

No. 77918-4

No. ~~94729~~ XXXXX

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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AMERICAN HOTEL & LODGING ASSOCIATION, SEATTLE HOTEL  
ASSOCIATION, and WASHINGTON HOSPITALITY ASSOCIATION,  
Appellants,

v.

CITY OF SEATTLE,  
Respondent,

and

UNITE HERE! LOCAL 8; SEATTLE PROTECTS WOMAN,  
Respondent.

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**CITY OF SEATTLE'S RESPONSE BRIEF**

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## I INTRODUCTION

In November 2016, Seattle voters overwhelmingly approved an Initiative addressing the “serious and significant health, safety, and welfare issues of some of Seattle’s most vulnerable employees, its hotel workers.” CP 370.<sup>1</sup> Finding no satisfaction at the ballot box, several hotel trade associations (the Association) brought a facial challenge seeking to invalidate the Initiative on numerous grounds. In a thorough and well-reasoned 38-page opinion, the trial court rejected each of the Association’s claims. While the Association now only challenges three of those rulings, its arguments should be rejected and the trial court should be affirmed.

*First*, the Initiative complies with the single-subject rule. Its title is general, not restrictive, and its provisions are rationally related to advancing the overarching purpose of the Initiative—worker health and safety. *Second*, the Association’s concerns about a provision it believes is unfair are speculative and without evidentiary support. Thus, the trial court correctly determined that the Association lacked standing to raise the constitutional rights of unknown hypothetical future hotel customers who may one day be falsely accused of assaulting a hotel worker. *Third*, Part 2 of the Initiative is not preempted by the Washington Industrial Safety and Health Act

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<sup>1</sup> The Initiative is codified at SMC 14.25 *et seq.* While the City refers to it as “the Initiative,” when addressing its substance, the City cites specific code sections.

(WISHA). Indeed, given WISHA's overriding purpose of worker protection, the Initiative does not in any sense conflict with WISHA. For the reasons stated below, this Court should affirm.

## **II FACTUAL AND PROCEDURAL HISTORY**

### **A. Seattle voters overwhelmingly approve the Initiative.**

On April 6, 2017, UNITE HERE! Local 8 filed a copy of the Initiative petition, which was designated I-124. CP 70. After the City Attorney's Office prepared the ballot title, UNITE HERE! and the Washington Lodging Association sued to challenge the title. CP 71. Judge Rogers approved a ballot title, which states in relevant part:

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?

CP 75. On November 8, 2016, Seattle voters overwhelmingly adopted the Initiative, with 76.59% voting in favor of its passage. CP 337. The results

were certified on November 29, 2016, and the Initiative went into effect the following day. CP 71.

**B. Overview of the Initiative.**

The Initiative adds a new chapter to the Seattle Municipal Code, titled Hotel Employees Health and Safety. The Initiative has seven parts, all of which are rationally related to worker health, safety and labor standards.

Part 1 protects hotel workers from assault and harassment. It contains several provisions, including:

- Requiring panic buttons. *See* SMC 14.25.030.
- Requiring employers to maintain a list of guest names accused of assaulting or harassing employees; ensuring such guests remain on these lists for five years; and notifying hotel employees should an accused guest stay at the hotel. *See* SMC 14.25.040.A, C.
- Only when an accusation of assault or harassment is supported by a sworn statement or other evidence, the employer must exclude the accused guest from the hotel for three years. *See* SMC 14.25.040.B.
- Employers must post signs notifying guests as to the protections offered under the Initiative. *See* SMC 14.25.050.

Despite the Association's dogged focus on these provisions, no evidence exists that any guest has ever been placed on any list or been denied lodgings because of the Initiative.

Part 2 protects hotel workers from on-the-job injuries. *See* SMC 14.25.070. To that end, it requires hotel employers to provide a safe workplace and protects employees from exposure to hazardous chemicals,

while also limiting the amount of floor space any hotel housekeeper may be required to clean in a workday. *See* SMC 14.25.080-.100.

Part 3, which is unchallenged, “improve[s] access to affordable family medical care.” SMC 14.25.110. It 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, which is unchallenged, reduces economic disruption caused by property sales or ownership changes in the hotel industry and protects low-income workers. *See* SMC 14.25.130. When a hotel changes control, the incoming employer must maintain a list of employees, based on seniority, 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 from this list for at least 90 days, barring cause for termination. *Id.*

Part 5, which is no longer being challenged, 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 an 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. Part 5 also requires 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. It also creates a private right of action for violations of the Initiative. *See* SMC 14.25.150.C. Part 5 authorizes, but does not require, the City to *investigate* alleged violations of the Initiative, and to promulgate regulations. *See* SMC 14.25.150.D. Part 5 also sets forth a penalty scheme and payout structure for such penalties. *See* SMC 14.25.150.E. Nothing in Part 5, however, provides any City agency with the ability to *enforce* the Initiative, nor does it *require* the City to obtain documents from those subject to the Initiative.<sup>2</sup>

Part 6 provides definitions. Part 7 allows any provisions of Chapter 14.25, except for the provisions on assault and 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.

### **C. Procedural history.**

A few weeks after the Initiative went into effect, the Association filed this suit, bringing seven different claims. CP 1-9. The Initiative proponents intervened shortly thereafter. All parties moved for summary judgment, agreeing that no material facts were in dispute, given the Association was only bringing a facial challenge. On June 9, 2017, Judge

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<sup>2</sup> Thus, the Association's repeated claim that the City (and therefore the public), "will have access to any such list," is simply untrue based on the face of the statute. Br. at 30.

Erlick issues a comprehensive 38-page opinion rejecting each of the Association's claims. CP 333-370.

### III LEGAL ARGUMENT

The trial court should be affirmed. *First*, the Initiative complies with single-subject rule because the ballot title is general, not restrictive, and a rational unity exists between all parts of the Initiative. *Second*, the Association lacks standing to press the constitutional rights of future hypothetical hotel guests and its myriad concerns regarding the so-called blacklist provision are entirely speculative and lacking in concreteness. *Finally*, Part II of the Initiative is not preempted by WISHA because WISHA allows for concurrent jurisdiction and the Initiative's additional protections for workers are consistent with WISHA's paramount purpose of worker safety and protection.

#### A. The Initiative satisfies the single-subject rule.

Article IV, section 7 of the Seattle City Charter provides: "Every ordinance shall be clearly entitled and shall contain but one subject, which shall be clearly expressed in its title." This provision "was adopted as a shield to prevent the union of diverse, incongruous, and disconnected matters, but it cannot be used as a sword to strike down useful legislation not within the mischief sought to be avoided." *City of Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 664, 104 P. 1121 (1909). Given the

similarities in purpose, it is appropriate to look to the well-developed body of single-subject under the Washington State Constitution law in evaluating the Association's structural challenge. *See, e.g., Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 781-82, 357 P.3d 1040 (2015).

The single-subject rule is not intended to burden the democratic process—the effective result of the Association's restrictive interpretation—but merely serves “to prevent logrolling.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000). This requirement must be “liberally construed *in favor of the legislation.*” *Washington Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 654, 278 P.3d 632 (2012) (emphasis added) (hereinafter “WASVP”). While the Association implies greater scrutiny is required of laws enacted through direct, as opposed to representative, democracy, *see* Br. at 4; the opposite is true. *See, e.g., Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003). Both are presumed constitutional. *Brower v. State*, 137 Wash.2d 44, 52, 969 P.2d 42 (1998). Thus, a party challenging the constitutionality of either “bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt.” *Amalgamated Transit*, 142 Wn.2d at 205. Any reasonable doubts are to be resolved in favor of constitutionality. *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995). As explained below, the

Association fails to satisfy its burden to overcome the presumption of constitutionality afforded to the Initiative.

**1. The ballot title is general, not restrictive.**

A ballot title may be general or restrictive which, as the Association recognizes, guides this Court's level of scrutiny. Br. at 6. A restrictive title "is one where a *particular branch* of a subject is carved out and selected as the subject of the legislation." *Amalgamated Transit*, 142 Wn.2d at 210 (quotation omitted; emphasis added). By contrast, a general title is "broad rather than narrow" and "comprehensive and generic rather than specific." *Id.* at 207-08. Although broad in scope, a general title may contain several incidental subjects or subdivisions. *Wash. Fed'n of State Emps.*, 127 Wn.2d at 556. The Initiative unmistakably possesses a general ballot title and, in asserting otherwise, the Association warps controlling authority.

