FILE
IN CLERK'S OFFICE
SUPREME COURT, STATE OF WASHINGTON
NOVEMBER 19, 2026
CHIEF JUSTICE

THIS OPINION WAS FILED
FOR RECORD AT 8 A.M. ON
NOVEMBER 19, 2026
SARAH R. PENDLETON
SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRADSHAW DEVELOPMENT, INC. dba ANYTIME FITNESS,	)	No. 104579-4
Respondent,	)	
v.	)	En Banc
WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,	)	
Petitioner.	)	Filed: November 19, 2026

GONZÁLEZ, J.—Under a Washington statute, state safety inspectors may "enter a worksite at an entry point designated by the employer or, in the event no entry point has been designated, at a reasonably recognizable entry point" to request consent to inspect and investigate violations of workplace safety regulations. RCW 49.17.070(3). We are asked whether, under this statute, state safety inspectors were authorized to follow a customer into a key card accessible fitness center's front entrance, illuminated with an "open" sign, to request consent to inspect and investigate claims that the fitness center was operating in violation

of a COVID-19 emergency workplace safety regulation. We hold that the inspectors did not violate this statute.

We are also asked whether the inspectors' entry violated the search and seizure provisions of the federal constitution. We conclude that Bradshaw Development Inc. has not demonstrated an expectation of privacy in the fitness center's front entrance area, which impliedly invited the public to enter to make legitimate business inquiries, and the inspectors did no more than a reasonably respectful person would have done. Accordingly, we hold the inspectors' entry did not violate the Fourth Amendment to the United States Constitution.

While the protections of article I, section 7 of the Washington Constitution are often broader than the Fourth Amendment's, an independent state constitutional analysis has not been adequately presented in this case. Therefore, we do not reach the state constitution under these facts. We reverse, vacate the trial court's order dismissing the inspectors' citation, and remand to the trial court for further proceedings.

BACKGROUND

Proclamation by Governor Jay Inslee No. 20-25.4 (Wash. May 31, 2020)[1] temporarily restricted certain business activities to fight the spread of COVID-19.

[1] https://governor.wa.gov/sites/default/files/2023-01/20-25.4%20COVID-19%20Safe%20Start.pdf[https://perma.cc/4HY6-S2CM]

See Clerk's Papers (CP) at 722-28 (describing Washington's phased reopening plan). In support of that proclamation, the Department of Labor and Industries (L&I) enacted an emergency workplace safety rule to prohibit employers from allowing employees to perform work where business activity has been prohibited by an emergency proclamation. Former WAC 296-800-14035 (Wash. St. Reg. 20-12-017, effective May 26, 2020); *see also* CP at 31-32, 1144.

Wesley Bradshaw owns Bradshaw Development Inc., operating as Anytime Fitness. Gyms and fitness centers were among the businesses that were temporarily closed in Yakima County in June 2020. L&I received a complaint that Anytime Fitness in Selah was open, and operating as usual, in violation of the emergency proclamation. On June 15, 2020, L&I workplace safety inspectors visited that Anytime Fitness location to determine if the business was violating the emergency workplace safety rule.

On arrival, the L&I inspectors "saw a lit neon 'open' sign in the window of the building but the doors opened only to individuals who had key cards." CP at 32. This was the gym's "only obvious entrance." *Id.* at 28. The inspectors unsuccessfully attempted to reach anyone at the gym by telephone at the posted number. They entered the locked gym by safely following someone carrying a

gym bag.[2] Inside, the L&I inspectors saw people exercising, sitting in an office, and apparently assisting a customer with a new gym membership. The inspectors asked an employee for consent to conduct an inspection of the facility.

The first person the inspectors spoke with declined to give consent and asked them to wait where they were for the general manager. As they waited for about 20 minutes, the inspectors "observed several people enter the building as well as a chalkboard on which was written, 'Welcome back.'" *Id.* at 32. The inspectors left after the general manager arrived and said he did not consent to them conducting an inspection.

