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' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION AND RELIEF REQUESTED

UNITE HERE! Local 8 ("Local 8") drafted an initiative establishing minimum employment standards for hotel industry workers in the City of Seattle. Together with Seattle Protects Women, they helped see I-124 passed overwhelmingly by the voters of Seattle. Plaintiffs oppose I-124, and want to prevent it from protecting Seattle's hotel housekeepers from sexual harassment, inhumane workloads, or basic human rights on the job. But Plaintiffs cannot succeed on any of their claims, and therefore Intervenors request this Court grant its Motion for Summary Judgment against all of Plaintiffs' claims.

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

STATEMENT OF FACTS

Local 8 is a labor organization representing over 5,000 workers in the hospitality industries of Oregon and Washington State. Declaration of Stefan Moritz ("Moritz Dec."), ¶3. They include room cleaners, cooks, bartenders, bellmen, food and beverage servers, bussers, and dishwashers. *Id.* Local 8's stated goals are to fight for living wages, job security, respect in the workplace, and affordable family health insurance provided by employers. *Id.* at ¶4, Ex. A.

Sexual harassment of hotel employees—especially room attendants—is so rampant that studies have found it has essentially been normalized. Moritz Dec., ¶¶7-8, Exs. C-F. 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. Moritz Dec., ¶8, Ex. F. Respondents also reported that 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 often afraid of reporting the incidents to their supervisors. *Id.* at ¶9, Ex. F. Nearly all respondents of the survey reported that they would feel safer if equipped with a panic button. *Id.* at ¶10, Ex. F.

Additionally, hotel staffers also suffer from on-the-job injuries, due in large part to excessive workloads, and are often given terrible (and unaffordable) options for health care. Moritz Dec., ¶11, Exs. F-H. Nearly all surveyed downtown housekeepers reported that they suffer from work-related pain. *Id.* at ¶12, Ex. F. Most of these injuries are severe enough to cause long term hindrance and disruption to the workers' daily lives. *Id.* Half of respondents reported a variety of short- and longer-term consequences of housekeeping work, including taking pain medication, residual pain, and interference in everyday routines. *Id.* at ¶13, Ex. F. In

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

addition, most respondents said that their workload had increased in the past five years, and a high percentage reported that they find themselves being forced to skip breaks. *Id.*

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.

ISSUE PRESENTED

Should this Court grant Intervenors' Motion for Summary Judgment, where there is no genuine issue as to any material fact and Intervenors are entitled to judgment as a matter of law?

EVIDENCE RELIED UPON

Proposed Intervenors rely upon the Complaint, this Motion and supporting declaration and exhibits, and the record on file with this Court.

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, 794095, 64 O.3d 22 (2003). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. &Santa Fe R.R. Co.*, 153 Wn.2d 780, 789 (2005). Being entitled to judgment as a matter of law means that the moving party must meet the burden of satisfying the substantive requirements inherent in that party's

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

claim or defense. *Sedwick v. Gwinn*, 73 Wn. App. 879 (1994); WRIGHT AND MILLER, 10A FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 2725.

Here, both parties will agree that there are no issues as to any material facts. As every claim made by Plaintiffs in their Complaint is either utterly premature or demonstrably unsupported by case law, as explained herein, Intervenors are entitled to judgment as a matter of law. Therefore, Intervenors' Motion should be granted.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

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

Article IV, Sec. 7 of the Seattle City Charter requires that every legislative act "shall contain but one subject, which shall be clearly expressed in its title." This language is identical to that in RCW 35A.12.130, which provides in relevant part that "[n]o ordinance shall contain more than one subject and that must be clearly expressed in its title." 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). 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).

As the Court 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

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

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," *Amalgamated Transit Union 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)). 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.

Here, the ballot title to I-124 states:

> 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.
>
> Should this measure be enacted into law?

King County Elections, November 8, 2016 General Election.[1] The breadth of the topics covered in I-124 and the structure of its title is 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.

Regarding the subject in title challenge, *Filo Foods* is again instructive. The Court referred to its earlier holding in *Washington Ass'n for Substance Abuse & Violence Prevention*,

---

[1] *Available at* http://aqua.kingcounty.gov/elections2/contests/measureinfo.aspx?cid=90050&eid=5.

