THE HONORABLE JOHN ERLICK
Noted for Consideration With Oral Argument
March 31, 2017 at 11:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

AMERICAN HOTEL & LODGING ASSOCIATION, SEATTLE HOTEL ASSOCIATION, and WASHINGTON HOSPITALITY ASSOCIATION; Plaintiffs, v. CITY OF SEATTLE, UNITE HERE! LOCAL 8, AND SEATTLE PROTECTS WOMEN, Defendants.	No. 16-2-30233-5 SEA **INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION AND RELIEF REQUESTED

Plaintiffs (collectively "AHLA") represent hotels in Seattle who earn a profit in large part because of the employees I-124 seeks to protect. AHLA wants to prevent those employees from receiving protection from sexual harassment or inhumane workloads and working conditions, and therefore rely upon outright misstatements and unsupported, overbroad conclusions to support their Motion for Summary Judgment.

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To achieve this end, Plaintiffs assert that I-124 violates the subject-in-title and single-subject requirements for initiatives; that it violates constitutional privacy and due process rights; and that it is preempted.

Such claims are premature and are unsupported by the law. Plaintiffs are not entitled to judgment as a matter of law on any of these claims and, therefore, Intervenor-Defendants request this Court deny Plaintiffs' Motion entirely.

COUNTER-STATEMENT OF FACTS

Sexual harassment of hotel employees—especially room attendants—is so rampant that studies have found it has essentially been normalized. In a survey conducted of Seattle hotel housekeepers, respondents reported incidents of harassment and assault that occur in spaces where they are likely to be alone with a guest. Declaration of Stefan Moritz In Support Of Intervenor's Motion for Summary Judgment ("Moritz Dec."), ¶8, Ex. F. Incidents of being touched or groped, blocked from leaving the room, exposed to sexual content, and harassed in other ways by guests are widespread. *Id*. Housekeepers work in isolation in guest rooms and are afraid of reporting the incidents to their supervisors. *Id*. at ¶9, Ex. F. Respondents reported that they would feel safer if equipped with a panic button. *Id*. at ¶10, Ex. F.

Additionally, hotel staffers suffer from on-the-job injuries due, in large part, to excessive workloads, and they are often given terrible (and unaffordable) options for health care. Moritz Dec., ¶11, Exs. F-H. Housekeepers reported that they suffer from work-related pain due to injuries severe enough to cause long-term hindrance and disruption to the workers' daily lives. *Id*. at ¶12, Ex. F. Respondents reported a variety of short- and long-term consequences of housekeeping work, including residual pain and interference in everyday routines. *Id*. at ¶13, Ex. F. In addition, respondents said that their workloads had increased in the past five years. *Id*.

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Seeing that health and safety standards were needed to protect these workers, Local 8 staff drafted I-124, creating minimum employment standards to protect Seattle's hotel housekeepers from sexual harassment and inhumane workloads, and granting access to affordable family medical care and basic job security. Moritz Dec., ¶14. I-124 passed with 76.59% of Seattle voters' support. Moritz Dec., ¶16.

The City's Office of Labor Standards is developing a timeline for issuing Rules on implementation and enforcement. Moritz Dec., ¶18, Ex. I. No rules have been promulgated yet under I-124. Declaration of Jeff Slayton In Support Of The City's Motion for Summary Judgment ("Slayton Dec."), ¶8.

STATEMENT OF ISSUE

Should this Court grant Plaintiffs' Motion for Summary Judgment, where Plaintiffs cannot articulate a legal theory or doctrine to support their request to invalidate I-124 either in whole or in part?

EVIDENCE RELIED UPON

Intervenors rely upon the Complaint, this Response, and the record in this case.

AUTHORITY AND ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate when there is no genuine issue as to any material fact *and* the moving party is entitled to judgment as a matter of law. CR 56(c); *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794–95, 64 P.3d 22 (2003). Regarding judgment as a matter of law, the moving party must satisfy the substantive requirements inherent in that party's claim or defense. *Sedwick v. Gwinn*, 73 Wn. App. 879, 884, 873 P.2d 528, 531 (1994).

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Here, while all parties agree that there are no issues of material fact, Plaintiffs cannot articulate a valid legal theory or doctrine to support their position to invalidate I-124 in whole or in part. As every claim made by Plaintiffs is either utterly premature or demonstrably unsupported by case law, their Motion should be denied outright.

II. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW.

A. I-124 Complies With The Single Subject And Subject-In-Title Requirements.

The Washington Supreme Court outlined the analysis for determining whether a bill, ordinance, or initiative relates to one general subject or multiple specific subjects, looking to the provision's title for guidance, in *Filo Foods v. City of SeaTac*, 183 Wn.2d 770, 357 P.3d 1040 (2015). When classifying an initiative to the people, the operative title is the ballot title because "it is the ballot title with which voters are faced in the voting booth." *Id.* at 782, citing *Washington Citizens Action of Wash. v. State*, 162 Wn.2d 142, 154, 171 P.3d 486 (2007) (internal citations omitted). Setting aside AHLA's apparent dislike for Court precedent, *see, e.g.*, Plaintiffs' Motion at pg. 3, n. 1, 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." *Id.*, citing *Washington Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 655, 278 P.3d 632 (2012) (hereinafter "*SA&VP*").

Furthermore, as stated in *Filo Foods* at 782-83, when a ballot title "suggests a general, overarching subject matter for the initiative," *Washington Ass'n of Neigh. Stores v. State*, 149 Wn.2d 359, 369, 70 P.3d 920 (2003), it is considered to be general and "great liberality will be indulged to hold that any subject reasonably germane to such title may be embraced," *ATU Local 587 v. State*, 142 Wn.2d 183,207, 11 P.3d 762 (2000) (quoting *DeCano v. State*, 7 Wn.2d 613,627, 110 P.2d 627 (1941)). In *Filo Foods*, a measure impacting working conditions that

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narrowed application to one specific geographical area *and* one specific type of employer was found to be a general subject matter.

Even if the title were somehow restrictive, only rational unity among the matters need exist. *City of Burien v. Kiga*, 144 Wn.2d 819, 825-26,31 P.3d 659 (2001). Rational unity exists when the matters within the body of the initiative are germane to the general title and to one another. *Id*. at 826; *see also Pierce County v. State*, 150 Wn.2d 422, 431, 78 P.3d 640 (2003). There is no constitutional violation if a ballot measure contains incidental subdivisions or subjects as long as they all reasonably relate to the law's general subject. *WFSE v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995)); *SA&VP*, 174 Wn.2d at 656.

Here, the ballot title to I-124 meets the rational unity test, as the overarching subject is—as is stated in its title—"health, safety, and labor standards" for employees of a certain industry. Every one of I-124's provisions rationally relates to "health, safety, and labor standards." The breadth of the topics covered in I-124 and the structure of its title are not appreciably different from the scope and structure of SeaTac Proposition 1, recently reviewed by the State Supreme Court and upheld as valid in *Filo Foods*. *Id.* at 783.

Ignoring this fact, Plaintiffs also assert that I-124 contains multiple subjects, "each of which could and usually would stand on its own"—without *any* authority or support for such an assertion about what "usually" would happen with respect to initiatives related to such clearly related topics as health, safety, and labor standards. Plaintiffs' Motion at pg. 6.

Plaintiffs are also simply wrong that there is precedent for rejecting the type of regulation here, which combines several conditions of employment within one piece of legislation. Over a hundred years ago, the Industrial Welfare Act, 1913 Laws of Washington, c. 174 § 2, made it unlawful to employ women or minors "under *conditions of labor* detrimental to their health and

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morals," and also made it unlawful to employ "women in any industry within the State of Washington at wages which are not adequate for their maintenance," thus combining in the same law requirements relating to multiple conditions of labor.[1] I-124 thus follows in the well-established tradition of legislation in Washington that simultaneously addresses the problems of various conditions of labor.

