superior Court 2009); *New Hampshire v. N. of the Border Tobacco*, 32 A.3d 548, 558 (N.H. 2011); *Hyong Kim, dba Smokes 4 Less v. Alaska*, Cause No. 3AN-10-9817 CI (Alaska Third Judicial Dist. 2010); *Compton Point, Inc. v. Griffith*, Civil Action No. 11-C-75, (Circuit Court of Kanawha County West Virginia 2011). But for purposes of the motion for preliminary injunction petitioners were willing to assume the process for making cigarettes in Mr. Alexander's store is as reflected in his declaration.

Because, prior to the RYO Cigarette Machine Legislation, a tax stamping system was not in place for cigarettes made by consumers using commercial cigarette-making machines in retail establishments, the Department has relied on consumers using such machines to voluntarily report and pay the cigarette tax. Thronson Decl., ¶ 4. The Department's website contains a voluntary payment form for use by these consumers. Thronson Decl., Ex. A. Virtually no consumers who use commercial cigarette-making machines to produce cigarettes, however, voluntarily report and pay the cigarette tax. Thronson Decl., ¶ 4. Thus, over the past few years, the significant increase in the number of commercial cigarette-making machines in Washington, combined with the lack of an effective collection and enforcement mechanism, has led to widespread evasion of the cigarette tax. Thronson Decl., ¶ 6.

The Liquor Control Board (Board) is responsible for enforcing the provisions of RCW 82.24. Thronson Decl., ¶ 5. To effectively enforce the existing tax on cigarettes made from using commercial cigarette-making machines, the Board would have to identify each individual consumer who has obtained unstamped cigarettes and report that information, along with the number of cigarettes made, to the Department. *Id.* The Department then would need to determine the amount of cigarette tax due and issue assessments of tax and penalties to each consumer. *Id.* Neither the Department nor the Board, has sufficient resources to do this. *Id.*; Nordhorn Decl., ¶ 4. As a result, the Legislature amended Washington's cigarette tax statutes to provide for a stamping system,

which is a more accurate and efficient collection and enforcement mechanism for the State to collect the existing cigarette tax on those cigarettes made with commercial cigarette-making machines. *Id.*; Laws of 2012, 2d Sp. Sess., ch. 4, § 4. Pursuant to the RYO Cigarette Machine Legislation, cigarette-making machine retailers must purchase stamps from the Department and affix them to packages that consumers must use to transport their cigarettes out of the store. *Id.* There is no dispute that the cost of the stamps will be passed on to the consumer.

According to the fiscal note the Department prepared on 3E2SHB 2565, the legislation is expected to realize \$12 million in Fiscal Year 2013 (or approximately \$1 million per month) in state cigarette tax that would otherwise be lost to evasion. Glasgow Decl., Ex. F. Based on a 31-day month, the State would continue to lose approximately \$32,258 each day in cigarette tax, absent implementation of the stamping requirement. Thronson Decl., ¶ 14.<sup>5</sup>

Since the Cigarette Machine Legislation was enacted, the Department has been actively taking steps to implement the collection and enforcement requirements. Thronson Decl., ¶ 7. For example, the Department's Business Licensing Service developed a process for obtaining the new cigarette-machine retailer license called for in the legislation, and retailers have been applying for and receiving their

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<sup>5</sup> If the numbers provided in respondents' declarations filed in superior court are accurate, the potential loss to the State is about five times as much per day (\$150,000). Thronson Decl., ¶ 14; Glasgow Decl., Exs. D, E.

licenses. *Id.*, ¶ 11. The Department contracted with a vendor to create a special tax stamp that is self adhesive and can be applied to a variety of containers to prove payment of the tax. *Id.*, ¶ 7. The self-adhesive stamps have been made and the stamp-purchasing system is in place. *Id.*, ¶ 8.

Just days before the RYO Cigarette Machine Legislation was to take effect, respondents filed a complaint and sought a preliminary injunction in Franklin County Superior Court to halt the effectiveness of the new law. Ignoring the State's argument that the court lacked jurisdiction to issue an injunction before a tax assessment has been issued as required by the plain language of RCW 82.32.150, and rejecting the State's argument that the legislation does not raise taxes, the trial court held that the RYO Cigarette Machine Legislation is invalid on the theory that it raises taxes without a two-thirds majority vote contrary to Initiative 1053 (codified at RCW 43.135.034). While the legislation received a two-thirds majority vote in the House, it passed by a simple majority in the Senate. The trial court concluded that the RYO Cigarette Machine Legislation therefore violates I-1053's two-thirds vote requirement for tax increases. The trial court also concluded that because article VII, section 5 of the Washington Constitution prohibits a tax from being levied "except in pursuance of law," the failure to comply with I-1053's two-thirds vote requirement was actually a constitutional violation.

