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

AMERICAN HOTEL & LODGING ASSOCIATION, SEATTLE HOTEL ASSOCIATION, and WASHINGTON HOSPITALITY ASSOCIATION, Plaintiffs, vs. CITY OF SEATTLE, Defendant, and UNITE HERE! LOCAL 8 & SEATTLE PROTECTS WOMEN, Intervenors.	)	No. 16-2-30233-5 SEA MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT CITY OF SEATTLE AND INTERVENOR UNITE HERE! LOCAL 8 AND SEATTLE PROTECTS WOMEN AND DENYING SUMMARY JUDGMENT OF PLAINTIFFS AMERICAN HOTEL & LODGING ASSOCIATION, SEATTLE HOTEL ASSOCIATION, AND WASHINGTON HOSPITALITY ASSOCIATION

I. Introduction

City of Seattle Initiative 124 ("I-124") was adopted by voters on November 8, 2016. The purpose of this initiative was represented to protect the health, safety, and labor standards of employees in the hotel industry. The parties have filed cross Motions for Summary Judgment. The

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

plaintiffs American Hotel & Lodging Association, Seattle Hotel Association, And Washington Hospitality Association (Associations), move for summary judgment declaring I-124 to be invalid in its entirety, or alternatively, voiding parts I, II, and V. Defendant City of Seattle (Seattle) and Intervenor UNITE HERE! Local 8 and Seattle Protects Women (Union) cross-move for a determination that the initiative and enacted ordinance comply with constitutional requirements and must be enforced. Oral argument was heard on March 31, 2017.

II. Review of the initiative process and role of the Court.

It is not the role of the Court to weigh the wisdom of an enacted initiative or to question its desirability. Rather, the duty and responsibility of the Court is to carefully consider the lawfulness and constitutionality of that initiative and to rule upon the same.

An exercise of the initiative power is an exercise of the reserved power of the people to legislate. *State ex rel. Heavey v. Murphy,* 138 Wash.2d 800, 808, 982 P.2d 611 (1999); *Belas v. Kiga,* 135 Wash.2d 913, 920, 959 P.2d 1037 (1998). In approving an initiative measure, the people exercise the same power of sovereignty as the legislature does when enacting a statute. *Wash. Fed'n of State Employees v. State,* 127 Wash.2d 544, 556, 901 P.2d 1028 (1995). The fact that the legislative body has the power to achieve a particular result does not necessarily render its action constitutional; it must follow constitutional procedures. *State ex rel. Living Servs., Inc. v. Thompson,* 95 Wash.2d 753, 755, 630 P.2d 925 (1981). The people acting in their legislative capacity are subject to constitutional mandates. *State ex rel. Heavey,* 138 Wash.2d at 808, 982 P.2d 611; *Gerberding v. Munro,* 134 Wash.2d 188, 196, 949 P.2d 1366 (1998); *Culliton v. Chase,* 174 Wash. 363, 373–74, 25 P.2d 81 (1933).

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

A statute (in this case, ordinance) enacted through the initiative process is, as are other statutes (ordinances), presumed to be constitutional. *Brower v. State,* 137 Wash.2d 44, 52, 969 P.2d 42 (1998); *Gerberding,* 134 Wash.2d at 196, 949 P.2d 1366; *State ex rel. O'Connell v. Meyers,* 51 Wash.2d 454, 458, 319 P.2d 828 (1957). A party challenging the statute's (ordinance's) constitutionality bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt. *State ex rel. Heavey,* 138 Wash.2d at 808, 982 P.2d 611; *Gerberding,* 134 Wash.2d at 196, 949 P.2d 1366. This standard is met if argument and research show that there is no reasonable doubt that the statute violates the constitution. *Belas,* 135 Wash.2d at 920, 959 P.2d 1037; *Island County v. State,* 135 Wash.2d 141, 147, 955 P.2d 377 (1998).

Rules of statutory construction apply to initiatives. *Seeber v. Wash. State Pub. Disclosure Comm'n,* 96 Wash.2d 135, 139, 634 P.2d 303 (1981); *Gibson v. Dep't of Licensing,* 54 Wn.App. 188, 192, 773 P.2d 110 (1989). Thus, in determining the meaning of a statute enacted through the initiative process, the Court's purpose is to ascertain the collective intent of the voters who, acting in their legislative capacity, enacted the measure. *Wash. State Dep't of Revenue v. Hoppe,* 82 Wash.2d 549, 552, 512 P.2d 1094 (1973). Where the voters' intent is clearly expressed in the statute, the Court is not required to look further. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n,* 133 Wash.2d 229, 242, 943 P.2d 1358 (1997); *City of Tacoma v. State,* 117 Wash.2d 348, 356, 816 P.2d 7 (1991); *see Biggs v. Vail,* 119 Wash.2d 129, 134, 830 P.2d 350 (1992) (if statutory meaning is clear from plain and unambiguous language, that meaning must be accepted by the Court). In determining intent from the language of the statute, the Court focuses on the language as the average informed voter voting on the initiative would read it. *State v. Brown,* 139 Wash.2d 20, 28, 983 P.2d 608 (1999); *Senate Republican Campaign Comm.,* 133 Wash.2d at

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

243, 943 P.2d 1358. Where the language of an initiative enactment is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation. *State v. Thorne,* 129 Wash.2d 736, 762–63, 921 P.2d 514 (1996).

[I]t is not the prerogative nor the function of the judiciary to substitute what they may deem to be their better judgment for that of the electorate in enacting initiatives ... unless the errors in judgment clearly contravene state or federal constitutional provisions. *Fritz v. Gorton,* 83 Wash.2d 275, 287, 517 P.2d 911 (1974). Nor is it the province of the courts to declare laws passed in violation of the constitution valid based upon considerations of public policy. *State ex rel. Wash. Toll Bridge Auth. v. Yelle,* 32 Wash.2d 13, 24–25, 200 P.2d 467 (1948). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Construction of a statute is a question of law which is reviewed de novo. *State v. Ammons,* 136 Wash.2d 453, 456, 963 P.2d 812 (1998). In this instance, the parties have cross-moved for summary judgment and there being no genuine issues of material fact presented or argued by the parties, it is incumbent on this court to determine the enforceability of the Ordinance. The court considered the pleadings, declarations, exhibits, and documents set forth in Attachment A to this Memorandum Opinion and Order.

III. Facts

UNITE HERE! Local 8 originally filed a copy of the Initiative petition, designated as I-124. After the City Attorney's Office prepared a ballot title in accordance with state and local law, both UNITE HERE! Local 8 and the Washington Lodging Association brought suit in King County Superior Court to challenge the ballot title. Judge Rogers of the King County Superior Court approved the ballot title used, and the proponents gathered sufficient signatures to put I-124

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

on the ballot. Seattle voters overwhelmingly adopted the Initiative, with 76.59 percent voting in favor. The results were certified on November 29, 2016, and the Initiative went into effect the following day. Soon after, the American Hotel & Lodging Association, the Seattle Hotel Association, and the Washington Hospitality Association (Associations) filed this lawsuit.

