

No. 77918-4

NO. ~~91779~~

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 and SEATTLE PROTECTS WOMEN,  
Respondents/Intervenors.

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**RESPONSE BRIEF OF  
UNITE HERE! LOCAL 8 AND SEATTLE PROTECTS WOMEN**

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## I. INTRODUCTION

Sexual harassment of hotel employees—especially those who work in guest rooms—is so rampant that studies have found it has essentially been normalized.<sup>1</sup> Seeing that health and safety standards were needed to protect these workers, UNITE HERE! Local 8 staff drafted Initiative I-124, creating minimum employment standards to protect Seattle’s hotel housekeepers from sexual harassment and inhumane workloads, and granting access to affordable family medical care and basic job security—an initiative that passed with overwhelming support by Seattle voters.

Appellants American Hotel & Lodging Association, Seattle Hotel Association, and the Washington Hospitality Association (together, “the Associations”) oppose I-124, now codified at Seattle Municipal Code (“SMC”) 14.25 *et seq.*, and want to prevent it from protecting some of Seattle’s most vulnerable employees from sexual harassment, inhumane workloads, or basic human rights on the job.

The Associations go so far as to engage in unsupported, inflammatory hyperbole and victim-blaming to support their attacks on the basic protections and human dignity that I-124 provides hotel

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<sup>1</sup> See, e.g., <https://www.revealnews.org/blog/why-cleaning-a-hotel-room-makes-you-a-target-for-sexual-harassment/>; <http://www.nytimes.com/2011/05/21/business/21housekeeper.html>; [http://pugetsoundsage.org/wp-content/uploads/2016/12/PSS\\_HotelWorkerSurvey\\_Sept2016.pdf](http://pugetsoundsage.org/wp-content/uploads/2016/12/PSS_HotelWorkerSurvey_Sept2016.pdf); <http://onlinelibrary.wiley.com/doi/10.1111/gwao.12064/abstract>.

housekeeping staff. Such tactics failed to impress King County Superior Court Judge John Erlick, who correctly rejected the Associations' assertions that I-124 violates established laws and precedent. And such tactics should not prevail here.

## **II. STATEMENT OF THE CASE**

Respondents/Intervenors entirely agree with, and therefore rely upon, the background of the case provided by the City of Seattle ("the City") in its Response Brief.

## **III. LEGAL ARGUMENT**

The trial court properly denied the Associations the relief they sought—to overturn the will of the citizens of Seattle and to invalidate the necessary protections for hotel housekeepers outlined in I-124. Appellants' arguments in support of overturning the lower court's detailed, thoughtful, and careful analysis of the case do not survive careful scrutiny, and therefore, Appellants' claims should be denied in their entirety.

### **A. I-124 COMPLIES WITH THE SINGLE SUBJECT AND SUBJECT-IN-TITLE REQUIREMENTS OF WASHINGTON STATE LAW.**

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

contain more than one subject and that must be clearly expressed in its title.” The Washington Supreme Court outlined the analysis for determining whether a bill, ordinance, or initiative relates to one general subject or multiple specific subjects, looking to the provision’s title for guidance, in *Filo Foods v. City of SeaTac*, 183 Wn.2d 770, 357 P.3d 1040 (2015). When classifying an initiative to the people, the operative title is the ballot title because “it is the ballot title with which voters are faced in the voting booth.” *Id.* at 782, citing *Washington Citizens Action of Wash. v. State*, 162 Wn.2d 142, 154, 171 P.3d 486 (2007) (internal citations omitted). The ballot title “consists of a statement of the subject of the measure, a concise description of the measure, and the question of whether or not the measure should be enacted into law.” *Id.*, citing *Washington Ass’n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 655, 278 P.3d 632 (2012) (hereinafter “SA&VP”).

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

(1941)). In *Filo Foods*, a measure impacting working conditions that narrowed application to one specific geographical area *and* one specific type of employer was found to be a general subject matter. The same holds true for I-124, applying to hotel employers in Seattle.

Even if the title were somehow restrictive—which it is not—only rational unity among the matters need exist. *City of Burien v. Kiga*, 144 Wn.2d 819, 825-26, 31 P.3d 659 (2001). Rational unity exists when the matters within the body of the initiative are germane to the general title and to one another. *Id.* at 826; *see also Pierce County v. State*, 150 Wn.2d 422, 431, 78 P.3d 640 (2003). There is no violation of the constitution if a ballot measure contains incidental subdivisions or subjects as long as they all reasonably relate to the law’s general subject. *WFSE v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995); *SA&VP*, 174 Wn.2d at 656.

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

Appellants appear to suggest that it is “impossible” to view protecting hotel housekeepers from assault as having any relation to “health, safety, and labor conditions.” Appellants’ Brief at p. 13. But a willful ignorance of the connection between fostering a safe workplace and “health, safety, and labor conditions” does not a fact make.

Plaintiffs are also simply wrong that there is precedent for rejecting the type of regulation here, which combines several conditions of employment within one piece of legislation. Over a hundred years ago, the Industrial Welfare Act, 1913 Laws of Washington, c. 174 § 2, made it unlawful to employ women or minors “under *conditions of labor* detrimental to their health and morals,” and also made it unlawful to employ “women in any industry within the State of Washington at wages which are not adequate for their maintenance,” thus combining in the same law requirements relating to multiple conditions of labor.<sup>2</sup> I-124 thus follows in the well-established tradition of legislation in Washington that simultaneously addresses the problems of various conditions of labor.

Plaintiffs additionally assert that there is no “rational unity” among the subjects of I-124 because, they claim (with no support) that there is

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<sup>2</sup> See also RCW 49.12 generally (requiring adequate wages, forbidding wage discrimination based on sex, enabling use of paid time off for sick leave, addressing *other conditions of labor*, and authorizing rules and regulations “fixing minimum wages and standards, conditions and hours of labor” to be promulgated by the Department of Labor and Industries, RCW 49.12.091, all in one chapter of one title of the Revised Code of Washington).

“simply no plausible way to connect” I-124’s provisions to health, safety, and labor standards. Besides being untrue on its face, the State Supreme Court has expressly rejected such an argument. In *Citizens for Responsible Wildlife Mgt. v. State*, the initiative challengers asserted that “there is no rational unity between banning body-gripping traps and the use of the pesticides because it is completely unnecessary to ban traps in order to implement the ban on the use of these chemical compounds as pesticides.” 149 Wn.2d 622, 637, 71 P.3d 644 (2003) (internal quotations omitted). The Court held that such an argument “misconstrued” the *ATU 587* decision. *Id.* at 638. It reasoned: “An analysis of whether the incidental subjects are germane to one another does not necessitate a conclusion that they are necessary to implement each other, although that may be one way to do so. This court has not narrowed the test of rational unity to the degree claimed by *Citizens*.” *Id.*

I-124 bears no resemblance to the mere handful of laws with general titles that this Court has struck down on this basis during the more than 120 years of the constitutional provision’s existence. In *ATU 587*, the Court found that I-695 embraced two subjects—setting license tabs at \$30 and providing a method for approving future tax increases—that both fell under the general topic of taxes. 142 Wn.2d at 217. This Court invalidated the initiative in its entirety because the purposes of the two

subjects were unrelated to each other. *Id.* In *City of Burien*, 144 Wn.2d 819, the Court found that the initiative had two subjects: a tax refund and changes to the assessment process including a cap on property taxes. *Id.* at 827. The Court held that the refund provision was unrelated to the changes to property tax assessments in that the provision encompassed much more than property taxes in general. *Id.*

I-124 does not even arguably suffer from the same structural defect as the measures struck down in *ATU 587* and *City of Burien*.<sup>3</sup> Nor does I-124 comprise subtopics as disparate as those struck down by this Court in the past. All of I-124's subtopics rationally relate to establishing and enforcing health, safety, and labor standards with respect to certain employers. It easily satisfies the rational unity test.