At the threshold, the Association ignores the fact that the ballot title is the appropriate target of inquiry, as "it is the ballot title with which voters are faced in the voting booth." *Wash. Citizens Action of Wash. v. State*, 162 Wn.2d 142, 154, 171 P.3d 486 (2007) (quotation omitted). Any analysis of a ballot title looks to the "concise description of the measure," as well as its stated subject. *WASVP*, 174 Wn.2d at 655. Disregarding this, the Association cites two pages of cases that contain no discussion of any concise description, but only the statement of subject in cases generally

involving legislative titles. Br. at 6-7. None of these cases warrants analogy to the interests covered by the Initiative's ballot title, which contains a general subject (the "health, safety, and labor standards for Seattle hotel employees") followed by an outline of its substantive provisions. The Initiative's scope is akin to the proposition upheld in *Filo Foods*, this Court's most analogous ruling.

The tenuous links the Association creates between these older cases and the Initiative are unnecessary. In *Filo Foods*, this Court considered a proposition concerning "labor standards for certain employers," that is strikingly similar to the Initiative. *Filo Foods*, 183 Wn.2d at 783. *Filo Foods* outlined several distinct provisions in the proposition, narrowing the proposition's scope to specific SeaTac employees and employers. *Id.* One provision set the minimum wage for hospitality and transportation workers at \$15. *Id.* Another governed the distribution of tips. *Id.* Analogously, the Initiative regulates several distinct—albeit related—aspects of worker safety and standards for hotel employees. Given the diversity of services offered by major hotels, the title's scope is general indeed.

The trial court properly recognized the parallels between *Filo Foods* and the Initiative. CP 343-44. While proclaiming "meaningful differences" exists between the two titles, tellingly the Association never expounds on those differences. Br. at 8. Instead, the Association sidesteps the issue and

feigns confusion over the appropriate target of inquiry.<sup>3</sup> It compares *Filo Food's* stated subject ("labor standards for certain employers") with the Initiative's ("health, safety, and labor standards for Seattle hotel employees") and declares, without analysis or elaboration, that "it is hard to imagine how within the word limit a description could be more restrictive[.]" Br. at 9. The Association never explains how one of these subjects is more (or less) general than the other. The Association offers only the conclusory assertion that "health, safety, and labor" narrows the subject of regulation. *Id.* If anything, those terms widen its scope.<sup>4</sup> A proper analysis, looking also to the concise description, reveals that the Initiative's title is far more general than that considered in *Filo Foods*, excising specifics (e.g., a \$15 minimum wage) in favor of painting its provisions in broader strokes. Properly applying *Filo Foods* leads to the inextricable conclusion that the Initiative's ballot title is general.

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<sup>3</sup> The Association's prefaces its general/restrictive argument by insisting that this Court's analysis in *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 200 P.2d 467 (1948), controls. Br. at 7-8. Despite this insistence, by attempting to distinguish *Filo Foods*, the Association tacitly concedes that the trial court correctly observed that subsequent caselaw has added more nuance to the analysis. *Id.* In fact, in *Amalgamated Transit*, this Court eschewed *Yelle's* analysis on this score, instead concluding that a later case "controlled" the analysis. *Amalgamated Transit*, 142 Wn.2d at 215-16.

<sup>4</sup> In any case, a far greater list of verbs was upheld as general in *Wash. Toll Bridge Auth. v. State*, 49 Wn.2d 520, 522, 304 P.2d 676 (1956) ("providing for the acquisition, construction, improvement, extension, reconstruction, maintenance, repair and operation of toll roads.").

**2. The subjects of the Initiative are germane to one another.**

Where, as here, a title is general, the law requires only “that there be some ‘rational unity’ between the general subject and the incidental subdivisions.” *WASVP*, 174 Wn.2d at 656 (quotation omitted). When a title is general, “great liberality will be indulged to hold that any subject reasonably germane to such title may be embraced within the body of the bill.” *Amalgamated Transit*, 142 Wn.2d at 207. “Where the title of a legislative act expresses a general subject or purpose . . . all measures which will, or may, facilitate that accomplishment of the purpose so stated, are properly included in the act and are germane to its title.” *Id.* at 209 (quotation omitted). This is a flexible and permissive standard:

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...

*Id.* at 209-10 (quotation omitted). Indeed, even “arguably tenuous” subjects have been determined to be germane based on the overall purpose of the initiative in question. *Filo Foods*, 183 Wn.2d at 784 (discussing *WASVP*).

Having conceded the germaneness of the Initiative's other provisions, the Association zeros in on the so-called "blacklist" provision. Br. at 11. However, each of the Initiative's seven provisions—including the guest registry—clearly relate to its stated purpose: improving the health, safety, and labor standards for employees at certain hotels. Although the Association contends that the registry is an outlier, it acknowledges that "sexual harassment of hotel employees—especially room attendants—is so rampant that studies have found it has essentially been normalized." Br. at 20. Given its concession, it strains credulity to suggest that keeping individuals who have previously assaulted a hotel worker from coming back to that hotel does not rationally relate to hotel worker health and safety.<sup>5</sup>

Paralleling the Initiative, *Filo Foods* included several distinct protections for certain types of workers (including a minimum wage, paid sick leave, and worker retention requirements). 183 Wn.2d at 783. The court held that each of these provisions fell under the rubric of establishing "minimum employee benefits." *Id.* at 785. To get around *Filo Foods*, the

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<sup>5</sup> Even if it is determined that the ballot title is restrictive, the same result follows because all the Initiative's provisions "are fairly within the subject expressed in the title." *Citizens for Responsible Wildlife*, 149 Wn.2d at 636 (assuming arguendo that title was restrictive). Unless one ignores the rampant nature of sexual and violent assault of hotel workers, it cannot be seriously argued that restricting hotel access to sexually violent individuals does not fall "fairly within" the rubric of worker health and safety. The Association's myopic view of worker safety, which apparently does not include a workplace free of assaultive guests, should be rejected.

Association invents a legal distinction between the regulation of the employer-employee relationship and the guest registry's application to a third party. Br. at 12. The Association cites no authority supporting its novel theory. In fact, *WASVP* upheld an initiative regulating a wide range of parties—from advertisers to retailers—through its varied provisions concerning liquor privatization. 174 Wn.2d at 656-58.

Finally, the Association seizes on a one-line observation in *Amalgamated Transit* that neither of an initiative's provisions was necessary to implement the other. Br. at 12. Far from being decisive, this remark merely underscored the vast gulf separating the considered provisions in *Amalgamated Transit*. See *Citizens for Responsible Wildlife*, 149 Wn.2d at 638 (explaining *Amalgamated Transit*). Although the trial court expressly pointed this out, CP 344-45; the Association affects ignorance of the fact that its interpretation of *Amalgamated Transit* was explicitly rejected by this Court: "An analysis of whether the incidental subjects are germane to one another does not necessitate a conclusion that they are necessary to implement each other, although that may be one way to do so. This Court has not narrowed the test of rational unity to the degree claimed by" the Association." *Citizens for Responsible Wildlife* at 638.<sup>6</sup>

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<sup>6</sup> In effect, the Association is asking this Court to overrule *Citizens for Responsible Wildlife*, and adopt the dissent in that case. 149 Wn.2d at 657 (Sanders, J., dissenting); see also *City of Fircrest v. Jensen*, 158 Wn.2d 384, 411, 143 P.3d 776 (2006) (Sanders, J., dissenting).

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Even if *Filo Foods* was not directly on point with respect to the general nature of the ballot title, and even if it were a close call that the subjects contained in the Initiative are rationally (or fairly) related, the Association cannot “overcome the presumption that the initiative is constitutional.” *WASVP*, 174 Wn.2d at 646. After all, the single-subject rule must be “liberally construed in favor of the legislation.” *Id.* at 654; *see also Amalgamated Transit*, 142 Wn.2d at 206 (collecting cases).

At bottom, the Association’s real complaint is not with Judge Erlick’s faithful application of this Court’s precedents, but rather with this Court’s jurisprudence, which it believes does not properly ferret out “logrolling.” Br. at 4-5. Unless this Court adopts a sea-change in its single-subject jurisprudence, only one result can follow: The Initiative complies with the letter and spirit of the Seattle City Charter.

