

FILED
SUPREME COURT
STATE OF WASHINGTON
11/22/2017 8:00 AM
BY SUSAN L. CARLSON
CLERK

No. 77918-4

NO. ~~947279~~
~~XXXXXX~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

CITY OF SEATTLE,

Respondent,

and

UNITE HERE! LOCAL 8; SEATTLE PROTECTS WOMEN,

Respondents.

REPLY BRIEF OF AMERICAN HOTEL & LODGING ASSOCIATION,
SEATTLE HOTEL ASSOCIATION, and WASHINGTON
HOSPITALITY ASSOCIATION

Harry J. F. Korrell, WSBA #23173
Michele Radosevich, WSBA # 24282
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax
Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	1
A. If the Single Subject Rule Has Any Meaning Left, I-124 Cannot Stand.....	1
1. I-124 Has a Restrictive Title, Which Requires Strict Compliance with the Single Subject Rule	2
2. Even if I-124’s Title Were General, There Is No Rational Unity Among the Novel Blacklist Provision <i>and the Other Subparts</i> of I-124.....	4
B. AHLA Has Standing to Challenge the Blacklisting Provision.	6
1. AHLA Has Associational Standing.	8
2. AHLA’s Member Hotels Have Standing to Sue in Their Own Right.	9
3. AHLA Hotels Have Third Party Standing.	11
a. Contrary to the City’s assertions, nothing prohibits “stacking.”	11
b. Vendors have third party standing to assert customer rights.....	12
4. Washington’s Standing Jurisprudence Confirms AHLA has Standing to Challenge the Blacklist.	13

C.	I-124 Violates Guests’ Due Process and Privacy Rights.	14
1.	The Blacklisting Provision Violates Washington’s Right to Privacy.	14
2.	I-124 Violates the 14 th Amendment.	16
D.	This Facial Challenge to I-124 is Appropriate.	18
E.	WISHA Preempts Part II of I-124.	19
1.	WISHA Expressly Preempts the Field of Workplace Safety.	20
2.	WISHA’s Comprehensiveness and Context Imply Preemption.	23
3.	I-124 Conflicts with WISHA.	25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>ACLU of Nev. V. Masto</i> , 670 F.3d 1046 (9th Cir. 2012)	19
<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183 (2000)	4
<i>Ass’n of Data Processing Serv. Orgs., Inc. v. Camp</i> , 397 U.S. 150 (1970).....	7
<i>Atay v. County of Maui</i> , 842 F.3d 688 (9th Cir. 2016)	21
<i>Barrows v. Jackson</i> , 346 U.S. 249 (1953).....	11
<i>Bratt v. IBM Corp.</i> , 392 Mass. 508 (1984)	15
<i>Brown v. Montoya</i> , 662 F.3d 1152 (10th Cir. 2011)	16
<i>C.f., Segaline v. State, Dep’t of Labor & Indus.</i> , 199 Wn. App. 748 (2017)	17
<i>Casey v. Chapman</i> , 123 Wn. App. 670 (2004)	10
<i>City of Burien v. Kiga</i> , 144 Wn.2d 819 (2001)	5
<i>City of Snoqualmie v. King Cty. Exec. Dow Constantine</i> , 187 Wn.2d 289 (2016)	14
<i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398 (2013).....	6

<i>Cory v. Nethery</i> , 19 Wn.2d 326 (1943)	3, 4
<i>Council of Ins. Agents & Brokers v. Juarbe-Jimenez</i> , 443 F.3d 103 (1st Cir. 2006).....	11
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	11, 12, 13
<i>E. Gig Harbor Improvement Ass’n v. Pierce County</i> , 106 Wn.2d 707 (1986)	8
<i>Filo Foods LLC v. City of SeaTac</i> , 183 Wn.2d 770 (2015)	2, 3
<i>Five Corners Family Farmers v. State</i> , 173 Wn. 2d 296 (2011)	11
<i>Heinsma v. City of Vancouver</i> , 144 Wn.2d 556 (2001)	20
<i>Jackson v. Liquid Carbonic Corp.</i> , 863 F.2d 111 (1st Cir. 1988).....	15
<i>Kowalski v. Tesmer</i> , 543 U.S. 125 (2004).....	12
<i>Lee v. State</i> , 185 Wn.2d 608 (2016)	2, 4
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 166 Wn.2d 264 (2009)	2
<i>Meyer v. Univ. of Wash.</i> , 105 Wn.2d 847 (1986)	17
<i>Mgmt. Ass’n for Private Photogrammetric Surveyors v. United States</i> , 492 F. Supp. 2d 540 (E.D. Va. 2007)	12
<i>Microsoft Corp. v. U. S. Dep’t of Justice</i> , 233 F. Supp. 3d 887 (W.D. Wash. 2017).....	13