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

174 Wn.2d at 665, regarding Initiative 1183, where that initiative's ballot title indicated a general topic and then listed 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 *Substance Abuse & Violence Prevention*, the language of I-124 "is sufficiently broad to place voters on notice of its contents." *Filo Foods* at 784-85. The contents of I-124 concern labor standards and are reasonably germane to the establishment of minimum employee benefits.

B. Plaintiffs' Do Not Have Standing To Claim That I-124 Violates Hotel Guests' Privacy And Due Process Rights.

Setting aside the fact that rulemaking is in progress, making many of Plaintiffs' claims premature, I-124 does not violate guests' privacy and due process rights on its face. Neither can Plaintiffs even assert such a claim, as they lack standing to do so.

1. *Plaintiffs cannot allege that they or any of their members will be injured by the provision of I-124 they claim to be unconstitutional.*

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 others. *See, e.g., State v. Bohannon*, 62 Wn. App. 462, 469, 814 P.2d 694 (1991) (individual convicted of taking nude photographs of underage woman did not have standing to raise constitutional challenge asserting that statute prohibiting such conduct violated freedom of expression of woman he photographed); *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

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

(2001) (show promoter did not have standing to challenge constitutionality of state licensing requirements affecting companies that could not participate in the trade show).

To obtain declaratory relief under Washington's Declaratory Judgments Act, RCW Ch. 7.24, Plaintiffs must show that they have suffered an injury due to the operation of the challenged statutory provision. *See, e.g., To-Ro,* 100 Wn. App. at 489-94; *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802–03, 83 P.3d 419, 423 (2004) ("To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract. This statutory right is clarified by the common law doctrine of standing, which prohibits a litigant from raising another's legal right.")

A corporation, such as the trade associations that are Plaintiffs in this case, does not have standing to claim that it was denied a liberty interest without due process of law because the liberty guaranteed by the due process clause applies only to natural, not artificial, persons. *See Am. Legion Post No. 149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 594, 192 P.3d 306 (2008) (citing *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 527, 59 S.Ct. 954, 83 L.3d. 1423 (1939)). To bring such a claim on behalf of its members through associational standing, "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977). Because it must show that its members would have standing to sue in their own right, a trade association must show that at least one of its members has suffered an injury in fact or faces an imminent

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

threat of injury as a result of the operation of the provision of I-124 it seeks to challenge. *Id.* at 342 (quoting *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197 (1975)).

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). *See also Trepanier v. City of Everett,* 64 Wn. App. 380, 382–84, 824 P.2d 524 (1992) ("when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself.").

In this case, Plaintiffs are trade associations whose members include hotels and other businesses in the hospitality industry. *See* Complaint 1.1-1.3. 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 the requirement that hotels maintain a list of individuals accused of committing an act of violence toward hotel employees. *See* Complaint 6.1-6.6. Rather, the Complaint alleges only that placement on such a list "injures the good name and reputation *of the persons on the list* and invades their right to privacy." Complaint 6.4 (emphasis added). Plaintiffs cannot claim that any person who is, or may at any time be, placed on such a list is a member of any of the three associations that is a Plaintiff in this case. Accordingly, Plaintiffs have not established that they or any of their members have suffered any current or threatened injury resulting from the operation of the statutory provision they seek to challenge. Plaintiffs have not established that they have standing to raise the

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

constitutional challenge asserted in the Complaint.[2]

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 because the Complaint does not even allege facts sufficient to establish the existence of *any* situation where anyone has suffered an injury or faces an "immediate, concrete, and specific" threat of injury due to the challenged provision of I-124 that would allow such an individual to have standing to raise the constitutional challenge asserted in the Complaint's Third Claim. *KS Tacoma Holdings,* 166 Wn. App. at 128–29.

The Complaint alleges that the challenged provision of I-124 will damage the reputations of individuals who are added to a hotel's list of persons accused of committing acts of violence toward hotel employees. To establish injury, Plaintiffs must show that some individual has been placed on such a list or that he has engaged in some course of conduct or has a present intention of engaging in some course of conduct that will cause him to face an immediate, concrete, and specific threat of being placed on such a list. For an individual to be placed on such a list, a hotel employee must lodge a complaint with her employer alleging that the individual committed an act of violence towards the employee.