#### IV. GROUNDS FOR RELIEF

##### A. Standard For Granting A Stay.

A stay should be granted pending review where the issue presented is debatable and where the stay is “necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation.” *Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985). The Court “will (i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed.” RAP 8.1(b)(3). A showing of debatable issues does not require the moving party to demonstrate ultimate success on the merits, but simply that the issues are debatable. *Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956). Once the “debatable” standard is met, then the relative harm to the parties is weighed.

##### B. The Issues Presented By This Case Plainly Are Debatable.

The State does not intend to fully argue the merits of this case in this motion, but will discuss the merits as necessary to demonstrate that the issues presented by this case plainly are debatable. First and foremost, because the cigarette tax has been imposed for decades on the first possession, handling, and consumption of *all* cigarettes in Washington, and the RYO Cigarette Machine Legislation simply created a more effective enforcement mechanism to stop evasion of the tax in certain circumstances, there is certainly a debatable issue as to whether the

legislation “raise[s] taxes” for purposes of I-1053. *See* RCW 43.135.034; Laws of 2012, 2d Sp. Sess., ch. 4, § 2(6). While the RYO Cigarette Machine Legislation adds a sentence to the definition of “cigarette,” clarifying that the term “includes a roll-your-own cigarette,” no reasonable argument exists to conclude that such cigarettes were not included in the plain language of the definition of “cigarette” before that amendment.

The RYO Cigarette Machine Legislation does impose a new collection obligation on the retailer, but the United States Supreme Court and the Ninth Circuit have already held that imposing a collection obligation does not impose a tax. Even in situations where the retailer may itself be entirely exempt from the tax, such as tribal retailers on an Indian reservation, courts have approved a requirement that the retailer collect the tax from customers to prevent them from evading the cigarette tax. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976); *see also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 658 F.3d 1078, 1088-89 (9<sup>th</sup> Cir. 2011).

RCW 43.135.034(6) defines “raising taxes” as “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 into the general fund.” The trial court apparently concluded that the RYO Cigarette Machine Legislation would increase *amounts collected*, and therefore would require a two-thirds vote even if it does not involve an increase in the *amount of taxes imposed or due*. But

to read subsection (6) to make RCW 43.135.034's two-thirds vote requirement apply *whenever* some proposed legislation would result in increased *amounts collected* would obviously create absurd results. *E.g., Estate of Bunch v. McGraw Residential Center*, \_\_ Wn.2d \_\_, 275 P.3d 1119, 1123 (2012) (duty to avoid absurd results). Legislative acts completely unrelated to tax increases, like the allocation of funding in the State budget to the Department for additional auditors or for targeted taxpayer education, would likely increase tax amounts collected and would, under this theory, require a two-thirds vote. Legislatively approved tax amnesty programs would also trigger the two-thirds vote requirement. Even legislation intended to stimulate the state's economy through tax *cuts* could ultimately increase business and occupation and other taxes collected because of an increase in business activity.

Furthermore, the short ballot title of I-1053 is "Initiative Measure No. 1053 concerns *tax and fee increases* imposed by state government," and the concise description that follows speaks only in terms of "raising taxes." Glasgow Decl., Ex. J, (emphasis added). Nothing in the title of I-1053 suggests that it applies to new methods for collecting existing taxes. Pursuant to article II, section 19 of the Washington Constitution, the subject of an initiative expressed in the title fixes a limit on the scope of the act. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 226, 11 P.3d 762 (2000) (quoting *De Cano v. State*, 7 Wn.2d 613, 626, 110 P.2d 627 (1941)). Courts must, wherever possible, interpret statutes to avoid constitutional questions or infirmities. *E.g., State v. Speaks*, 119

Wn.2d 204, 207, 829 P.2d 1096 (1992). In sum, there is a debatable issue as to whether the RYO Cigarette Machine Legislation raises taxes for purposes of I-1053.

It is also debatable whether the trial court had jurisdiction to enter the preliminary injunction in the first instance. This Court has long held that the Legislature can fix the parameters of how and where a tax challenge can be brought against the State. *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965); *Weber v. School Dist. No. 7 of Yakima Cy.*, 185 Wash. 697, 56 P.2d 707 (1936). Through RCW 82.32.150 and RCW 82.32.180, the Legislature has authorized direct superior court review of excise taxes, but only where specific conditions are met:

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

RCW 82.32.150 (emphasis added). A taxpayer may seek an injunction preventing the collection of a tax only if (1) the Department has issued an assessment against the taxpayer, and (2) the assessment somehow violates the state or federal constitution. Otherwise, RCW 82.32.150 bars *any* action to enjoin the collection of a tax, regardless of whether the action is brought under RCW 82.32 or some other statute like the Uniform

Declaratory Judgment Act. *See Grace Brethren Church*, 457 U.S. 373, 407-08, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (construing the phrase “enjoin, suspend or restrain” in the federal Tax Injunction Act, 28 U.S.C. § 1341, to include declaratory relief); *Nat’l Private Truck Council v. Oklahoma Tax Comm’n*, 515 U.S. 582, 591, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995) (quoting *Grace Brethren Church* for the proposition that “there is little practical difference between injunctive and declaratory relief”).

