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CASE NUMBER: 16-2-30233-5 SEA

The Honorable John Erlick

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

AMERICAN HOTEL & LODGING ASSOCIATION, SEATTLE HOTEL ASSOCIATION, and WASHINGTON HOSPITALITY ASSOCIATION, Plaintiffs, v. CITY OF SEATTLE, Defendant.	No. 16-2-30233-5 SEA PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

City of Seattle Initiative 124 ("I-124") demonstrates the dangers of legislating by initiative and the importance of judicial review to ensure compliance with the safeguards found in the Washington Constitution and the City Charter. I-124 was sold as protection for hotel workers, but it actually creates a blacklisting requirement for hotel guests and imposes a health insurance subsidy requirement, among other things. I-124 includes a grab bag of dissimilar provisions in violation of the requirements that all legislation address only a single subject and that the subject be expressed in the title. In addition, many of the provisions of the initiative

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conflict with constitutional or statutory provisions. The Court should enter judgment declaring the measure invalid.

II. RELIEF REQUESTED

Plaintiffs American Hotel & Lodging Association, Seattle Hotel Association, and Washington Hospitality Association (collectively, "AHLA") move for summary judgment declaring I-124 to be invalid in its entirety, or, alternatively, voiding Parts I, II, and V.

III. STATEMENT OF FACTS

This is a facial challenge to I-124, the text of which can be found at Appendix A. The initiative was adopted by Seattle voters on November 8, 2016.

The American Hotel & Lodging Association is a trade association with over 24,000 members representing every segment of the lodging industry. Crawford Declaration ¶ 3. It has members located in Seattle subject to I-124. *Id.* ¶ 4. The Seattle Hotel Association is an organization of 59 member hotels located in the city of Seattle, some of which are subject to I-124. Lane Declaration ¶¶ 4, 6. The Washington Hospitality Association is a trade association representing more than 6,000 members involved in all aspects of the hospitality industry. *Id.* ¶ 3. It has hotel members located in Seattle and subject to I-124. *Id.* ¶¶ 3, 6. I-124 is imposing and will continue to impose additional operating challenges and costs and will cause economic injury to the Seattle hotels belonging to these trade associations. Crawford Decl. ¶ 6; Lane Decl. ¶ 7.

IV. STATEMENT OF ISSUES

A. Whether I-124 violates the requirements that an initiative cover a single subject and that the subject be expressed in the title.

B. Whether the blacklisting requirements violate the state and federal constitutions' guarantees of privacy and due process.

C. Whether the health and safety requirements of I-124 are preempted by WISHA.

D. Whether the burden-shifting requirements for retaliation claims violate existing law, due process, and the right to a jury trial.

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V. EVIDENCE RELIED UPON

The Declarations of Brian Crawford and John Lane and the text of I-124 (attached as Appendix A).

VI. AUTHORITY AND ARGUMENT

A. I-124 Violates the Single Subject and Subject-in-Title Rules.

Both the Washington Constitution (art. II, sec. 19) and the Seattle City Charter (art. IV, sec. 7) impose two requirements for all legislation: (1) no bill shall embrace more than one subject; and (2) no bill shall contain a subject that not expressed in the title. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207 (2000). These requirements apply to ordinances adopted by initiative. *See Wash. Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wn.2d 642, 654 (2012). If legislation fails either requirement, it is wholly invalid. *See State v. Thomas*, 103 Wn. App. 800, 813 (2000).

I-124 fails on both counts. I-124 is a disjointed compendium of diverse and unrelated components, cobbled together for political expediency. It regulates the employment terms between hotels and their employees, but it also affects a third group – hotel guests who are strangers to the employment relationship governed by the rest of I-124. In addition, I-124's title failed to give voters adequate notice of controversial provision with far-reaching and serious implications. Accordingly, the Court should declare I-124 void.

1. I-124 Violates the Single Subject Rule.

Determining whether an initiative violates the single subject rule requires a two-step analysis. The standard depends upon whether the ballot title is deemed "general" or "restrictive."[1] *See Amalgamated Transit*, 142 Wn.2d at 207-10. Where the title of an enactment is general, courts apply a "rational unity" test. *Id.* When the title is restrictive,

[1] Until recently, the title of an initiative was just the statement of its subject, *e.g.*,"Initiative 124 concerns . . ." *See, e.g., Amalgamated Transit*, 142 Wn.2d at 209; *Wash. Fed'n of State Employees v. State*, 127 Wash. 2d 544, 555 (1995). In two recent cases, without explanation for the change, the Court said the ballot title "consists of a statement of the subject of the measure, a concise description of the measure, and the question of whether or not the measure should be enacted into law." *WASVP*, 174 Wn.2d at 655; *accord, Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 782 (2015). Under either approach, the title of Initiative 124 is restrictive.

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courts apply a more stringent test, and the measure must comply more strictly with the single subject rule. "[L]aws with restrictive titles fail if their substantive provisions do not fall fairly within the restrictive language." *Lee v. State*, 185 Wn. 2d 608, 621 (2016) (quotation omitted).

a. I-124's Title is Restrictive, Which Requires Strict Compliance With the Single Subject Rules.

A restrictive title "is one where a particular part or branch of a subject is carved out and selected as subject of the legislation." *See State v. Broadaway*, 133 Wn.2d 118, 127 (1997). A restrictive title is "narrow" as opposed to broad; it is of specific rather than generic import. *Id.* If an enactment's title "carves out an area" for legislation, it is restrictive. *Id.* at 127-28. Courts more readily find violations of the single subject rule where a restrictive title is used. *Amalgamated Transit*, 142 Wn.2d at 211.