**B. The constitutionality of the blacklist is not justiciable.**

While the Association invokes numerous strains of this Court’s standing jurisprudence, none of them can overcome the fact that the Association lacks standing to raise the constitutional rights of its members’ unknown hypothetical future customers. The Association puts forth no evidence that anyone’s name has ever been placed on a list and denied lodgings, let alone that anyone has been placed on a list based on a false

accusation. Thus, its professed concerns for its members' unknown future customers are entirely speculative. This is insufficient to create a justiciable controversy under the Uniform Declaratory Judgments Act (UDJA). Consequently, the trial court correctly ruled that the Association lacks standing to vindicate the purported constitutional rights of its members' hypothetical future customers.

**1. This case is not justiciable.**

This Court has “steadfastly adhered to the virtually universal rule that, before the jurisdiction of a court may be invoked under the [UDJA], there must be a justiciable controversy.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quotation omitted).<sup>7</sup> Justiciability requires a “coalesce[ing]” of four independent factors, which ensures that any judgment rendered is based “on an actual dispute,” not a hypothetical one. *Id.* Unless each of these factors is met, this Court “steps into the prohibited area of advisory opinions.” *Id.* at 416 (quotation omitted).

**a. The Association's concerns are speculative.**

The Association's constitutional challenges to the so-called blacklist fail at the outset because those claims rest on assumptions of how the law

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<sup>7</sup> The Association also sought injunctive relief. CP 9. On appeal, the Association makes no attempt to argue that it meets the requirements necessary to obtain injunctive relief; thus, the City will focus only on the Association's request for declaratory relief.

*might* operate or *might* impact unknown hypothetical future hotel guests. Such speculation is not the stuff of a justiciable controversy. *To-Ro Trade Shows*, 144 Wn.2d at 416 (2001) (“we have repeatedly refused to find a justiciable controversy where the event at issue has not yet occurred or remains a matter of speculation”) (collecting cases). Despite having months to provide evidence of the registry’s impacts on actual hotel guests, the Association provides no evidence that any person has ever been placed on a list. If this were not enough to demonstrate the speculative nature of the Association’s claims, its arguments all rest on a cynical assumption: that someone will be *falsely* accused. *See generally* Br. at 28-38.<sup>8</sup>

But there is certainly no evidence that anyone has ever been falsely accused, and no reason to believe that it will necessarily occur. In fact, our Legislature has acknowledged that “Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities.” RCW 7.90.005; *see also Duvall v. Nelson*, 197 Wn. App. 441, 455 n. 13, 387 P.3d 1158 (2017). Given that cases of actual sexual assault are grossly underreported, it makes little sense for the Association to claim that “mistaken (or false) accusations are inevitable.” Br. at 27. The Association supports this speculation by citing to two irrelevant newspaper

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<sup>8</sup> The City does not understand the Association to be claiming that hotel guests have a constitutional right to not to be placed on a list if they actually assault a hotel worker.

articles.<sup>9</sup> Speculation is not evidence. *Trepanier v. City of Everett*, 64 Wn. App. 380, 383-84, 824 P.2d 524 (1992).

Absent a set of concrete facts, this Court enters the prohibited area of an advisory opinion by rendering a constitutional ruling on a provision of the Initiative which, to date, has never been employed. Declining to wade into the Association's hypothetical world, where unnamed hotel guests are falsely and unknowingly accused of assault, is consistent with "the fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002) (collecting cases).

That the City has not yet engaged in rulemaking, which could alleviate some of the Association's purported concerns, underscores why the advisory opinion the Association requests should be denied. CP 355; *see also Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) (finding only hypothetical dispute where statute could be amended). Until a concrete

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<sup>9</sup> Reliance on these newspaper articles is improper as an evidentiary matter (they are hearsay), and just plain troubling. By citing to news reports, the Association minimizes the significant hurdles facing the victims of sexual assault from coming forward and ignores the reality that many instances of sexual assault go unreported. Implicit in the argument is that individuals, mostly women, who accuse someone of sexual or violent assault are not being truthful. This is little more than a pernicious manifestation of a practice commonly referred to as "victim-blaming." *See* Kayleigh Roberts, *The Psychology of Victim-Blaming*, THE ATLANTIC (October 5, 2016) (available at <https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/>) (last visited October 19, 2017).

set of facts presents itself, the Association's parade of horribles is entirely speculative and therefore this case is not justiciable.

**b. In any event, the Association lacks standing to raise the constitutional rights of unknown future hotel guests.**

At the outset, it is important to clear up the confusion created by the Association's failure to use the correct terminology regarding standing. The Association claims that it has "direct standing" under the UDJA. Br. at 14-15. "Direct" or "personal" standing only applies, however, when the actual party claims an injury to itself. *City of Snoqualmie v. Constantine*, 187 Wn.2d 289, 296, 386 P.3d 279 (2016). Because the Association claims no injury of its own, it cannot invoke "direct" or "personal" standing.

In contrast to "direct" standing, organizations can invoke "associational" standing on behalf of their members.<sup>10</sup> To do so, it must demonstrate: "(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." *Am. Legion Post #149 v. Wash. State Bd. of Health*, 164 Wn.2d 570, 595,

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<sup>10</sup> This Court has also appeared to recognize a distinct subspecies of non-personal standing, referred to as "representative" standing, which generally applies in instances where a government seeks to represent the interest of its citizens. *See, e.g., City of Seattle v. State*, 103 Wn.2d 663, 669, 694 P.2d 641 (1985). Here, the Association does not seek to represent the interests of Seattle's citizens, who overwhelmingly approved the Initiative.

192 P.3d 306 (2008) (quoting *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977)). Importantly here, the Association does not claim that any of *its members'* constitutional rights are at issue; rather, it seeks to expand the associational standing exception to vindicate the purported constitutional rights of its members' future hypothetical customers.

In other words, the Association attempts to vindicate the purported constitutional rights of unknown individuals who are three steps removed from the Association by relying on an injury that has no relationship to the constitutional guarantees in question. Unsurprisingly, the Association points to no Washington authority where an associational plaintiff was permitted to stack two standing exceptions on top of one another to get around the “traditional rule [] that a person challenging a statute may not challenge the statute on the ground it may conceivably be applied unconstitutionally to others in situations not before the court.” *State v. Myers*, 133 Wn.2d 26, 31, 941 P.2d 1102 (1997);<sup>11</sup> *see also Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 103, 369 P.3d 140 (2016) (“The standing doctrine prohibits a litigant from raising another’s legal rights.”) (quotation omitted). Having

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<sup>11</sup> While *Myers* recognized a First Amendment “exception to this rule,” 133 Wn.2d at 31; the Associations makes no claim under the First Amendment.

put the Association's claim of standing into proper context, the City will now explain why the Association lacks associational standing.

*First*, the Association fails the second factor in the *Hunt* analysis—germaneness of organizational purpose. *American Legion*, 164 Wn.2d at 595. For example, the “mission” of the American Hotel & Lodging Association “is to be the voice of the lodging industry, its primary advocate, and an indispensable resource.” CP 318. It accomplishes this mission by engaging in lawsuits, education, and lobbying. *See id.* This “mission” says nothing about hotel guests, let alone vindicating their purported constitutional rights. Accordingly, the Association cannot satisfy *Hunt*'s second prong. *American Legion*, 164 Wn.2d at 596 (finding lack of standing because “smoking” was not germane to organization's “purpose”); *see also Fleck & Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1106 (9th Cir. 2006) (denying associational standing because organization's purpose, which was purely financial, was not germane to the vindication of “the putative privacy interests of its customers.”).<sup>12</sup>

*Second*, the Association fails *Hunt*'s first factor—member standing. *American Legion*, 164 Wn.2d at 595. Under the UDJA, standing may exist

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<sup>12</sup> Under *Hunt*'s third prong, associational standing is only permissible when the claim asserted does not require the participation of individual members. *American Legion*, 164 Wn.2d at 595. In an as-applied challenge, there can be no doubt that the Association would flunk this part of the test because the participation of the individual's whose constitutional rights were at stake would unquestionably be necessary.

where (1) “the interests sought to be protected” are “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question” and, (2) “the challenged action must have caused injury in fact, economic or otherwise, to the party seeking standing.” *Spokane Entrepreneurial*, 185 Wn.2d at 103 (quotation omitted).

