

SENT VIA ELECTRONIC MAIL

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Seattle City Council
600 Fourth Avenue, 2nd Floor
Seattle, WA 98104



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Washington

901 Fifth Ave, Suite #630
Seattle, WA 98164
(206) 624-2184
aclu-wa.org

Tana Lin
Board President

Michele Storms
Executive Director

Emily Chiang
Legal Director

Antoinette Davis
John Midgley
Nancy Talner
Senior Staff Attorneys

Eunice Cho
Lisa Nowlin
Breanne Schuster
Staff Attorneys

Michael Youhana
Legal Fellow

Re: Proposed Chapter 14.26

Dear Members of the Seattle City Council:

The ACLU of Washington applauds the Seattle City Council's recognition of the serious need for improved protections for the health and safety of hotel workers, who are often vulnerable to exploitation and abuse by both their employers and hotel guests. Initiative 124—approved by Seattle voters in 2016 and currently being considered by the Council as a package of ordinances revising the Municipal Code—appropriately acknowledges that these workers, who are typically women and often women of color, are entitled to measures that take into account the nature of their work, which is often performed in hotel rooms. Panic buttons—which we supported in SB 5358—might seem superfluous but in fact reduce workplace sexual harassment and assault and improve health outcomes and inequities among isolated workers.

Although the ACLU strongly supports the overall package of ordinances, we write to draw the Council's attention to a series of problematic provisions in one of the proposed chapters that, if not remedied, will likely result in legal challenge.

Proposed new Chapter 14.26, "Protecting Hotel Employees from Violent or Harassing Conduct" is well-intentioned but problematic because it (1) contains unconstitutionally vague language, violates due process and First Amendment requirements and impermissibly enables arbitrary and discriminatory enforcement (2) fails to comport with basic procedural due process requirements regarding notice and opportunity to be heard and (3) impermissibly delegates law enforcement, adjudication, and sentencing authority to private for-profit entities. These provisions also raise concerns about the disproportionate impact they will likely have on people of color, and men of color in particular; and about the security of the data the ordinance requires hotels to maintain.

Our nation has had a troubling history with so-called "blacklists," dating back to the McCarthy era (targeting in relevant part public sector employees and union activists) and continuing through to the post-9/11

“no-fly” lists that continue to be administered in secret to the great detriment of Muslims and members of the South Asian community. Time and again we have learned that such lists are unreliable, do not make us safer, lack procedural protections for those listed, and disproportionately target people of color. In the new digital age, we have also learned that unless necessary and appropriate steps are taken to protect sensitive data, that data is not secure. That the City now additionally seeks to delegate the creation, administration, and enforcement of such a list to *private for-profit* corporations is unprecedented, unwise, and dangerous.

ACLU-WA urges the City Council simply to delete Sections 14.26.070, -.080, -.110.A(1)-(3), and the fine regarding failure to maintain records for five years set forth in -.170.E, leaving the rest of the Ordinance and Chapter intact. Proposed Section 14.26.250, “Severability,” already contemplates that the provisions of this Chapter are considered separate and severable.

1. Because Proposed Section 14.26.070 is Unconstitutionally Vague, it Violates Due Process and the First Amendment, Enabling Arbitrary and Disproportionate Enforcement

Proposed Section 14.26.070 contains a number of references to language that is insufficient to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). “Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” *Chicago v. Morales*, 527 U.S. 41, 56 (1999). *See also State v. Padilla*, 190 Wn.2d 672 (2018). Both reasons are applicable here.

The section refers repeatedly to “violent or harassing conduct” as the trigger for various obligations and actions to be taken by hotel employers; “violent and harassing conduct” is in turn defined as including “unwelcome or inappropriate sexual remarks” and “intimidation.” But nowhere does the ordinance clarify the meaning of “harassing conduct,” what remarks might be considered “sexual” in nature, or how remarks will be determined to be “inappropriate.”

An inquiry as to whether one has been following HBO’s *Game of Thrones*—a popular television show that contains graphic depictions of sex and sexual violence, but that is also a pop culture phenomenon—could be interpreted by some as sexual, unwelcome, and inappropriate. Reference to a “reasonable person” standard does not cure the deficiency, particularly since it is a private for-profit hotel employee who is being

asked to make the initial determination. *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (“[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies.”); *see also id.* at 575 (“Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law”).

The ordinance fails to do that which every government prohibition must: “enable the ordinary citizen to conform his or her conduct to the law.” *Morales*, 527 U.S. at 58. Neither does the signage requirement contained in proposed Section 14.26.060 suffice. That section refers to “Sexual Harassment” without defining the term and merely refers readers to a generic citation to Chapter 14.26 as a whole. The Ordinance’s requirement that hotels develop “a written policy” is also circular: hotel employers seeking guidance as to what such a policy should contain are told only that “the policy must explain the employer’s obligations under this Section.” 14.26.070.

When it is unclear what speech is permissible, *i.e.* what constitutes that which is sexual in nature, unwelcome, or harassing, law-abiding people will err on the side of not speaking at all, or limiting their speech to only the most banal. The vagueness of this particular prohibition thus also creates an impermissible chilling effect under the First Amendment. *Cf. State v. Immelt*, 173 Wn.2d 1, 8 (2011) (internal quotation marks and citations omitted) (“[T]he threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions”); *see also id.* (“Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole . . .”).