I-124 adds a chapter to the Seattle Municipal Code, titled "Hotel Employees Health and Safety." Ch. 14.25 SMC. 14.25 has seven different parts, all of which concern general working conditions of hotel workers including (1) Protecting hotel employees from violent assault and sexual harassment, including a registry of assaultive guests; (2) Protecting hotel employees from injury; (3) Improving access to medical care for low income employees; (4) Preventing disruptions in the hotel industry; (5) Enforcing compliance with the law; (6) Definitions; and (7) Allows some provisions to be waived via a collective bargaining agreement. Plaintiffs are challenging constitutionality of the structure of the Initiative, as well as Part I, II, and V. Challengers to this ordinance assert a multiplicity of claims asserting the unenforceability of the Ordinance's provisions. These include the claims that: 1) I-124 violates the requirements that an initiative cover a single subject and the subject be expressed in the title; 2) maintaining of a list of hotel guests accused of harassment violates the state and federal constitutions' guarantees of privacy and due process; 3) the health and safety requirements of I-124 are preempted by the Washington Industrial Safety and Health Act (WISHA); 4) the burden-shifting requirements for retaliation claims conflict with existing law, violate due process, and deprive hotel employers of a right to a jury trial; and 5) I-124 is not severable. Defendant City of Seattle and Intervenor UNITE HERE! Local 8 and Seattle Protects Women argue that the ordinance meets constitutional requirements and further contends that plaintiffs Associations lack standing to challenge the registry

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

requirements. This Court will address each of these challenges brought against enforceability of this Ordinance.

The Ordinance Implementing the Initiative

The Initiative adds a new chapter to the Seattle Municipal Code ("SMC"), titled Hotel Employees Health and Safety. Ch. 14.25 SMC. The Initiative has seven parts, all of which concern hotel workers and are rationally related to worker health, safety and labor standards.

Part 1 - Protecting Hotel Employees from Violent Assault and Sexual Harassment.

The purpose of this section is to protect hotel workers from assault and harassment and to provide them a mechanism for reporting such an incident. *See* SMC 14.25.020. First, it requires certain hotel employers to provide panic buttons to certain employees. *See* SMC 14.25.030. Second, it requires hotel employers to maintain lists containing the names of any guests accused of assaulting, sexually assaulting, or sexually harassing hotel employees; to ensure that any such guests remain on these lists for five years; and to notify hotel employees should an accused guest stay at the hotel. *See* SMC 14.25.040.A, C. If any accusation of assault, sexual assault, or sexual harassment toward a hotel employee is supported by a sworn statement or other evidence, the hotel employer must exclude the accused guest from the hotel for three years. *See* SMC 14.25.040.B. As of the time of the oral arguments on these cross-motions, the City Attorney's Office is aware of no cases in which a hotel has invoked Part 1 of the Initiative to place an accused guest on a list or exclude such a guest from the hotel. Third, Part 1 requires hotel employers to post signs notifying guests as to the protections offered under the Initiative. *See* SMC 14.25.050. Finally, it provides that following any accusation by an employee of assault, sexual assault, or sexual harassment, a hotel employer must reassign the employee to a different work area upon request;

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

provide paid time off to allow the employee to contact the police, a counselor, or an advisor; and, with the consent of the employee, report any accusations of criminal conduct by guests to law enforcement. *See* SMC 14.25.060.

Part 2 - Protecting Hotel Employees from Injury.

The purpose of this section is to protect hotel workers from on-the-job injuries. *See* SMC 14.25.070. To that end, Part 2 requires hotel employers to provide a safe workplace and protect employees from exposure to hazardous chemicals in the workplace, while also setting limits on the amount of floor space any hotel housekeeper may be required to clean in a workday without overtime pay. *See* SMC 14.25.080-.100. The floor-space limits only apply to large hotels, defined as hotels containing 100 or more guest rooms or suites. SMC 14.25.100; SMC 14.25.160.

Part 3 - Improving Access to Medical Care for Low Income Hotel Employees.

The purpose of this section is "to improve access to affordable family medical care for hotel employees." SMC 14.25.110. This section only applies to large hotels and requires large hotel employers to provide healthcare subsidies to employees who earn 400% or less of the federal poverty line or to provide health care coverage equal to at least a gold-level policy on the Washington Health Care Benefit Exchange. *See generally* SMC 14.25.120.

Part 4 - Preventing Disruptions in the Hotel Industry.

The purpose of this section is to reduce disruption to Seattle's economy caused by property sales or ownership changes in the hotel industry and to protect low-income workers. *See* SMC 14.25.130. It requires that when a hotel undergoes a change in control, the incoming employer maintains a list of employees, based on seniority, who were employed by the prior owner. *See* SMC 14.25.140. The new hotel must hire from this list for six months and retain employees hired

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

from this list for at least 90 days, barring good cause for termination. *Id*. The Associations makes no specific challenge to these provisions.

Part 5 - Enforcing Compliance with the Law.

Part 5 prohibits hotel employers from retaliating against employees who exercise their rights under the Initiative. *See* SMC 14.25.150.A. It also creates a rebuttable presumption of retaliation if a hotel employer takes an adverse action against an employee within 90 days of the employee's exercise of such rights. *See* SMC 14.25.150.A.5. Hotel employers may rebut the presumption by clear and convincing evidence that the adverse action was taken for a permissible purpose and that the employee's exercise of rights under the Initiative was not a motivating factor behind the action. *Id.*

Part 5 further requires hotel employers to notify employees of their rights under the Initiative and to keep records documenting compliance with the Initiative. *See* SMC 14.25.150.B. Part 5 also creates a private right of action for violations of the Initiative. *See* SMC 14.25.150.C. Part 5 also authorizes, but does not require, Seattle's Office for Civil Rights to investigate alleged violations of the Initiative, and to promulgate regulations. *See* SMC 14.25.150.D. Finally, Part 5 sets forth a penalty scheme and payout structure for such penalties. *See* SMC 14.25.150.E.

Part 6 - Definitions

This is the Definitions sections defining terms used in the Ordinance.

Part 7 - Miscellaneous.

Part 7 allows any provisions of Chapter 14.25, except for the provisions on assault, sexual assault, and sexual harassment, to be waived via a collective bargaining agreement. SMC 14.25.170. Part 7 also contains a severability clause and a short title. *See* SMC 14.25.180 & .190.

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

IV. Legal Analysis and Conclusions

A. The Initiative Does Not Violate the Single Subject and Subject-In-Title Rules

Associations assert that I-124 violates the single subject and subject-in-title rules set out in the Washington Constitution (art. II, sec. 19) and the Seattle City Charter (art. IV, sec. 7). 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." Statutes enacted through the initiative process must be shown to be unconstitutional beyond a reasonable doubt; they are not reviewed under more or less scrutiny than legislatively enacted bills. *Amalgamated Transit Union Local 587 v. State,* 142 Wash.2d 183, 205, 11 P.3d 762 (2000). Any reasonable doubts are resolved in favor of constitutionality. *Wash. Fed'n of State Emps. v. State,* 127 Wash.2d 544, 556, 901 P.2d 1028 (1995).

There are two distinct prohibitions in article II, section 19. *Amalgamated*, 142 Wash.2d at 207. First, no bill or initiative shall embrace more than one subject, and the purpose of this prohibition is to prevent "logrolling." *Id.* "Logrolling" occurs when a measure is drafted such that a legislator or voter may be required to vote for something of which he or she disapproves in order to secure approval of an unrelated law. *Washington Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wash.2d 642, 655 (2012). Second, no bill or initiative shall have a subject which is not expressed in its title. *Id* at 206. A statute enacted through the initiative process is, as are other statutes, presumed to be constitutional. *Brower v. State,* 137 Wash.2d 44, 52, 969 P.2d 42 (1998).