As counsel for the Appellants should know, the instant case is quite analogous to this Court's decision related to initiatives regulating labor standards in *Filo Foods*, which built upon this Court's jurisprudence clearly addressing single-subject and ballot title issues. *SV&AP*, 174 Wn.2d 642; *Citizens for Responsible Wildlife*, 149 Wn.2d 622. These cases have left no room for confusion with respect to the issues presented in this case, unless engaging in a type of selective quoting of case law

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<sup>3</sup>In *SV&AP*, the Court explained that the fundamental flaw with the initiatives at issue in *ATU 587* and *City of Burien*, was that they combined a very specific law with an immediate impact with a general measure having only a future impact. 174 Wn.2d at 659.

divorced from the realities and holdings of the decisions (as engaged in by the Associations in their Brief).

The contents of I-124 concern labor standards and are reasonably germane to the establishment of minimum employee benefits, and the language of I-124 “is sufficiently broad to place voters on notice of its contents.” *Filo Foods* at 784-85. The Associations seek to sow confusion and chaos where none exists. Hyperbole and rhetoric aside, the contents of I-124 all concern health, safety, and labor standards and are reasonably germane to the establishment of those employee protections. The Associations’ arguments to the contrary fail, and the lower court saw through that. This claim should be dismissed.

**B. APPELLANTS DO NOT HAVE STANDING TO CHALLENGE THE FACIAL CONSTITUTIONALITY OF THE GUEST REGISTRY PROVISION.**

Judge Erlick found that Appellants do not have standing to bring a facial challenge to the constitutionality of SMC 14.25.040,<sup>4</sup> which requires hotels to record complaints of assault and harassment of hotel employees, by asserting that this provision violates the constitutional rights of individuals accused of assault or harassment hotel workers. CP 350-55.

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<sup>4</sup> Appellants derisively refer to SMC 14.25.040 as “the blacklist”. The superior court referenced the provision as SMC 14.25.040 or “the guest registry provision.” In this brief, the provision will be referenced as SMC 14.25.040 or “the guest registry provision.”

Judge Erlick found that Appellants did not establish that SMC 14.25.040 caused a concrete and specific injury to the Appellants that is supported by evidence in the record. CP 252-53. The court also found that Appellants did not establish that hypothetical individuals who might at some future time be accused of assault or harassment of hotel employees could not assert their own rights if they believed their constitutional rights were somehow violated by the operation of SMC 14.25.040. CP 353-54. The superior court's decision should be affirmed because Appellants do not have standing to assert the purported constitutional rights of hypothetical third parties where they have not established the elements of Washington's three-part test for third-party standing.

**1. Appellants Cannot Assert The Constitutional Rights Of Third Parties Without Establishing The Requirements Of Washington's Three-Part Test For Third-Party Standing.**

While Appellants' opening brief appears to suggest that the Associations would have standing to assert the purported constitutional rights of third parties if Appellants were able to satisfy the requirements of either the test for direct standing or the test for third-party standing, Appellants are mistaken. By establishing direct standing a party may assert its own rights, but it may not seek to "vindicate the constitutional

rights of a third party” unless it meets the requirements of Washington’s three-part test for third-party standing. *See In re Guardianship of Cobb*, 172 Wn. App. 393, 401-02, 292 P.3d 772 (2012) (while siblings had standing to assert their own due process rights, they lacked standing to assert the purported constitutional rights of brother because they did not show that their brother was unable to assert his own rights).

The general rule is that “a person lacks standing to vindicate the constitutional rights of a third party.” *In re Guardianship of Decker*, 188 Wn. App. 429, 445, 353 P.3d 669, 676 (2015), *review denied*, 184 Wn.2d 1015 (2015). A narrow exception to this rule allows a litigant to assert a third party’s constitutional rights where the litigant establishes each of the following three elements: (1) the litigant has suffered an injury in fact, (2) the litigant has a close relationship to the third party, and (3) the third party lacks the ability to assert his or her own rights. *Id.* All three elements must be satisfied for a litigant to have standing to assert the purported constitutional rights of a third party. *Id.* Thus, in addition to establishing that it has personally suffered an injury in fact, as it must to establish direct standing to assert its own rights, “[a] litigant purporting to vindicate a third party’s constitutional rights bears the burden of demonstrating that ‘the allegedly injured third party lacks the ability to vindicate his or her rights.’” *Id.*

Washington courts apply this three-part test where a litigant seeks to assert the constitutional rights of a third party regardless of whether the litigant has direct standing to assert its own rights. *See Decker*, 188 Wn. App. at 445; *Cobb*, 172 Wn. App. at 401-02; *Ludwig v. Washington State Dep't of Ret. Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006); *State v. A.W.*, 181 Wn. App. 400, 409-10, 326 P.3d 737 (2014). The purpose of the third-party standing test is to determine whether a party that may have direct standing to assert its own rights can establish standing to assert the purported constitutional rights of others. A litigant may have standing to bring a challenge asserting a violation of its own constitutional rights, but lack standing to assert the purported rights of others where the litigant does not establish the second and third elements of the three-part test for third-party standing. *See Cobb*, 172 Wn. App. at 401-02; *State v. Farmer*, 116 Wn.2d 414, 421–22, 805 P.2d 200, 204 (1991), *amended on denial of reconsideration*, 812 P.2d 858 (1991).

Washington courts have often held that a party could not challenge a statute by asserting that it violated the constitutional privacy or due process rights of third parties where the litigant did not establish third-party standing. *See State v. Corder*, 131 Wn. App. 1009 (2006) (“Constitutional claims based on the right to privacy are subject to the traditional rules of standing and the party challenging the law must do so

on his or her own behalf.”); *Amunrud v. Bd. of Appeals*, 124 Wn. App. 884, 892-93, 103 P.3d 257 (2004), *aff’d*, 158 Wn.2d 208, 143 P.3d 571 (2006) (“Because Amunrud does not claim a personal infringement of his privacy, he does not have standing to challenge the constitutionality of these statutes.”); *State v. Gutierrez*, 50 Wn. App. 583, 591-92, 749 P.2d 213 (1988) (criminal defendant lacked standing to assert the due process rights of a third-party codefendant); *Farmer*, 116 Wn.2d at 421 (litigant lacked standing to assert a third party’s due process rights); *Cobb*, 172 Wn. App. at 401-02 (same); *Decker*, 188 Wn. App. at 445 (same).