<i>Nat'l Elec. Contractors Ass'n v. Riveland,</i> 138 Wn.2d 9 (1999)	25
<i>Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n,</i> 144 Wn.2d 516 (2001)	16
<i>Ohio Ass'n of Indep. Sch. v. Goff,</i> 92 F.3d 419 (6th Cir. 1996)	12
<i>Paul v. Davis,</i> 424 U.S. 693 (1976)	16
<i>Pennsylvania Psych. Soc'y v. Green Spring Health Servs., Inc.,</i> 280 F.3d 278 (3rd Cir. 2002)	12
<i>Save a Valuable Env't (SAVE) v. City of Bothell,</i> 89 Wn.2d 862 (1978)	9, 10
<i>Scott v. Cascade Structures,</i> 100 Wn.2d 537 (1983)	3
<i>Seattle Sch. Dist. No. 1 v. State,</i> 90 Wn.2d 476 (1978)	10
<i>Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution,</i> 185 Wn.2d 97 (2016)	9
<i>State Farm Mut. Auto. Ins. Co. v. Phillips,</i> 2 Wn.App. 169 (1970)	8
<i>State v. Broadway,</i> 133 Wn.2d 118 (1997)	3
<i>State v. Surge,</i> 160 Wn.2d 65 (2007)	14
<i>State v. Taylor,</i> 67 Wn. App. 350 (1992)	16

<i>Superior Asphalt & Concrete Co. v. Wash. Dep’t of Labor & Indus.</i> , 121 Wn. App. 601 (2004)	9
<i>Ulrich v. City & County of San Francisco</i> , 308 F.3d 968 (9th Cir. 2002)	16
<i>United States v. Askren</i> , 2016 WL 4055640 (D. Nev. July 26, 2016)	16
<i>Wash. Nat. Gas Co. v. Pub. Util. Dist. No 1</i> , 77 Wn.2d 94 (1969)	13
<i>Weyerhaeuser Co. v. King County</i> , 91 Wn.2d 721 (1979)	21
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971)	17
<i>Woodfin Suite Hotels, LLC v. City of Emeryville</i> , 2006 WL 2739309 (N.D. Cal. Aug. 23, 2006)	10
<i>Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima</i> , 122 Wn.2d 371 (1993)	10
Statutes	
RCW 7.92.120(4)	18
RCW 26.50.070(4)	18
RCW 49.17.230	24
RCW 49.17.270	<i>passim</i>
RCW 90.48.420	21
Other Authorities	
CR 65(b)	18
RAP 2.5	8

I. INTRODUCTION

This case involves an unprecedented attempt to force hotels do what the City could not legally do—punish people without due process. But while this case raises a number of novel issues, the analysis is not complex. In any straightforward application of the law, Initiative 124 is unconstitutional: it violates the single subject rule; it violates the privacy and due process rights of hotel guests; and it impermissibly intrudes on the State’s exclusive authority to regulate workplace safety in Washington. To avoid this result, the City and Intervenors distort the applicable legal tests and precedents. As explained below, the Court should ignore these efforts to overcomplicate the analysis and reverse the trial court.

II. ARGUMENT

A. **If the Single Subject Rule Has Any Meaning Left, I-124 Cannot Stand**

I-124 combines a controversial law (requiring hotels to deny lodging to guests merely accused of harassment) with three new labor laws regulating the employer-employee relationship. It is impossible to say with a straight face that such dissimilar laws regulating entirely different groups constitute one subject. It is thus not surprising that the trial court, the City, and the Intervenors get the analysis wrong. They use the wrong standard for laws with restrictive titles *and* the wrong standard for laws with general titles, and they ultimately reach the wrong result.

If the single subject rule is to have any enduring meaning, it must prevent an initiative like I-124, made up of disconnected laws affecting different constituents. If I-124 survives, interest groups and legislators will have the *incentive to* logroll, exactly what the rule is supposed to prevent. Why not, when proposing legislation, try to hitch a controversial or unpopular provision to the bandwagon of a popular one (or three)? If the single subject rule is as moribund as the City and Intervenors would have it, then the Court should resuscitate it and bring back the promise of integrity and fairness in the democratic process—including in initiatives.

1. I-124 Has a Restrictive Title, Which Requires Strict Compliance with the Single Subject Rule

Courts apply a more rigorous standard under the single subject rule when a law's title is restrictive. *Lee v. State*, 185 Wn.2d 608, 621 (2016). Accordingly, over decades the Supreme Court has started its analysis by determining whether a law's title is general or restrictive. The City asks the Court to ignore this entire body of law except *Filo Foods LLC v. City of SeaTac*, 183 Wn.2d 770 (2015). City Br. 9. The City seems to argue that *Filo Foods* implicitly overruled the earlier cases. However, *Filo Foods* did not expressly overrule *any* of these cases, and there is a strong presumption against overruling by implication. *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280 (2009). The Court

should look to the full body of law, which dictates that I-124's title is restrictive. Some laws have titles like "an act relating to fiscal matters" or "[a]n Act relating to tort actions." See, e.g., *Scott v. Cascade Structures*, 100 Wn.2d 537, 546 (1983). Those are general. Others call out a "particular part or branch of a subject," *State v. Broadway*, 133 Wn.2d 118, 127 (1997), like "[a]n act relating to local improvements in cities and towns," *Cory v. Nethery*, 19 Wn.2d 326, 329-31 (1943). Those are restrictive. I-124's title falls into the latter camp.