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

1. Single Subject Rule

In determining whether a bill, ordinance, or initiative contains multiple subjects, the courts begin with the title of the measure. *Amalgamated Transit,* 142 Wash.2d at 207. A 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. RCW 29A.72.050; *Wash. Ass'n for Substance Abuse & Violence Prevention v. State,* 174 Wash.2d 642, 655, 278 P.3d 632 (2012). Here, the ballot title to I-124 stated:

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

a. **A ballot title may be general or restrictive**

A ballot title may be general or restrictive. *Amalgamated,* 142 Wash.2d at 207. "In assessing whether a title is general, it is not necessary that the title contain a general statement of the subject of an act; few well-chosen words, suggestive of the general subject stated, is all that is necessary." *Id.* at 209. When a ballot title suggests a general, overarching subject matter for the initiative, 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." *Id.* at 207 (quoting *DeCano v. State,* 7 Wash.2d 613, 627, 110 P.2d 627 (1941)). There is no violation of article II, section 19 even if a

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

general subject contains several incidental subjects or subdivisions. *Wash. Fed'n of State Emps.,* 127 Wash.2d at 556.

In contrast, a title is considered restrictive "where a particular part or branch of a subject is carved out and selected as the subject of the legislation." *State v. Broadaway,* 133 Wash.2d 118, 127, 942 P.2d 363 (1997) (quoting *Gruen v. State Tax Comm'n,* 35 Wash.2d 1, 23, 211 P.2d 651 (1949)). Restrictive titles of an initiative are not given the same liberal construction as general titles when considering whether they violate the single subject rule; laws with restrictive titles fail if their substantive provisions do not fall fairly within the restrictive language. WA. CONST. art. 2, § 19; *Filo Foods, LLC v. City of SeaTac,* 183 Wash.2d 770, 783, 357 P.3d 1040, 1047 (2015).

Associations argue that this title is restrictive and should not be regarded liberally. They rely on a 1948 Washington case, which found that a title regulating both "toll bridges" and "ferry connections" was not general in dealing with the broad topic of a "transportation system." *See State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash.2d 13, 200 P.2d 467 (1948).

However, since that decision, the single subject rule has evolved and the immediate case is more analogous to a recent Washington Supreme Court decision related to initiatives regulating labor standards. *See Filo Foods*, 183 Wash.2d 770. In *Filo Foods*, a measure impacting working conditions that narrowed application to one specific geographical area and one type of employer was found to be general. *Id.* at 783. That initiative included a number of distinct protections for certain types of workers, including minimum wage, paid sick leave, and worker retention requirements. *See Id.* The ballot title in that case indicated:

> Proposition No. 1 concerns labor standards for certain employers.
>
> This Ordinance requires certain hospitality and transportation employers to pay specified employees a $15.00 hourly minimum wage, adjusted annually for

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

> inflation, and pay sick and safe time of 1 hour per 40 hours worked. Tips shall be retained by workers who performed the services. Employers must offer additional hours to existing part-time employees before hiring from the outside. SeaTac must establish auditing procedures to monitor and ensure compliance. Other labor standards are established.

Id. at 783 (quoting voter's pamphlet). While this initiative established a $15–per–hour minimum wage and other benefits and rights for employees in hospitality and transportation industries as well as an auditing and compliance procedure, the Supreme Court found it was general and did not violate single-subject rule. *Id* at 784.

b. **Even if the title is restrictive, only rational unity among the matters need exist.**

Even if the title is restrictive, only rational unity among the matters need exist. *City of Burien v. Kiga,* 144 Wash.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. While I-124 does contain several independent provisions, the ways the Initiative sets out to protect hotel employees has rational unity by seeking to protect employees from sexual assault, reduce workplace injuries, improve access to health insurance, and reduce disruptions in employment.

Associations also assert that I-124 contains multiple subjects, each of which could stand on its own with no rational unity, and the mere fact that all subjects pertain to the hotel industry is not enough. Associations rely on language from *Amalgamated* stating a title was general when provisions were not necessary to implement each other. 142 Wash.2d at 216–17. However, the State Supreme Court rejected this interpretation as exclusive in determining rational unity in *Citizens for Responsible Wildlife v. State*, 149 Wash.2d 622, 71 P.3d 644 (2003) ("An analysis of whether the incidental subjects are germane to one another does not necessitate a conclusion that

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

they are necessary to implement each other, although that may be one way to do so.") *State ex rel. Washington State Fin. Comm. v. Martin,* 62 Wash.2d 645, 384 P.2d 833 (1963).

This principle has been explained as follows:

> Under the true rule of construction, the scope of the general title should be held to embrace any provision of the act, directly or indirectly related to the subject expressed in the title and having a natural connection thereto, and not foreign thereto. Or, the rule may be stated as follows: Where the title of a legislative act expresses a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will, or may, facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title.

Kueckelhan v. Federal Old Line Ins. Co. (Mut.), 69 Wash.2d at 403, 418 P.2d 443 (1966).

The requirement of rational unity has also been expressed as follows:

> [A constitutional single-subject prohibition] does not by restricting the contents of an 'act' to one subject, contemplate a metaphysical singleness of idea or thing, but rather that there must be some rational unity between the matters embraced in the act, the unity being found in the general purpose of the act and the practical problems of efficient administration. It is hardly necessary to suggest that matters which ordinarily would not be thought to have any common features or characteristics might, for purposes of legislative treatment, be grouped together and treated as one subject. For purposes of legislation, 'subjects' are not absolute existences to be discovered by some sort of *a priori* reasoning, but are the result of classification for convenience of treatment and for greater effectiveness in attaining the general purpose of the particular legislative act....

State ex rel Washington Toll Bridge Auth. v. Yelle, 61 Wash.2d at 33, 377 P.2d 466 (1948); *See Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 209–10, 11 P.3d 762, 782 (2000).

In *Washington Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wash.2d 642, 656, 278 P.3d 632, 640 (2012), the Washington Supreme Court held that an earmark of funds for public safety was germane to the general subject of liquor privatization because privatizing

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

liquor implicated public safety and local governments would have to enforce the new liquor sales laws. *Wash. Ass'n for Substance Abuse*, 174 Wash.2d at 656–58, 278 P.3d 632. Thus, the earmark was "necessary to implement" the statute. *Amalg.*, 142 Wash.2d at 217, 11 P.3d 762. Also relevant was the fact that the legislature had previously treated the subjects of liquor regulation and public welfare together. *Wash. Ass'n for Substance Abuse*, 174 Wash.2d at 657, 278 P.3d 632. In that case, the opponents of the initiative argued that the challenged provisions lacked rational unity with the general topic—which they characterized as "liquor privatization"—and with one another. They contended that I–1183 violated the single-subject rule because along with the general topic of liquor privatization, the initiative includes a $10 million public safety earmark, privatized wine distribution, impacted liquor advertising, and modified the State's policy regarding liquor.

Addressing the issue of rational unity, the Court found that the public safety earmark provision was "germane to the general topic of I–1183", whether that is liquor or the narrower subject of liquor privatization, as the challengers suggested. "Although the public safety earmark is not restricted to use for facially liquor-related safety issues, *see* Laws of 2012, ch. 2, § 302, liquor has an obvious connection to broader public safety concerns than might feasibly be addressed by a more limited earmark. As local government officials assert in their amici brief, the burden of enforcing liquor sales laws and prosecuting offenders falls heavily on local governments." Id.at 656–57. The Court further ruled on the argument that privatization of the distribution and sale of spirits was not germane to the deregulation of the private distribution of wine, in violation of the single-subject rule. In distinguishing prior case law on the single subject rule, the Court concluded, that "[t]here is a closer nexus between I–1183's provisions affecting spirits and wine, however, than there was in the relevant provisions examined in *Barde,*

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

Amalgamated Transit, and *Kiga.* Unlike the subjects combined by the law examined in *Barde,* spirits and wine share the common distinction of being liquor and have been governed as such by the same act for decades. *See* Laws of 1933, Ex.Sess., ch. 62, § 3 (defining "liquor"). Moreover, unlike the subjects at issue in *Amalgamated Transit* and *Kiga,* I–1183's changes to the regulation of spirits and wine do not combine a specific impact of a law with a general measure for the future. Id. at 658–59. The Court ultimately upheld the initiative finding that it did not violate the single subject or subject-in-title rule, but rather concluded that the initiative "indicates that it generally pertains to the broad subject of liquor." Id.