At least one Court of Appeals decision has interpreted RCW 82.32.150 to require *both* an assessment of a tax and a showing of a constitutional violation for a taxpayer to be able to obtain an injunction:

According to the plain language of this statute, the *sole time* when collection of a tax can be prospectively enjoined is when *a tax assessment* violates the federal or state constitution.

*Booker Auction Co. v. Dep’t of Revenue*, 158 Wn. App. 84, 88, 241 P.3d 439 (2010) (emphasis added). Lest there be any confusion as to the meaning of the term “assessment” in RCW 82.32, a related provision explains that an assessment is something that the Department issues to a particular taxpayer when it has found an additional amount of 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 respondents for failure to pay cigarette tax. Accordingly, the trial court lacked statutory authority to enter the preliminary injunction.

If these issues were not enough, it is also at least debatable whether separation of powers principles should have prevented the trial court from looking behind the enrolled bill to hold invalid the process through which the bill was enacted. *See Brown v. Owen*, 165 Wn.2d 706, 720-21, 206 P.3d 310 (2009) (explaining that the enrolled bill doctrine prevented the court from adjudicating the validity of a ruling on a point of order in the Senate, especially where no member had sought appropriate review of the President's ruling, namely reversal by a majority vote from the members of the Senate).

Moreover, this Court has plainly held that an initiative, by itself, cannot bind future legislatures; only the state and federal constitutions can restrict the legislature's plenary powers. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290-91, 174 P.3d 1142 (2007). While article II, section 41 provides that no duly enacted initiative can be "amended or repealed" within a period of two years following its enactment, there is a debatable issue as to whether the RYO Cigarette Machine Legislation can be said to "amend or repeal" I-1053 when the legislation amended only the cigarette tax statutes. Finally, there is a debatable issue as to whether article VII, section 5 of the Washington Constitution somehow elevates statutes or initiatives to constitutional status such that the provision diminishes the plenary authority of future legislatures to enact laws they see fit to enact.

In sum, there are several debatable issues that are raised in this case. As a result, the Court must compare the injuries to the parties that could occur while review is pending.

**C. On Balance, The Equities Support A Stay Of The Preliminary Injunction Order.**

The State stands to lose far more pending the outcome of this Court's review than respondents do, especially in light of the adequate legal remedies available to taxpayers for seeking tax refunds. Furthermore, consumers like Ms. Henne have always been personally liable for the cigarette tax on the unstamped cigarettes they possess, handle, or consume in Washington. RCW 82.24.020(1), .260. To the extent Ms. Henne is not voluntarily reporting and paying the cigarette tax, she is evading the existing tax. She has no valid interest in continuing to do so.

This Court has recognized that, as a matter of law, requiring a party to pay of a tax due does not establish harm. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 794-95, 638 P.2d 1213 (1982). And if Ms. Henne somehow were to prevail, she would have ample legal remedies available to her. Taxpayers may seek administrative refunds under RCW 82.32.170 or, if they so choose, may file excise tax refund actions in the Thurston County Superior Court under RCW 82.32.180.<sup>6</sup> With respect to taxes paid in 2012, a taxpayer would have until December

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<sup>6</sup> Of course, if this Court agrees that the cigarette tax has for decades been due on the possession, consumption, and handling of *all* cigarettes in Washington, then no refund would be due.

31, 2016, to file a refund claim, pursuant to RCW 82.32.060(1). For taxes paid in 2013, a taxpayer would have until December 31, 2017, to seek a refund. In addition, any taxpayer receiving a refund would be entitled to statutory interest under RCW 82.32.060(5).

1/2 Price Smokes complains that if the RYO Cigarette Machine Legislation takes effect, collection of the cigarette tax through the stamping system will cause it to go out of business because it will lose its price advantage over retailers of prepackaged cigarettes. However, 1/2 Price Smokes has no entitlement to a business model that relies on evasion of the cigarette tax by its customers and undercuts the prices of law-abiding small businesses like groceries and convenience stores. A state's interest in collecting taxes far outweighs the interests of businesses in marketing to customers a way to evade the cigarette tax. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 160, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); see also *Department of Taxation & Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73, 114 S. Ct. 2028, 129 L. Ed. 2d 52 (1994) ("States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere.").