In this case, Appellants are trade associations whose members include hotels and other businesses in the hospitality industry. *See* CP 2, 25, 27-28. Hotel guests and individuals who might one day become hotel guests are *not* “members” of the Associations. *Id.* Appellants do not seek to challenge the constitutionality of the guest registry provision by asserting that it violates the constitutional rights of the Associations or any of their members. They do not allege that the guest registry provision violates the privacy or due process rights of the Associations or any of the hotels that are members of the Associations, nor *could* they, as these rights are held only by natural persons and not by artificial persons such as the Associations and their members. *See Am. Legion Post No. 149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 594, 192 P.3d 306

(2008) (citing *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 527, 59 S.Ct. 954, 83 L.3d. 1423 (1939)).

Rather, the Appellants seek to challenge the constitutionality of the guest registry provision by asserting that it violates the constitutional rights of third parties, the hypothetical individuals who might be accused of assault or harassment of hotel employees. Appellants assert that the guest registry provision is unconstitutional because recording complaints of assault or harassment of hotel workers and maintaining a record of individuals accused of assaulting hotel employees “injures the good name and reputation *of the persons on the list* and invades *their* right to privacy.” *See* CP 6 (emphasis added). Appellants do not claim that any such person exists or is a member of the Associations, nor do they claim that any individual who might be accused of assault or harassment of a hotel employee and have that complaint recorded in the future would be a member of any of the Associations, as hotel guests and individuals who might one day visit hotels are not members of the Associations. Thus, it is quite clear that Appellants do not seek to assert their own rights. Appellants seek to challenge the constitutionality of the guest registry provision by asserting only the purported constitutional rights of third parties. To do so, they must establish the three elements of the test for third-party standing. *See, e.g., Decker*, 188 Wn. App. at 445. As is

demonstrated below, Appellants fail to do so because they have not established that they suffered a concrete injury in fact, that they have a close relationship with hypothetical individuals who might be accused of assault or harassment of hotel employees at some time in the future, or that these as-yet unascertained individuals would lack the ability to assert their own rights if they one day exist and believe that their constitutional rights were somehow violated by the operation of SMC 14.25.040.

**2. Appellants Did Not, And Cannot, Establish An Injury In Fact Caused By The Guest Registry Provision.**

As the superior court's well-reasoned decision explained, Appellants do not have standing to assert a constitutional challenge to SMC 14.25.040 because they failed to establish that they suffered an injury in fact caused by this provision. CP 352-53. This would be a necessary element to establish standing to seek a declaratory judgment under the Uniform Declaratory Judgments Act ("UDJA") even if Appellants sought to assert their own constitutional claims rather than attempting to establish standing to assert the purported constitutional rights of third parties. *See, e.g., Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (to establish standing to seek a declaratory judgment under the UDJA, a party must show (1) that the interest it asserts is within the zone of interests to be

protected by the statute in question, and (2) that it suffered an injury in fact that was caused by the statutory provision it seeks to challenge). Establishing that Appellants suffered an injury in fact that was caused by the guest registry provision is also the first element of the three-part test for third-party standing, which Appellants must satisfy in order to assert the purported constitutional rights of the as-yet unascertained individuals who might be accused of assault or harassment of hotel employees in the future. *See, e.g., Decker*, 188 Wn. App. at 445. Thus, a litigant that fails to establish an injury in fact caused by the particular statutory provision it claims is unconstitutional cannot establish direct or third-party standing.

While Appellants may be able to demonstrate an injury in fact caused by other provisions of I-124, it must establish that it was injured by the operation of the guest registry provision in order to have standing to challenge the constitutionality of that provision. *See, e.g., State v. Rowe*, 60 Wn.2d 797, 799, 376 P.2d 446 (1962) (“A person may not urge the unconstitutionality of a statute unless he is harmfully affected by the particular feature of the statute alleged to be violative of the constitution.”).

To establish an injury in fact, Appellants must show that the guest registry provision caused a specific injury that is personal to the Appellants and is “substantial rather than speculative or abstract.” *Grant*

*Cty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802. “A conjectural or hypothetical injury will not confer standing.” *Harris v. Pierce Cty.*, 84 Wn. App. 222, 231, 928 P.2d 111 (1996). *See also Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992) (“If the injury is merely conjectural or hypothetical, there can be no standing.”). Thus, “[t]he pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected.” *Snohomish Cty. Prop. Rights All. v. Snohomish Cty.*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994). Where, as here, “a person or corporation alleges a threatened injury, as opposed to an existing injury, the person or corporation must show an immediate, concrete, and specific injury to themselves.” *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 129, 272 P.3d 876 (2012). *See also Trepanier*, 64 Wn. App. at 383; *Harris*, 84 Wn. App. at 231.

To establish injury in fact, Appellants must rely upon evidence in the record that establishes a concrete and specific injury. It may not rely on the arguments of counsel or conclusory statements in affidavits or declarations that do not set forth evidentiary facts. *See Snohomish Cty. Prop. Rights All.*, at 53 (litigant failed to establish an injury in fact where “The affidavits and declarations fail to set forth facts which are evidentiary in nature. Instead, they are speculative and assert conclusions

as to anticipated future effects of the county-wide planning.”). *See also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986) (“[T]he necessary factual predicate may not be gleaned from the briefs and arguments themselves.”)

In this case, the superior court correctly found that Appellants did not establish a concrete injury caused by the operation of SMC 14.25.040. CP 352-53. While Appellants argue that recording complaints of assault or harassment of hotel employees will increase operating costs and that hotels will lose customers because they must exclude individuals accused of assault or harassment of hotel employees, these claims are speculative and are not supported by any evidence in the record. As the superior court noted, there is no evidence that any hotel has recorded a complaint of assault or harassment since SMC 14.25.040 went into effect and no evidence that any hotel will do so in the immediate future. CP 352-53. Because no evidence has been provided regarding “how many, if any” complaints will be recorded, there is nothing to support Appellants’ speculation regarding lost revenue due to the exclusion of individuals accused of assault or harassment or that the number of complaints will be so large that additional staff must be hired or new record-keeping systems implemented in order to maintain them. CP 353. SMC 14.25.040 has been in effect since November 30, 2016, and there is no evidence that a

hotel has recorded even one complaint to date. CP 71, 353. As the superior court noted, “as of the time of oral arguments on this matter, there was no evidence of any guests having been placed on a registry.” CP 353. Not only is there no evidence that any hotel has recorded a complaint since the law went into effect, there is no evidence indicating that any hotel will do so in the immediate future, much less that any hotel has or will record so many complaints that maintaining them will increase the hotel’s labor or administrative costs. Accordingly, the superior court correctly found that Appellants’ claimed injuries “are merely speculative.” CP 352. The superior court explained, “[T]he Associations argue injury-in-fact because I-124 imposes additional operational, labor, and administrative costs on hotels and will reduce the number of customers, including those the hotel must bar from its premises. At this stage, on a facial constitutional challenge, these injuries are merely speculative.” *Id.* Because there is no evidence that any hotel has or will record a complaint pursuant to SMC 14.25.040, “the threatened injury is not immediate, concrete, or specific enough” to establish an injury in fact. *Id.* This superior court’s finding should be affirmed, as it is well established that the asserted injury must be “immediate, concrete, and specific” in order to confer standing, *KS Tacoma Holdings*, 166 Wn. App. at 129, while “a conjectural or hypothetical injury will not confer standing.” *Harris*, 84