The same analysis must apply here. In this case, all of the provisions are rationally related to the single subject of health, safety, and labor conditions for hotel employees. These provisions provide: (1) protecting hotel employees from violent assault and sexual harassment, including a registry of assaultive guests; (2) protecting hotel employees from injury; (3) improving access to medical care for low income employees; (4) preventing disruptions in the hotel industry; and (5) enforcing compliance with the law. Perhaps the most controversial of these provisions (at least the most addressed at oral argument on these motions) is the registry of assaultive guests provision. Admittedly, that provision is not necessary to implement the other provisions of the Initiative. *See Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 209–10. Nonetheless, under prior definitions of rational unity, this Court finds that the enacted popular legislation "expresses a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will, or may, facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title". Each of these

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

provisions has a rational unity to the general subject of health, safety, and labor conditions for hotel employees and, therefore, does not violate the single subject rule.

2. **Subject-in-Title**

Associations also assert that I-124 violates the subject-in-title rule. They argue that I-124 violates this rule because the title fails to provide notice of the registry requirement, characterized by Associations as the "required blacklist." Additionally, they maintain that the ballot title fails to notify voters of the nature and breadth of I-124's health insurance mandate. Both of these arguments fail because both contested provisions are clearly mentioned in the title. RCW 29A.72.050; *Wash. Ass'n,* 174 Wash.2d at 655. In addition, when a topic is general, not all of the specific provisions are required to be spelled out in the title if they are reasonably germane to the general topic. *Id*. A title fails the subject-in-title test when a title is misleading or false. *Id.* at 662. "Although a measure's title can be broad and general—without any particular expressions or words required—the material representations in the title must not be misleading or false, which would thwart the underlying purpose of ensuring that no person may be deceived as to what matters are being legislated upon." *Id*. at 642.

For example, in *Filo Foods supra*, the Court found the language in that initiative was sufficiently broad to put voters on notice even though not every substantive measure was spelled out, including a 90-day worker retention policy. *See* 183 Wash.2d 770. The initiative listed various provisions, but it generally concerned labor standards for certain employers, which was sufficiently broad to place voters on notice of its contents. *Id.*; WA CONST. art. 2, § 19; and RCW 35A.12.130. The *Filo Foods* decision relied on *Washington Ass'n* where I-1183, an initiative with

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

a similar scope and structure, was upheld in a subject-in-title challenge. *See Wash. Ass'n,* 174 Wash.2d at 665.

> I-1183 stated:
>
> Initiative Measure No. 1183 concerns liquor: beer, wine, and spirits (hard liquor).
>
> This measure would close state liquor stores and sell their assets; license private parties to sell and distribute spirits; set license fees based on sales; regulate licensees; and change regulation of wine distribution.

Id. (quoting voter's pamphlet). In addition to these specific provisions, the measure earmarked a portion of revenue raised from liquor license fees for the funding of public safety programs, including police, fire, and emergency services. *Id.* at 650. Similar to the structure of the proposition in *Filo Foods*, Initiative 1183 indicated a general topic and then listed some but not all of its substantive measures. Despite these more specific details, the Court found the title was general, pertaining "to the broad subject of liquor." *Id.* at 655.

While plaintiffs Associations allege the ballot title does not enumerate the details of every provision in the Initiative, a "title need not be an index to the contents, nor must it provide details of the measure." *Wash. Ass'n*, 174 Wash.2d at 660. "A title complies with the constitution if it gives notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law." *Id.* (quoting *Young Men's Christian Ass'n v. State,* 62 Wash.2d 504, 506, 383 P.2d 497 (1963)). Both of the contended provisions, the increased health care benefits and the guest registry, were in the title and generally concern the working conditions of hotel employees. Accordingly, the title sufficiently gave notice to members of the public to the subject matter of the measure.

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

B. Associations Do Not Have Standing to Challenge the Facial Constitutionality of the Guest Registry Provision

Plaintiffs challenge the constitutionality of Part I, which states,

> A hotel employer must record the accusations it receives that a guest has committed an act of violence, including assault, sexual assault, or sexual harassment towards an employee. The hotel employer must determine and record the name of the guest; if the name of the guest cannot be determined, the hotel employer must determine and record as much identifying information about the guest as is reasonably possible. The hotel employer shall compile and maintain a list of all guests so accused. The employer shall retain a guest on the list for at least five years from the date of the most recent accusation against the guest, during which time the employer shall retain all written documents relating to such accusations.

SMC 14.25.040.A. Plaintiffs are concerned that once a hotel guest is listed, there is no way for him or her to confront the accuser or to clear their name. Plaintiffs assert this part of I-124 violates 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.

As a threshold matter the Court must first determine whether Associations present a facial or an as-applied challenge to the constitutionality of SMC 14.25.020. An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n,* 141 Wash.2d 245, 282 n. 14, 4 P.3d 808 (2000). Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated. *Id.* In contrast, a successful facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied. *Id.* (citing *In re Det. of Turay,* 139 Wash.2d 379, 417 n. 27, 986 P.2d 790 (1999)). The remedy for holding a statute facially unconstitutional is to render

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

the statute totally inoperative. *Turay,* 139 Wash.2d at 417 n. 27, 986 P.2d 790. *City of Redmond v. Moore*, 151 Wash.2d 664, 668–69, 91 P.3d 875, 878 (2004). In this instance, Associations denominate their claims as a facial challenge to the initiative. *See* Plaintiffs' Motion for Summary Judgment, at 2.

1**. Direct Standing**

The Associations first argue that because Part I forces hotels to be the instruments of constitutional violations and causes economic injury, they have standing to bring these claims. The Supreme Court's test for standing in declaratory judgment actions has two requirements; "[f]irst, the interest sought to be protected must be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question . . . . Second, the challenged action must have caused injury in fact, economic or otherwise, to the party seeking standing." *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution,* 185 Wash.2d 97, 103, 369 P.3d 140 (2016). The Associations contend that they have direct standing because their members can satisfy both elements. Although I-124 regulates hotels, the members of plaintiffs Associations, plaintiffs fail to show injury necessary for standing on the challenge to the registry.

Plaintiffs claim direct injury by citing to a federal district court case which held that hotels had standing to challenge portions of a minimum wage ordinance, which also required a 5,000 square foot cleaning maximum per day. While the plaintiffs likely have standing to challenge the cleaning maximums, that standing may not be conferred to other provisions. "Person may not urge unconstitutionality of statute unless he (sic) is harmfully affected by particular feature of statute alleged to be violative of Constitution." *State v. Rowe*, 60 Wash.2d 797, 799, 376 P.2d 446

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

(1962). One who challenges the constitutionality of a statute must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general framework of the statute. *State v. Lundquist*, 60 Wash.2d 397, 401, 374 P.2d 246 (1962). In this case, plaintiffs have not sufficiently shown the creation of a list of those accused of harassment infringes on any interests particular to the Associations or to its members.