While administrative burdens may give the Association the requisite injury to claim the Initiative violates the single-subject rule or make a preemption claim to specific sections of the Initiative,<sup>13</sup> it does not place them in the “zone of interests” to be protected by the so-called blacklist provision or the “constitutional guarantees” they seek to vindicate. Nor does it confer an injury in fact of the type required to raise constitutional claims that are not its (or even its members’) own.

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<sup>13</sup> Authority the Association champions makes this point. *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C06-1254 SBA, 2006 WL 2739309, at \* 4 (N.D. Cal. Aug. 23, 2006) (“A plaintiff may have standing to challenge some provisions of a law, but not others.”) (quotation omitted). That the Association has standing to challenge the entirety of the Initiative on single-subject grounds, does not mean that it has standing to assert specific constitutional claims directed at discrete subparts. It is the nature of the single-subject challenge (that the law as whole does not comport with certain requirements) that permits a broad challenge on those grounds alone. *See, e.g., Hejira Corp. v. MacFarlane*, 660 F.2d 1356, 1360 (10th Cir. 1981) (allowing standing on facial challenge under due process void for vagueness claim, but noting that “plaintiffs lack standing to raise issues which are the private rights of potential purchasers and possessors of drug paraphernalia, and which deal with conditions and situations not properly before the court, such as whether the Act may violate the privacy of potential possessors of drug paraphernalia.”).

Zone of interests. While the Initiative generally regulates the Association's members' conduct,<sup>14</sup> the so-called blacklist provision regulates the conduct of hotel guests—by holding them accountable for assaulting hotel workers. Moreover, this provision is designed to *protect* hotel workers from assaultive guests, not hotels from administrative burdens. “Since the [provisions] in question were not designed to protect [the hotels'] interests, they are not within the zone of interest” and therefore standing cannot exist. *Grant Cty. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004); *see also Branson v. Port of Seattle*, 152 Wn.2d 862, 876, 101 P.3d 67 (2004) (concluding that party lacked standing because he was “not within the zone of interests intended to be protected by the *particular statutory requirement*” at issue) (emphasis added); *Allan v. Univ of Wash.*, 92 Wn. App. 31, 38, 959 P.2d 1184 (1998) (same). Similarly, the interests the Association actually seeks to protect—the avoidance of administrative burdens—“clearly do not coincide with the” blacklist’s “aim of protecting” hotel workers from assaultive guests; thus, for this additional reason no member of the

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<sup>14</sup> The Association claims the trial court determined that it fell within the zone of interests regulated by the Initiative. *See* Op. Br. at 16. A fair reading of the opinion shows, however, that the court did not determine this issue because it ultimately concluded that “plaintiffs fail[ed] to show injury necessary for standing on the challenge to the registry.” CP 351.

Association's is within the zone of interests regulated or protected by the blacklist provision. *To-Ro Trade Shows*, 144 Wn.2d at 415.

Likewise, none of the Association's members are within the "zone of interests" of the "constitutional guarantees" at issue. Indeed, the Association's member hotels "cannot claim the [Initiative] interferes with [their] liberty interests in violation of due process" because as non-natural persons they possess no such liberty interest. *American Legion*, 164 Wn.2d at 594. That future hypothetical customers may have such constitutional guarantees does not place any Association member into the zone of interests those guarantees protect. *Foss v. Dep't of Corrs.*, 82 Wn. App. 355, 364, 918 P.2d 521 (1996) (denying standing where teachers were "not within the zone of interests protected by" constitutional claim of "procedural due process right to a hearing"). "As the name implies, the zone of interests test turns on the *interest* sought to be protected, not the *harm* suffered by plaintiff." *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 848 (9th Cir. 2009) (emphasis in original). Financial injury, without more, "does not implicate the zone of interests protected" by any of the constitutional guarantees in question because administrative burdens are not "tied to the purposes animating" procedural due process or privacy. *Id.*

Injury-in-fact. Even assuming its members fall within the “zone of interests,” the Association cannot satisfy the injury-in-fact requirement. It has long been the rule in Washington that:

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. 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 a statute.

*State v. Rowe*, 60 Wn.2d 797, 799, 376 P.2d 446 (1962) (emphasis added; alterations omitted); *see also Amunrud v. Bd. of Appeals*, 124 Wn. App. 884, 892, 103 P.3d 257 (2004), *aff'd on other grounds*, 158 Wn.2d 208 (2006). Because the Association’s alleged injury—administrative burden—has no connection, let alone a direct one, with any person’s due process or privacy rights, this injury is not of the type of injury required to assert standing on constitutional grounds. Moreover, the Association has not alleged any injury to its business that necessarily flows from the purported constitutional violations. For example, the Association provided no evidence that any individual has chosen not to frequent its members’ hotels for fear of being falsely placed on a list, or that its members’ business has suffered in any way because of the blacklist provision being on the books. *See, e.g., To-Ro Trade Shows*, 144 Wn.2d at 413. At bottom, the

Association's claim is little more than a generalized grievance that others might be harmed by operation of the provision.

Federal courts view the matter similarly. "Our standing decisions make clear that standing is not dispensed in gross. To the contrary, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotations & citations omitted). This is so because:

It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

*Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (emphasis in original); *see also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982) (finding no injury in fact where party failed "to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error") (emphasis added).

The Association cannot parlay a generalized claim of administrative harm that has no relation to, and is not an attendant consequence of, an alleged constitutional violation into an injury in fact sufficient enough to

raise the constitutional rights of third parties not before the Court. This is doubly so because any claim of constitutional harm lacks immediacy, specificity, and concreteness. CP 352-53.

**c. The Association lacks third-party standing.**

Under Washington law, when a party asserts the constitutional rights of others different considerations apply. Such plaintiffs must satisfy three specific conditions: (1) an injury in fact sufficient to demonstrate a “concrete interest in the outcome of the dispute;” (2) that they have a “close relation to the third party;” and, (3) there exists a “hindrance to the third party’s ability to protect his or her own interests.” *State v. Herron*, 183 Wn.2d 737, 746, 356 P.3d 709 (2015); *see also T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 424 n.6, 138 P.3d 1053 (2006). While failure to establish any one of these factors is fatal, the Association fails on all three.

Injury in fact. The City already explained why the Association fails this requirement directly and in an associational capacity. *See supra* Part III.B.I.b.

Close relationship. The Association fails this prong on three levels. *First*, as the party seeking relief, it is the Association’s relationship, not its members’ relationship, with potential hotel customers that is the critical inquiry. The Association glosses over the fact that it has no relationship whatsoever with any hotel customers, let alone hypothetical ones.

*Second*, even assuming the Association can stack its purported associational standing on top of third-party standing to get around its lack of direct standing, the result is the same. Just like the Association, its hotel members have no relationship with unnamed and unknown future hypothetical customers. It is entirely speculative to assume that such customers will someday exist. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 132 (2004) (“The attorneys before us do not have a ‘close relationship’ with their alleged ‘clients’; indeed, they have no relationship at all.”). Such a situation is far removed from the cases upon which the Association relies.

For example, in *Craig v. Boren*, 429 U.S. 190 (1976), the Court allowed a beer vendor to challenge, on equal protection grounds, a state law prohibiting the sale of 3.2% beer to males under age 18 and to females under age 21. *See id.* at 192. In assessing standing, the Court first noted that Mr. Craig, an original plaintiff in this case, “attained the age of 21 after we noted probable jurisdiction.” *Id.* To get around mootness, the Court noted that, unlike here, the state never objected to the vendor’s ability to rely on the constitutional rights of others, and, in fact, conceded the point at oral argument. *Id.* at 193. It also noted that, unlike here, the “lower court already has entertained the relevant constitutional challenge and the parties have sought or at least never resisted an authoritative constitutional determination.” *Id.*

Most importantly, the Supreme Court concluded that the vendor independently established a constitutionally-based injury in fact *that directly flowed from* the alleged constitutional violation. The injury occurred in the form of “direct economic injury through the constriction of her buyers’ market.” *Id.* at 194. That conclusion made sense because the vendor was not allowed to sell 3.2% beer to any male under the age of 21 in the state of Oklahoma—a large and readily definable group of customers. (Indeed, one of those would-be customers, Mr. Craig, had already brought the case.) Thus, the economic harm to vendor’s business in *Craig* was direct, substantial and non-speculative and could only be redressed by remedying the alleged constitutional violation.