Based on the inspectors' report, L&I cited Bradshaw Development Inc. for willfully violating former WAC 296-800-14035 and assessed a penalty of $9,639. The Board of Industrial Insurance Appeals reinstated the citation after an industrial appeals judge vacated the citation based on insufficient evidence.[3] *See id*. at 32-34. The Board explained that the inspectors "had the right to enter the building for

---

[2] To describe the inspectors' entry, after recognizing the inspectors entered "in a safe manner," the Board of Industrial Insurance Appeals used the colloquial term "tailgating," using quotation marks, without defining it. CP at 28. Based on the testimony, the term describes an inspector "grabb[ing] the door and follow[ing]" a key card holder inside the locked gym. *Id*. at 1195. The dissent effectively makes its own factual finding that the inspectors were acting in a sneaky manner, suggesting their actions were contrary to policies established and enforced by Bradshaw, but the Board did not find that to be the case, and the evidence is not sufficient to support that conclusion. We are not the fact finder. We should constrain ourselves to making legal judgments.

[3] L&I had also cited Bradshaw for willfully violating the emergency workplace safety rule three times in July 2020. The inspectors did not enter any of the Anytime Fitness locations in July. The Board adopted the industrial appeals judge's decision to vacate those three citations based on insufficient evidence and the State did not cross-appeal. CP at 32-34.

the sole purpose of obtaining consent to inspect the premises" and properly relied on their observations inside the gym while awaiting consent, along with the owner Wesley Bradshaw's refusal to answer questions, to find the violation willful. *Id.* at 27-29.

Bradshaw sought review in Yakima County Superior Court, which adopted the Board's findings of fact but vacated the citation on statutory and constitutional grounds.[4] That court agreed with the Board that RCW 49.17.070 allowed the L&I inspectors to enter the gym for the purpose of obtaining consent but concluded any observations inside the gym were inadmissible because, it concluded, "A business that limits entry to keycard holders is not open to the public. Therefore, Anytime Fitness had a reasonable expectation of privacy in the commercial premises." CP at 1297.

The State appealed, and the Court of Appeals affirmed on different grounds. *Bradshaw Dev., Inc. v. Dep't of Lab. & Indus.*, 34 Wn. App. 2d 705, 571 P.3d 300 (2025). The Court of Appeals held that neither the statute nor the state and federal constitutions allowed the inspectors to enter a commercial premises' key card accessible doors without permission through "tailgating"; therefore, any of their

[4] If the Board's findings were challenged, we would review them to determine whether they are supported by substantial evidence in the record as a whole. *Potelco, Inc. v. Dep't of Lab. & Indus.*, 191 Wn. App. 9, 21, 361 P.3d 767 (2015). Here, in the absence of a proper challenge, the Board's factual findings are binding.

observations inside the gym were inadmissible. *See id.* at 721-24. The State successfully sought our review. 5 Wn.3d 1042 (2026). The American Civil Liberties Union of Washington Foundation (ACLU of WA) has filed an amicus brief in support of Bradshaw.

ANALYSIS

1. ENTRY UNDER THE STATUTE

The Washington Legislature has enacted legislation "in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every [person] working in the state of Washington." RCW 49.17.010. All workers in Washington are entitled to safe workplaces and, for workers in some industries, workplace safety is a fundamental right protected by our constitution. *See id.*; WASH. CONST. art. II, § 35; *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 196 Wn.2d 506, 519-20, 475 P.3d 164 (2020). To implement these assurances and protect these rights, our legislature enacted WISHA,[5] along with many other statutes, and authorized L&I workplace safety inspectors to "enter a worksite at an entry point designated by the employer or, in the event no entry point has been designated, at a

[5] Washington Industrial Safety and Health Act of 1973, chapter 49.17 RCW. WISHA requires the State's worker safety program to equal or exceed federal workplace safety standards. RCW 49.17.010.

reasonably recognizable entry point" to request consent to inspect and investigate violations of workplace safety regulations. RCW 49.17.070.

Bradshaw contends RCW 49.17.070, read in light of its context and history, prohibits L&I inspectors from entering a locked business by following a customer inside and the L&I inspectors were required to get a warrant under RCW 49.17.075 to enter the gym. To determine whether the inspectors were statutorily authorized to enter, we must look at the plain meaning of RCW 49.17.070, .075, and related statutes. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). We "must not add words where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003); *see also State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008) (courts "'cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question'" (internal quotation marks omitted) (quoting *Miller v. French*, 530 U.S. 327, 341, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000))).