2. Third-Party Standing

The Associations also assert third party standing to challenge the constitutionality of the registry. The general rule is that "a person lacks standing to vindicate the constitutional rights of a third party." *State v. Herron*, 183 Wash.2d 737, 745, 356 P.3d 709 (2015). However, a litigant may have standing where (1) they have suffered an injury-in-fact, giving him or her a sufficiently concrete interest in the outcome of the disputed issue; (2) they have a close relationship to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests." *Id.* A litigant purporting to vindicate a third party's constitutional rights bears the burden of demonstrating that the allegedly injured third party lacks the ability to vindicate his or her rights. *Id.*

First, the Associations argue injury-in-fact because I-124 imposes additional operational, labor, and administrative costs on hotels and will reduce the number of customers, including those the hotel must bar from its premises. At this stage, on a facial constitutional challenge, these injuries are merely speculative. Therefore, this argument fails because the Associations cannot demonstrate that they will be "specifically and perceptibly harmed" by the Initiative. *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn.App. 853, 868, 351 P.3d 875 (2015). Where, as here, a party alleges a threatened injury, "as opposed to an existing injury," the party

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

must prove that the threatened injury is "immediate, concrete, and specific." *Id.* Without knowing how many, if any, guests will be on this list or even how many potential guests will be excluded from Seattle hotels each year, the threatened injury is not immediate, concrete, or specific enough to satisfy this prong. As noted above, as of the time of oral arguments on this matter, there was no evidence of any guests having been placed on a registry.

Second, plaintiffs Associations assert they do have a close relationship to an affected party and should be able to assert the rights of the third party (hotel guests). Plaintiffs cite to *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 286, 849 L.Ed.2d 826 (1976) (doctors who perform abortions were able to challenge state abortion laws on behalf of patients because of uniqueness of physician-patient relationship) and *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (NAACP was able to assert the rights of their members with respect to contested disclosure of members' names) in support of this proposition. In this case, the guests are not members of the Association and a common business transaction between the third party guests and the hotels who may be members of one or more of plaintiffs Associations is insufficient and too attenuated to establish the type of relationship necessary to meet this factor. *Cf. In re Guardianship of Decker*, 188 Wn.App. 429, 446, 353 P.3d 669 (2015) (finding the attorney of an individual in a guardianship established the second prong).

Third, Associations argue that individuals will be reluctant to challenge this provision because of the stigma attached. However, plaintiffs have not demonstrated that individuals are refraining from acting or why established procedures that allow individuals to litigate anonymously are insufficient. *See John Doe G v. Dept. of Corrs.*, 197 Wn.App. 609, 391 P.3d

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

496, 498 (2017) (2017) (allowing offenders to proceed under pseudonyms did not implicate open administration of justice provision of state constitution).

I-124 does not expressly require provision of notice to guests if they are on the list. When proceeding under traditional analysis of standing to assert rights for a third party, a litigant must demonstrate the allegedly injured third party *lacks the ability* to vindicate his rights before a court may grant the litigant standing to act on the injured third party's behalf. *In re Guardianship of Cobb*, 172 Wn.App. 393, 403, 292 P.3d 772 (2012). Plaintiffs do not assert that guests will not know of the potential injury, in fact they argue the opposite: that the list will not be confidential or private under SMC 14.25.060(C) and .150(D)(2) and is subject to public disclosure.

In this facial challenge, Associations cannot demonstrate that no set of circumstances exists in which the statute, as currently written, can be constitutionally applied. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n,* 141 Wash.2d 245, 282 n. 14, 4 P.3d 808 (2000) (citing *In re Det. of Turay,* 139 Wash.2d 379, 417 n. 27, 986 P.2d 790 (1999)). A facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied. *Id.* The parties debated at oral argument on these cross-motions the practical impact affected, if any, on hotel guests. There was speculation as to whether their names might be become public – or otherwise publicized, whether guests would be notified, whether guests would be denied the opportunity to attend group functions or conferences at hotels, and whether excluded guests could anonymously challenge the constitutionality of this Initiative. Moreover, as noted by Seattle and the Union, administrative rules and guidelines implementing the Initiative and SMC 14.25 have yet to be enacted. Many of the due process considerations

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

raised by plaintiffs Associations (such as notice and an opportunity to be heard) may be obviated or addressed based upon such regulations.

Moreover, the "other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply." *Singleton v. Wulff*, 96 S.Ct. 2868, 2873, 428 U.S. 106, 112–13 (1976). If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent. *Id*.

Thus, in *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), the Court held that the National Association for the Advancement of Colored People, in resisting a court order that it divulge the names of its members, could assert the First and Fourteenth Amendments rights of those members to remain anonymous. The Court reasoned that "(t)o require that (the right) be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *Id.* A similar concern has been expressed by plaintiffs Associations in this case. However, facts, such as administrative rules, may develop that would address these due process concerns of notice and an opportunity to challenge placement on the subject registry. For that matter, the posting of a notice requirement of the initiative may be successful in its deterrence effect, avoiding the necessity of reporting assaultive guests. Thus, a challenge to the constitutionality of this initiative is more properly brought as an as-applied challenge by an affected guest of a hotel, placed on a registry and excluded from a hotel. For these reasons, the facial constitutional challenge brought by the Associations on this record fails.

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

C. **WISHA Does Not Preempt Broader Protection Provided to Hotel Employees Under the Initiative.**

Associations assert Part II of the Ordinance which protects hotel employees from specified types of injury, is preempted by Washington Industrial Safety and Health Act (WISHA) and conflicts with state law. Under article XI, section 10 of the state constitution, the legislature has delegated police powers to charter cities so that the cities "may make and enforce within [their] limits all such local police, sanitary and other regulations as are not in conflict with general laws." Thus, a first class city may, without sanction from the legislature, legislate regarding any local subject matter. *Heinsma v. City of Vancouver,* 144 Wash.2d 556, 560, 29 P.3d 709 (2001). However, this power ends when the legislature adopts a law concerning a particular interest, unless the legislature has left room for concurrent jurisdiction. *Id.* An ordinance will be found to be invalid (1) if a general statute preempts city regulation of the subject or (2) if the ordinance directly conflicts with a statute. *Brown v. City of Yakima,* 116 Wash.2d 556, 560-1, 807 P.2d 353 (1991).

1. **Preemption**

When the legislature has expressly stated its intent to preempt the field, a city may not enact any ordinances affecting the given field. *See Brown,* 116 Wash.2d at 560. However, if the legislature is silent regarding its intent, 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. *Id.* at 560.

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

RCW 49.17.270 provides:

> The department 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 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.

The parties interpret this statute differently. Plaintiffs assert that the legislature intended Labor and Industries (L&I) to be the only agency responsible for administering the regulation of industrial safety and health by stating "the department *shall be the sole and paramount administrative agency* responsible for the administration of" WISHA. Previously, our State Supreme Court has found similar statutory language to express preemption in the context of a later enacted forestry practices statute amending or altering portions of an earlier enacted shorelines management act. *Weyerhaeuser Co. v. King Cnty.,* 91 Wash.2d 721, 734, 592 P.2d 1108 (1979) (interpreting RCW 90.48.420, "The department of ecology, pursuant to powers vested in it previously by chapter 90.48 RCW and consistent with the policies of said chapter and RCW 90.54.020(3), *shall be solely responsible* for establishing water quality standards for waters of the state" (emphasis added)). *Id.*

That opinion does say that the test is whether a new act changes a prior act in scope and effect. The court in *Weyerhaeuser* held that a section of an act amending the Forest Practices Act of 1974(FPA), RCW 76.09.010–.280 amended the Shoreline Management Act of 1971(SMA), chapter 90.58 RCW, without setting forth the text of the SMA. The new enactment prohibited

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

imposition of any regulations other than Department of Natural Resources' regulations on shoreline forest practices, contravening the intent of the SMA that shoreline master programs control. It also deprived local governments of enforcement power under the SMA by prohibiting any enforcement other than by procedures in the FPA. The court reasoned that the effect of the new enactment was to substantially change the scope and effect of the SMA without changing the language of the SMA to reflect the changes. 91 Wash.2d at 731–32, 592 P.2d 1108. Thus, the court concluded that the new enactment could not be understood without reference to both the FPA and SMA, and was therefore not a complete act and not excepted from the Art. II, § 37 requirement. *Id.* at 732, 592 P.2d 1108.