Even if the Court were to overlook decades of cases and focus only on *Filo Foods*, it should still find I-124 restrictive. I-124's title itemizes three subjects: health, safety, and labor standards and only in the hotel industry. Contrast that with the initiative at issue in *Filo Foods*, which addressed "labor standards for certain employers." 183 Wn.2d at 783. The Intervenor recognize this distinction and attempt to distort the title in *Filo Foods* to make it seem like it restricts the subject in two ways, to "one specific geographical area *and* one specific type of employer." Intervenor Br. 4 (emphasis in original). But the geographical restriction is a fabrication: it is a matter of jurisdiction that a municipal law proposed for adoption in the City of Sea-Tac only applies in that "geographical area." Unlike the title in *Filo Foods*, I-124's title identifies with specificity three kinds of laws and a specific industry. I-124's title is as restrictive as other

titles labeled restrictive in previous cases. *See, e.g., Cory*, 19 Wn.2d at 329-31 (1943) (“[a]n act relating to local improvements in cities and towns”).

The City and Intervenors also continue to use the wrong standard for restrictive titles. The Supreme Court has been clear: laws with restrictive titles “will not be given the same liberal construction as general titles.” *Lee*, 185 Wn.2d at 621. Yet Respondents argue in the face of contrary authority that “only rational unity among the matters need exist” even for laws with restrictive titles. Intervenor Br. 4. This mistake, also made by the superior court, *see* CP 344, disregards the Supreme Court’s dictate that “where a restrictive title is used, the rational unity analysis does not apply.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 215 n.8 (2000). Their collective evasion of the proper, rigorous test is unsurprising because there is no credible argument that I-124’s blacklist provision (affecting hotel guests) is merely a component of the same single subject encompassing I-124’s mix of labor laws regulating the employer-employee relationship.

2. Even if I-124’s Title Were General, There Is No Rational Unity Among the Novel Blacklist Provision and the Other Subparts of I-124

The City and Intervenors also misrepresent the rational unity test applicable to laws with general titles. They argue I-124 should pass

muster because its “provisions rationally relate[] to ‘health, safety, and labor standards.’” Intervenor Br. 4; *see also* City Br. 12. That is *not* the correct inquiry. What matters for purposes of the single subject rule is whether the provisions of a law are rationally related *to each other*. *See City of Burien v. Kiga*, 144 Wn.2d 819, 825-26 (2001) (where a law’s title is general, courts “look to the body of the initiative to determine whether a rational unity among the matters addressed in the initiative exists.”). As AHLA argued, Opening Br. 11-13, there is no way to articulate a rational unity among I-124’s distinct laws regulating different conduct and different populations.¹ Respondents do not even attempt to.

Respondents’ approach to rational unity lets them avoid the rule’s central question: whether a law covers a single subject. It is easy to find connections between a broad, general subject and any number of disparate provisions with no connection *to each other*. Consider a law “concerning health and safety of highway construction workers,” which included (1) a requirement that employers of such workers provide hard hats and orange vests; (2) a health insurance mandate requiring those employers to pay for gold level health insurance; and (3) a novel law lowering the speed limit on highways and imposing mandatory fines for infractions, with

¹ The drafters of the measure could not even articulate a single statement of intent for the measure, instead using a separate statements of intent for each the four main parts of the initiative. *Compare* SMC 14.25.020; 14.25.070; 14.25.110; 14.25.130.

determinations based on cell phone geolocation data. All those provisions conceivably relate to health and safety of highway workers. But they are not rationally related to each another. One part of the bill is an employee benefits bill; one is a workplace safety measure; and the third is a novel law affecting all drivers—strangers to the employment relationship regulated by the first two. Voters would be entitled to vote separately on the novel geolocation-based speeding ticket system. That law would not survive single subject scrutiny, and neither should I-124.

The single subject rule protects voters’ right to vote separately on policy proposals, without having to vote at the same time for unrelated provisions they may not support. The rule’s enduring power is critical to the integrity of the democratic process. Seattle voters were denied the rule’s protection when an initiative imposing automatic punishments on those accused of harassment was packaged with three popular labor laws.

B. AHLA Has Standing to Challenge the Blacklisting Provision.²

To avoid the obvious due process problems with I-124, the City and Intervenors attempt to defeat AHLA’s challenge on standing grounds, but standing is not as complicated as they make it out to be. Standing only requires a “concrete, particularized, and actual or imminent” injury.

Clapper v. Amnesty Int’l USA, 568 U.S. 398, 408-09 (2013). “[T]he

² There is no dispute that AHLA has standing to challenge the other provisions.

question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151–52 (1970).