Our legislature directs L&I inspectors, once they present their credentials to the owner or other person with authority, to "enter without delay and at all reasonable times" to investigate workplace safety "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner." LAWS OF 1973, ch. 80, § 7, *codified as* RCW 49.17.070. Originally, both

state and federal law purported to allow inspectors to enter without a warrant or exception to the warrant requirement. *See* 29 U.S.C § 657(a). Before our legislature amended the state statute to add procedural protections, the United States Supreme Court had held the federal law "is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); *see also See v. City of Seattle*, 387 U.S. 541, 545, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

In 2006, our legislature made its intent clear:

> The legislature intends that inspections performed under the Washington industrial safety and health act ensure safe and healthful working conditions for every person working in the state of Washington. Inspections must follow the mandates of Article II, section 35 of the state Constitution, and equal or exceed the requirements prescribed by the occupational safety and health act of 1970 (Public Law 91-596, 84 Stat. 1590). The legislature also intends that the inspections comply with the fourth and fourteenth amendments to the United States Constitution and Article I, section 7 of the state Constitution.

LAWS OF 2006, ch. 31, § 1.[6] Our legislature made the workplace safety directive subject to, among other things, a consent requirement. *Id.* § 2. Specifically, L&I inspectors "entering any worksite located on private property" must enter "in a safe

[6] Our legislature expressed the intent for RCW 49.17.070 to comport with state and federal constitutional standards and also enacted a warrant procedure for L&I. LAWS OF 2006, ch. 31, § 1; *see also id.* § 3, *codified as* RCW 49.17.075. We address the state and federal constitutions below.

manner . . . at an entry point designated by the employer" or, if none has been designated, "at a reasonably recognizable entry point" to gain consent to inspect. RCW 49.17.070(3). As the House testimony in support of the amendment explained, "The notion is that the Department will go in at a place where most people would enter the property." H.B. REP. ON SUBSTITUTE H.B. 2538, at 3, 59th Leg., Reg. Sess. (Wash. 2006). Our legislature also specified that L&I may take "action consistent with a recognized exception to the warrant requirements of the federal and state Constitutions" and is not required to give "advance notice of an inspection." RCW 49.17.070(4)-(5).

Here, to gain consent as authorized by WISHA, the inspectors entered through a key card accessible front door by safely following a key card holder inside. The Board found this was the "only obvious entrance." CP at 28. There was no other entry point designated by the employer. The inspectors observed an illuminated neon "open" sign and entered through the adjacent front door. The statute does not specify an entry point has to be unlocked, and we would be adding words to the statute to hold a key card accessible front door is an unreasonable point of entry for inspectors seeking consent from a business owner while the business is open. *See* RCW 49.17.070(3). Under these facts, the open gym's front door is a reasonably recognizable entry point. The inspectors' entry did not violate the statute.

Next, we address whether the inspectors' entry violated Bradshaw's constitutional right to privacy under the Fourth Amendment to the United States Constitution. If the inspectors' entry did not violate Bradshaw's right to privacy, then the inspectors were justified in occupying the space where they sought consent.

2. CONSTITUTIONAL RIGHT TO PRIVACY

"We review claims that constitutional rights were violated de novo." *State v. Vanhollebeke*, 190 Wn.2d 315, 321, 412 P.3d 1274 (2018). "The right to be free from searches by government agents is deeply rooted in our nation's history and law, and it is enshrined in our state and national constitutions." *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007).

Under the Fourth Amendment, a search occurs "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects." *Florida v. Jardines*, 569 U.S. 1, 5, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)). Further, a search occurs when (1) there is a subjective manifestation of privacy in the area searched and (2) society recognizes that privacy interest as reasonable. *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (quoting *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)); *Katz v. United States*, 389 U.S. 347,

361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). "What a person knowingly exposes to the public, even in [their] own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351.