However, the analysis of the Court on preemption in that case was based on constitutional compliance under art. II, § 37. As the dissent pointed out, acts which are exempt from the requirement of art. II, § 37 are:

> (1) [C]omplete acts which repeal prior acts or sections thereof on the same subject; (2) complete acts which adopt by reference provisions of prior acts; (3) complete acts which supplement prior acts or sections thereof without repealing them; [and] (4) complete acts which incidentally or impliedly amend prior acts.

Weyerhaeuser, 91 Wash.2d at 738, 592 P.2d 1108 (Dolliver, J., dissenting) (quoting *Naccarato v. Sullivan,* 46 Wash.2d 67, 75, 278 P.2d 641 (1955)). As the dissent pointed out, the lead case on the meaning of art. II, § 37 is *Spokane Grain.* The court there said:

> But how often must we look to two or more acts to ascertain the full declaration of the legislative will. No one will for a moment doubt the power of the legislature to exempt homesteads by one act, household goods by another, farming implements by a third, and so on; yet the full declaration of the legislative will on the subject of exemptions could only be gathered by referring to these several acts. Followed to its logical conclusion, this argument would compel the legislature to embody in a single enactment, or in amendments thereto, all legislation relating to a single subject. Such was not the object or purpose of the provision in question. So long as

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

> a legislative act is complete in itself and does not tend to mislead or deceive, it is not violative of the constitution.

Spokane Grain, 59 Wash. at 84, 109 P. 316 *quoted in Weyerhaeuser,* 91 Wash.2d at 739, 592 P.2d 1108 (Dolliver, J., dissenting).

Weyerhaeuser should not be read so broadly in this instance. First, as indicated in *Spokane Grain, Weyerhaeuser* 's statement that the need to look to two acts to know the law means that the later act is not a complete act is overly broad. Further, *Weyerhaeuser* also states the test for whether the requirement of art. II, § 37 must be followed is whether the later enactment changes [the] prior act in scope and effect. A later enactment which is a complete act may very well change prior acts and is exempt from the requirement of art. II, § 37. However, aside from such statements, the new enactment in *Weyerhaeuser* clearly violated art. II, § 37. The new enactment specifically altered some of the provisions of the SMA (stating that local entities could exercise any authority under the SMA except that in relation to 'shorelines' as defined in RCW 90.58.030, the following shall apply [then describing exceptions to that authority,] and providing that with the exceptions stated (in the new FPA), the authority of local government was unchanged, Laws of 1975, 1st Ex.Sess., ch. 200, § 11). This is the kind of amendment of an existing statute which art. II, § 37 addresses. *See Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 250–52, 11 P.3d 762, 803–04, (2000).

This analysis is simply not applicable here, where the issue is supremacy of a state law. If the state law preempts the field, a local government cannot legislate or regulate within the same realm. Under article 11, section 11, cities have the right to enact ordinances prohibiting the same acts state law prohibits 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. *Bellingham v. Schampera,* 57

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

Wash.2d 106, 109, 356 P.2d 292 (1960). Thus, the ordinance must yield to a statute on the same subject either if the statute preempts the field, leaving no room for concurrent jurisdiction, *Diamond Parking, Inc. v. Seattle,* 78 Wash.2d 778, 781, 479 P.2d 47 (1971), or if a conflict exists such that the two cannot be harmonized. *Spokane v. J-R Distribs., Inc.,* 90 Wash.2d 722, 730, 585 P.2d 784 (1978). *Brown v. City of Yakima*, 116 Wash.2d 556, 559, 807 P.2d 353, 354 (1991). Thus, the proper analysis here rests with article 11, §11, not art. II, § 37.

In addition to the analysis of our Court in the *Brown* case, this Court considers by analogy the analysis of the Court in *Inlandboatmen's Union of the Pacific v. Department of Transp.,* 119 Wash.2d 697, 701–03 836 P.2d 823, 826–27, (1992). In that case, the Court was confronted with the issue of whether regulation of Washington State ferries by the DLI under WISHA was precluded by Coast Guard regulation of the ferries under federal law. This Court recognizes that federal preemption under the Supremacy Clause triggers not entirely analogous analysis to the issues present here, but the reasoning of our Supreme Court provides some critical guidance to the instant case:

> Federal preemption is governed by the intent of Congress and may be expressed in the federal statute. Absent explicit preemptive language, Congress' intent to supersede state law in a given area may be implied if (1) a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, (2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or (3) if the goals sought to be obtained or the obligations imposed reveal a purpose to preclude state authority. Federal regulations, within the scope of an agency's authority, have the same preemptive effect as federal statutes.
>
> Even if Congress has not occupied an entire field, preemption may occur to the extent that state and federal law actually conflict. Such a conflict occurs (1) when compliance with both laws is physically impossible, or (2) when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

> There is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption. It follows, therefore, that our inquiry in the present case is whether the Coast Guard statutes and regulations either explicitly, implicitly or by virtue of an actual conflict preempt the Washington safety statute and regulations.
>
> *Explicit Preemption*
> In order to find preemption, the courts have required an "unambiguous congressional mandate". The ferry system argues that the statement of the primary duties of the Coast Guard found in 14 U.S.C. § 2 is an explicit statement of Congress' intent to preempt state regulation. We find nothing in this statutory section indicating an intent to preempt state law on maritime safety matters. As will be discussed shortly, numerous decisions have concluded that the maritime area is not a field which Congress has totally occupied. The Coast Guard, however, does at times share its regulatory authority with state regulators.

Id.

Careful review of the actual language of the WISHA provision cited by the parties leads this court to the conclusion that the responsibility for "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" is not preempted by R.C.W. 49.17. To the contrary, three times in the section cited by plaintiffs in support of its preemption argument, the statute refers to administration, regulation, and enforcement of the laws of "this chapter."

> The department 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 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.**

RCW 49.17.270 (emphasis added.)

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

Review of the chapter reveals no preemptive language that would preclude municipalities or other governmental bodies from adopting laws or regulations related to the health and safety of employees more protective of those set forth in WISHA, provided that such local acts do not conflict or are not inconsistent with WISHA. *Bellingham v. Schampera,* 57 Wash.2d 106, 109, 356 P.2d 292 (1960); *Spokane v. J-R Distribs., Inc.,* 90 Wash.2d 722, 730, 585 P.2d 784 (1978). *Brown v. City of Yakima*, 116 Wash.2d 556, 559, 807 P.2d 353, 354 (1991).

2**. Conflict**

Having concluded that the field was not preempted, the Court must also consider if I-124 conflicts with other general statutes. *Id.* at 563. When considering whether an ordinance violates the Constitution the Court will consider an ordinance to be invalid on grounds of conflict only if the ordinance "directly and irreconcilably conflicts with the statute." *Brown,* 116 Wash.2d at 561. Similarly, a statute will not be construed as restricting a municipality's authority to enact an ordinance if the ordinance and the statute can be harmonized. *Id.* at 563.