AHLA easily clears this threshold. The ordinance requires AHLA member hotels to act—essentially as agents of the City—in ways that violate guests’ rights, automatically placing them on a blacklist and denying lodging for three years without any due process. Hotels have standing to object to being made to act this way. In addition, the blacklisting provision imposes concrete burdens and costs on hotels, as described in the declarations of witnesses. CP 26, 28. At a minimum, hotels must immediately adopt policies, train personnel, and modify reservations systems so that barred guests do not inadvertently book a room. *Id.* Thus, the hotels have standing in their own right. In addition, if assault is as rampant as Intervenors claim, hotels will shortly have to deny accommodations to some guests, which constitutes further injury.

Further, any guest denied lodging would obviously have standing to bring a claim against the City, and under well-settled authority, the hotels also have third-party standing to assert their rights.

Finally, AHLA, as a trade association advocate for the hotels, has associational standing to bring claims on behalf of the member hotels.

This is so whether the hotels have standing directly, based on their own injuries, or on a third-party basis, asserting the rights of their guests.

1. AHLA Has Associational Standing.

As a threshold matter, neither the City nor Intervenors challenged AHLA's associational standing below. The focus was on whether the member hotels had *direct standing* based on their own injuries and *third party standing* to assert the rights of their guests. The trial court's decision assumes associational standing was appropriate, CP 350-55, and neither the City nor the Intervenors appealed. Thus, this Court need not consider this belated challenge. See RAP 2.5; *State Farm Mut. Auto. Ins. Co. v. Phillips*, 2 Wn.App. 169, 182 (1970). In any event, AHLA meets the requirements for associational standing because "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *KS Tacoma Holdings v. Shoreline Hearings Bd.*, Wn. App. 117, 138 (2012); Opening Br. 13 n.2.

An association generally has standing to sue as long as one of its members has standing. *E. Gig Harbor Improvement Ass'n v. Pierce County*, 106 Wn.2d 707, 710 (1986). If the association's members suffer injury, there is "no reason to bar injured persons from [using associational

standing] to seek[] a remedy.” *Save a Valuable Env’t (SAVE) v. City of Bothell*, 89 Wn.2d 862, 867 (1978). Thus, the analysis begins with an analysis of the member hotels’ standing.³

2. AHLA’s Member Hotels Have Standing to Sue in Their Own Right.

Washington’s Uniform Declaratory Judgement Act (UDJA), RCW 7.24.020, contains sweeping language. It empowers any “person ... whose rights, status or other legal relations are affected by a statute [or] municipal ordinance” to have “any question of construction or validity arising under the statute [or] ordinance” determined. *Id.* The test for standing in declaratory judgment action has two requirements. “First, 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 Wn.2d 97, 103 (2016) (internal citations and quotations omitted).⁴

³ The City does not credibly contest that AHLA meets the second and third parts of the test. It concedes that AHLA is the voice of the lodging industry. City Br. 20. The claim that legislation affecting how hotels must treat their guests is not germane to a hotel association should be rejected.

⁴ To the extent the City also argues AHLA’s claim is not justiciable, that argument should be rejected for the same reasons the Court should reject the City’s standing argument. “In any action under the [UDJA], the standing requirement tends to overlap the justiciable controversy requirement.” *Superior Asphalt & Concrete Co. v. Wash. Dep’t of Labor & Indus.*, 121 Wn. App. 601, 605–06 (2004).

Respondents unnecessarily complicate this analysis. First, the City argues AHLA is not within the “zone of interests” protected by I-124. City Br. at 22. But the City omits a key portion of the applicable test: “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.” *SAVE*, 89 Wn.2d at 866. No complicated analysis is required to see that hotels are within the zone of interests *regulated* by I-124. SMC 14.25.040 repeatedly dictates what hotels (not guests) “must” and “shall” do. “Under these circumstances it would be unreasonable to deny standing to the [the hotels] which, far from being a nominal party, stand[] at the very vortex of the entire [initiative].” *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 494 (1978).

Second, the hotels have suffered injury-in-fact. “Parties whose financial interests are affected by the outcome of a declaratory judgment action have standing.” *Casey v. Chapman*, 123 Wn. App. 670, 676 (2004); *Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379 (1993). The blacklisting provision imposes financial and administrative burdens on AHLA members. CP 26, 28. These injuries are not speculative. At a bare minimum, to comply hotels must develop and implement policies and systems now, before the first claim of harassment is made. The injury requirement is satisfied here. *See Woodfin*

Suite Hotels, LLC v. City of Emeryville, 2006 WL 2739309, at *7 (N.D. Cal. Aug. 23, 2006) (administrative burden, “even if trivial,” is sufficient).

3. AHLA Hotels Have Third Party Standing.

As explained in its opening brief, AHLA member hotels also satisfy the requirements for third party standing.⁵ Respondents’ arguments to the contrary are unpersuasive and unsupported.

a. Contrary to the City’s assertions, nothing prohibits “stacking.”