Wn. App. at 231. *See also Trepanier*, 64 Wn. App. at 383. Where, as here, the pleadings and evidence “merely reveal imagined circumstances in which the plaintiff could be affected”, Appellants have not established a concrete injury sufficient to confer standing. *Snohomish Cty. Prop. Rights All.*, 76 Wn. App. at 53.

Appellants cannot rely on arguments of counsel or conclusory statements in declarations that do not set forth evidentiary facts. *See Snohomish Cty. Prop. Rights All.*, 76 Wn. App. at 53; *Bender*, 475 U.S. at 546. The arguments of counsel on pages 17-18 of Appellants’ opening brief are not evidence. While Appellants argue that the various claimed administrative burdens listed in its brief are substantiated by the declarations of John Lane and Brian Crawford, CP 25-28, these declarations merely contain conclusory statements that do not set forth evidentiary facts. The declarations of John Lane and Brian Crawford merely state that “the administration of the ‘blacklist’ of guests accused of assault or sexual harassment” will impose “additional operating costs”. CP 26, 28. They do not set forth any facts indicating concrete and specific administrative burdens any hotel has in fact incurred, and they provide no facts that demonstrate that such unspecified administrative burdens have imposed additional costs on any hotel. *Id.* Thus, as in *Snohomish Cty. Prop. Rights All.*, the declarations Appellants seek to rely upon “fail to set

forth facts which are evidentiary in nature” as they are merely “speculative and assert conclusions as to anticipated future effects” of the guest registry provision. 76 Wn. App. at 53.

The record does not merely fail to establish that Appellants have been harmed by the guest registry provision, it contains no evidence that SMC 14.25.040 has harmed anyone. Appellants cannot establish standing by claiming to stand in the shoes of some as-yet unascertained third party where there is nothing in the record to establish that any person has suffered an injury or faces an “immediate, concrete, and specific” threat of injury due to the operation of SMC 14.25.040 that would allow him to have standing to raise the constitutional challenge asserted in the Complaint’s Third Claim. *KS Tacoma Holdings*, 166 Wn. App. at 128–29.

Appellants’ Third Claim alleges that SMC 14.25.040 will injure the privacy and reputational interests of individuals accused of assault or harassment of hotel employees because those complaints will be recorded in the guest registry. To establish that an individual has suffered an injury by the operation of SMC 14.25.040, Plaintiffs must show that some individual has been the subject of a complaint that was recorded in a hotel’s guest registry or that he has engaged in some course of conduct or has a present intention of engaging in some course of conduct that will

cause him to face an immediate, concrete, and specific threat of becoming the subject of such a complaint. There is no evidence that any individual has been the subject of a recorded complaint, that any individual believes such a complaint will imminently be made, or that any individual has engaged in or has a present intention to engage in any course of conduct that would cause a hotel employee to report a complaint of assault or harassment that would be recorded in the guest registry. Accordingly, Appellants fail to allege that any individual has suffered an injury or faces an “immediate, concrete, and specific” threat of future injury resulting from the operation of the guest registry provision. Thus, Plaintiffs have not shown that any person has standing to raise the constitutional challenge asserted, much less that Plaintiffs can stand in the shoes of such a person to assert claims on his or her behalf.

**3. Appellants Do Not Have A Close Relationship With Hotel Guests Or Individuals Who Might Visit Hotels In The Future.**

To establish the second prong of the three-part test for third-party standing, Appellants must show that the Associations have a close relationship with the individuals whose purported constitutional rights the Associations seek to assert. *Decker*, 188 Wn. App. at 445. To do so, Appellants must show that the Associations have a close relationship with individuals who may visit a hotel in the future and be accused of assault or

harassment of a hotel employee, as these are the as-yet unascertained individuals whose purported constitutional rights Appellants claim would be violated by the guest registry provision. However, the Supreme Court recently made clear that this relationship is not sufficiently close to satisfy the second prong of the test for third-party standing. *Kowalski v. Tesmer*, 543 U.S. 125, 125 S. Ct. 564 (2004). While Appellants cite several cases for the proposition that vendors have a close relationship with their customers, the Court recently made clear in *Kowalski* that a business does *not* have a close relationship with hypothetical individuals who may become its clients in the future.<sup>5</sup> While the Court noted that it has recognized that attorneys have a close relationship with their clients for purposes of establishing the second element of the third-party standing test, the relationship between attorneys and as-yet unascertained individuals whom the attorneys asserted would become their clients in the future was treated quite differently. *Id.* at 130. The Court explained, “The attorneys in this case invoke the attorney-client relationship to demonstrate the requisite closeness. Specifically, they rely on a future attorney-client relationship with as yet unascertained Michigan criminal

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<sup>5</sup> The cases cited by Appellants on pages 21-22 of its Brief are also distinguishable, because they relied on the fact that the operation of the challenged statutory provision caused significant financial harm to the party seeking to assert third-party standing. In this case, Appellants have not established any concrete economic injury caused by the guest registry provision that is more than speculative.

defendants ‘who will request, but be denied, the appointment of appellate counsel, based on the operation’ of the statute.” *Id.* The Court concluded that the relationship between the attorneys and their asserted future clients was not sufficiently close to meet the second prong of the test for third-party standing. *Id.* at 131. Rather, the Court concluded, “The attorneys before us do not have a ‘close relationship’ with their alleged ‘clients’; indeed, they have no relationship at all.” *Id.*

Appellants stand in the same position as the attorneys in *Kowalski*. They do not seek to assert the purported constitutional rights of customers who have been accused of assault or harassment of hotel employees and believe the operation of SMC 14.25.040 has violated their constitutional rights, as there is no evidence in the record that any such person exists. As the superior court noted, “as of the time of oral arguments on this matter, there was no evidence of any guests having been placed on a registry.” Rather, Appellants seek to challenge SMC 14.25.040 by asserting third-party constitutional claims on behalf of as-yet unascertained individuals whom the Associations assert will be future customers of a hotel that is a member of the Associations. However, like the attorneys in *Kowalski*, the Associations cannot claim to have a close relationship with as-yet unascertained individuals who might in the future become clients of a

hotel that may be a member of the Associations. Thus, as in *Kowalski*, the Associations' attempt to establish third-party standing must fail.