The Associations assert that I-124 conflicts with WISHA by going beyond it by limiting the amount of square feet a worker can clean a day and creating a private right of action for enforcement or damages for violations of Part II. Nevertheless, Seattle and the Union assert that I-124 does not take any administrative abilities away from the State, it merely provides the City the power to investigate, and all of the enforcement powers are channeled through a private right of action. See SMC 14.25.150(C). The right of action would be under the provisions of I-124 and not WISHA. Because I-124 does not conflict with WISHA and creates separate legislation, there is no conflict. If the two enactments can be harmonized, no conflict will be found. *Rabon*, 135 Wash.2d at 292.

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

D. Part V(A)(5) and (6), the Rebuttable Presumption of Retaliation is Not Preempted By Existing State Law and is Not Unconstitutional

Associations also challenge the particular subpart of the Initiative which states:

> There shall be a rebuttable presumption of retaliation if a hotel employer takes an adverse action against an employee within 90 days of the employee's exercise of rights protected in this Chapter 14.25. The hotel employer may 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.

SMC 14.25.150 (A)(5). The Associations claim (1) this provision is preempted, (2) it violates due process, and (3) it violates the employer's right to a jury trial.

1. **Preemption**

Associations assert that I-124 conflicts with the established federal and state framework for retaliation claims under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under the *McDonnell Douglas* framework, the plaintiff has the initial burden of proving a prima facie case in employment discrimination claims. *See id.* This framework has also been adopted in Washington for cases involving employment discrimination under WLAD. *See e.g. Domingo v. Boeing Emps.' Credit Union*, 124 Wn.App. 71, 77, 98 P.3d 1222 (2004).

The doctrine of separation of powers, implicit in our state constitution, divides the political power of the people into three co-equal branches of government. Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist. " The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. " *State v.*

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

Moreno, 147 Wash.2d 500, 505–06, 58 P.3d 265 (2002) (quoting *Carrick v. Locke,* 125 Wash.2d 129, 135, 882 P.2d 173 (1994)).

In *City of Fircrest v. Jensen*, 158 Wash.2d 384, 393–94, 143 P.3d 776, 781–82 (2006), the question presented was whether a newly enacted DUI law act violated either the United States Constitution or the Washington Constitution by (1) including more than one subject in its title (2) not including the subject of the bill in its title (3) violating the doctrine of separation of powers and/or (4) violating due process by creating a mandatory rebuttable presumption. In addressing whether a legislatively enacted evidentiary rule was constitutional, the Court noted the concurrent authorities of the Legislature and the courts in adopting such rules of evidence:

> The issue here is whether the legislature is threatening the independence or integrity or invading the prerogative of the judiciary by passing SHB 3055. This court is vested with judicial power from article IV of our state constitution and from the legislature under RCW 2.04.190. The inherent power of article IV includes the power to govern court procedures. The delegated power of RCW 2.04.190 includes the power to adopt rules of procedure. *State v. Fields,* 85 Wash.2d 126, 128–29, 530 P.2d 284 (1975). In general, the judiciary's province is procedural and the legislature's is substantive. "Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *State v. Smith,* 84 Wash.2d 498, 501, 527 P.2d 674 (1974). *The adoption of the rules of evidence is a legislatively delegated power of the judiciary. RCW 2.04.190. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches. When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both. Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power*, the court rule will prevail. *Wash. State Council of County & City Employees v. Hahn,* 151 Wash.2d 163, 168–69, 86 P.3d 774 (2004).

City of Fircrest v. Jensen, 158 Wash.2d 384, 393–94, 143 P.3d 776, 781–82 (2006) (emphasis added.)

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

Washington courts have long approached the review of legislative enactments with great care. The wisdom of legislation is not justiciable; the court's only power is to determine the legislation's constitutional validity. *Petstel, Inc. v. County of King,* 77 Wash.2d 144, 151, 459 P.2d 937 (1969); *State ex rel. Bolen v. Seattle,* 61 Wash.2d 196, 198, 377 P.2d 454 (1963), *Smith v. Centralia,* 55 Wash. 573, 576, 104 P. 797 (1909). In matters of economic legislation, courts follow the rule giving every reasonable presumption in favor of the constitutionality of the law or ordinance. *Shea v. Olson,* 185 Wash. 143, 152, 53 P.2d 615, 111 A.L.R. 998 (1936). We employ this caution to avoid substituting the court's judgment for the judgment of the Legislature. *See State Public Employees' Bd. v. Cook,* 88 Wash.2d 200, 206, 559 P.2d 991 (1977), *aff'd on rehearing,* 90 Wash.2d 89, 579 P.2d 359 (1978); *Fritz v. Gorton,* 83 Wash.2d 275, 283, 517 P.2d 911 (1974); *Jones v. Jones,* 48 Wn.2d 862, 868, 296 P.2d 1010, 54 A.L.R.2d 1403 (1956); *see also* Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. Puget Sound L.Rev. 491, 522–23 (1984). *Sofie v. Fibreboard Corp*., 112 Wash.2d 636, 642–43, 771 P.2d 711, 715 (1989).

This issue was addressed in a different context initially in *Spratt v. Toft*, 180 Wn.App. 620, 636–37, 324 P.3d 707, 715(2014). In that case, the Court of Appeals recognized the Legislature's authority in establishing a heightened standard of proof in a civil claim in the context of an anti-SLAPP (Strategic Lawsuit Against Public Participation) statute:

> The issue of whether the statute's heightened burden of proof (clear and convincing evidence) in order to survive the anti-SLAPP motions violates the separation of powers doctrine was also not addressed below. While we need not decide that issue, we believe the burden of proof to be a substantive aspect of a claim and, as such, the statute would prevail. Heightened burdens have been upheld in other instances, including actions for defamation. This analysis subsumes the question of whether the requirement for clear and convincing evidence of a claim also violates access to the courts because it requires a heightened burden of proof.

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

> The legislature has the right to define the parameters of a claim and to set forth the factors that must be considered before liability can be established. **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. Finally, we note that as recently stated in *Dillon,* the clear and convincing evidence of a probability of prevailing on a claim is applied in a manner similar to the summary judgment standard.

Id.

However, subsequently, our Supreme Court called into question this analysis in striking down the anti-SLAPP statute in *Davis v. Cox,* 183 Wash.2d 269, 294, 351 P.3d 862, 874 (2015):

> Thus, RCW 4.24.525(4)(b) creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial. Such a procedure invades the jury's essential role of deciding debatable questions of fact. In this way, RCW 4.24.525(4)(b) violates the right of trial by jury under article I, section 21 of the Washington Constitution.

In that case, the Court reasoned that the heightened burden of proof at the preliminary stage of litigation "requires the trial judge to make a factual determination of whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim. This is no frivolousness standard." *Id.* Thus, by creating a preliminary threshold for a plaintiff requiring the trial judge to hold the plaintiff to a heightened nonfrivolous burden deprived the plaintiff of rights to a jury trial.