By contrast, the Association has not claimed that any alleged constitutional violation—putting someone falsely accused of assault on a list—has caused them any loss of business or constricted the relevant market in any respect.<sup>15</sup> The Association cannot point to a single customer lost because the blacklist provision is on the books. While the economic harm to the market in *Craig* was real and directly tied to the alleged constitutional

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<sup>15</sup> Because the City has no enforcement authority under the Initiative, this is not a situation like *Craig* where the vendor could lose their ability to operate in the City if they do not comply with the law. *Craig* at 194.

violation (discrimination based on sex), here it is imaginary and bears no relationship to the alleged constitutional violation.<sup>16</sup>

The Associations reads *Craig* as recognizing a *per se* “close relationship” between a vendor and its customers. *See* Br. at 21. As explained, this oversimplifies *Craig*. Moreover, since *Craig*, the Supreme Court has refined its third-party standing doctrine to require a more stringent standard. *See, e.g., Miller v. Albright*, 523 U.S. 420, 447 (1998) (O’Connor, J., concurring). And, most importantly, this Court adopted a more refined third-party standing analysis in *State v. Herron, supra*.<sup>17</sup>

*Third*, the nature of rights being derivatively asserted counsel against third-party standing because “[c]onstitutional privacy rights are personal rights that cannot be vicariously asserted.” *State v. Francisco*, 107 Wn. App. 247, 252, 26 P.3d 1008 (2001). Both due process in a good name

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<sup>16</sup> Reliance on *Kaahumanu v. Hawaii*, 682 F.3d 789 (9th Cir. 2012), is inapt because in that case the association’s members, unlike here, ably demonstrated “direct economic injury” because the law in question resulted in demonstrated loss of business. *Id.* at 796-98.

<sup>17</sup> Curiously, in support of its argument that it will be an “adequate advocate” for unknown hypothetical future hotel customers, the Association relies on a case holding the exact opposite. *See* Br. at 22 (citing *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078 (9th Cir. 1987)). Reliance on *Hong Kong* is further misplaced because it pre-dates the Supreme Court’s clarification of the three requirements of third-party standing, and therefore omits any discussion of hindrance or a close relationship. Likewise, *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port. Auth.*, 335 F. Supp.2d 275 (D. Conn. 2004) and *Czajkowski v. Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977), are unhelpful because both cases found third-party standing even though they both concluded that no hindrance existed. *Bridgeport* at 284; *Czajkowski* at 1275 (same). Thus, both were wrongly decided because they applied the wrong test.

and privacy are personal rights. *Desimone v. Shields*, 152 Wn. 353, 360, 277 P. 829 (1929) (“due process . . . held to be a personal right”); *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 240, 654 P.2d 673 (1982) (“the right to privacy is a fundamental personal right”) (quotation omitted). Under the Association’s theory of “close relationship,” any company that sells goods to a consumer would have standing to assert the personal constitutional rights of its customers. For example, Microsoft could bring a Fourth Amendment privacy claim on behalf of its customers. *But see Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp.3d 887, 915-916 (W.D. Wash. 2016) (rejecting Microsoft’s claim of third-party standing in Fourth Amendment privacy context on behalf of customers).

The Association’s view of a “close relationship” has no logical stopping point because it is not based on any actual relationship, let alone one “of special consequence.” *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989). This is not a case where a physician is asserting the rights of her patient. *Singleton v. Wulff*, 428 U.S. 106, 114-115 (1976) (plurality). Nor is this a case where a lawyer is asserting the rights of his client. *In re Guardianship of Decker*, 188 Wn. App. 429, 446, 353 P.3d 669 (2015). Accepting the Association’s view that a close relationship exists between every member hotel in Seattle and every *potential* hotel guest that might someday walk through a hotel’s doors

requires an unprecedented leap in logic and is outside the contours of the *two exceptions* to standing upon which the Association relies.

Somewhere along the way the Association has lost sight of the fact that it invokes, in tandem, *two exceptions* to the “traditional rule [] that a person challenging a statute may not challenge the statute on the ground it may conceivably be applied unconstitutionally to others in situations not before the court.” *State v. Myers*, 133 Wn.2d at 31. This fact was not, however, lost on the trial court which correctly concluded that “a common business transaction between 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.” CP 353.

Hindrance. To invoke the rare exception of third-party standing, the Association must demonstrate an actual, not hypothetical, hindrance. *In re Guardianship of Decker*, 188 Wn. App. at 446 (2015); *see also Woodfin Suite Hotels*, 2006 WL 2739309, at \* 8 (N. D. Cal. Aug. 23, 2006) (denying third-party standing to hotel seeking to vindicate privacy interests of its employees); *see also id.* at \* 11. While the Association posits several theories as to why an individual may not seek to vindicate their own constitutional rights, no evidence supports these hypothetical hindrances. And the Association never gives a reason for its failure to get a declaration

from an individual who had been placed on a list explaining why that person felt they could not assert their own rights. This declaration could have been submitted under a pseudonym. *See* GR 15.

Rather than muster the necessary evidence, the Association puts forth nothing but conjecture, which is insufficient to establish an actual hindrance. *See, e.g., King v. Governor of the State of New Jersey*, 767 F.3d 216, 244 (3d Cir. 2014) (rejecting third-party standing based on “stigma” because “evidence does not sufficiently establish the presence of such fear here.”);<sup>18</sup> *Mazzocchi v. Windsor Owners Corp.*, 204 F. Supp.3d 583, 605 (S.D.N.Y 2016) (requiring claims of hindrance based on mental illness be corroborated by actual evidence); *HomeAway Inc. v. City & County of San Francisco*, No. 14-cv-04859-JCS, 2015 WL 367121, at \* 11 (N.D. Cal. Jan. 27, 2015) (rejecting third-party standing based on “modest financial interest” of customers absent actual evidence of the same).<sup>19</sup>

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<sup>18</sup> Despite the Association’s claim to the contrary, the court in *Pennsylvania Psychiatric Society v. Green Springs Health Services, Inc.*, 280 F.3d 278 (3d Cir. 2002), did not hold that alleged stigma, standing alone, was sufficient to meet the hindrance requirement. *See* Br. at 25. Rather, the court held that “the patients’ fear of stigmatization, *coupled with their potential incapacity to pursue legal remedies*, operates as a powerful deterrent to bringing suit.” *Pennsylvania Psychiatric* at 290 (emphasis added).

<sup>19</sup> To the extent the Association claims individuals will not know they have been falsely accused, *see* Br. at 24; that concern is easily addressed via rulemaking because the Initiative does not prohibit the City from requiring hotels to provide notice to any person whose name has been placed on a list. CP 354-55.

Moreover, the Association's self-serving conjecture is internally inconsistent. On the one hand, it argues that being falsely accused of sexual assault is too stigmatizing to motivate someone to clear their own name, *see* Br. at 25; on the other hand, it relies on a *Boston Globe* biographical story where a former Yale quarterback claims he was falsely accused of sexual assault. *See id.* at 30-31. Which is it? Will those falsely accused of sexual assault be too timid "to draw even more attention to the accusation," *see* Br. at 25; or will they follow the lead of Patrick Witt and take to the *Seattle Times* to try and clear their good name? Ultimately, the answer to this question does not matter because the Association puts forth no evidence, as it must, that any actual hindrance exists. *See* CP 353-55.

**d. Public interest standing is not appropriate in this case.**

Given that the question of whether the Association has standing to raise the constitutional rights of its members' hypothetical future customers is not a close call, by invoking public interest standing the Association is not asking this Court to relax the standing requirements; rather, it is asking the Court to dispense of them entirely. This Court should not do so.

To be sure, this Court has, "on the rare occasion, rendered an advisory opinion as a matter of comity for other branches of government or the judiciary," but given the ill-defined nature of the claims being asserted,

this case does not warrant the issuance of an advisory opinion. *Walker*, 124 Wn.2d at 417. And this is particularly so, where, as here, not only is the City is seeking “dismissal of the case,” *id.*; but where the Association has failed to provide any evidence that any person’s constitutional rights have ever been implicated, much less violated.