In *Amalgamated Transit*, the Court cited several examples of restrictive titles, including: (1) "[s]hall criminals who are convicted 'of most serious offenses' on three occasions be sentenced to life in prison without parole?" *Thorne v. State*, 129 Wn.2d 736, 757-58 (1996); (2) "[a]n act relating to local improvements in cities and towns...," *Cory v. Nethery*, 19 Wn.2d 326, 329-31 (1943); (3) "[a]n act relating to the rights and disabilities of aliens with respect to land...," *DeCano v. State*, 7 Wn.2d 613, 623 (1941); and (4) "[a]n act giving workmen's compensation benefits to persons engaged in hazardous and extra-hazardous occupations in charitable institutions," *Swedish Hosp. v. Dep't of Labor & Indus*., 26 Wn.2d 819, 830-31 (1947).

A general title, in contrast, must be broad rather than narrow. *Washington Fed'n*, 127 Wn.2d at 555. A general title is comprehensive and generic rather than specific. *Olympic Motors, Inc. v. McCroskey*, 15 Wn.2d 665, 672 (1942). In *Amalgamated Transit*, the Court also cited examples of general titles: (1) "[a]n Act relating to violence prevention," *In re Boot*, 130 Wn.2d 553, 566 (1996); (2) "[a]n Act relating to tort actions...," *Scott v. Cascade Structures*, 100 Wn.2d 537, 546 (1983); and (3) "[a]n Act Relating to Community Colleges...," *Washington Educ. Ass'n v. State*, 97 Wn.2d 899, 906-07 (1982).

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In *State ex. rel Washington Toll Bridge Authority v. Yelle*, the Court found that a title referring to "toll bridges" and "ferry connections" was not general in dealing with the broad topic of a "transportation system." 32 Wn.2d 13, 27 (1948). Instead, the Court held the title was restrictive because it dealt with two specific modes of transportation, bridges and ferries. The Court stated: "Referring… to the *title* of the 1945 act, we note that it does not employ any such broad, general term as 'transportation system,' but deals only with the specific subject of toll bridges and, at most, highway and ferry connections and approaches thereto." *Id.* at 27 (emphasis in original).

Similarly, I-124's title identifies specific aspects of a particular industry for regulation and then (after the phrase "this initiative would") purports to list the issues addressed:

> Initiative 124 concerns health, safety, and labor standards for Seattle hotel employees.
>
> If passed, this initiative would require certain sized hotel-employers to further protect employees against assault, sexual harassment, and injury by retaining lists of accused guests among other measures; improve access to healthcare; limit workloads; and provide limited job security for employees upon hotel ownership transfer. Requirements except assault protections are waivable through collective bargaining. The City may investigate violations. Persons claiming injury are protected from retaliation and may sue hotel-employers. Penalties go to City enforcement, affected employees, and the complainant.

Appendix A (petition).

Rather than offering a general statement of its subject, the title indicates it applies only to a specific business sector: the hotel industry. And rather than identifying the measure as regulating the hotel industry generally, the title identifies the kinds of standards proposed: health, safety, and labor. In addition, the description sets forth specific—although incomplete and misleading—details regarding the different components, suggesting to voters that the title captures all the topics addressed. *Id.* Accordingly, the Court should closely scrutinize I-124, require strict adherence to the single subject rule, and invalidate the law for containing multiple subjects.

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b. I-124 Contains Multiple Subjects.

The purpose of the single-subject rule is to "prevent logrolling or pushing legislation through by attaching it to other legislation." *See Amalgamated Transit*, 142 Wn.2d at 207. When an initiative embodies multiple subjects, "it is impossible for the court to assess whether either subject would have received majority support if voted on separately. Consequently, the entire initiative must be voided." *City of Burien v. Kiga*, 144 Wn.2d 819, 825 (2001) (citing *Power, Inc. v. Huntley*, 39 Wn.2d 191, 200 (1951)). As Justice Rosellini observed in his dissent in *Fritz v. Gorton* —a dissent the Supreme Court unanimously ***adopted*** in *Washington Fed'n of State Employees*, 127 Wn.2d 544—"Logrolling is an even greater danger to the democratic exercise of power in the initiative process. . . . [T]he electorate is faced with a Hobson's choice: reject what it likes or adopt what it dislikes. Only article 2, section 19 preserves the integrity of the initiative process." 83 Wn.2d 275, 333 (1974).

Whether intended or not, I-124 is a prime example of logrolling. The ordinance comprises at least four new laws, some of which govern the employer-employee relationship, others of which severely affect the privacy and due process rights of third parties, and each of which could and usually would stand on its own. The ordinance

1. Requires hotels (a) to provide panic buttons to employees; (b) to maintain a blacklist of hotel guests accused of sexual harassment or assault; (c) to share that list with other hotel employees; and (d) to deny accommodations to accused guests for three years, if the employee signs a statement or presents "other evidence" and regardless of any hotel or law enforcement investigation into the incident;

2. Imposes requirements for informing employees about chemicals used in the course of work, limits the area employee may be assigned to clean, and requires premium pay for all hours worked in a day in which the limit is exceeded;

3. Requires hotels to fund medical insurance for a broad swath of their employees benchmarked to the highest tier policies on the state insurance exchange; and

4. Requires retention and preferential hiring of existing hotel employees after a change in ownership.

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SMC 14.25.020-140. In addition, I-124 provides unions leverage in organizing and bargaining by allowing waiver of the provisions of I-124 (except the panic button and blacklisting requirements), but only in a union contract. SMC 14.25.170. There is no way for the Court to know if any of these diverse new laws would have been adopted if voters had the opportunity to vote on them separately. Accordingly, I-124 is invalid. *See Kiga*, 144 Wn.2d at 824-25.

c. Even If I-124's Title Is General, It Violates the Single Subject Rule.