The City makes much of the fact that AHLA “invokes, in tandem, two exceptions” to the traditional standing rule. City Br. 31. However, “[o]rganizations have standing to assert the interests of their members, so long as members of the organization would otherwise have standing to sue....” *Five Corners Family Farmers v. State*, 173 Wn. 2d 296, 304 (2011). The City points to no authority for its view that an association cannot assert a third-party claim on behalf of its members, and numerous courts reject such a rule. *See, e.g., Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 443 F.3d 103, 108–11 (1st Cir. 2006) (association had

⁵ Once a party establishes it suffered injury-in-fact, the remaining considerations are wholly prudential. Prudential considerations, like the general prohibition on third party standing, are “not constitutionally mandated, but rather stem from a salutary ‘rule of self-restraint’ designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.” *Craig v. Boren*, 429 U.S. 190, 193 (1976). The policies underlying that “rule of practice” are “outweighed by the need to protect ... fundamental rights” when “it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court.” *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). Precisely the case here.

standing to bring claims on behalf of members' employees); *Pennsylvania Psych. Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 293 (3rd Cir. 2002) ("So long as the association's members have or will suffer sufficient injury to merit standing and their members possess standing to represent the interests of third-parties, then associations can advance the third-party claims of their members without suffering injuries themselves."); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) (association had standing to bring claims on behalf of parents of its members' students). "The better view seems to be ... that associational and third party standing can be 'stacked' to create 'derivative standing'" *Mgmt. Ass'n for Private Photogrammetric Surveyors v. United States*, 492 F. Supp. 2d 540, 549 (E.D. Va. 2007).

b. Vendors have third party standing to assert customer rights.

The City spends over four pages trying to explain away the Supreme Court's holding in *Craig v. Boren*, 429 U.S. at 195, which recognized a vendor's relationship with a vendee is a "close relationship" for purposes of third party standing. City Br. 26-31. Its arguments are unavailing because *Craig* remains good law⁶ and is directly applicable. *Craig* holds that "[v]endors and those in like positions have been

⁶ The City and Intervenor's citation to *Kowalski v. Tesmer*, 543 U.S. 125, 132 (2004) is inapposite. *Kowalski* examined the nature of an attorney-client relationship.

uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function.” 429 U.S. at 195. Numerous cases repeat this rule,⁷ and there is no reason for this Court to reject it here. *See* Opening Br. at 21-24.⁸

4. Washington’s Standing Jurisprudence Confirms AHLA has Standing to Challenge the Blacklist.

Washington courts impose a low bar to standing in cases involving issues of public importance. *E.g., Wash. Nat. Gas Co. v. Pub. Util. Dist. No 1*, 77 Wn.2d 94, 96 (1969). This is such a case.

I-124 raises questions about the limits of government power to conscript private entities to enforce laws the City could not constitutionally enforce and the appropriate balance between protecting people from harm and the rights of the accused to due process and privacy. It will affect every person accused of harassment at a hotel in Seattle and Seattle’s hotel and tourism industry generally.

That industry is an important part of the region’s economy and labor market. About 19.7 million overnight visitors came to King County

⁷ The City’s response to AHLA’s cases is they were “wrongly decided.” City Br. 29 n.17.
⁸ *Microsoft Corp. v. U. S. Dep’t of Justice*, 233 F. Supp. 3d 887 (W.D. Wash. 2017), cited on by the City, is not to the contrary. The court held only that Microsoft lacked standing to assert the Fourth Amendment rights of customers and noted that in other contexts “the Supreme Court and the Ninth Circuit routinely employ the third-party standing doctrine to cases involving constitutional rights.” *Id.* at 915.

in 2015. David Blandford, *Seattle Achieves Record Tourism Growth for the Third Consecutive Year, Job Growth Out-Paces the U.S.* (April 25, 2016), available at <https://www.visitseattle.org/press/press-releases/seattle-tourism-statistics-announced/>. When the indirect and induced effects of this direct spending are calculated, tourism in Seattle generated an estimated \$9.7 billion in economic impact. *Id.*

This case epitomizes what the Supreme Court envisioned when it said the standing doctrine should be construed liberally to ensure courts address questions of public importance. *See, e.g., City of Snoqualmie v. King Cty. Exec. Dow Constantine*, 187 Wn.2d 289, 296-97 (2016). The case has been fully briefed (twice) by effective advocates, committed to representing clients whose interests are directly affected by the measure, and the Court should decide the merits.

C. I-124 Violates Guests' Due Process and Privacy Rights.

1. The Blacklisting Provision Violates Washington's Right to Privacy.

Determining whether I-124 violates the right to privacy requires a two part inquiry: first, does the “action complained of constitute a disturbance of one’s private affairs” and second, does “the authority of law justif[y] the intrusion.” *State v. Surge*, 160 Wn.2d 65, 71 (2007).

First, the creation of the blacklist, even if it is only published to hotel employees, violates guests’ right to privacy. The Intervenors claim

publishing the list only to other employees and not publicly does not infringe privacy rights. Intervenor Br. 37. But internal publication to other employees is sufficient. *See, e.g., Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 117 (1st Cir. 1988) (if employer’s plan “contemplates sharing the results of the tests with managerial personnel, even if only for the purpose of terminating the employment of a worker who fails the tests, it also implicates this statutorily protected area of privacy.”); *Bratt v. IBM Corp.*, 392 Mass. 508, 519 (1984) (“disclosure of private facts about an employee among other employees . . . can constitute sufficient publication” under a Massachusetts privacy statute.”). I-124 requires this type of internal publication. *See* SMC 14.25.030(C). Moreover, once information is so disclosed, wider publication is likely. If a celebrity, politician, judge, or athlete was accused of harassment at a hotel, news of the incident would undoubtedly reach the public at internet speed. In addition, as noted in AHLA’s opening brief, publication is not limited to other hotel employees. The City will have access to the list as part of its investigation and oversight under SMC 14.25.150(D). Opening Br. 30.