Plaintiffs additionally assert that "there is no 'rational unity' among the subjects" of I-124 because the "mere fact that they all pertain in some way to the hotel industry is not enough." Plaintiffs' Motion at pg. 7 (citing *ATU 587*, 142 Wn.2d at 209, 217). The State Supreme Court has rejected such an argument. In *Citizens for Responsible Wildlife Mgt. v. State*, the initiative challengers asserted that "there is no rational unity between banning body-gripping traps and the use of the pesticides because it is completely unnecessary to ban traps in order to implement the ban on the use of these chemical compounds as pesticides." 149 Wn.2d 622, 637, 71 P.3d 644 (2003) (internal quotations omitted). The Court held that such an argument "misconstrued" the *ATU 587* decision. *Id.* at 638. It reasoned: "An analysis of whether the incidental subjects are germane to one another does not necessitate a conclusion that they are necessary to implement each other, although that may be one way to do so. This court has not narrowed the test of rational unity to the degree claimed by Citizens." *Id.*

Likewise, this Court has not narrowed the rational unity test to the degree claimed by Plaintiffs. As the following review demonstrates, I-124 bears no resemblance to the mere

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[1] *See also* RCW 49.12 generally (requiring adequate wages, forbidding wage discrimination based on sex, enabling use of paid time off for sick leave, addressing *other conditions of labor*, and authorizing rules and regulations "fixing minimum wages and standards, conditions and hours of labor" to be promulgated by the Department of Labor and Industries, RCW 49.12.091, all in one chapter of one title of the Revised Code of Washington).

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handful of laws with general titles that this Court has struck down on this basis during the more than 120 years of the constitutional provision's existence.

- *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 523-524, 304 P.2d 676 ("*Wash. Toll Bridge Auth. II*") (1956), struck down an act that provided both a procedure for the establishing and financing of toll roads generally and the financing for a specific toll road from Tacoma to Everett. The Court concluded that the statute had two component parts with two different purposes, the first continuing and general in character, the second specific and temporary.
- *Price v. Evergreen Cemetery Co. of Seattle*, 57 Wn.2d 352, 353-54, 357 P.2d 702 (1960), struck down an act that provided for a cemetery fund and administrative board on the one hand, and banned racial discrimination in private cemeteries on the other.
- *Barde v. State*, 90 Wn.2d 470, 472, 584 P.2d 390 (1978) struck down an enactment that provided criminal sanctions for "dognapping" and the recovery of attorneys' fees in civil replevin actions, finding that the two subjects had no rational unity to one another.
- *ATU 587* found that I-695 embraced two subjects— (1) setting license tabs at $30 and (2) providing a method for approving future tax increases—that both fell under the general topic of taxes. 142 Wn.2d at 217. This Court invalidated the initiative in its entirety because the purposes of the two subjects were unrelated to each other. *Id.*
  City of Burien held that the initiative had two subjects: a tax refund and changes to the assessment process including a cap on property taxes. 144 Wn.2d at 827. The Court held that the refund provision was unrelated to the changes to property tax assessments in that the provision encompassed much more than property taxes in general. *Id.*

I-124 does not even arguably suffer from the same structural defect as the measures struck down in *ATU 587* and *City of Burien*, and the bill at issue in *Wash. Toll Bridge Auth. II*.[2] Nor does Proposition 1 comprise subtopics as disparate as those in the laws the Court struck down in *Barde*, *Power, Inc.*, or *Price*. All of I-124's subtopics rationally relate to establishing

[2]In *SV&AP*, the Court explained that the fundamental flaw with the initiatives at issue in *ATU 587* and *City of Burien*, and the bill at issue in *Wash. Toll Bridge Auth. II*, was that they combined a very specific law with an immediate impact with a general measure having only a future impact. 174 Wn.2d at 659.

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and enforcing health, safety, and labor standards with respect to certain employers. It easily satisfies the rational unity test.

Regarding the subject in title challenge, *Filo Foods* is, again, instructive. The Court referred to its earlier holding in *SA&VP*, 174 Wn.2d at 665, regarding Initiative 1183, where that initiative's ballot title indicated a general topic and then spelled out some but not all of its substantive measures. *Filo Foods* at 784. The title was general enough and germane enough to survive challenge. *Id.* Here, just as in *Filo Foods* and *SA&VP*, the language of I-124 "is sufficiently broad to place voters on notice of its contents." *Filo Foods* at 784-85.

Hyperbole and rhetoric aside, the contents of I-124 all concern health, safety, and labor standards and are reasonably germane to the establishment of those employee protections. Plaintiffs' arguments to the contrary fail.

B. Plaintiffs Do Not Have Standing To Assert Hotel Guests' Privacy And Due Process Rights; Such Claims Are Also Premature.

I-124 does not violate guests' privacy and due process rights on its face, and Plaintiffs cannot even assert such a claim as they lack standing to do so. Furthermore, rulemaking has yet to occur, making these claims premature.