Even if the Court deemed I-124's title to be general, it nevertheless violates the single subject rule because there is no "rational unity" among the subjects. The mere fact that they all pertain in some way to the hotel industry is not enough. In *Amalgamated Transit*, the Supreme Court determined that a ballot title was general but nevertheless found no rational unity between the two subjects: (1) reducing automobile license tab fees and eliminating the Motor Vehicle Excise Tax ("MVET"), and (2) providing a method of approving all future tax increases, designed to prevent an increase in taxes to offset the elimination of the MVET. 142 Wn.2d at 217. The Court rejected the argument that the tax increase requirement (to prevent governments from increasing other fees and taxes to compensate for lost MVET revenues) was sufficiently related to the elimination of the MVET, finding "neither subject necessary to implement the other." *Id.*; *accord Wash. Toll Bridge Auth v. State.*, 49 Wn.2d 520, 524 (1956) (act impermissibly contained two subjects not rationally united: (a) setting procedure for approving and financing toll roads and (b) approving a toll road between Tacoma and Everett).

I-124's four core provisions run the gamut from a mandatory blacklist of guests accused of sexual harassment, to information requirements regarding chemical exposure, to square footage cleaning limits, to a sector-specific attempt at health insurance reform. Some of the provisions regulate the relationship between a hotel and its employees, but others severely affect the rights of third parties – hotel guests who are strangers to the employment relationship. None of these provisions is necessary to implement the others. The fact that they all relate in some way to the hotel industry is not enough to satisfy the requirements of article

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19, section 2 or the City Charter. *Id.* I-124 may not have been an intentional effort at logrolling (though it looks like it), but it nonetheless manifests the evils of the practice.

Buried in the text of the measure, the statements of the "intent" of each of the four key sub-parts of the initiative further confirm I-124 addresses more than one subject:

> Part I: "It is the intent of Part I of this measure to protect hotel employees from violent assault, including sexual assault, and sexual harassment and to enable employees to speak out when they experience harassment or assault on the job." SMC 14.25.020.
>
> Part II: "It is the intent of Part II of this measure to protect hotel employees from on-the-job injury." SMC 14.25.070.
>
> Part III: "It is the intent of Part III of this measure to improve access to affordable family medical care for hotel employee." SMC 14.25.110.
>
> Part IV: "Part IV of this measure is intended to reduce disruptions to the Seattle economy that could result from the increasing number of property sales and changes in ownership in the hotel industry and also to protect low-income worker." SMC 14.25.130.

It strains the concept of "rational unity" beyond the breaking point to contend that subjects as diverse as these four stated aims are sufficiently related to qualify as a single subject. A measure intended to protect employees from sexual assault, reduce workplace injuries (from chemical exposure and strenuous work), improve access to family health insurance, and reduce disruptions in the economy cannot pass the single subject test if that test has any function at all. Voters were entitled to vote separately on these disparate subjects. I-124 denied them this chance, and it is therefore invalid. *See Kiga*, 144 Wn.2d at 828.

2. I-124 Is Invalid Because it Contains Subjects Not Identified in Its Title.

The purpose of the subject-in-title requirement is to "notify those voting on the measure of its contents." *Amalgamated Transit*, 142 Wn.2d at 191-92. The Supreme Court has recognized that the subject-in-title rule is particularly important for initiatives:

> We think the assertion may safely be ventured that it is only a few persons who earnestly favor or zealously oppose the passage of a proposed law, initiated by petition, who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this

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> information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage. *It is important, therefore, that the title to laws proposed in the manner indicated should strictly comply with the constitutional requirement*.

Fritz, 83 Wn.2d at 331-32 (*quoting State ex rel. v Richardson*, 48 Or. 309, 319 (1906)) (italics in original); *accord Amalgamated Transit*, 142 Wn.2d at 217. The ballot title of an initiative does not satisfy the subject-in-title requirement unless it "gives notice which would lead to an inquiry into the body of the act or indicates the scope or purpose of the law to an inquiring mind." *Id.* at 217.

I-124's title fails to notify voters of the nature and reach of some of its most contentious and problematic subjects.[2] ***First***, the title fails to provide notice of the incontestable and automatic punishment regime I-124 imposes on individuals placed on the required blacklist. The concise description in I-124's ballot title merely states the initiative would require hotels "to further protect employees against assault, sexual harassment, and injury by retaining lists of accused guests among other measures." Nothing in that description notified voters the ordinance ***requires*** hotels to share the list of accused guests with any hotel employee who might come into contact with them (even when the accusing employee is unwilling to sign a statement verifying the accusation). SMC 14.125.040(C). Nothing in the description informed voters the ordinance would ***require*** hotels to deny lodging to accused guests ***for three years,*** on the strength of a single signed statement ("or other evidence," whatever that means), ***without any means of challenging the accusation or the mandatory punishment***. SMC 14.25.040(B). A hotel guest is not even entitled to notice of the allegation.