The Association cannot meet the general criteria necessary to invoke public interest standing. *First*, this case is not one of “statewide importance” that affects “a substantial percentage of the population.” *Wash. Nat’l Gas Co. v. PUD No. 1 of Snohomish Cty.*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969); *see also Constantine*, 187 Wn.2d at 297 (relaxed standing appropriate where issue would “impact Indian tribes throughout the state” and might “broadly impact the legislature’s actions” concerning tax policy); *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) (relaxed standing appropriate where issues raised were “vital to state revenue process”).

Under the Association’s own theory, the so-called blacklist provision only impacts a discrete group of individuals—those falsely accused of assault. Given that there is no broad public impact, even hypothetically speaking, standing should not be relaxed. *See, e.g., Steilacoom Historical Sch. Dist. No. 1 v. Winter*, 111 Wn.2d 721, 725, 763 P.2d 1223 (1988) (denying relaxed standing where “[r]esolution of the controversy affects only the Steilacoom and Clover Park school districts.”).

*Second*, given the Association's lack of evidence, it cannot be credibly asserted that this case "*immediately* affects" anyone, let alone "significant segments of the population." *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004) (emphasis added). As Judge Erlick correctly observed, "the posting of a notice requirement of the initiative may be successful in its deterrence effect, avoiding the necessity of reporting assaultive guests." CP 355. Given the Association's inability to muster any evidence, the Initiative's notice requirement appears to be working; thus, it may never come to pass that any person is ever placed on a list based on a false accusation.

*Third*, there is no indication that any due process of privacy claims will "escape review" absent such invocation. *Grant Cty.*, 150 Wn.2d at 803. Recognizing this, Judge Erlick correctly concluded that any due process or privacy challenge "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." CP 355; *accord To-Ro Trade Shows*, 144 Wn.2d at 415-16 (refusing "to find justiciable controversy where the event at issue has not yet occurred or remains a matter of speculation") (collecting cases).

Because the Association ignored its evidentiary burden and provided no evidence in support of its constitutional claims, its challenge is

not an appropriate vehicle for this Court to render an advisory opinion on a provision that has not harmed, and may never harm, any person.

**C. Due process merits.**

Even if the Association is permitted to stack two standing exceptions on top of one another to vindicate the purported constitutional rights of unknown future hypothetical guests, the proper course would be to remand the case so that the trial court can decide the merits in the first instance.

That said, statutes are “presumed to be constitutional.” *State v. Shultz*, 138 Wn.2d 638, 642, 980 P.2d 1265 (1999) (quotation omitted). And, importantly, to bring a successful facial challenge, the Association must prove that “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). While the Association focuses its entire argument on concerns regarding *false* accusations, it must acknowledge that not every person accused of sexual or violent assault is innocent. Given this, there are plainly sets of circumstances—cases of actual assault—where even the Association would have to concede that neither the due process or privacy rights of its members’ hypothetical future customers are implicated, much less violated. While high on rhetoric, the Association’s concerns are entirely speculative and lack evidentiary support. Thus, even if the Court considers the constitutional claims, those

claims must fail. *See, e.g., Lummi Indian Nation v. State*, 170 Wn.2d 247, 267, 241 P.3d 1220 (2010) (rejecting facial challenge where “no case has been pleaded or proved” that anyone’s rights were “impaired or deprived in violation of due process of law.”).

**D. The Initiative is not preempted by WISHA.**

The Initiative is self-contained, and notwithstanding the Association’s arguments to the contrary, WISHA does not preempt the Initiative. Br. at 38-39. As with its standing argument, the Association asks this Court to apply each strain of its preemption jurisprudence in the hopes that one will stick. The Association’s preemptions claims are without merit, and also at odds with the right of home rule cities to “make and enforce within [their] limits all such . . . regulations as are not in conflict with general laws.” Wash. Const. art. XI, § 10. Home rule only ends where an irreconcilable conflict with state law begins. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 560, 29 P.3d 709 (2001).

The Association thus bears “a heavy burden” under which “every presumption will be in favor of constitutionality.” *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 226, 351 P.3d 151 (2015) (quotation omitted). Its facial challenge is void if there are any circumstances under which the Initiative can be constitutionally applied. *Lummi Indian Nation*, 170 Wash. 2d at 258 (2010). Such circumstances exist here: The City’s reading of

WISHA, truer to its language and intent, demonstrates no preemption.

**1. Judge Erlick applied the correct standard.**

In the hopes of undermining Judge Erlick’s well-reasoned decision, the Association criticizes him for conducting “an extensive analysis of art. II, sec. 37 of the state constitution.” Br. at 40. Not fair. This was in direct response to the Association’s reliance on *Weyerhaeuser Co. v. King County*, 91 Wn.2d 721, 734, 592 P.2d 1108 (1979), for the proposition that the Department of Labor and Industries’ (L&I) role as the “sole and paramount administrative agency responsible for the administration of this chapter [WISHA]” preempted enactment of local laws to protect workers. CP 212. Given the Association’s reliance on the case before the trial court,<sup>20</sup> the court correctly noted that *Weyerhaeuser* “is simply not applicable here, where the issue is supremacy of state law.” CP 359. As shown below, the trial court reached the correct conclusion by relying on the applicable law.

**2. The Initiative is neither expressly nor impliedly preempted.**

Except where a statute expressly or impliedly preempts the field, municipalities may enact ordinances on matters already covered by state law. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010).

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<sup>20</sup> The Association’s Opening Brief does not cite *Weyerhaeuser*.

The Association can make no argument, on either front, that withstands the constitutional presumption in favor of the Initiative. Neither WISHA’s wording nor its legislative intent so much as suggest that it occupies the entire field of state labor protections. Rather, WISHA serves as a floor on the safeguards offered to Washington’s workforce. Municipalities are not obligated to make that floor their ceiling—as the Association implies—and may adopt higher standards within their jurisdiction. Doing so, in fact, advances WISHA’s fundamental purpose—worker protection and safety.

**a. WISHA contains no express preemption language.**

Express preemption is easily identifiable and does not require the strained interpretation of statutory language the Association offers here. *See, e.g., Watson v. City of Seattle*, 401 P.3d 1, 12 (2017) (noting express preemption in a law declaring that “[t]he state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state.”). Express preemption emerges from interpretation of a statute’s plain language. *See Diaz v. State*, 175 Wash.2d 457, 463, 285 P.3d 873 (2012). Moreover, where, as here, “a statute is susceptible to an interpretation that may render it unconstitutional, courts should adopt, if possible, a construction that will uphold its constitutionality.” *In re Det. of C. W.*, 147 Wn.2d 259, 277, 53 P.3d 979 (2002) (quotation omitted).

The plain language of WISHA indicates the Legislature's desire for the state to have administrative authority over *that chapter*, not to cap the protections afforded to workers. The statute's relevant portion, which the Association also relies on, provides:

The department [of Labor and Industries] shall be the sole and paramount administrative agency responsible for the administration *of the provisions of this chapter*, and any other agency of the state or *any municipal corporation or political subdivision of the state having administrative authority* over the inspection, survey, investigation, or any regulatory or enforcement authority of safety and health standards related to the health and safety of employees in any workplace subject to this chapter, *shall* be required, notwithstanding any statute to 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). The Association would have this Court believe that such language places a choke collar on the City's power to enforce higher standards. Br. at 44. It does not. On three separate occasions, the provision indicates it is only applicable to situations where a municipality is enforcing the regulations provided for in WISHA (*e.g.*, "relative to the procedures to be followed in the enforcement of *this chapter*"). RCW 49.17.270. This is consistent with its goal of establishing a threshold of acceptable labor conditions.

The Association nevertheless attempts to keep afloat its interpretation of L&I as the “sole and paramount administrative agency” for all labor regulations in this State, instead of “this chapter” as the plain language of the statute reads. Br. at 42. This is misguided: L&I is, rather, the sole enforcer of the provisions of WISHA. The Association’s exclusive reliance on *Atay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016) indicates the weakness of its argument. In *Atay*, concerning Hawaiian law, the court deemed a statute including the language “sole administrative responsibility” preemptive in its field. *Id.* at 709. However, far from being the hinge on which the court’s decision swung, this language was one of the many provisions that informed the court’s opinion on *implied* preemption. *Id.* at 709-10. Why the Association holds *Atay* up as authority on express preemption is unclear.