The Complaint does not allege that any individual has been placed on such a list, that any individual believes a hotel employee has lodged a complaint that will result in his placement on

---

[2] Moreover, even if a member of one of the associations that is a Plaintiff in this case were able to establish that it has suffered some injury that would give it standing to sue in its own right, Plaintiffs could not meet the second requirement for associational standing because the interests sought to be protected in the Complaint's Third Claim are not germane to the purpose of trade associations. The Plaintiffs in this case are trade associations whose purpose is to promote the economic interests of businesses in the hospitality industry. The interests sought to be protected in the Complaint's Third Claim are the alleged civil liberties of individuals whom the Complaint speculates may be accused of committing an act of violence toward hotel employees at some time in the future. Plaintiffs do not claim, nor can they, that protecting the civil liberties of such individuals is germane to the purpose of a trade association.

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

such a list, or that any individual has engaged in or has a present intention to engage in any course of conduct that would cause a hotel employee to lodge a complaint that would result in his placement on such a list. Accordingly, the Complaint fails to allege that any individual has suffered an injury or faces an "immediate, concrete, and specific" threat of future injury resulting from the operation of the provision of I-124 it seeks to challenge, much less shown that such an individual has some relationship to one of the organizations that is a Plaintiff in this case that would allow that organization to stand in his or her shoes for purposes of establishing standing in this case. Plaintiffs have not shown that any person has standing to raise the constitutional challenge asserted, much less that Plaintiffs can stand in the shoes of such a person to assert claims on his or her behalf.

2. *Even if Plaintiffs could establish standing, this claim has no merit.*

Reputational harm alone does not implicate an individual's due process rights under the U.S. Constitution. *See, e.g., Paul v. Davis*, 424 U.S. 693, 707-12, 96 S.Ct. 1155 (1976); *Miller v. California*, 355 F.3d 1172, 1178-79, (9th Cir. 2004). Rather, an individual asserting that the government violated a "liberty" interest guaranteed by the Due Process Clause by injuring his reputation through some stigmatizing statement or action "must show that the stigma was accompanied by some additional deprivation of liberty or property." *Miller*, 355 F.3d at 1178. This is known as the "stigma-plus" test. *Id.* To establish a due process violation under the "stigma-plus" test, Plaintiffs must show that they suffered reputational harm sufficient to satisfy the "stigma" element and must satisfy the "plus" element by establishing that the stigmatizing statement or action resulted in the alteration or extinguishment of "a right or status previously recognized by state law." *Paul*, 424 U.S. at 711. Where, as here, the Plaintiffs claim a due process violation based on the disclosure of a statement, record, or charge they allege to be

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

damaging to someone's reputation, "due process protections apply only if a plaintiff is subjected to 'stigma plus'; i.e., if the state makes a charge against [a plaintiff] that might seriously damage his standing and associations in the community and 1) the accuracy of the charge is contested, 2) there is some public disclosure of the charge, and 3) it is made in connection with the termination or the alteration of some right or status recognized by state law." *Wenger v. Monroe*, 282 F.3d 1068, 1074 (9th Cir. 2002).

To satisfy the "stigma" element, the allegedly stigmatizing statement, document, or charge must be publicly disclosed. *See, e.g., Wenger*, at 1074 n.5 (plaintiff failed to establish the "stigma" element of the "stigma-plus" test where the allegedly stigmatizing material was disclosed only to other branches of the military and not to the public). There is no public disclosure sufficient to implicate an individual's due process rights where an allegedly stigmatizing record is used internally and is not disclosed to the general public. *Id.*

In this case, Plaintiffs fail to establish either prong of the test. The "stigma" element is not established 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 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). Complaint § 6.3. Setting aside the dubiousness of disclosure of any such documentation under the PRA, to the extent that such a

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

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 was unconstitutional. A statute that requires creation of a record is not unconstitutional because *another* statute might unconstitutionally require the disclosure of that record. If the Plaintiffs believe that a record will be disclosed under the PRA and that such disclosure would be unconstitutional, they can seek injunctive relief to prevent such disclosure and a declaratory judgment regarding the constitutionality of that disclosure. It is sufficient for purposes of this case to note that the constitutionality of disclosure under 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.

Moreover, Plaintiffs fail to establish the "plus" element because they cannot show that an individual whose name is recorded on a list of persons accused by hotel employees of committing an act of violence towards a hotel employee will suffer the termination or alteration of any right or status previously recognized by state law. The only conceivable "plus" element that may be asserted by an individual whose name is recorded on such a list is that he is prevented from returning to the hotel for three years after the date of the incident in cases where a hotel employee supported the allegation with a statement made under penalty of perjury or other evidence. SMC 14.25.040(B). However, this does not terminate or alter any right or status previously recognized by state law, as Washington law does not provide individuals any legal right to obtain service at a hotel where an employee has accused the individual of committing an act of violence, such as assault, sexual assault, or sexual harassment, towards a hotel employee.