Nothing in the title or the description put voters on notice of these controversial provisions that deprive a hotel of any opportunity to investigate a complaint before taking

[2] This is true under both definitions of a ballot title used by the Washington Supreme Court. *See supra*, n.1. Under the narrower definition in *Amalgamated Transit*, a ballot title (like the title of a legislative bill) comprises only the statement of subject (here, "Initiative 124 concerns health, safety, and labor standards for Seattle hotel employees"). If that is the title, it is even easier to conclude the title does not identify all the subjects addressed by I-124.

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action against a guest and denying an accused guest any opportunity to clear his or her name.[3] Likewise, nothing in the title or the description notifies voters that the blacklists required by the ordinance will become public records, available to the media or anyone else who seeks production of the records of the City's monitoring or enforcement activities. *See* RCW 42.56.0001 *et seq*.

Second, the ballot title fails to notify voters of the nature and breadth of I-124's health insurance mandate. The statement of subject is completely silent on the issue. The concise description merely states that the bill will "improve access to healthcare." That sounds like a law requiring an on-site nurse at hotels. In reality, I-124 requires funding for premium health insurance for a huge portion of the employees working in Seattle's large hospitality industry. This gold-level medical insurance mandate ostensibly only applies to low-wage employees. However, "low-wage employee" is defined as "an employee whose total compensation from the employer is 400 percent or less of the federal poverty line for the size of the employee's household." SMC 14.25.160. The U.S. Department of Health & Human Services 2017 Poverty Guidelines provide that the poverty line for a family of five living in the 48 contiguous states is $28,780. *See* https://aspe.hhs.gov/poverty-guidelines. Accordingly, an individual that is part of a family of five would be considered a "low-wage" employee even if he or she made $100,000 per year, and regardless of whether there were other wage earners in the household. The broad reach of this insurance mandate is significant because many voters this election cycle considered health care a critical issue.[4] I-124 is a local, industry-specific health care

[3] The question of what process is due to those accused of sexual assault has been a matter of hot debate in the context of campus sexual harassment policies. After Harvard instituted a policy limiting the procedural rights of the accused, 28 of Harvard's law professors opposed the change, arguing the rules were "overwhelmingly stacked against the accused" and "starkly one-sided." *See* Rethink Harvard's sexual harassment policy, https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html; *see also Doe v. Ohio State Univ.*, No. 15-CV-2830 (S.D. Ohio Nov. 7, 2016) (due process requires "a fundamentally fair hearing process" before imposing punishment for sexual assault); *Doe v. Univ. Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL (Sup. Ct. Cal. July 10, 2015) (college hearing on sexual assault accusation failed to provide due process where, among other things "the university unfairly limited the petitioner's right to cross-examine the primary witness against him.").

[4] According to a July 2016 Pew Research poll, 74% of registered voters said health care was "very important" to their vote in 2016. *See* http://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/. A

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reform bill tangled up with, and largely hidden by, a mess of other provisions. Voters were entitled to notice that this initiative was going to impose a premium health insurance coverage mandate for hotel employees.

The title fails to provide notice of these two controversial provisions and is therefore void.

B. Part I of I-124 Forces Hotels to Violate the Constitutional Rights of Their Guests and Is Thus Void.

It has long been understood that a person has an interest in his or her reputation: "But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 12 (1990) (quoting W. Shakespeare, *Othello*, act III, sc. 3). A person's interest in an untarnished reputation is protected by both the Washington and U.S. Constitutions. Therefore, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

Part I of I-124 requires hotels to violate the reputational rights of their guests, without affording any notice or *opportunity* to be heard. Part I requires that hotels keep and publicly share a list of hotel guests who have been accused by hotel employees of sexual harassment or assault. Once listed, the hotel guest has no way to confront the accuser or clear his or her name. And because the accuser does not have to produce any supporting evidence (or even sign a statement verifying the allegation) and neither the City nor the hotel is empowered to investigate, mistaken (or false) accusations are inevitable. This part of I-124violates the privacy and due process rights of hotel guests under the Washington Constitution, art. I, sec. 7, and the Fourteenth Amendment to the U.S. Constitution.

Because I-124 forces hotels to be the instruments of these constitutional violations, they have standing to bring these claims. *See Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976)

November 2016 Gallup poll found that 10% of registered voters considered health care *the most important* problem facing the country. *See* http://www.gallup.com/poll/1675/most-important-problem.aspx.

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(explaining third-party standing is allowed when the third party's interests are "inextricably bound up with the activity the litigant wishes to pursue;" when the litigant is "fully, or very nearly, as effective a proponent of the right" as the third party; or when the third party is less able to assert her own rights). Vendors, for example, "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S. 190, 195 (1976). Likewise, doctors may assert the rights of their patients. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965). And advocacy organizations such as the NAACP may assert the constitutional rights of their members. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958). In addition, I-124 imposes additional operational, labor, and administrative costs on hotels and will reduce the number of customers (at a minimum by the number of guests a hotel must bar from its premises), resulting in economic injury, which also confers standing. *WASAVP*, 174 Wn. 2d at 653.

1. I-124 Violates a Hotel Guest's Right to Privacy under the Washington Constitution.

I-124 interferes with the right to privacy protected by article I, section 7 of the Washington Constitution. Under article I, section 7, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The right to privacy protects against disclosure of intimate personal information. *Serv. Employees Int'l Union Local 925 v. Freedom Found.*, 2016 WL 7374228, at *7 (Wn. App. 12/20/16). When determining whether this right has been violated, the court engages in a two-part analysis, asking first whether the "action complained of constitute[s] a disturbance of one's private affairs," and, second, whether the authority of law justifies the intrusion. *State v. Surge*, 160 Wn.2d 65, 71 (2007).

a. Placement on the blacklist interferes with a person's "private affairs."