Second, the “authority of law” does not justify the intrusion. The Intervenor merely asserts the invasion of privacy “is clearly warranted.” Intervenor Br. 47. But publicizing accusations of misconduct is only justified when the public has a legitimate interest in the information, and

the public has a legitimate interest *only when the accused has been afforded due process*. Opening Br. 28-29 (citing cases).

2. I-124 Violates the 14th Amendment.

Placing a person's name on a mandated registry triggers the right to due process when it (1) causes stigma and (2) alters a "right or status previously recognized by" law. *Paul v. Davis*, 424 U.S. 693, 711 (1976) ("stigma plus" test). Where these elements exist, a person is entitled to notice and a "hearing to clear his name." *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002); *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 523 (2001).

First, placement on a list of people accused of sexual misconduct results in stigma. "Placing a person's name on a public registry suffices as a public statement for the purposes of the stigma plus test." *Brown v. Montoya*, 662 F.3d 1152, 1169 n.11 (10th Cir. 2011); *State v. Taylor*, 67 Wn. App. 350, 357 (1992) ("There is a stigma attached to one who has committed a sexual offense."); *United States v. Askren*, 2016 WL 4055640, at *6 (D. Nev. July 26, 2016) ("society places a heavy stigma upon those accused of sex crimes."). The Intervenors assert that the registry is not public enough, but as explained above, that is incorrect.

Second, the plus factor is satisfied where, as here, the resulting bar from a hotel for three years alters a right or status previously recognized

by state law. *See Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 854 (1986) (“The United States Supreme Court held a liberty interest could be found in the damage of a person’s reputation if coupled with a more tangible interest such as employment.”). Being denied hotel accommodation for three years is at least as significant an injury as that found sufficient in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), where registry prevented the plaintiff from buying alcohol.

Moreover, whether or not the publication and harm here satisfies the “stigma-plus” test used to determine if reputational harm is sufficient to trigger due process rights, this Court should hold that denying accommodation under color of law, based on an unadjudicated allegation, constitutes a deprivation of liberty that triggers due process rights. *C.f.*, *Segaline v. State, Dep’t of Labor & Indus.*, 199 Wn. App. 748, 764 (2017) (“[f]ederal courts recognize a protected liberty interest to enter and remain in a public place”) (citing *Vincent v. City of Sulphur*, 805 F.3d 543, 548 (5th Cir. 2015)). In Seattle, a visitor has the freedom to stay at any hotel of his or her choosing (provided it has space available). Under I-124, that freedom will be denied, by a hotel forced to act by the City, on the basis of unadjudicated allegations. Because I-124 imposes automatic punishment without due process, this Court should hold it unconstitutional.

The Intervenors' analogy to restraining orders, Intervenor Br. 47, is apt, but it actually helps prove AHLA's point. It is true the government can sometimes prohibit people from going certain places (prohibiting a stalker from coming within a specified distance of another person, for example). But it is *not* true that the government can do this without giving the accused a meaningful opportunity to defend against the claim. Even emergency anti-harassment and restraining orders are temporary (typically for two weeks) and dissolve if not renewed at a hearing at which the accused has an opportunity to avoid the deprivation of liberty. *See* RCW 7.92.120(4) (stalking); RCW 26.50.070(4) (domestic violence); CR 65(b) (temporary restraining orders).

D. This Facial Challenge to I-124 is Appropriate.

Respondents object to this facial challenge, arguing AHLA cannot prove that “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” City Br. 36; *see also id.*, at 16; Intervenor Br. 48. But the argument is based on the false premise that a person is entitled to due process only if innocent:

there are plainly sets of circumstances—cases of actual assault—where even the Association would have to concede that neither the due process nor privacy rights of its members' hypothetical future customers are implicated, much less violated.

City Br. 36; *see also* Intervenor Br. 48. To the contrary, **all** accused people are entitled to due process. *See ACLU of Nev. V. Masto*, 670 F.3d 1046, 1060 (9th Cir. 2012). I-124’s automatic punishment is unconstitutional both for those wrongly accused and for those who actually committed harassment.⁹

And as explained in AHILA’s opening brief, the fact that the City has not adopted implementing rules (rules cannot repeal the automatic punishment provision) and the fact that no one has yet been wrongfully denied accommodation does not render the claims speculative. Opening Br. 36-37 (citing cases). Respondents do not address those authorities. AHILA is not seeking an advisory opinion: the initiative passed, regulates how hotels treat guests, imposes new burdens, and violates guests’ rights. This is a real dispute, and the court should decide the merits.