Under federal law, individuals in the state of Washington have a legal right to equal enjoyment of the services of any place of public accommodation without discrimination on the basis of race, color, religion, national origin, or disability. *See* 42 U.S.C. § 2000a(a); 42 U.S.C. §

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

12182. Under RCW 49.60.215, individuals in the state of Washington have a legal right to equal enjoyment of places of public accommodation "except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability." RCW 49.60.215. I-124 does nothing more than impose conditions established by law that are applicable to all persons regardless of any of the factors enumerated in RCW 49.60.215 or in 42 U.S.C. § 2000a(a) and 42 U.S.C. § 12182. Accordingly, I-124 does not terminate or alter any right or status recognized by state law. Therefore, even if I-124 required public disclosure of the allegedly stigmatizing records, which it plainly does not, Plaintiffs cannot satisfy the "plus" element of the "stigma-plus" test because they do not allege any termination or alteration of rights recognized by state law. This claim has no merit.

Furthermore, 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 Washington Constitution. Article I, § 7 of 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). *See also O'Hartigan v. Dep't of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991).[3] In *Ino Ino*, the Supreme Court made clear that Washington courts applying the state

[3] *See also In re Meyer*, 142 Wn.2d 608, 619-20, 16 P.3d 563 (2001) ("The petitioners claim a liberty interest, under article I, section 7 of the Washington Constitution, in the information subject to disclosure because that

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

constitution recognize "two types of interests protected by the right to privacy: the right to autonomous decisionmaking and the right to nondisclosure of intimate personal information, or confidentiality." *Id.* The Court held that the right to autonomous decisionmaking is a fundamental right that is subject to heightened scrutiny, while the right to nondisclosure of personal information is not. *Id.* Accordingly, 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, the privacy interest asserted is an individual's privacy interest in nondisclosure of personal information, not the right to autonomous decisionmaking. The privacy interest asserted is the alleged right to nondisclosure of the fact that an individual's name is included on a list of persons who have been accused of committing acts of violence toward hotel employees. *See* Complaint 6.3-6.4. Article I, § 7 of the Washington Constitution confers no greater privacy right in this instance than the U.S. Constitution, and both 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.

---

constitutional provision affords significantly greater privacy protection than the United States Constitution. The petitioners misconstrue our case law. In examining just such a contention, we held the Washington Constitution provides no more protection than the federal constitution in the context of the interest in confidentiality, or the nondisclosure of personal information. *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 124, 937 P.2d 154 (1997). In that case, we even performed a Gunwall analysis and found no more protection under article I, section 7 of the Washington Constitution than under the Fourteenth Amendment. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986). Thus, the right of privacy guaranteed by the Washington Constitution in this setting has the same boundaries as that guaranteed by the federal constitution.")

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

This standard is easily met here. 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).

Moreover, it is quite clear that the requirements of the challenged provision of I-124—which requires hotels to document complaints by hotel employees regarding assault and sexual harassment, warn employees who are asked to enter rooms occupied by individuals who have been accused of engaging in such conduct, and temporarily bar individuals from returning to the hotel when an employee submits a statement under penalty of perjury documenting an instance of assault or sexual harassment committed by that individual—are rationally related to this legitimate government interest. Accordingly, the challenged provision of I-124 comfortably meets the rational basis test and does not violate the U.S. Constitution or Article I, § 7 of the Washington Constitution.

C. I-124 Does Not Preempt State Or Federal Law, And Is Not Beyond The City's Authority To Legislate, So Plaintiffs' Claims Asserting Otherwise Fail.

"In the exercise of the police power, the city may enact all laws necessary for the comfort, safety, and well-being of the city and its inhabitants." *City of Spokane v. Carlson*, 73 Wn.2d 76, 82, 436 P.2d 454, 458 (1968).

In their Complaint, Plaintiffs cite RCW 49.17.270 to proclaim that since Seattle hotels are subject to health and safety standards under this Chapter, the City's additional standards in I-124 are preempted. However, Washington's preemption doctrine is well settled. Wash. Const. art.