Placing a guest on the blacklist constitutes a disturbance of the individual's private affairs. I-124 requires hotels to record and to publish (to hotel employees and to the City)

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information — unsubstantiated allegations of sexual misconduct— that is unquestionably information about an individual's "private affairs."

In *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199 (2008), the Washington Supreme Court evaluated the disturbance of the right to privacy in a similar context. Certain Bellevue teachers had been accused of sexual misconduct. The Seattle Times sought the names of these instructors through a public records request. The Supreme Court held the Seattle Times had no right to this information. Two of the Court's conclusions are particularly germane. First, it held "[t]he mere fact of the allegation of sexual misconduct toward a minor may hold the teacher up to hatred and ridicule in the community, without any evidence that such misconduct ever occurred." *Id*. at 215. Second, it held "[t]he fact that a teacher is accused of sexual misconduct is a 'matter concerning the private life'" and therefore the accused "teachers have right to privacy in their identities." *Id*. at 215-16 (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135 (1978)). In other words, "the public has no legitimate interest in finding out the identity of someone accused of an unsubstantiated allegation of sexual misconduct." *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 415 (2011).

Under these authorities, I-124 violates hotel guests' right to privacy. The initiative requires a hotel to place a guest on a blacklist if an employee accuses the guest of harassment, even if the employee declines to sign a statement verifying the allegations. This blacklist is not confidential or private.[5] To the contrary, hotels are required to notify "any hotel employee assigned to work in guest rooms . . . of any guest on the list . . . who is staying at the hotel." SMC 14.25.030(C). If the employee does sign a statement (or provide "other evidence"), the hotel must bar the guest from the hotel for three years. Moreover, the City will have access to any such lists to monitor compliance and to investigate alleged violations of the ordinance

[5] Under I-124 14.25.060(C), before a hotel reports an incident to law enforcement, the employee must consent, and under .150(D)(2), the City must promulgate rules protecting "the identity and privacy rights of employees who have made complaints," demonstrating that even the sponsors of the ordinance recognize that involvement in allegations involving sexual misconduct is a sensitive issue.

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under SMC 14.25.150(D), and Washington's Public Records Act makes such records public. RCW 42.56.001 *et seq*. Because a hotel has no right to investigate the validity of a report before putting a guest on the blacklist, and because there is no opportunity for a guest to refute the charges (and even if a guest did so, the ordinance still requires blacklisting based on a mere allegation), the information available to the public has the potential to be largely inaccurate. The affected guest is left with no power to clear his or her name and must simply watch as false or damaging information is spread throughout the community.

The potential harm can be seen in just a few examples. Take an associate practicing law in California. Every year she travels to Seattle with her firm to attend a conference. While attending the 2017 conference, a hotel employee accuses her of harassment or assault and signs a statement. She is entitled to no notice of this charge or opportunity to dispute it. When attempting to register for the conference the following year, the associate would be denied accommodations at the hotel her firm books and forced to explain why to her employer. This could result in damage to her career and reputation. Or, consider the married man and father who travels to Seattle from Yakima for business and is accused of harassment or assault. When this becomes public through a public records request, he has no recourse while the accusation spreads through his community, damaging his marriage, friendships, family, and career.

These hypotheticals are not farfetched. In 2011, Yale's quarterback, Patrick Witt, was accused of sexual assault. In that case, the accuser never filed a complaint, never went to the police, and never offered any evidence. In the words of Witt: "My summer employer and the NFL certainly couldn't understand it, and the media flat out didn't care --- the words 'informal complaint' were all that was needed to establish my guilt in their eyes." Patrick Witt, *A Sexual Harassment Policy That Nearly Ruined My Life*, Boston Globe, https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html (last visited Feb. 6, 2017). Witt was forced to withdraw his Rhodes Scholarship application after being announced as a finalist, and his employer rescinded his job offer. *Id.* He's had to "address it with every prospective employer

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whom [he's] contacted, with every girl that [he's] dated since, and even with Harvard Law School during [his] admissions interview." *Id.* Like the blacklist required by I-124, Yale's "informal 'process' begins and ends at the point of accusation; the truth of the claim is immaterial." *Id.*

Not only is the harm from false or erroneous accusations serious, it is also reasonably likely that the blacklisting mechanism would be abused. Misuse of arguably legitimate processes for unlawful ends is not uncommon in labor disputes. *See, e.g., BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 536-37 (2002) (recognizing that abuses of the litigation process occur in labor disputes); *National Association of Letter Carriers*, Case 13-CB-17418, Advice Memorandum 11/25/03 (union abused grievance process to attack employee who declined union membership); *New England Council of Carpenters*, Case 1-CC-2712, Advice Memorandum 12/8/03 (union filed comments in opposition to application for licensing of a construction project with goal of imposing litigation costs, regardless of the outcome).

b. The authority of law does not justify this intrusion.

The "authority of law" does not justify the intrusion worked by I-124; the public has no legitimate interest in such a blacklist because of the lack of verification. *Bellevue John Does*, 164 Wn.2d at 216-17 (only when a complaint regarding is substantiated or results in some sort of discipline, does a public employee lose a right to privacy in the complaint). Making accusations of misconduct public is only justified when the public has a legitimate interest in the information, and the public only has a legitimate interest when the accused has been afforded due process. *ACLU of Nevada v. Masto*, 670 F.3d 1046, 1060 (9th Cir. 2012) (holding bill requiring registration as sex offenders could only be constitutionally applied to those who "have been convicted of a sex offense or found as the result of a judicial hearing to have committed a sexually motivated crime, with all the attendant procedural protections guaranteed by [the state's] criminal justice system").