"The Fourth Amendment does not . . . prevent all investigations conducted on private property." *Jardines*, 569 U.S. at 6; *see, e.g.*, *Patel v. City of Montclair*, 798 F.3d 895, 900 (9th Cir. 2015) (holding the areas of a motel "open to the public are not within the enumerated items in the Fourth Amendment; therefore, no search occurs when police officers enter those areas"). A business owner retains no privacy interest "in areas of its licensed premises that it actively invites the public to enter." *Dodge City Saloon, Inc. v. Wash. State Liquor Control Bd.*, 168 Wn. App. 388, 398, 288 P.3d 343 (2012) (citing *Barlow's Inc.*, 436 U.S. at 315); *accord Maryland v. Macon*, 472 U.S. 463, 469, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985) ("Here, respondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business."). In contrast, a business owner has a reasonable expectation of privacy in nonpublic areas of commercial premises, and this ordinarily requires a warrant (or a recognized exception to the warrant requirement, such as consent) before a state actor may enter. *New York v. Burger*, 482 U.S. 691, 699-700, 107 S. Ct. 2636, 96

L. Ed. 2d 601 (1987); *see Barlow's Inc.*, 436 U.S. at 315; *see also, e.g.*, *See*, 387 U.S. at 545 (locked warehouse).[7]

The protections of article I, section 7 of our state constitution are "qualitatively different from," and often broader than, those provided by the Fourth Amendment. *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994). "[O]ur state constitution goes further" than the federal constitution "and requires actual authority of law before the State may disturb the individual's private affairs." *Day*, 161 Wn.2d at 893; *see also State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) ("Under Const. art. [I], § 7, the focus is whether the 'private affairs' of an individual have been unreasonably violated rather than whether a person's expectation of privacy is reasonable."). In determining whether there is a disturbance of private affairs, we examine "'the nature and extent' of the intrusion 'and the extent to which the information has been voluntarily exposed to the public.'" *State v. Evans*, 5 Wn.3d 199, 210-11, 572 P.3d 1172 (2025) (quoting *State v. Puapuaga*, 164 Wn.2d 515, 522, 192 P.3d 360 (2008)). "Interference with the broad right to privacy can be legally authorized by statute or common law, but

[7] In *See*, the United States Supreme Court held a person "may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant" for a nonpublic space. 387 U.S. at 546. The Court did not hold that entering a locked door without consent violates a reasonable expectation of privacy or is a trespassory search of a constitutionally protected area enumerated within the text of the Fourth Amendment. *Jones*, 565 U.S. at 411 (recognizing "[t]he Government's physical intrusion on" an unenumerated area "is of no Fourth Amendment significance"). Accordingly, contrary to the dissent's assertions, *See* is not analogous.

only insofar as is reasonably necessary to further substantial governmental interests that justify the intrusion." *State v. Chacon Arreola*, 176 Wn.2d 284, 292, 290 P.3d 983 (2012).

In the context of WISHA inspections of commercial businesses, the State argues that our state "[c]onstitution's protections are coextensive with those of the Fourth Amendment." Suppl. Br. of L&I at 18 (citing *Centimark Corp. v. Dep't of Lab. & Indus.*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005)). To show our state constitution is more protective here, Bradshaw was required to "provide argument and relevant authorities supporting the specific outcome they seek in light of 'the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest.'" *State v. Mayfield*, 192 Wn.2d 871, 881, 434 P.3d 58 (2019) (quoting *State v. Chenoweth*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007)). We decline to reach the issue of whether the state constitution's privacy protections for commercial business are different under these facts because Bradshaw did not adequately present an independent state constitutional analysis.

Under the Fourth Amendment, a threshold question is whether Bradshaw had a reasonable expectation of privacy in the front entrance area of Anytime Fitness. Specifically, the party arguing that government agents searched a private location "'has the burden of showing both a subjective expectation of privacy and

that the expectation is objectively reasonable; that is, one that society is willing to accept.'" *United States v. Perry*, 548 F.3d 688, 691 (8th Cir. 2008) (quoting *United States v. McCaster,* 193 F.3d 930, 933 (8th Cir. 1999)); *see also State v. Evans*, 159 Wn.2d 402, 409, 150 P.3d 105 (2007) (holding that the defendant, "[t]o establish that he had a reasonable expectation of privacy," must "satisfy a twofold test: (1) Did he 'exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?' and (2) '[d]oes society recognize that expectation as reasonable'" (second alteration in original) (quoting *State v. Kealey*, 80 Wn. App. 162, 168, 907 P.2d 319 (1995))). Here, Bradshaw has not carried its burden.