Moreover, even if a member hotel could establish third-party standing with as-yet unascertained individuals it speculates will be customers in the future, which under *Kowalski* it cannot, this would not establish that the Associations have standing to assert the third-party constitutional claims at issue here. The Associations are trade associations whose members are businesses in the hospitality industry, and whose purpose is to promote the financial interests of those businesses. The Associations have no relationship with hotel guests, or with individuals who might become hotel guests in the future, much less a sufficiently close relationship to satisfy the second element of the test for third-party standing. These individuals are not members of the Associations nor are they customers or future customers of the Associations. While the Associations may argue that they could rely on associational standing to allow them to assert the third-party constitutional claims of as-yet unascertained individuals who may be guests of one of its members in the future, Appellants cannot establish associational standing to bring a constitutional challenge asserting that the guest registry provision violates the purported constitutional privacy rights and reputational interests of individuals accused of assault or harassment of hotel employees because it

cannot demonstrate the second and third elements of the test for associational standing. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977).

To establish associational standing, the Appellants must show that “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt*, 432 U.S. at 343. The Associations are trade associations whose purpose is to promote the economic interests of businesses in the hospitality industry. The Associations are not organizations whose purpose is to promote the individual privacy rights or reputational interests of individuals. While an organization whose purpose is to promote the constitutional liberty interests of individuals, such as the American Civil Liberties Union, could demonstrate that advocating for the constitutional privacy interests of individuals is germane to the organization’s purpose, a trade association whose purpose is to promote the financial interests of businesses in the hospitality industry cannot. Thus, the Associations cannot establish associational standing to bring a constitutional challenge to SMC 14.25.040 that seeks to vindicate the constitutional privacy rights of individuals accused of assault or harassment of hotel workers because the

interests it seeks to protect in asserting this claim are not germane to the organization's purpose.

Moreover, the Associations cannot establish the third prong of the *Hunt* test because the claim it seeks to assert requires the participation of the individuals whose purported privacy and reputational interests the Associations seek to assert. Washington courts have recognized the personal nature of privacy interests. *State v. Francisco*, 107 Wn. App. 247, 252, 26 P.3d 1008 (2001). Federal authority is in accord. *See Woodfin Suite Hotels, LLC v. City of Emeryville*, 2006 WL 2739309 at at \*8 (N.D. Cal. August 23, 2006) (“[T]here is ... a danger in recognizing standing for a party asserting the privacy rights of others when the interests of the party asserting the privacy rights and the parties possessing the privacy rights differ.”). Accordingly, Washington courts and federal courts have often found that litigants lacked standing to assert the purported privacy rights of others. *See Corder*, 131 Wn. App. 1009 (“Constitutional claims based on the right to privacy are subject to the traditional rules of standing and the party challenging the law must do so on his or her own behalf.”); *Amunrud*, 124 Wn. App. at 892-93; *Farmer*, 116 Wn.2d at 421 (“Farmer’s standing therefore would arise where the statute affected his right to privacy and right to engage in sexual activity. However, he may not obtain standing by challenging the statute based

upon how it affected Eric’s and Jim’s right to privacy.”); *Ferris v. Santa Clara Cty.*, 891 F.2d 715, 717 (9th Cir. 1989) (“As to Ferris’ argument that these laws impermissibly invade the privacy rights of minor females, Ferris lacks standing to argue the constitutional rights of third parties not represented in this appeal.”); *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) (“To the extent that Meek invites us to consider the privacy interest a child might have in his online identity, we decline. As a third party, Meek does not have standing to raise an invasion of privacy claim on behalf of the minor.”).

Accordingly, because the Associations and their members do not have a close relationship with as-yet unascertained individuals who might visit a hotel in the future and because the Associations cannot establish associational standing to assert the purported privacy and reputational interests of such individuals, the Associations cannot establish standing to assert their Third Claim and this claim should be dismissed.

**4. Appellants Have Not Established That Hypothetical Future Hotel Guests Would Lack The Ability To Assert Their Own Rights If They Believe Their Constitutional Rights Were Somehow Violated By The Guest Registry Provision.**

To establish the third element of the test for third-party standing, Appellants must prove that the third party individual whose rights the Associations seek to assert “lacks the ability to vindicate his or her rights.”

*Decker*, 188 Wn. App. at 445. “A litigant purporting to vindicate a third party’s constitutional rights bears the burden of demonstrating that ‘the allegedly injured third party lacks the ability to vindicate his or her rights.’” *Id.* (quoting *Cobb*, 172 Wn. App. at 403).

The trial court correctly found that Appellants failed to prove that the third party whose purported constitutional rights the Associations seek to assert lacks the ability to assert his or her rights. CP 352-53. As explained above, there is no evidence that any person has been affected by the operation of SMC 14.25.040, and no evidence indicating that any person has refrained from asserting his rights because of any purported stigma, financial constraints, or any other reason. CP 338, 352-53. Appellants’ various theories about why a hypothetical individual accused of assault or harassment of hotel employees might choose not to litigate the matter are entirely speculative. There is nothing in the record to support this speculation. Rather, Appellants rely entirely on the arguments of counsel. As explained above, this is not evidence that can confer standing. *See Bender*, 475 U.S. at 546.

Moreover, Appellants’ theories regarding speculative hindrances that might prevent a hypothetical individual from asserting his own rights are unavailing. While Appellants argue that as-yet unascertained third parties might be reluctant to assert their own rights because of the

supposed stigma Appellants claim would be associated with doing so, the Associations “have not demonstrated that individuals are refraining from acting or why established procedures that allow individuals to litigate anonymously are insufficient.” CP 353. In *John Doe G. v. Dept. of Corrs.*, 197 Wn. App. 609, 625-26, 391 P.3d 496 (2017), the court noted that “a routine and desirable practice exists among Washington courts to allow parties, when appropriate, to proceed under pseudonyms.” Thus, “plaintiffs’ real names have not ‘historically been open to the press and general public’ when the nature of the action shows that compelling them to use their real names would chill their exercise of their right to seek relief. Numerous opinions from the Supreme Court and this court demonstrate this longstanding and previously uncontroversial practice in Washington.” *Id.* at 625. In the absence of any evidence that any individual is in fact refraining from asserting his rights because of a purported “stigma” or that the procedures allowing individuals to litigate anonymously are somehow insufficient, Appellants’ claim that individuals might be reluctant to assert their own rights due to “stigma” cannot satisfy the third prong of the test for third-party standing.

Similarly, Appellants suggest that as-yet unascertained third parties might be unable to assert their rights because of financial constraints. However, there is no evidence in the record indicating that any person has

refrained from acting for this reason. While nothing in the record establishes that the hypothetical third-party individuals whose rights Appellants seek to assert are indigent, even if Appellants could point to such evidence the mere fact that a third party is indigent is not sufficient to establish that he lacks the ability to assert his rights in order to satisfy the third prong of the test for third-party standing. *See Kowalski*, 543 U.S. at 131-32 (noting that indigency is not “the type of hindrance necessary to allow another to assert the indigent defendants’ rights”). Thus, Appellants’ claim that third parties lack the ability to assert their rights because of financial constraints is unavailing.