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Here, because accused guests have no opportunity to dispute the accusations and no mechanism to prevent appearing on a blacklist based on false or mistaken allegations, their right to privacy will have been unconstitutionally violated.

2. **I-124 Violates the Fourteenth Amendment to the U.S. Constitution.**

Under the U.S. Constitution, the right to privacy is found in the Fourteenth Amendment. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973). When an action by government threatens to tarnish a person's reputation, he or she has a constitutional right to notice of the threat and a chance to clear his or her name. *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (quoting *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100 (9th Cir. 1981)); *Nguyen v. State, Department of Health Medical Quality Assurance Comm'n*, 144 Wn.2d 516, 523-24 (2001). This right to due process is triggered whenever the government action, such as placement of a person's name on a list: (1) causes some type of social stigma; and (2) alters a "right or status previously recognized by state law." *Paul v. Davis*, 424 U.S. 693, 711 (1976) (adopting this test, which has been called "stigma plus"). "Where these elements exist," a person is "'entitled to notice and a hearing to clear his name.'" *Ulrich*, 308 F.3d at 982 (quoting *Bollow*, 650 F.2d at 1100); *Nguyen*, 144 Wn.2d at 523-24. I-124 satisfies both factors of *Paul's* "stigma plus" test: (1) it causes social stigma; and (2) it interferes with an individual's interest in obtaining public accommodation, an interest previously recognized by state law. Therefore, because I-124 provides no opportunity for due process, it is unconstitutional.

a. Being placed on the blacklist damages the name and reputation of hotel guests.

There is no doubt that being placed on a publicly available list of hotel guests accused of assault, sexual assault, or sexual harassment stigmatizes the person listed. *See* SMC 14.25.040(A); *Brown v. Montoya*, 662 F.3d 1152, 1169 (10th Cir. 2011) ("Placing a person's name on a public registry suffices as a public statement for the purposes of the stigma plus test."); *Smith v. Doe*, 538 U.S. 84, 98 (2003) (quoting Massaro, *Shame, Culture, and American*

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Criminal Law, 89 Mich. L. Rev. 1880, 1913 (1992) (historically, colonial punishments using labeling was designed to make the offender "suffer 'permanent stigmas, which in effect cast the person out of the community.'")).

b. The stigma created by I-124's blacklist interferes with an interest previously recognized by the state.

The "plus" factor of the stigma plus test asks whether the government action interferes with a tangible interest created by the state. *In re Meyer*, 142 Wn.2d 608, 621 (2001). A tangible, state-created interest need not rise to the level of a property right. *Constantineau* involved a blacklist of problem drinkers posted at bars and liquor stores that resulted in the blacklisted person being unable to purchase alcohol. 400 U.S. at 435. As discussed in *Paul v. Davis*, it was this posting that "significantly altered her status as a matter of state law, and it was that alteration of legal status, which combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." 424 U.S. at 708-09.

In this case, the initiative interferes with the interest in obtaining public accommodation. This interest is at least as significant as the interest in buying alcohol recognized in *Constantineau*. Moreover, Washington law expressly recognizes the importance of fair access to public accommodation. In RCW 49.60.215, the Legislature recognized the right of all persons to secure lodging in places of public accommodation without discrimination on the basis of membership in a list of protected classes. This interest in securing public accommodation is sufficient to satisfy the "plus" factor under the Fourteenth Amendment.

Because Part I violates the privacy and due process rights of hotel guests, it is invalid. The court should enter judgment declaring Part I of I-124 void.

C. Part II of I-124 Is Preempted by WISHA and Is Thus Void.

Part II of I-124 is titled "Protecting Hotel Employees From Injury." Its stated intent is "to protect hotel employees from on-the-job injury." SMC 14.25.070. It requires hotels to:

- "[P]rovide and use safety devices, and safeguards and use work practices, methods, processes, and means that are reasonably adequate to make their workplaces safe" (SMC 14.25.080);

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- "Control chemical agents in a manner that they will not present a hazard" (SMC 14.25.090); [6] and

- Limit housekeeping services to 5,000 square feet of guest rooms cleaned per eight-hour workday, thereby limiting the number of rooms to be cleaned (SMC 14.25.100).

This provision of I-124 is preempted by state law, specifically the Washington Industrial Safety and Health Act of 1973, chapter 49.17 RCW ("WISHA"), and is therefore invalid as a matter of law.

Where state laws expressly or impliedly preempt a legislative field, local ordinances on the same subject violate the Supremacy Clause of Washington's Constitution. *Clallam Cty. Deputy Sheriff's Guild v. Bd. of Clallam Cty. Comm'rs*, 92 Wn.2d 844, 850 (1979); *see also Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561 (2001) (Washington cities are preempted from enacting ordinances if the state legislature "has expressly or by implication stated its intention to preempt the field."). To determine whether a state statute preempts local laws on the same subject, the first question is whether the legislature expressed preemption in the statute; if not, the "court must consider both 'the purposes of the statute and ... the facts and circumstances upon which the statute was intended to operate' in order to determine the intent of the legislature." *Heinsma*, 144 Wn.2d at 561 (quoting *Brown v. City of Yakima*, 116 Wn.2d 556, 560 (1991)).