1. *Plaintiffs cannot show injury.*

To establish standing to challenge the constitutionality of a statutory provision, Plaintiffs must show that they will be injured by the operation of the provision they seek to challenge. *See, e.g., State v. Rowe*, 60 Wn.2d 797, 799, 376 P.2d 446, 447 (1962) ("A person may not urge the unconstitutionality of a statute unless he is harmfully affected by the particular feature of the statute alleged to be violative of the constitution."). Plaintiffs may not challenge the constitutionality of a statutory provision by asserting that it will injure the constitutional rights of

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others. *See, e.g., State v. Bohannon*, 62 Wn. App. 462, 469, 814 P.2d 694 (1991); *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 488–94, 997 P.2d 960 (2000), *aff'd*, 144 Wn.2d 403, 27 P.3d 1149 (2001).

Where a person or corporation seeks to satisfy the injury-in-fact requirement by alleging a threat of future injury, it must show "an immediate, concrete, and specific injury to themselves." *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 128–29, 272 P.3d 876, 882–83 (2012); *Trepanier v. City of Everett*, 64 Wn. App. 380, 382–84, 824 P.2d 524 (1992).

Plaintiffs assert that they are "certain" that I-124 will impose generalized "challenges and confusion" and "increased operating costs." Plaintiffs do *not* allege that they or any of their members have suffered any injury or face an immediate threat of injury resulting from the provision of I-124 they seek to challenge regarding lists of individuals accused of committing acts of violence toward hotel employees. Plaintiffs *cannot* claim that any person who may at any time be placed on such a list is a member of any Plaintiff association here. Plaintiffs have not established that they or any of their members have suffered any injury resulting from the operation of the statutory provision they seek to challenge.

Even if a member of a Plaintiff were able to establish some injury that would give it standing to sue in its own right, the interests sought to be protected here are not germane to the purpose of trade associations—Plaintiffs in this case are trade associations whose purpose is to promote the economic interests of businesses in the hospitality industry, and the interests sought to be protected by Plaintiffs here are the alleged civil liberties of *individuals* whom Plaintiffs speculate may be accused of committing an act of violence toward hotel employees at some time in the future.

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Plaintiffs cannot establish standing by claiming to stand in the shoes of some third party who is not a member of any of the organizations that are Plaintiffs in this case, and cannot allege that anyone has suffered an injury or faces an "immediate, concrete, and specific" threat of injury due to the challenged provision of I-124. *KS Tacoma Holdings*, 166 Wn. App. at 128–29.

2. *Even if Plaintiffs could establish standing, this claim has no merit, as I-124 does not violate Constitutional rights*.

Plaintiffs fail to show any stigma sufficient to raise a claim because I-124 does not require public disclosure of the names of individuals accused of committing acts of violence toward hotel employees. The statute requires disclosure only to certain hotel employees who will be required to enter guest rooms without other employees present. SMC 14.25.040(C). Such internal disclosure to employees does not constitute the public disclosure required to satisfy the "stigma" element. Moreover, it is the *public disclosure* of a stigmatizing record—not the *creation* and *use* of such a record—that is the basis of the challenge asserted here.

Plaintiffs claim that such lists *may* be disclosed to the public by the operation of *another* statute, Washington's Public Records Act (PRA). Setting aside the dubiousness of disclosure of any such documentation under the PRA, to the extent that such a disclosure would infringe upon any person's constitutional rights, that would only demonstrate a constitutional issue with regard to the PRA; it would not show that I-124 itself was unconstitutional. A statute that requires creation of a record is not unconstitutional because *another* statute might unconstitutionally require the disclosure of that record. The PRA simply has no bearing on the constitutionality of I-124, which plainly does not require any public disclosure of the allegedly stigmatizing records.

I-124's requirement that hotels record the names of guests who have been accused of committing acts of violence toward hotel employees does not violate Article I, Section 7, of the

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Washington Constitution. The Washington Constitution does not confer a greater right to nondisclosure of personal information than the U.S. Constitution. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154 (1997), *amended*, 943 P.2d 1358 (1997). In questions involving an individual's privacy interest in nondisclosure of personal information, "the state constitution offers no greater protection than the federal constitution, which requires only application of a rational basis test." *Id.* at 124. Under the rational basis test, a statute that is rationally related to a legitimate government interest meets constitutional scrutiny. *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 604, 192 P.3d 306 (2008).