Finally, any impact on RYO Machines, the Ohio manufacturer of the cigarette machines, will at most be only indirect, as RYO Machines

would not be liable for the tax and will have no collection obligation under the RYO Cigarette Machine Legislation. RYO Machines has offered no more than mere speculation that but for the legislation, additional machines would soon be purchased in Washington. Glasgow Decl. Ex. D.

In contrast, the loss to the State will be significant if the RYO Cigarette Machine Legislation is not implemented on July 1, 2012. The collection and enforcement mechanisms put in place by the legislation are expected to realize \$12 million in previously unpaid cigarette tax in Fiscal Year 2013 (or approximately \$1 million per month). Thronson Decl., ¶ 14; Glasgow Decl., Ex. F. Recall that this number represents taxes that are currently due, but are being evaded. Based on a 31-day month, the approximate amount lost *each day* would be \$32,258. Thronson Decl., ¶ 14. Thus, the required bond will, at most, protect the State against seven days of lost cigarette tax revenues. *Id.*

Most importantly, there will be no practical way for the Department to recover lost cigarette tax revenue owed to the State if the RYO Cigarette Machine Legislation does not go into effect on July 1, 2012. There is no practical way to identify consumers who have used the RYO cigarette-making machines or to determine how much tax each consumer owes. Thronson Decl., ¶ 5; Nordhorn Decl. ¶ 4. Thus, the Department will not, for practical purposes, be able to recover the forgone taxes if it eventually prevails on review.

To the extent that the court considers the status quo, *Kennett v. Levine*, 49 Wn.2d 605, 608, 304 P.2d 682 (1957), it is important to

recognize exactly what the status quo is. The cigarette tax is and has for decades been due on *all* cigarettes possessed, handled, or consumed in Washington. RCW 82.24.020(1). The status quo is that the RYO Cigarette Machine Legislation is to take effect on July 1, 2012, to prevent ongoing evasion of the existing cigarette tax, and the Department has taken all of the necessary steps for stamping to begin on that day. Thronson Decl., ¶¶ 7-12. Switching a tax collection and enforcement mechanism on and off during the course of litigation challenging tax legislation would be costly and extremely burdensome to the Department. *Id.*, ¶ 12. Maintaining the current effective date of the legislation would maintain the status quo and would avoid irreparable harm to the State until the case is resolved.

In sum, if the Court grants a stay but respondents were to ultimately prevail, consumers entitled to refunds could file refund claims. While 1/2 Price Smokes and RYO Machines also claim harm, they are not entitled to continue a business model that relies on consumers' tax evasion to obtain a competitive edge over other small businesses. On the other hand, if the preliminary injunction blocking the legislation were to remain in place until this case is resolved, the State would never be able to recover the millions of dollars in unpaid cigarette taxes due. These are funds the Legislature counted on developing the State's operating budget, so the inability to collect the cigarette tax due will adversely impact the state's budget by cutting its unrestricted funds from \$22.7 million to \$10.7

million. Murray Decl., ¶ 5. On balance, the State's potential harm absent a stay, amounting to between \$32,258 and \$150,000 *per day* in evaded cigarette taxes, far outweighs respondents' articulated interests.

**D. Hearing On This Motion Should Be Expedited.**

Absent a stay, the trial court's preliminary injunction will remain in place, blocking the RYO Cigarette Machine Legislation and resulting in significant daily losses. The State respectfully requests that the Court expedite review of this motion so that if a stay is granted, it can occur before the July 1, 2012 effective date of the legislation.

Further, if the Court were to decide not to enter a stay, the State respectfully requests that review of its motions for direct review and discretionary review be expedited, and that the case be set for oral argument this Fall to avoid unnecessary, ongoing revenue losses. This may also allow the case to be resolved on an expedited basis before or during the early part of the next 2013 legislative session, so that the Legislature may consider any budget ramifications of the Court's decision.

**V. CONCLUSION**

This Court should expedite review of this motion and, for the foregoing reasons, grant petitioners' motion prior to July 1, 2012. The Court should stay the trial court's preliminary injunction order pending the

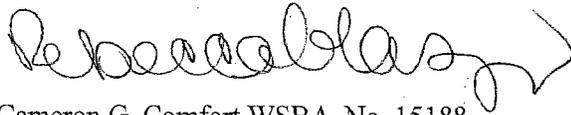
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final resolution of this Court's review. Alternatively, the State requests a temporary stay until such date as the Court may rule upon this motion.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of June, 2012.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in cursive script, appearing to read "Rebecca Glasgow", written in black ink.

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