Here, the legislature expressly stated that WISHA preempts the field of workplace safety. RCW 49.17.270 provides:

> The department [of labor and industries] shall be the ***sole and paramount administrative agency responsible for the administration of the provisions of this chapter,*** and any other agency of the state or ***any municipal corporation or political subdivision of the state*** having administrative authority over the inspection, survey, investigation, or any regulatory or enforcement authority of safety and health standards related to the health and safety of employees in any workplace subject to this chapter, ***shall be required, notwithstanding any statute to***

[6] Part 2 copied these provisions verbatim from WISHA rules. *See* WAC 296-800-11010; WAC 296-800-11040.

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> ***the contrary, to exercise such authority as provided in this chapter and subject to interagency agreement*** or agreements with the department made under the authority of the interlocal cooperation act (chapter 39.34 RCW) relative to the procedures to be followed in the enforcement of this chapter. . . .

(Emphasis added). This section dictates that the Department of Labor and Industries ("L&I") "shall be the ***sole and paramount*** administrative agency responsible for the administration" of WISHA. (Emphasis added). Unequivocally, the legislature intended L&I to be the ***only*** agency responsible for administering the regulation of industrial safety and health. *Id.* The legislature reinforced this notion by declaring L&I "paramount." *See Heinsma*, 144 Wn.2d at 560 ("When the state's interest is ***paramount*** or joint with the city's interest, the city may not enact ordinances affecting the interest unless it has delegated authority.") (Emphasis added.)

Courts have found similar statutory language to express preemption. *See, e.g.*, *Atay v. Cty. of Maui*, No. 15-16466, No. 15-16552, 2016 WL 6832509, at *16 (9th Cir. Nov. 18, 2016) (statute stating that state had *"**sole administrative responsibility*** and accountability for that designated function of invasive species control" indicated legislative intent to preempt counties from regulating invasive species (emphasis added)); *Weyerhaeuser Co. v. King Cty.*, 91 Wn.2d 721, 734 (1979) (finding Department of Ecology had exclusive control over water quality standards where statute said the Department "***has sole responsibility*** for establishing" such standards (emphasis added)).

Further, RCW 49.17.270 not only makes L&I the sole agency responsible for regulating workplace safety and health, it also expressly constrains cities and towns that help administer state rules by providing that "any municipal corporation or political subdivision . . . shall be required, notwithstanding any statute to the contrary, to exercise ***such authority as provided in this chapter and subject to an interlocal agreement***." (Emphasis added.) Thus, a city like Seattle can only enforce the health and safety standards provided by WISHA and then only pursuant to an interlocal agreement, which it does not have.

Because Part II is preempted by WISHA it is invalid.

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D. I-124 Is Invalid Because It Creates a Presumption That Conflicts With Existing Law.

More than forty years ago, the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) "established an allocation of the burden of production and an order for the presentation of proof in … discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Under the *McDonnell Douglas* framework, if a plaintiff establishes a prima facie case of discrimination, the burden *of production*, the obligation to produce an alternate, "legitimate, nondiscriminatory reason" for an employment decision, shifts to the defendant. *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). "This burden [on the defendant] is one ***of production, not persuasion***." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000) (emphasis added). Once a defendant produces a reason in response to a *prima facie* case of discrimination, the "*McDonnell-Burdine* presumption drops from the case" and "the fact finder must then decide whether the [adverse employment action] was discriminatory." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). "[A]s in the case of all presumptions… the ultimate burden of persuasion remain[s] at all times with" the plaintiff. *St. Mary's Honor Ctr.*, 509 U.S. at 502.

The Washington Supreme Court has adopted the *McDonnell Douglas* framework, recognizing that "[w]hile *McDonnell Douglas* requires both parties to carry their respective 'intermediate evidentiary burdens' to avoid an unfavorable judgment as a matter of law, ***the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff***." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-81 (2001), *as amended on denial of reconsideration* (emphasis added). Washington courts "apply the same federal *McDonnell Douglas* burden-shifting scheme to retaliation claims." *Short v. Battle Ground Sch. Dist.*, 169 Wn. App. 188, 204 (2012).

Under Article 11 of the Washington Constitution, when an existing law "and municipal regulation on the same subject cannot be harmonized, the municipal regulation must yield." *State v. City of Seattle*, 94 Wn.2d 162, 166 (1980). I-124 directly conflicts with the

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burden-shifting framework governing retaliation claims by creating a "presumption of retaliation if a hotel employer takes an adverse action against an employee within 90 days of the employees' exercise of rights protected in this Chapter 14.25." SMC 14.25.150(A)(5). A hotel can only rebut the presumption "***with clear and convincing evidence*** that the action was taken for a permissible purpose ***and*** that the employee's exercise of rights protected in this Chapter 14.25 was not a motivating factor in the adverse action." *Id.* (emphasis added). This burden shifting purportedly applies to ***any*** retaliation claim, federal, state, or directly under I-124's private right of action provision. This shifting of the burden of proof from plaintiffs to the defendants, and raising the standard of proof for the defendants to "clear and convincing evidence," are contrary to the existing burden of proof for retaliation claims. For instance, if a hotel employee exercises a right under I-124, such as accusing a guest of sexual harassment, then brings a retaliation claim under WLAD, I-124 would conflict with the existing burden-shifting framework for WLAD retaliation claims. *Short*, 169 Wn. App. at 204. It is well recognized that "where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). I-124 conflicts with the established framework for retaliation claims and, therefore, is void.