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

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 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 certainly no conflict between I-124 and any provision of RCW 49.17.270. Labor & Industries' enforcement powers are not impacted by I-124 in any way. And, as codified in Seattle Municipal Code 14.25.080-090, employers must "adopt reasonable practices to protect the safety of hotel employees"; requires that hotel employers "provide and use safety devices, and safeguards," and "use work practices, methods, processes, and means that are reasonably adequate to make their workplaces safe"—all certainly consistent with, and not in conflict with, anything promulgated by L&I.

Furthermore, I-124's antiretaliation language is not preempted by any other law. I-124 creates no such supplemental sanction for violations of federal or state law; instead providing an employee a remedy for illegal retaliation for exercising rights protected under any other law, I-124 provides an employee a remedy for illegal retaliation for exercising rights protected *under I-124*. The two are not the same. I-124 is self-contained. If an employer takes an adverse action against an employee because the employee reported conduct in violation of I-124, the employer violates I-124's antiretaliation provision, but does not necessarily violate any other law's antiretaliation provision nor become subject to a new sanction for a violation of any other law. I-124's antiretaliation provision is not a supplemental sanction appended to federal or state law, but instead protects against retaliation for the exercise of rights under its provisions. *See, e.g.*, *Filo Foods* at 802 (holding Proposition 1 not preempted under same analysis).

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

D. A Statutory Presumption That Is 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.

Civil statutes that do not implicate fundamental rights may create a rebuttable presumption that shifts the burden of proof where certain facts are established without violating constitutional due process rights. *See, e.g., Lavine v. Milne,* 424 U.S. 577, 585, 96 S.Ct. 1010, 1014, 47 L.Ed.2d 249 (1976) ("Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment."); *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 637-38, 108 S.Ct. 1423 (1988) (noting that a statutory presumption shifting the burden of persuasion "if applied in a criminal proceeding, would violate the Due Process Clause because it would undercut the State's burden to prove guilt beyond a reasonable doubt. If applied in a civil proceeding, however, this particular statute would be constitutionally valid."); *Speiser v. Randall,* 357 U.S. 513, 523-24, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) ("It is of course within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, 'unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'").

A civil statute that does not implicate fundamental rights may provide that the presumption is rebutted by clear and convincing evidence rather than by a preponderance of the evidence. Numerous Washington statutes create rebuttable presumptions which shift the burden of persuasion and require proof by clear and convincing evidence to overcome them. *See* RCW § 4.24.460(2) ("If a nuclear incident occurs, there is a presumption that the operator of a waste repository was negligent in constructing, operating, or monitoring the waste repository, or in transporting radioactive waste, and that the operator was an actual cause of the nuclear incident.

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

The presumption may be rebutted by a clear and convincing showing by the operator that the nuclear incident was not the result of the operator's negligence and that the operator's negligence was not an actual cause of the nuclear incident."); *see also* 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). Washington courts have noted that imposing 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.").

I-124 is a civil statute without criminal penalties. *See* SMC 14.25.150. As explained above, 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, pursuant to the above-cited authorities, 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. This is precisely what I-124 does. *See* SMC 14.25.150.A.5. Thus, Plaintiffs' cannot prevail under their Sixth Claim.

CONCLUSION

The Intervenors therefore respectfully request that this Court grant their Motion for Summary Judgment.

I certify that this memorandum contains 5,618 words, in compliance with the Local Civil Rules.

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828

DATED this 17th day of February, 2017.

s/Laura Ewan
Laura Ewan, WSBA No. 45201
Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Ste 400
Seattle, WA 98119-3971
(206) 257-6012
***e**wan@workerlaw.com*

Counsel for UNITE HERE! Local 8 and Seattle Protects Women

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2017, I caused the foregoing Defendant-Intervenors' 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:

Harry J. F. Korrell
harrykorrell@dwt.com

Michele Radosevich
micheleradosevich@dwt.com

Michael K. Ryan
Michael.ryan@seattle.gov

Jeff Slayton
Jeff.slayton@seattle.gov

Erica Franklin
Erica.franklin@seattle.gov

DATED: February 17, 2017

s/Laura Ewan
Laura Ewan, WSBA # 45201

LAW OFFICES OF
SCHWERIN CAMPBELL
BARNARD IGLITZIN & LAVITT, LLP
18 WEST MERCER STREET SUITE 400
SEATTLE, WASHINGTON 98119-3971
(206) 285-2828