E. WISHA Preempts Part II of I-124.

In their opposition, Respondents misconstrue Washington’s preemption doctrine. They incorrectly claim a city’s right to make and enforce regulations “only ends where an irreconcilable conflict with state law begins.” City Br. 37 (citing *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 560 (2001)). But a city cannot regulate **at all** in a field if the

⁹ Whether or not a hotel would decide, as a matter of business judgment, to deny accommodation to a guest based on a report of misconduct, it is different when the government imposes the punishment. When the government imposes punishment, both the guilty and the innocent are entitled to a meaningful chance to defend themselves.

state “has expressly or by implication stated its intention to preempt the field,” *Heinsma*, 144 Wn.2d at 561, as the state has with respect to workplace safety. In an attempt to avoid the plain statement of intent in WISHA, Respondents offer an incoherent interpretation of WISHA’s preemption clause. They do not address Washington’s comprehensive regulation of workplace safety. And they ignore that I-124 would require an interlocal agreement even under their incorrect interpretation.

1. WISHA Expressly Preempts the Field of Workplace Safety.

RCW 49.17.270 contains WISHA’s express preemption language in a dense, 124-word sentence punctuated by five commas. Yet the operative language plainly says L&I “shall be the sole and paramount administrative agency responsible for the administration of the provisions of [WISHA], and any ... municipal corporation ... having ... any regulatory or enforcement authority of safety and health standards related to the health and safety of employees in any workplace... shall be required, notwithstanding any statute to the contrary, to exercise such authority [1] as provided in this chapter and [2] subject to interagency agreement or agreements” with L&I. *Id.* The legislature thus mandated that cities could only regulate “related to the health and safety of employees in any workplace” if they did so “as provided” in WISHA,

through coordination with L&I, documented in an interlocal agreement. This expresses the intent that the state (through L&I and WISHA) occupy the field of workplace safety in Washington.¹⁰

Despite claiming to rely on plain language, Respondents resort to reading snippets of RCW 49.17.270 independently, incompletely, and out of order. For example, the City highlights the phrase “as provided in this chapter” in RCW 49.17.270, claiming it limits WISHA’s reach and preemptive effect to situations where cities are “enforcing the regulations provided for in WISHA.” City Br. 40-42. But read in proper context (and in its actual place in the sentence), the statute uses “as provided in this chapter” to limit completely a city’s authority to regulate related to workplace health and safety. It says: “**any** ... municipal corporation ... having ... **any** regulatory or enforcement authority of safety and health standards related to the health and safety of employees in **any** workplace shall be required...to exercise such authority [1] as provided in this chapter and [2] subject to interagency agreement or agreements with [L&I]...relative to the procedures to be followed in the enforcement of

¹⁰ Both the trial court and Respondents focused for the wrong reason on AHILA’s citation to *Weyerhaeuser Co. v. King County*, 91 Wn.2d 721, 734 (1979). AHILA cited it as example of another statute that used similar preemption language (there, RCW 90.48.420, which says the department of ecology “**shall be solely responsible** for establishing water quality standards for waters of the state” (emphasis added)). The same was true for *Atay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016), in which the law at issue contained the language “sole administrative responsibility.” The issues and analyses in those cases otherwise have nothing to do with the issues and analysis here.

this chapter....” RCW 49.17.270 (emphasis added). This ensures that in the event **any** municipality claims **any** authority to regulate (not just enforce) “related to” workplace health and safety, whatever the basis for its claimed authority, it must do so “as provided in [WISHA].” Contrary to the City and Intervenors, the “as provided in this chapter” language does not narrow the preemptive effect of WISHA; it reinforces the limit on municipal power to regulate any matter “related to the health and safety of employees in any workplace.”

The City misses the point in trying to explain away the explicit grant of concurrent jurisdiction over the regulation of ionizing radiation in the final clause of RCW 49.17.270. There, the legislature mandated that L&I and the department of social and health services adopt policies “not inconsistent with the provisions of this chapter.” This language (“not inconsistent with”) reflects a grant of concurrent jurisdiction—i.e., another entity can enact policies on the topic as long as they do not conflict with WISHA. But the legislature chose **not** to include this language in the clause before, opting instead for the restrictive, “as provided in.”

This critical distinction was made in *City of Tacoma v. Luvene*, where the law at issue used variants of both phrases:

Cities, towns, and counties ... may enact only those laws and ordinances relating to controlled substances that **are consistent**

with this chapter. Such local ordinances shall have the same penalties *as provided for* by state law.

118 Wn.2d 826, 834 (1992) (emphasis added). While the Court held there was no field preemption for general controlled substances laws (which cites could enact as long as they were “consistent with” state law), it held the second part of the law “expressly preempt[ed] the field of setting penalties” for controlled substance violations because a city could only enact penalties “as provided” by state law. *Id.*

2. WISHA’s Comprehensiveness and Context Imply Preemption.

The parties agree WISHA was enacted so the state would not “lose control” over the workplace safety program. Opening Br. 44-45; City Br. 44-45. This means the parties agree on two essential facts—that the State *had* control of the workplace safety program and wanted to *keep* control. Respondents do not dispute that I-124 represents the first time a city has challenged the State’s exclusive regulation of workplace safety.