Finally, Appellants suggest that hypothetical third parties may lack the ability to assert their rights because they will not be notified that a complaint was made. Again, Appellants offer no evidence that this has occurred or that any person has refrained from acting for this reason. Moreover, as the superior court noted, “administrative rules and guidelines implementing the Initiative and SMC 14.25 have yet to be enacted. Many of the due process considerations raised by plaintiffs Associations (such as notice and an opportunity to be heard) may be obviated or addressed based upon such regulations.” CP 354-55. Appellants concede that “City rule makers may decide to require notice” and point to no evidence that any person has or will be affected by SMC 14.25.040 before these

implementing rules and guidelines become effective. Opening Brief of Appellants at 25. Accordingly, Appellants cannot show that any third-party individual has or will lack the ability to assert his rights due to lack of notice.

Because Appellants can point to no evidence indicating that any person has refrained from asserting his rights because of purported stigma, financial constraints, or any other reason, Appellants failed to prove that the hypothetical third party whose purported constitutional rights the Associations seek to assert lacks the ability to assert his or her rights. Thus, Appellants have not satisfied the third element of the test for third-party standing. Therefore, Appellants do not have standing to assert the third-party constitutional claims in its Third Claim, and this claim should be dismissed.

**5. Standing Requirements Should Not Be Relaxed To Permit Appellants To Assert The Privacy Rights Of Third Parties Without Establishing Third-Party Standing Because Appellants' Attempt To Challenge The Guest Registry Provision Does Not Present An Issue Of Broad Public Significance Immediately Affecting Significant Segments Of The Population.**

Appellants urge this Court to relax the standing requirements discussed above to permit the Associations to assert the purported constitutional rights of third parties without satisfying Washington's three-part test for third-party standing because Appellants believe their theory

that requiring hotels to record accusations of assault or harassment of hotel employees violates the constitutional privacy rights of hypothetical individuals who might one day be accused of assault or harassment of hotel employees presents an issue of serious public importance immediately affecting substantial segments of the population. This Court should decline to do so, as Appellants' attempt to challenge the guest registry provision does not present an issue of statewide importance that affects a substantial percentage of the population.

Standing requirements may only be relaxed in rare occasions “where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally”. *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969). For example, standing requirements were relaxed in *Washington Nat. Gas* because the court found that the case presented issues affecting “a substantial percentage of the population.” *Id.* The issue presented in that case “directly involves the generation, sale and distribution of electrical energy within the state and will immediately affect the management and operation of public utility districts and other municipal corporations in this state.” *Id.* Standing requirements were relaxed in *Farris v. Munro*, 99 Wn.2d

326, 329-30, 662 P.2d 821 (1983) because a challenge to the State Lottery Act presented “an issue vital to the state revenue process”, and in *State v. Watson*, 155 Wn.2d 574, 577-78, 122 P.3d 903 (2005) which involved an issue critical to the administration of justice.

The guest registry provision does not involve an issue of broad public importance that immediately affects a substantial portion of the population. While Appellants suggest that the challenged provision affects every hotel guest in Seattle, it in fact affects only individuals accused of assault or harassment of hotel employees. SMC 14.25.040. The challenged provision has no effect on any other person who visits a hotel or who may visit a hotel in the future. The provision has been in effect since November 30, 2016, and there is no evidence that it has affected even one person to date. CP 71, 353. The record does not show that any hotel has recorded a complaint of assault or harassment since the law went into effect, and there is certainly no evidence that any person has been wrongfully accused. As the superior court noted, “as of the time of oral arguments on this matter, there was no evidence of any guests having been placed on a registry.” CP 353. This demonstrates that the challenged provision is not one that immediately affects a broad segment of society. Rather, it is one that has not been shown to immediately affect anyone, and there is nothing in the record to suggest that it is likely to affect a

significant number of people in the future. While Appellants speculate that there will be many accusations of assault and harassment of hotel employees, and that many people will be wrongfully accused, there is no evidence to support this speculation. In fact, the record suggests otherwise. The only evidence in the record regarding the number of complaints of assault and harassment of hotel employees is a survey of hotel employees which found that less than half of assaults on hotel employees were reported to the victim's employer. CP 107. This suggests that SMC 14.25.040 will likely affect only a portion of the individuals who commit an act of violence toward hotel employees. Clearly, the evidence does not support Appellants' claim that the challenged provision impacts a sufficiently substantial portion of the overall population to relax the standing requirements.

Moreover, individual privacy and reputational interests are not issues of broad public importance that affect large segments of society. They are claims that are personal to the individual and have no bearing on commerce, finance, labor, industry, agriculture or other issues that may impact the general public. Washington courts have recognized the personal nature of privacy interests. *Francisco*, 107 Wn. App. 252 (“Constitutional privacy rights are personal rights that cannot be vicariously asserted.”). Accordingly, Washington courts and federal

courts have found that litigants lacked standing to assert the purported privacy rights of others where they did not establish the traditional third-party standing requirements. See *Corder*, 131 Wn. App. 1009 (“Constitutional claims based on the right to privacy are subject to the traditional rules of standing and the party challenging the law must do so on his or her own behalf.”); *Amunrud*, 124 Wn. App. at 892-93; *Farmer*, 116 Wn.2d at 421; *Ferris*, 891 F.2d at 717; *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) (as a third party, no standing to raise an invasion of privacy claim on behalf of a minor).

Because Appellants’ attempt to challenge SMC 14.25.040 does not present issues of broad public importance immediately affecting substantial segments of the population, this Court should not relax the traditional standing requirements to permit the Associations to assert the purported constitutional rights of third parties without satisfying Washington’s three-part test for third party standing. Where Appellants cannot establish third-party standing to assert the constitutional claims of third parties for the reasons discussed above, the superior court’s determination that Appellants lacked standing to challenge the constitutionality of the guest registry provision should be affirmed and Appellants’ Third Claim should be dismissed.