In this instance, the Initiative provides for a rule of evidence. It does not create the unconstitutional threshold addressed in *Davis v. Cox* depriving a litigant of jury rights. It is neither uncommon nor unconstitutional for a legislative body to create such evidentiary presumptions. *See, e.g., Spivey v. City of Bellevue*, 187 Wash.2d 716, 721, 389 P.3d 504, 507, (2017) (statutory presumption that malignant melanoma in firefighters is occupational. RCW 51.32.185(1) (the "firefighter presumption")); *Sunrise Exp., Inc. v. Washington State Dept. of*

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

Licensing, 77 Wn.App. 537, 539, 892 P.2d 1108, 1109, (1995) (statutory presumption that its vehicles had a fuel consumption rate of 4 miles per gallon*); Deegan v. Windermere Real Estate/Center-Isle, Inc.,* 197 Wn..App. 875, 890, 391 P.3d 582, 589, (2017) (causation under the CPA for omission of material facts includes a rebuttable presumption of reliance.)

Associations' argument that the Seattle Ordinance conflicts with the well-established burden-shifting jurisprudence set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and applied under Washington law, *see Domingo v. Boeing Emps.' Credit Union*, 124 Wn.App. 71, 77, 98 P.3d 1222 (2004) is well taken. Apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect, if possible. *Emwright v. King Cy.,* 96 Wash.2d 538, 543, 637 P.2d 656 (1981); *Nearing v. Golden State Foods Corp*., 114 Wash.2d 817, 821, 792 P.2d 500, 502–03 (1990). As noted above, the legislature has exercised its prerogative in protecting certain types of vulnerable employees by creating specified rebuttable presumptions based on public policy .*See, e.g.* RCW 51.32.185(1) (the "firefighter presumption"). This Ordinance does the same. It carves out a specified group of highly vulnerable employees – hotel employees – for enhanced protection against retaliatory conduct by their employers. Accordingly, this Court concludes that the rebuttable presumption and heightened controverting burden of proof is consistent with the law and burden-shifting rules established under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Domingo v. Boeing Emps.' Credit Union*, 124 Wn.App. 71, 77, 98 P.3d 1222 (2004).

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

2. **Due Process**

Plaintiffs assert that I-124 creates a presumption of unlawful conduct, which violates the due process rights of employers. "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 Wash.2d 879, 886, 468 P.2d 444 (1970). However, it is not arbitrary to presume retaliation when a hotel takes an adverse action against an employee within 90 days after asserting his or her rights under the Initiative. There are many reasons to place the burden on the employer to prove an adverse action was not in retaliation including the fact that direct evidence of retaliation will be seldom if ever seen in these retaliation claims. "Direct, 'smoking gun' evidence of discriminatory animus is rare, since there will seldom be eyewitness testimony as to the employer's mental processes and employers infrequently announce their bad motives orally or in writing; consequently, it would be improper to require every plaintiff to produce direct evidence of discriminatory intent." *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 179, 23 P.3d 440 (2001) (overturned on other grounds). Accordingly, there is a rational reason why the voters chose to provide plaintiffs alleging retaliation with a rebuttable presumption, and this provision does not violate due process.

3. **Right to Jury Trial**

Plaintiffs assert that I-124 violates the hotel employers' right to a jury trial when defending claims. For example, our Supreme Court held that the evidentiary burden of Strategic Lawsuit Against Public Participation (anti-SLAPP) statute violates constitutional provision that guarantees right to trial by jury. *See Davis v. Cox*, 183 Wash.2d 269, 351 P.3d 862 (2015). The statute required a trial judge to make a factual determination of whether the plaintiff had established by clear and

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

convincing evidence a probability of prevailing on the claim, and mandated dismissal of a claim and imposition of sanctions merely because the claim could not establish a probability of prevailing at trial. *Id.* at 288-9.

This case is distinguishable because nothing in the Initiative invades the jury's fact-finding role. Given the fact the presumption is rebuttable, nothing in the Initiative deprives the Associations from having a jury hear and determine the factual question of whether retaliation was the reason certain action was taken. *Cf. Davis v. Cox*, 183 Wash.2d 269, 351 P.3d 862 (2015). A fundamental requirement of due process is opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). There is no evidence in this record that members of plaintiffs Associations would be deprived of such due process.

E. **Severability**

If the Court concludes that any provision of the Initiative is invalid, it has the option to strike down the particular provision and leave the remainder intact. The Initiative includes a severability clause stating, "The provisions of this Chapter 14.25 are declared to be separate and severable." SMC 14.25.180(A). In assessing severability, the Court must follow a two-step test. *Davis*, 183 Wash.2d at 293 (2015). To determine severability, courts first ask whether the constitutional and unconstitutional provisions are so connected that it could not be believed that the legislature (or in this case the voters) would have passed one without the other; the courts then consider whether the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature. *Id.*

This Initiative has a severability clause, and "[w]here the initiative passed by the people

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

contains a severability clause, the court may view this as conclusive as to the circumstances asserted unless it can be said that the declaration is obviously false on its face." *League of Educ. Voters v. State*, 176 Wash.2d 808, 827, 295 P.3d 743 (2013). Defendants argue that while all of the Initiative's requirements are related to each other, they operate independently and could be severed without rendering the entire Initiative useless. Nonetheless, in this instance, this Court has upheld all terms and provisions of the subject Initiative and Ordinance and, therefore, severability need not be further substantively analyzed or addressed.

IV. Conclusion and Orders

The Initiative, I-124, and implementing Ordinance, SMC Ch. 14.25, is legislation popularly enacted by the voters of the City of Seattle to address serious and significant health, safety, and welfare issues of some of Seattle's most vulnerable employees, its hotel workers. Based upon the foregoing, this Court concludes that the Initiative and Ordinance do not violate the federal or Washington State Constitutions, are not inconsistent with or preempted by existing law, and that plaintiffs Associations lack the requisite standing for a facial constitutional challenge to the assaultive guest registry requirement provisions of the legislation.

For these reasons, IT IS HEREBY ORDERED that summary judgment in favor of Defendant City of Seattle and Intervenor Unite Here! Local 8 And Seattle Protects Women is GRANTED and summary judgment of plaintiffs American Hotel & Lodging Association, Seattle Hotel Association, and Washington Hospitality Association is DENIED.

DONE in OPEN COURT this 9th day of June, 2017.

/s/ John P. Erlick

Honorable John Erlick

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623

Attachment 1 – Documents considered and reviewed by the Court

I. Plaintiffs' Motion for Summary Judgment
1. Plaintiffs' Motion for Summary Judgment
2. Declaration of Brian Crawford in Support of Plaintiffs' Motion for Summary Judgment
3. City of Seattle's Memorandum in Opposition to Associations' Motion for Summary Judgment
4. Intervenors' response in Opposition to Plaintiffs' Motion for Summary Judgment
5. Corrected Plaintiffs' Reply in Support of Motion for Summary Judgment
6. Reply Declaration of Brian Crawford in Support of Plaintiffs' Motion for Summary Judgment

II. Defendant's Cross-Motion for Summary Judgment
1. Defendant's Cross-Motion for Summary Judgment
2. City of Seattle's Memorandum in Support of Summary Judgment
3. Declaration of Jeff Slayton in Support of City of Seattle's Cross Motion for Summary Judgment
4. Plaintiffs' Response to Motions for Summary Judgment
5. City of Seattle's Reply Brief in Support of the City's Motion for Summary Judgment

III. Intervenors' Motion for Summary Judgment
1. Intervenors' Motion for Summary Judgment
2. Declaration of Stefan Moritz in Support of Intervenors' Motion for Summary Judgment
3. Plaintiffs' Response to Motions for Summary Judgment
4. Intervenors' Reply in Support of Their Motion for Summary Judgment

JOHN P. ERLICK, JUDGE
King County Superior Court
516Third Avenue
Seattle, WA 98104
(206) 477-1623