Respondents are right that some of the comments in the legislative history were made in the context of responding to federal regulation of workplace safety under OSHA, but that does not change the fact that the Washington legislature intended to “keep safety regulations within *state jurisdiction*, and the regulatory powers within *one agency*” and “consolidate...the rules and regulations of existing statute under *one*

jurisdictional agency [L&I].” Report by Comm. on Labor, Industrial Safety and Health Act, Feb. 14, 1973 (emphasis added). Nor does it change the fact that the final text of WISHA mandates L&I to enact rules necessary to pass OSHA approval so the *state* could “*assume the responsibility for* the development and enforcement of occupational safety and health standards in *all workplaces within this state . . .*” RCW 49.17.230 (emphasis added). Respondents ignore the fact that WISHA was adopted to centralize regulation of workplace safety, including by bringing safety regulation and industrial insurance within one agency.

Finally, WISHA is comprehensive. The State—through WISHA and L&I—occupies the field of workplace safety in the truest sense. The City ducks this point and argues it should be a “secondary” consideration. City Br. 45-46. It does this by minimizing the analysis in *City of Spokane v. Portch*, where the court stated several times that a statute’s comprehensiveness “evinced an intent on the part of the legislature to preempt the field” and “indicated an intent on the part of the legislature to preempt that area of obscenity control. . . .” 92 Wn.2d 342, 348 (1979).

The language in WISHA, the legislative materials surrounding its passage, the decision to put safety and health regulation and workers compensation administration in one agency, and the comprehensive nature of WISHA and the L&I regulations all confirm the state intended to

occupy the field of workplace safety regulation in Washington. I-124's workplace safety provisions are, therefore, preempted.

3. I-124 Conflicts with WISHA.

I-124 conflicts with WISHA even under Respondents' errant reading of both laws. The City contends WISHA's preemption only applies (and interlocal agreement is only required) when a city is "enforcing the regulations provided for in WISHA," but not when a City enforces its own regulations of those same workplaces. City Br. 40-42.¹¹ But here it is undisputed I-124 includes regulations that are identical to those found in WISHA. Opening Br. 48-49. In addition, I-124 authorizes the City to investigate violations and creates a private right of action for individuals based on its provisions. If the City is right, then any municipality could simply adopt whole cloth L&I's workplace regulations and provide for city and private enforcement, effectively cutting L&I out of the enforcement picture entirely. That cannot be what the legislature had in mind when it said in RCW 49.17.270 that the state Department of Labor and Industries "shall be the sole and paramount administrative agency responsible for the administration of" WISHA.

¹¹ The City's additional argument that the power to investigate is not "enforcement" power is untethered to reality or any legal authority. See, e.g., *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 31 (1999) (stating that L&I's "enforcement powers" include "performing investigations [and] conducting inspections").

RESPECTFULLY SUBMITTED this 21st day of November, 2017.

Davis Wright Tremaine LLP

By s/ Harry J. F. Korrell

Harry J. F. Korrell, WSBA #23173
Michele Radosevich, WSBA #24282
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax
Attorneys for Appellants

CERTIFICATE OF SERVICE

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

On this date, I caused to be served in the manner noted below, a copy of the Reply Brief of American Hotel & Lodging Association, Seattle Hotel Association, and Washington Hospitality Association on the following:

Via E-file Notification

Michael Ryan, WSBA # 32091
Erica R. Franklin, WSBA # 43477
Jeff Slayton, WSBA # 14215
Assistant City Attorneys
City of Seattle
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Michael.ryan@seattle.gov
Erica.franklin@seattle.gov
Jeff.slayton@seattle.gov

Via E-file Notification

Laura Ewan, WSBA # 45201
Schwerin Campbell Barnard Iglitzin & Lavitt
18 W. Mercer Street, Suite 400
Seattle, WA 98104
ewan@workerlaw.com

Executed this 21st day of November, 2017, in Seattle, Washington.

s/ Harry J. F. Korrell
Harry J. F. Korrell

DAVIS WRIGHT TREMAINE LLP

November 21, 2017 - 5:17 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94727-9
Appellate Court Case Title: American Hotel & Lodging Association, et al. v. City of Seattle, et al.
Superior Court Case Number: 16-2-30233-5

The following documents have been uploaded:

- 947279_Briefs_20171121171416SC958074_0734.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was WA Supreme Court Reply Brief - Standing and Due Process.pdf

A copy of the uploaded files will be sent to:

- erica.franklin@seattle.gov
- ewan@workerlaw.com
- harrykorrell@dwt.com
- jeff.slayton@seattle.gov
- lise.kim@seattle.gov
- michael.ryan@seattle.gov
- robinson@workerlaw.com

Comments:

Sender Name: Michele Radosevich - Email: micheleradosevich@dwt.com

Address:
1201 3RD AVE STE 2200
SEATTLE, WA, 98101-3045
Phone: 206-757-8124

Note: The Filing Id is 20171121171416SC958074