The prohibition on vagueness also serves to prevent “arbitrary and discriminatory enforcement.” *Morales*, 527 U.S. at 71 (Kennedy, J., concurring) (finding ordinance unconstitutional because police officers are given too much discretion). ACLU-WA expects that in the context of this particular ordinance, the population most likely to bear the brunt of arbitrary and discriminatory enforcement are men of color and, specifically, Black and Latino men. *Cf. William O. Douglas, Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960) (noting that vague laws for “suspicion” and “vagrancy” are disproportionately enforced against “minority groups who are not sufficiently vocal to protect themselves, and

who do not have the prestige to prevent an easy laying-on of hands by the police.”); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. Pa. J. Const. L. 296, 296–07 (2001) (noting that in 1998, of 52,000 people selected by customs officials for body searches, almost half of all persons selected were African-American or Latino).

2. The Proposed Ordinance Fails to Provide Protections Required by Due Process

Because hotel guests have both a liberty interest in their reputations and in freely accessing what are otherwise places of public accommodation, the proposed ordinance implicates procedural due process, which prohibits deprivation of a liberty interest without proper notice and an opportunity to be heard. “The fundamental requirement of [procedural] due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). *Mathews* sets out the three factors that must be considered to determine whether the procedural protections provided for are sufficient to protect the interest at stake: (1) the private interest at stake (2) the risk of erroneous deprivation and (3) the government interest. *Id.* at 321.

Although the government interest at issue is significant and compelling, the Ordinance as currently drafted will create far too great a risk of erroneous deprivation of the liberty interests at stake unless additional protections are provided.

In the context of “no-fly” lists used to bar travelers from boarding airplanes, courts have found that ample procedural safeguards must be provided—and in the context of the no-fly lists, government was held to a reasonable suspicion standard even to place someone on the list, whereas here there is no clear standard (much less one administered by publicly accountable government officials) that applies. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1151 (D. Or. 2014), *appeal denied*, No. 14-36027 (9th Cir. 2014) (finding a high risk of erroneous deprivation of travelers’ rights to international travel and reputation even where the no-fly list used a “reasonable suspicion” standard).

Here, the only apparent procedural safeguard is that guests may request a hearing before the “Hearing Examiner” within 30 days. But nowhere does this Chapter state who the “Hearing Examiner” is, how the location of the “Hearing Examiner” is to be known, or what standards are to apply in such hearings. Neither does it make any accommodation for the likelihood that most guests staying in Seattle hotels are visiting from out of town, some with additional stops on their itineraries, some for whom English is not their first language *etc.*: if the appeal is not filed within 30 days, the

findings made by the private for-profit hotel employer with no government involvement whatsoever are final and binding.

3. The Ordinance Impermissibly Delegates State Law Enforcement Authority to Private For-Profit Hotels that are Wholly Unaccountable to the Public

Perhaps the most troubling aspect of the proposed Chapter 14.26 is its wholesale delegation of state investigative, adjudicative, and enforcement powers to wholly unaccountable private for-profit corporations who have not traditionally been considered state actors.¹ This delegation is in contrast to the provisions contained in proposed Chapter 14.29 regarding “Hotel Employees Job Retention,” which appropriately reserve enforcement to the Office of Labor Standards and its Director.

Not only are private for-profit hotels—corporations in the business of making money by renting rooms out to travelers—tasked with conducting “fair and impartial investigation[s] into . . . alleged conduct,” they are given no guidance whatsoever how to do so. They are additionally tasked with providing legally sufficient notice, both to victims and alleged perpetrators; with making “a prompt determination about whether the conduct occurred,” “document[ing] the investigation and determination in writing,” and “provid[ing] a written copy of the determination to the accused guest and the alleged victim”—*i.e.* issuing a quasi-judicial opinion. Additionally, and separately concerning, the proposed Ordinance also requires private for-profit hotels to engage in law enforcement by declining service to guests these hotels have adjudicated as being in violation for five years.

These requirements are unlawful. Certain aspects of state authority are properly reserved only to the state—and when delegation is proper, it includes both substantive and procedural protections to prevent the abuse of authority. *Cf. State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886) in holding a Seattle ordinance that delegated building permit approval to nearby private property owners unconstitutional and a “delegation of power . . . repugnant to the due process clause of the Fourteenth Amendment”); *see also Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) (“Liberty requires accountability. . . . Government officials can wield power without owning up to the consequences. One way the Government can regulate without

¹ Of course, hotels exercising state authority pursuant to the Ordinance would be state actors for the purpose of the exercise of that authority and bound by the state and federal constitutions accordingly. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (noting the key question is whether the private person’s conduct “may be fairly characterized as ‘state action’” or is “fairly attributable to the State.”).

accountability is by passing off a Government operation as an independent private concern.”).

Conclusion

Time and again, we have learned that lists purporting to ban people are unreliable, do not make us safer, lack procedural protections for those listed, and disproportionately target people of color. Because delegating the creation, administration, and enforcement of such a list to *private for-profit* corporations is both unprecedented and unwise, ACLU-WA respectfully urges the City Council to delete proposed Sections 14.26.070, -.080, -.110.A(1)-(3), and the fine regarding failure to maintain records for five years set forth in -.170.E. Failure of the Seattle City Council and Mayor to address these civil liberties concerns will place at risk the important worker protections we support extending to an already vulnerable labor workforce.

Sincerely,



Emily Chiang
Legal Director

CC: Jenny Durkan, Mayor of Seattle
Pete Holmes, City Attorney