In this case, both Washington and the US Constitution require only that the challenged provision of I-124 be rationally related to a legitimate government interest. *See Ino Ino*, 132 Wn.2d at 124. I-124 states that its purpose is "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. This is clearly a legitimate government interest. *See In re Det. of Thorell*, 149 Wn.2d 724, 750, 72 P.3d 708 (2003) (noting legitimate interest in government protecting citizens from sexual violence). The challenged provision of I-124 meets the rational basis test and does not violate the U.S. Constitution or Washington Constitution.

C. Plaintiffs' Claims Asserting I-124 Is Preempted By WISHA Also Fail.

Plaintiffs cite RCW 49.17.270 to proclaim that, since Seattle hotels are subject to health and safety standards under that Chapter, the City's standards in I-124 are preempted; however, Washington's preemption doctrine is well settled. Wash. Const. art. XI, § 11; *City of Tacoma v. Luvene*, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992). Under Article XI, Section 11, cities may enact ordinances prohibiting the same acts prohibited by state law so long as the state enactment

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was not intended to be exclusive *and* the city ordinance does not conflict with the general law of the state. *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 353, 75 P.3d 1003, 1009 (2003), citing *Luvene* at 833.

Here, there is no conflict between I-124 and any provision of RCW 49.17.270. L&I's enforcement powers are not impacted by I-124 in any way; indeed, RCW 49.17 recognizes cities' concurrent jurisdiction to regulate in the area of worker safety in a manner that is consistent with RCW 49.17's procedures. As codified in Seattle Municipal Code 14.25.080-090, employers must "adopt reasonable practices to protect the safety of hotel employees," must "provide and use safety devices, and safeguards," and must "use work practices, methods, processes, and means that are reasonably adequate to make their workplaces safe"—all consistent with, and not in conflict with, anything promulgated by L&I.

D. A Statutory Presumption Overcome By Clear And Convincing Evidence Does Not Violate Due Process Rights Or The Right To A Jury Trial In Civil Cases That Do Not Involve Fundamental Rights.

I-124's imposition of a clear and convincing evidence standard of proof in civil cases does not violate the right to a jury trial. *See Spratt v. Toft*, 180 Wn. App. 620, 636, 324 P.3d 707 (2014) ("The fact that a statute increases the standard of proof needed for a common law claim does not compromise the right of access to courts. It is within the realm of the legislature's authority to impose a heightened burden of proof."). Numerous Washington statutes create presumptions which shift the burden of persuasion[3] and require proof by clear and convincing

[3] Furthermore, Plaintiffs' claims regarding alleged violations of the burden-shifting analysis endorsed by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to be employed in cases brought under federal statutes have no bearing on what burden-shifting analysis would, or should, apply under the Initiative. The City is under no obligation to employ the same burden-shifting tests that federal courts apply when interpreting

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evidence to overcome them. *See, e.g.* RCW 4.24.460(2); RCW 19.118.095(2); RCW 70.160.075. Some of these statutes are cited with approval in *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 543 n. 7, 29 P.3d 689 (2001).

I-124 is a civil statute without criminal penalties. *See* SMC 14.25.150. I-124 does not affect fundamental constitutional rights, as the privacy interest in nondisclosure of personal information is not a fundamental right. *See Ino Ino*, 132 Wn.2d at 124. Accordingly, I-124 may create a rebuttable presumption that shifts the burden of persuasion where certain facts are established, and may require proof by clear and convincing evidence to overcome the presumption—which it does. SMC 14.25.150.A.5. Thus, Plaintiffs' claims to the contrary fail.

CONCLUSION

The Intervenors respectfully request that this Court deny Plaintiffs' Motion for Summary Judgment.

DATED this 13th day of March, 2017.

I certify that this memorandum contains 3,832 words, in compliance with the Local Civil Rules.

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federal statutes. *See, e.g., Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.2d 440 (2001) (quoting *Grimwood v. Univ. of Puget Sound, Inc*., 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988)).

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2017, I caused the foregoing Response In Opposition To Plaintiffs' Motion for Summary Judgment to be filed with the Court using the e-filing system, and true and correct copies of the same to be served via eservice and email, per agreement of counsel, to:

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