Equally unsupported are the Association’s claims that any concurrent jurisdiction afforded by WISHA must be achieved via a formal interlocal agreement. Br. at 43. As already noted, WISHA requires cities 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...*relative to the procedures to be followed in the enforcement of this chapter....*” RCW 49.17.270 (emphasis added). A reasonable reading of this language does not lead to the

Association's preferred interpretation. At most, it supports the conclusion that WISHA requires an interlocal agreement where the City promulgates rules or enforces provisions under the authority of WISHA.

The Association attempts to bolster its own reading by noting that WISHA expressly calls for concurrent jurisdiction in relation to ionizing radiation. Br. at 42; RCW 49.17.270 (“[I]n relation to employers using...sources of ionizing radiation the department of labor and industries and the department of social and health services shall agree upon mutual policies...compatible with policies pursuant to chapter 70.98 RCW insofar as such policies...are not inconsistent with the provisions of this chapter.”). It insists that such language would be superfluous if WISHA meant to create general concurrent jurisdiction. However, a plain reading of the provision shows it to *mandate* cooperation (i.e., “shall agree”) on the topic of ionized radiation, not confine exercises of concurrent jurisdiction to that subject.

Similarly, the Association cannot avail itself of the fact that more explicit language on concurrent jurisdiction is contained in OSHA. Br. at 42; 29 U.S.C. § 667(a) (“Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect....”). The Association cites no authority demonstrating that grants of concurrent jurisdiction must mimic the specificity of this language. None

exists. Rather, a straightforward application of the analysis outlined in *Lawson* shows why the Association's claim must fail. There, the court reasoned that statutory language referencing the exercise of some authority by local government was proof that the legislature did not intend field preemption. 168 Wn.2d at 680. The same is true here.

**b. WISHA's history and context underscore the fact that preemption in the field of workplace health and safety could be counterproductive to its legislative intent.**

Just as WISHA contains no express preemption, a contextual analysis of the "purposes of the statute and [ ] the facts and circumstances upon which [it] was intended to operate" reveals no support for the Association's implied preemption claim. *Brown v. City of Yakima*, 116 Wn.2d 556, 560, 807 P.2d 353 (1991). When construing a statute, the court must ascertain and give effect to legislative intent. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 146, 750 P.2d 1257 (1988). To find that a statute preempts the field, the constitutional presumption in favor of a law will only give way where contrary legislative intent is "clearly indicate[d]." *Rabon v. City of Seattle*, 135 Wn.2d 278, 291, 957 P.2d 621 (1998).

The legislative intent of WISHA is clearly indicated but does not weigh in the Association's favor. Its stated purpose is to "create, maintain, continue, and enhance the industrial safety and health program of the state"

in response to the “personal injuries and illnesses arising out of conditions of employment.” RCW 49.17.010. This does not comport with the Association’s assertion that WISHA was passed to consolidate regulatory power into one agency or to create a uniform system of regulation. Br. at 44. Rather, WISHA is remedial legislation designed to “assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington[.]” RCW 49.17.010; *see also Frank Coluccio Const. Co. v. Wash. State Dep’t. of Labor & Indus.*, 181 Wn. App. 25, 36, 329 P.3d 91 (2014) (“We construe WISHA statutes and regulations liberally to achieve their purpose of providing safe working conditions for workers in Washington.”); *J & S Servs., Inc. v. Wash. State Dep’t of Labor & Indus.*, 142 Wn. App. 502, 506, 174 P.3d 1190 (2007) (“We also construe WISHA regulations liberally to achieve their purpose of providing safe working conditions for every Washington worker.”); *Robison Const., Inc. v. Wash. State Dep’t of Labor & Indus.*, 136 Wn. App. 369, 374, 149 P.3d 424 (2006) (“The legislature enacted WISHA...to assure safe working conditions for Washington workers.”).

When placed in proper context, the Association’s legislative history does not advance its argument. While it is true that when enacting WISHA, the Legislature did not want to “lose control” and wanted to “keep safety regulations within state jurisdiction,” the Association ignores the proper

context in which those statements were made. Br. at 45 (selectively quoting legislative history).<sup>21</sup> The statements were made in the context of the passage of OSHA, which “intended to preempt state jurisdiction over employment safety and health matters” unless states “adopted a plan approved by the Secretary of Labor.” Jane Roe Hotneier, *An Alternative to Federal Preemption: The Washington Plan*, 9 GONZ. L. REV. 615, 615 (1974). That the Legislature did not want to “lose control” over workplace safety to *the Federal Government* says nothing about whether it intended to prevent municipalities from passing laws more protective of workers’ rights.

Nor does the comprehensiveness of WISHA’s provisions imply that it is Washington’s sole source of authority on occupational health and safety standards. Br. at 46-47. The Association’s claim otherwise is premised on *City of Spokane v. Portch*, 92 Wn.2d 342, 348, 596 P.2d 1044 (1979), where a local obscenity ordinance was held to be preempted by state law. Although the court did consider the comprehensiveness of the state law, the primary source of its preemption determination was that the local ordinance created

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<sup>21</sup> For example, the complete passage from one of the reports reads: “The purpose of the bill is to bring Washington State health and safety regulations up to federal standards. Without this, the Federal government will take over supervision of the safety program under OSHA, and Wash. State will lose control of the program.” Report of Standing Committee on WISHA, Feb. 2, 1973 (attached as Attachment A).

confusion over the definition of obscenity and, thus, chilled freedom of speech. *Id.* at 347-48. The comprehensiveness of the state law was a secondary consideration. *See id.*; *see also Rabon*, 135 Wn.2d at 289-90 (rejecting a comprehensive legislative scheme as determinative of preemption). Indeed, the court in *Spokane* stated that “[n]othing in this opinion should be construed to deprive municipalities of their authority to control obscene material by taking measures which do not fall within the purview of state law.” 92 Wn.2d at 349. The same sentiment applies here. The trial court rightly recognized L&I as the sole administrative agency tasked with enforcing WISHA but also noted that nothing in the act prevented a municipality from providing its workers more protections than those granted by WISHA. CP 362. Indeed, additional protections like those provided in the Initiative comport with WISHA’s goal of protecting against occupational hazards. *See RCW 49.17.010.*

**3. The Initiative Presents No Conflict with WISHA and Works in Harmony with its Provisions.**

“Conflict preemption occurs when an ordinance permits what state law forbids or forbids what state law permits. An ordinance is constitutionally invalid when it directly and irreconcilably conflicts with the statute.” *Watson*, 401 P.3d at 12 (2017) (quotations omitted). The Association now claims that the Initiative interferes with several of

WISHA's provisions. Br. at 48. However, self-contained legislation like the Initiative, that in no way steps on the toes of L&I, cannot "directly and irreconcilably" conflict with WISHA. Even were a conflict to present itself, "no conflict may be found" if a local enactment and a state law may be "harmonized." *Rabon*, 135 Wn.2d at 292. This presumption attaches to the City's reading of WISHA, which shows it to operate in harmony with the Initiative.

All but one of the provisions that the Association cites as a source of conflict (*e.g.*, procedures for filing complaints) are intended to regulate the enforcement of WISHA, not the additional protections contained within the Initiative. Br. at 48-49. The Initiative's requirements do not, and do not purport to, interfere with the state regulations on administering WISHA. Instead, they empower the Seattle Office of Civil Rights to investigate complaints *arising under the Initiative*. SMC 14.25.150 D.1. Furthermore, under the Initiative, the City has no enforcement powers, only investigative powers, and both of those only apply in relation to the Initiative's requirements. Thus, given the Initiative is self-contained, it is impossible for the Initiative to circumscribe L&I's powers under WISHA.

Additionally, it is the Initiative's provisions—not WISHA's—which are enforced through the private right of action with which the Association takes issue. Br. at 49. Contrary to the Association's claim that

this conflicts with L&I's enforcement power, the private right of action can only arise under the Initiative and is not applicable to claims arising under WISHA. SMC 14.25.150 C.1. As the Initiative does not conflict with WISHA and, indeed, creates entirely separate legislation and investigation requirements, there is no conflict.

Where the Association's interpretation of WISHA is contrary to its basic structure, the trial court's conclusions are correct, consistent with the paramount purpose of WISHA, and allow this Court to harmonize the Initiative with WISHA.