**C. EVEN IF THE ASSOCIATIONS COULD ESTABLISH STANDING—AND THEY CANNOT—I-124 DOES NOT IMPERMISSIBLY VIOLATE CONSTITUTIONAL RIGHTS.**

Despite the Associations’ arguments implying the contrary, reputational harm alone does not implicate an individual’s due process rights under the U.S. Constitution. *See, e.g., Paul v. Davis*, 424 U.S. 693, 707-12, 96 S.Ct. 1155 (1976); *Miller v. California*, 355 F.3d 1172, 1178-79, (9th Cir. 2004). Rather, an individual asserting that the government violated a “liberty” interest guaranteed by the Due Process Clause by injuring his reputation through some stigmatizing statement or action “must show that the stigma was accompanied by some additional deprivation of liberty or property.” *Miller*, 355 F.3d at 1178. This is known as the “stigma-plus” test. *Id.*

To establish a due process violation under the “stigma-plus” test, the Associations must show that they suffered reputational harm sufficient to satisfy the “stigma” element and must satisfy the “plus” element by establishing that the stigmatizing statement or action resulted in the alteration or extinguishment of “a right or status previously recognized by state law.” *Paul*, 424 U.S. at 711. Where, as here, the Associations claim a due process violation based on the disclosure of a statement, record, or charge they allege to be damaging to someone’s reputation, “due process protections apply *only* if a plaintiff is subjected to ‘stigma plus’; i.e., if the

state makes a charge against [a plaintiff] that might seriously damage his standing and associations in the community and 1) the accuracy of the charge is contested, 2) there is some public disclosure of the charge, and 3) it is made in connection with the termination or the alteration of some right or status recognized by state law.” *Wenger v. Monroe*, 282 F.3d 1068, 1074 (9th Cir. 2002) (emphasis added).

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

In this case, Plaintiffs fail to establish either prong of the test. The “stigma” element is *not* established because I-124 does *not* require public disclosure of the names of individuals accused of committing acts of violence toward hotel employees. The statute requires disclosure only to certain employees who will be required to enter guest rooms without other employees present. SMC 14.25.040(C). Such internal disclosure to employees does not constitute the public disclosure required to satisfy the

“stigma” element. Moreover, it is the public disclosure of a stigmatizing record, not the *creation* of such, that is the basis of the challenge here.

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

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

U.S.C. § 12182. Under RCW 49.60.215, individuals in the state of Washington have a legal right to equal enjoyment of places of public accommodation “except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability.” RCW 49.60.215.

I-124 does nothing more than impose conditions established by law that are applicable to all persons regardless of any of the factors enumerated in RCW 49.60.215 or in 42 U.S.C. § 2000a(a) and 42 U.S.C. § 12182. Accordingly, I-124 does not terminate or alter any right or status recognized by state law. Therefore, even if I-124 required public disclosure of the allegedly stigmatizing records, which it plainly does *not*, Plaintiffs cannot satisfy the “plus” element of the “stigma-plus” test because they do not allege any termination or alteration of rights recognized by state law. This claim has no merit.

Furthermore, I-124’s requirement that hotels record the names of guests who have been accused of committing acts of violence toward hotel employees does not violate Article I, § 7 of the Washington Constitution. Article I, § 7 of the Washington Constitution does not confer a greater

right to nondisclosure of personal information than the U.S. Constitution. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154 (1997), *amended*, 943 P.2d 1358 (1997). *See also O’Hartigan v. Dep’t of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991).<sup>6</sup> In *Ino Ino*, the Supreme Court made clear that Washington courts applying the state constitution recognize “two types of interests protected by the right to privacy: the right to autonomous decisionmaking and the right to nondisclosure of intimate personal information, or confidentiality.” *Id.* The Court held that the right to autonomous decisionmaking is a fundamental right that is subject to heightened scrutiny, while the right to nondisclosure of personal information is not. *Id.* Accordingly, in questions involving an individual’s privacy interest in nondisclosure of personal information, “the state constitution offers no greater protection than the federal constitution, which requires only application of a rational basis test.” *Id.* at 124. Under the rational basis test, a statute that is

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<sup>6</sup> *See also In re Meyer*, 142 Wn.2d 608, 619-20, 16 P.3d 563 (2001) (“The petitioners claim a liberty interest, under article I, § 7 of the Washington Constitution, in the information subject to disclosure because that constitutional provision affords significantly greater privacy protection than the United States Constitution. The petitioners misconstrue our case law. In examining just such a contention, we held the Washington Constitution provides no more protection than the federal constitution in the context of the interest in confidentiality, or the nondisclosure of personal information. *Ino Ino*, 132 Wn.2d at 124. In that case, we even performed a Gunwall analysis and found no more protection under article I, § 7 of the Washington Constitution than under the Fourteenth Amendment. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986). Thus, the right of privacy guaranteed by the Washington Constitution in this setting has the same boundaries as that guaranteed by the federal constitution.”)

rationally related to a legitimate government interest meets constitutional scrutiny. *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 604, 192 P.3d 306 (2008).

In this case, the privacy interest asserted is an individual's privacy interest in nondisclosure of personal information, not the right to autonomous decisionmaking. The privacy interest asserted is the alleged right to nondisclosure of the fact that an individual's name is included on a list of persons who have been accused of committing acts of violence toward hotel employees. *See* CP 5-6. Article I, § 7 of the Washington Constitution confers no greater privacy right in this instance than the U.S. Constitution, and both require only that the challenged provision of I-124 be rationally related to a legitimate government interest. *See Ino Ino*, 132 Wn.2d at 124.

This standard is easily met here. I-124 states that its purpose is "to protect hotel employees from violent assault, including sexual assault, and sexual harassment and to enable employees to speak out when they experience harassment or assault on the job." SMC 14.25.020. This is clearly a legitimate government interest. *See In re Det. of Thorell*, 149 Wn.2d 724, 750, 72 P.3d 708 (2003) (noting legitimate interest in government protecting citizens from sexual violence).

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

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

I-124's requirement that hotels record the names of guests who have been accused of committing acts of violence toward hotel employees does not violate Article I, § 7, of the Washington Constitution. The Washington Constitution does not confer a greater right to nondisclosure of personal information than the U.S. Constitution. *See Ino Ino*, 132 Wn.2d at 124. In questions involving an individual's privacy interest in nondisclosure of personal information, "the state constitution offers no greater protection than the federal constitution, which requires only application of a rational basis test." *Id.* Under the rational basis test, a statute that is rationally related to a legitimate government interest meets constitutional scrutiny. *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 604, 192 P.3d 306 (2008).

In this case, both Washington and the U.S. Constitution require only that the challenged provision of I-124 be rationally related to a legitimate government interest. *See Ino Ino*, 132 Wn.2d at 124. I-124 states that its purpose is "to protect hotel employees from violent assault, including sexual assault, and sexual harassment and to enable employees to speak out when they experience harassment or assault on the job." SMC 14.25.020. This is clearly a legitimate government interest. *See Thorell*, 149 Wn.2d at 750 (noting legitimate interest in government protecting citizens from sexual violence). The challenged provision of I-

124 meets the rational basis test and does not violate the U.S. Constitution or Washington Constitution.

Furthermore, AHLA's constitutional argument is a facial challenge to the statute, as opposed to an as-applied challenge. The significance of this is that, as the trial court noted on pages 18 and 19 of its decision in this case, to prevail on a facial challenge to the statute AHLA must prove that *no* set of circumstances exists in which the statute as currently written can be constitutionally applied. *See Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000) (“[a] facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied.” As the Washington Supreme Court explained in *In re Detention of Turay*, 139 Wn.2d 379, 417 n. 27 (1999):

Our traditional rule has been, however, that *a facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied.*” *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting) ... . While this dissenting opinion does not constitute binding authority, it does provide an excellent framework for the analysis of [the] “as applied” challenge... .