E. Part V of I-124 Violates the Right to Due Process and a Jury Trial.

The presumption of unlawful conduct created by I-124 violates the due process rights of hotel employers. Due process requires, at a minimum, notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768 (1994). "The opportunity to be heard must be at a meaningful time and in a meaningful manner, appropriate to the case." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216 (2006). A presumption imposed by law deprives a party of a meaningful opportunity to be heard in violation of the due process clause when there is no "rational connection between the fact proved and the ultimate fact presumed." *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910); *Miller v. Paul Revere Life Ins. Co.*, 81 Wn.2d 302, 306 (1972) (for a presumption to comply with the due process clause "there shall be some rational connection between the fact proved and the ultimate fact presumed."). Put another

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way, "a presumption is only permissible … when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until the adversary disproves it." *Sec'y of Labor v. Keystone Coal Min. Corp.*, 151 F.3d 1096, 1100 (D.C. Cir. 1998) (quotations omitted). "If there is an alternate explanation for the evidence that is also reasonably likely, then the presumption is irrational." *Id.* at 1101.

Where a presumption requires an inference that is "not necessarily or universally true, in fact," a party must have a meaningful opportunity to show the actual facts. *Vlandis v. Kline*, 412 U.S. 441, 452 (1973). "[A] statute which creates a presumption which is arbitrary, or which operates to deny a fair opportunity to repel it, violates the due process clause of the fourteenth amendment to the United States Constitution." *Ware v. Phillips*, 77 Wn.2d 879, 886 (1970). Where a presumption does not have empirical support, it deprives a party of procedural due process. *See, e.g.*, *National Mining Ass'n v. Babbitt*, 172 F.3d 906, 910 (D.D.C. 1999) (holding that an administrative presumption fails the rational connection test because proof of basic facts does not make it more likely than not that presumed fact exists); *University of Tex. Med. Sch. at Houston v. Than*, 874 S.W.2d 839, 851 n.10 (Tex. App. 1994) (violation of due process to place burden upon student accused of cheating to show he did not cheat). In *Babbitt*, the court invalidated a rebuttable presumption that damage resulting from earth movement within a certain "angle of draw" from an underground coal mine was caused by the mining operation:

> We think the government has failed to justify its presumption. It has not offered any support, scientific or otherwise, that even begins to establish that the angle of draw delimits the surface area within which it is logical or reasonable to employ an evidentiary presumption of causation.

172 F.3d at 912.

Here, there is no empirical support for the burden-shifting presumption created by I-124. Because I-124 is a voter initiative, there was ***no empirical consideration by the legislature*** to support a presumption that employers retaliated against their employees whenever there is an adverse employment action within 90 days of the employees exercising

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any of their rights under I-124. As discussed above, it is firmly rooted in both Washington and federal jurisprudence that in retaliation cases the ultimate burden of persuasion regarding the reason for an adverse employment action rests "***at all times with the plaintiff***." *Hill*, 144 Wn.2d at 181. To upend that existing law without running afoul of the due process clause, there must be some empirical support for the burden-shifting presumption. *Miller*, 81 Wn.2d at 306. I-124 offers none. I-124 creates an irrational presumption that a hotel employer is retaliating when it takes ***any adverse action against an employee within 90 days*** after that employee exercises ***any rights under I-124***. There are many reasons a hotel employer might take an adverse action against an employee in a 90-day period, such as poor employee performance, violation of an employer's policies, and changes in a hotel employer's business needs. There is an especially high probability of employee turnover in the hospitality industry, which has the lowest median employee tenure of any sector. *See* Bureau of Labor Statistics, *Employee Tenure in 2016*, *available at* https://www.bls.gov/news.release/pdf/tenure.pdf. Moreover, there are no data nor any apparent reason to believe that employers will retaliate against employees that exercise rights under I-124 in some disproportionate manner that justifies completely reversing the usual evidentiary burdens for retaliation cases. In short, there is no empirical support for I-124's burden-shifting presumption. Therefore, the Court should find that the presumption violates due process and is invalid.

The presumption created by I-124 also violates hotel employers' right to a jury trial under art. 1, sec. 21 of the Washington Constitution when defending retaliation claims that implicate I-124. "The jury trial is the rootstock of our liberties, a fundamental right for which the peers of England stood firm at Runnymede against King John, without which the original states refused to ratify the constitution until the bill of rights was added, and which article I section 21 requires must remain 'inviolate.'" *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 785 (2012). "Instructing a jury that under certain circumstances it *must* draw a particular inference infringes upon … the right to trial by jury on that element." *State v. Johnson*, 100 Wn.2d 607, 617 (1983) (emphasis in original). I-124 creates a presumption of retaliation

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whenever an employer takes an adverse action against an employee within 90 days of the employee exercising any rights under I-124. To defeat this presumption, a hotel employer must prove ***by clear and convincing evidence*** both: (1) that the action was taken for a permissible purpose; and (2) that the employee's exercise of rights under I-124 was not a motivating factor in the adverse action. SMC 14.25.150. I-124 thus strips hotel employers of their right to a jury trial on the issue of whether an adverse employment action was retaliatory. The Court should find the presumption created by Part V of I-124 is unconstitutional.

VII. CONCLUSION

For the foregoing reasons, AHLA respectfully requests the Court grant summary judgment and declare I-124 invalid in its entirety, or, alternatively, declare that Parts I, II, and V are void. If the Court concludes that voters would not have passed I-124 without any one of these Parts, the Court should invalidate the entire initiative. *See Amalgamated Transit*, 142 Wn.2d at 227-28; *Hall v. Niemer*, 97 Wn.2d 574, 582 (1982).

This memorandum contains 8,394 words, in compliance with the Local Civil Rules.

DATED this 17th day of February, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the document entitled Plaintiff's Motion for Summary Judgment on the following:

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