#### IV CONCLUSION

For these reasons, and those laid out in Judge Erlick's comprehensive and well-reasoned 38-page opinion, the trial court should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 20th day of October 2017.

PETER S. HOLMES  
Seattle City Attorney

/s/ Michael K. Ryan  
Michael K. Ryan, WSBA #32091  
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City of Seattle  
Tel: (206) 684-8200

**PROOF OF SERVICE**

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 20th day of October 2017, I caused to be served, a true copy of the foregoing CITY OF SEATTLE'S RESPONSE BRIEF upon the parties listed below:

Michele Radosevich Harry J.F. Korrell DAVIS WRIGHT TREMAINE LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101-3045	<input checked="" type="checkbox"/> E-file notification <a href="mailto:MicheleRadosevich@dwt.com">MicheleRadosevich@dwt.com</a> <a href="mailto:HarryKorrell@dwt.com">HarryKorrell@dwt.com</a>
Laura Ewan Schwerin Campbell Barnard IGLITZIN & LAVITT, LLP 18 West Mercer Street, Suite 400 Seattle, WA 98119-3971	<input checked="" type="checkbox"/> E-file notification <a href="mailto:ewan@workerlaw.com">ewan@workerlaw.com</a>

Dated this 20th day of October 2017.

/s/ Marisa Johnson  
Marisa Johnson, Legal Assistant

**ATTACHMENT A**

REPORT OF STANDING COMMITTEE

February 2, 1973

SENATE BILL NO. 2386, enacting the Washington Industrial

Safety and Health Act of 1973

(reported by Committee on Labor):

six members recommendation: **Do pass.**

(If ALL members of committee sign,  
leave above line blank.)

Signed by: Senators  
Connor, Chairman;  
Fleming  
Grant  
~~X386~~  
Matson  
Ridder  
Stender

*Frank T. Connor*  
Frank T. Connor, Chairman

*George Fleming*  
George Fleming

*Gary Grant*  
Gary Grant

John Jones  
*John Matson*  
John Matson

*Robert C. Ridder*  
Robert C. Ridder

*John H. Stender*  
John H. Stender

Passed to Committee on Rules for second reading.

BILL NO: 2386

SHORT TITLE: Enacting the  
Washington Industrial Safety  
and Health Act of 1973

SPONSORS: Stender, Guess, Grant,

Lewis (Harry), Sellar, Connor, Jones and Atwood

(By Executive Request)

DRAFTER: Code Revisor: Gary Reid

OTHER: \_\_\_\_\_

PRINCIPAL PROPONENTS:

Bill Jacobs, Dept. of Labor and Industries

Phillip Bork, Chairman of Workman's Compensation Advisory Comm.

Tom Knox, Association of Washington Business

PRINCIPAL OPPONENTS:

Dale Greenwood, Washington Railroad Association

PRINCIPAL ARGUMENTS:

FOR:

The purpose of the bill is to bring Washington State health  
and safety regulations up to federal standards. Without this, the  
Federal government will take over supervision of the safety program  
under OSHA, and Wash. State will lose control of the program.

The Washington Industrial Safety and Health Act, (WISHA),  
was conditionally approved by OSHA on Jan. 19, '73.

AGAINST:

The Washington Railroad Association proposed an amendment  
to exclude them from coverage. Since they are covered under the  
Railroad Safety Act, they felt they should be excluded. They  
were not successful in their attempt.

COMMITTEE: LABOR - Joint

SENATE BILL # 2386  
BILL NO. House Bill # 452

DATE:

SHORT TITLE: Companion Bills.  
Enacting the Washington Industrial  
Safety and Health Act of 1973

LOCATION: Room 432, Public Lands.

Name	Address	Tel.	Representing	Pro-Con.	Testify	Submit Material	Receive Material
Bill Parry	1833 E. 8th Olympia	943-3582	Asn of Western Pulp & Paper Workers	Pro	✓	✓	
Bill Jacobs	Gen. Admin Bldg	753-6307	Dept. of L & I	Pro	✓		
DALE GREENWOOD	WASH RR ASSN 213 Capital Park Bldg	357-9801	WASH RR ASSOC		✓	Amendment	
Tom Knox	1414 S. Cherry	993-1600	AWB	Pro	✓		
Al Duclos	Insurance Bldg	753-6434	W.U.T.C.		✓		
Dave Holloway	" "	" "	W.U.T.C.		✓		
Phillip Bork	Labor & Ind.	753-6308	—	Pro	✓		
B.L. Coje	Wash. Retail Clerks			Pro			
Joe DAVIS	" ST. Labor Cnd	943-0608		Pro	✓		

## WORKMEN'S COMPENSATION ADVISORY COMMITTEE

Mr. Phillip T. Bork, Chairman

Representing Employers:

Mr. Tom D. Knox  
 Research Manager  
 Association of Washington Business  
 1414 South Cherry Street  
 Olympia, Washington 98501  
 Telephone: 943-1600  
 Term expires: June 30, 1973

Mr. Vern Crossen  
 Management Representative  
 Bethlehem Steel Corporation  
 P. O. Box 3827  
 Seattle, Washington 98124  
 Telephone: 935-1100  
 Term expires: June 30, 1975

Mr. E. N. Figon  
 Managing Underwriter  
 Unigard Insurance Group  
 The Financial Center  
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 Seattle, Washington 98161  
 Telephone: 292-1234  
 Term expires: June 30, 1974

Representing Self-Insuring Employers:

Mr. Chet Diehl, Supervisor  
 Workmen's Compensation  
 Weyerhaeuser Company  
 Tacoma, Washington 98401  
 Telephone: 924-3670  
 Term expires: June 30, 1974

Representing Employees:

Mr. P. L. Cope, Executive Secretary  
 Wash. State Council of Retail Clerks  
 AFL-CIO  
 Labor Temple  
 2812 Lombard  
 Everett, Washington 98201  
 Telephone: 259-2750  
 Term expires: June 30, 1974

Mr. Joseph H. Davis, President  
 Washington State Labor Council  
 AFL-CIO  
 2700 First Avenue  
 Seattle, Washington 98121  
 Telephone: 682-6002  
 Term expires: June 30, 1973

Mr. Earl Collins, Secretary-Treasurer  
 Newspaper & Magazine Drivers and  
 Chauffeurs, Local No. 763  
 International Brotherhood of Teamsters  
 553 John Street  
 Seattle, Washington 98109  
 Telephone: 623-2053  
 Term expires: June 30, 1975

Representing Self-Insuring Employees:

Mr. Gene N. Hain, Secretary-Treasurer  
 Association of Western Pulp and  
 Paper Workers  
 1430 S. W. Clay  
 Portland, Oregon 97201  
 Telephone: (503) 228-7486  
 Term expires: June 30, 1975

Representing the Department:

Mr. Phillip T. Bork  
 Supervisor of Industrial Insurance  
 Department of Labor and Industries  
 General Administration Building  
 Olympia, Washington 98504  
 Telephone: 753-6308  
 Term expires: June 30, 1974

Committee Amendment to SB 2386  
by Committee on Labor HB 452

On page 4 New Section Sec. 3. line 8 after "state"  
strike the period and add "; except operating property  
of common carrier railroads, as defined in RCW 84.12.280."

February 1, 1973

TO THE JOINT SENATE AND HOUSE LABOR COMMITTEES

We regret that due to circumstances beyond our control ~~were~~ were unable to send witnesses to testify on behalf of our 1,500 members as to the merits of the WISHA proposal and what we have experienced over the years as a deficient state enforcement of safety standards on the mill level. Since OSHA has been in force we have witnessed a great surge of voluntary compliance with safety standards by our employer and we have been happily surprised.

We are very apprehensive about the potential return to state enforcement of all safety standards and we fear a return to employer-programmed safety inspection. Should the Joint Labor Committees and the Legislature act favorably on the WISHA proposal we respectfully urge that the Legislature enact safeguards to ensure that adequate inspectors will be employed in such a way as to insure them a free hand in exposing and penalizing safety violations of both the physical and physiological hazards of the workplace.

Al Morrison, Secretary  
Local 153, Association of Western  
Pulp & Paper Workers  
724 15th Avenue, Longview, Wash.

**SEATTLE CITY ATTORNEY'S OFFICE - GOVERNMENT AFFAIRS**

**October 20, 2017 - 4:43 PM**

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**Superior Court Case Number:** 16-2-30233-5

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