Here, in addition to there not being any constitutional violation even under the circumstances the Associations speculatively posit in their brief (i.e., a person who did nothing wrong is erroneously put on the list and the list is

disclosed to the public), the Associations cannot prevail on a facial challenge to the statute merely by arguing that some circumstances *might* exist in which the operation of the statute would be unconstitutional. Rather, to prevail on a facial challenge to the statute, the Associations must prove that there are *no* circumstances where the statute can constitutionally be applied—in other words, they must show I-124 would be unconstitutional where the list is *not* disclosed to the public. Because the statute does not require the list to be disclosed to the public, it cannot be said that the list will be disclosed to the public in every case. Rather, it is clear that a circumstance could exist where the list is not disclosed to the public. In fact, it is likely that the list will not be disclosed to the public in most (if not all) cases because a hotel has no reason to disclose its list to the public and very likely will not do so. As the Association’s entire argument is that the public disclosure of the list violates the guest’s privacy rights, it clearly cannot prove that the constitutional violation still exists where the list is not disclosed to the public.

Even if the list is kept only in the hotel’s internal files and is not otherwise disclosed, it is still *not* “disclosed” to hotel employees in a manner that amounts to an unconstitutional privacy violation. Hotels routinely keep lists of all sorts of personal information about guests and

maintain that information in the hotel's internal files.<sup>7</sup> This would not be a constitutional violation because the hotel is a private actor as opposed to a state actor. But to the extent that hotels "publish" that information to hotel employees who access those files for the purpose of reading that information about guests in order to prepare for a guest's stay, if the Association's argument here was correct, every time a front desk employee at a hotel reads a piece of personal information that was logged about a guest (which would be defamatory if it was publicly disclosed), the hotel has committed defamation that would be actionable as a tort. This cannot be true. If it were, it would likely come as quite a surprise to many of the Associations' members who would be apparently committing defamation on a regular basis as a matter of routine.

It is clear that the state is authorized to require hotels to keep records of complaints of assault that are made by hotel employees. To the extent that this intrudes on the privacy of the person who is the subject of

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<sup>7</sup> See, e.g., Lindberg, Peter Jon, "What Your Hotel Knows About You," January 8, 2013 (at <http://www.travelandleisure.com/articles/what-your-hotel-knows-about-you>):

Hotels have always kept logs on their guests, tracking previous stays, comments and complaints, even which pay-per-view movies you ordered. "We write down everything," admits Karambir Singh Kang, area director, USA, for Taj Hotels and general manager of the Taj Boston. So when the bellman casually inquires, "Where are we off to today, folks?" no doubt your reply will be fed into your ever-expanding profile. Sometimes this "research" can take on questionable ethical dimensions. One veteran GM told me his staff aren't above going through guests' trash.

the record, the intrusion is clearly warranted in the interest of protecting the hotel employee from assault.

Finally, *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) is clearly distinguishable from the facts of this case. There, the police chief “caused to be posted a notice in *all retail liquor outlets* in Hartford that sales or gifts of liquors to appellee were forbidden for one year.” *Id.* at 435 (emphasis added). That is different from the facts here, where a guest’s appearance on a list is *not* posted in every hotel in the state—instead, the list is simply maintained in the internal files of a single hotel, and the persons on the list are not barred from staying in any hotel in the City, but are only prohibited from returning to a single hotel for the protection of a hotel employee who works there. The Associations’ comparisons between I-124 and the facts of *Constantineau* could not be more tenuous.

Similarly, at pages 35-36 of its Brief, the Associations argue that the provision of the statute stating that guests will be prevented from returning to the hotel for three years under certain circumstances is unconstitutional because it requires hotels to engage in unconstitutional law enforcement by barring people from hotels where they are merely accused (but not convicted) of a crime. But the state *does* have the authority to do this, as it does when restraining orders and trespass citations are issued based on an allegation that a person did something that

reasonably caused the person seeking the order to fear that person. Based on nothing more than a statement by the person seeking a restraining order that she is in fear, and without the proof that would be necessary to obtain a criminal conviction, a restraining order for a set period of time, or a trespass notice barring someone from the property, can be issued that prohibits a person from entering the locations listed in the order.

But here, too, in order to prove I-124 is unconstitutional on its face, the Associations must prove that it would be unconstitutional in *all* circumstances to bar a person from a hotel based on a complaint by a hotel employee that he assaulted her. While the Associations *only* focus on the circumstance in which the hotel guest's complaint is not meritorious and the guest who is barred from the hotel in fact did nothing wrong, the Associations must show that barring a guest from a hotel would be unconstitutional in *all* circumstances, *including* those in which the guest in fact did assault the hotel employee. They cannot do so.

**D. THE ASSOCIATIONS' CLAIMS ASSERTING I-124 IS PREEMPTED BY WISHA ALSO FAIL SCRUTINY.**

Plaintiffs cite RCW 49.17.270 to proclaim that, since Seattle hotels are subject to health and safety standards under that Chapter, the City's standards in I-124 are preempted; however, Washington's preemption doctrine is well settled. Wash. Const. Art. XI, § 11; *City of Tacoma v.*

*Luvene*, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992). Under Article XI, Section 11, cities may enact ordinances prohibiting the same acts prohibited by state law so long as the state enactment was not intended to be exclusive *and* the city ordinance does not conflict with the general law of the state. *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 353, 75 P.3d 1003, 1009 (2003), citing *Luvene* at 833.

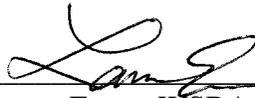
As so clearly articulated in the City's Brief, the plain language of WISHA indicates the Legislature's desire for the state to have administrative authority over *that chapter*—not to create a restriction over all protections afforded to workers. See RCW 49.17.270. The Association's absurd position seems to misread the actual language of RCW 49.17.270, which expressly indicates it is only applicable to situations where a municipality is enforcing the regulations provided for in WISHA.

Here, as the City clearly notes in its brief submitted to this Court, there is no conflict between I-124 and any provision of RCW 49.17.270. L&I's enforcement powers are not impacted by I-124 in any way. SMC 14.25.080-090 requires employers adopt policies consistent with, and not in conflict with, anything promulgated by L&I, and then states that any provisions therein "shall not apply where and to the extent that state or federal law or regulations preclude their applicability." Therefore, they are to be interpreted in a manner that allows application that is *not* preempted.

#### IV. CONCLUSION

For the foregoing reasons, this Court should not overturn Judge Erlick's thorough and well-reasoned opinion, which should be upheld in its entirety.

Respectfully submitted this 23rd day of October, 2017.



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## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2017, I caused the foregoing Respondents/Intervenors' Response Brief to be delivered via the e-filing web portal, and a true and correct copy of the same to be delivered via email and next-day US First Class mail to:

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**October 23, 2017 - 2:53 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

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