The State contends that Bradshaw has no expectation of privacy in the common area of the gym that members of the public with key cards may access. Bradshaw argues to the contrary, reasoning that "a locked key card exterior door is an objective manifestation that the interior is not a space the general public may enter at will." Suppl. Br. of Resp't at 25.

Like Bradshaw, the ACLU of WA would set the constitutional limit at a business's locked door. The ACLU of WA contends that the State's argument is contradicted by the leading treatise: "'[A] club or other business that is operated for a select clientele may not be public'" and "'the actual practice as to admitting persons into such facilities must be considered in making the determination of whether there was in fact a justified expectation of privacy therein.'" Br. of

Amicus Curiae ACLU of WA at 12-13 (alteration in original) (quoting 1 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.4(b) (6th ed. 2020)); *see also Asher v. City of Little Rock*, 449 S.W.2d 933, 936-37 (Ark. 1970). The State responds that Bradshaw had no privacy interest because it flouted the emergency proclamation and permitted customers and prospective customers to enter. *See* L&I's Resp. to Amicus Curiae ACLU of WA at 9.

The State grounds its argument in four cases that, it says, establish a business has no reasonable expectation of privacy under these facts. Suppl. Br. of L&I at 22. We disagree with the full range of the State's argument but ultimately agree with the State that no search occurred in this case. Bradshaw has not shown that Anytime Fitness prohibited the public from entering the front entrance area to make legitimate business inquiries, such as seeking to join the gym, which means Bradshaw did not have a reasonable expectation of privacy in that location.

Before considering the State's authority, we note that courts repeatedly have considered whether there is an expectation of privacy in membership businesses whose premises are locked and reserved for members and their guests. *Perry*, for example, involved a Veterans of Foreign Wars (VFW) hall with a locked door and a buzzer. 548 F.3d at 692. The court found no objectively reasonable expectation of privacy because Javarlo Perry did not present evidence that a members-only policy "was strictly enforced in the past." *Id.* To the contrary, the evidence of

record was that individuals, including police officers, were "admitted into the VFW without incident, though they sometimes had to wait a few moments after pressing the buzzer." *Id.*; *see also Commonwealth v. Weimer*, 262 Pa. Super. 69, 72-73, 75-76, 396 A.2d 649 (1978) (holding that "a locked front door activated by a buzzer system" was insufficient to create an expectation of privacy in a membership club that allowed undercover police officers to enter one time alone and another time by joining a group of others seeking admittance).

The ACLU of WA brings to our attention a case involving a similar business restriction made in response to COVID-19. *See* Br. of Amicus Curiae ACLU of WA at 13 (citing *Alexander Indus., LLC v. Town of Holly Ridge*, 2022 WL 288178 (E.D. N.C. Jan. 31, 2022) (court order)). In that case, state actors obtained the unauthorized key card of the former owner without the knowledge or consent of the current owner and did a warrantless search of the premises. *Alexander Indus.*, 2022 WL 288178 at *2-4. The district court, in declining to dismiss a civil action against the investigators, reasoned that "[d]rawing the line between what commercial premises are protected and what are not hinges on what structures or policies were in place to maintain privacy in the disputed space." *Id.* at *3. At the motion to dismiss stage, the court was required to accept the plaintiff's allegations as true. Because the gym was secured with a key card, the owner "reasonably could have expected that only gym members with keycards would access it." *Id*. at

*4 (citing *Mancusi v. DeForte*, 392 U.S. 364, 369, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968)). Importantly, the plaintiff alleged that "the gym had a policy in place of allowing *only* gym members onto the premises." *Id.* (emphasis added). "That members of the public belonging to the Gym regularly accessed it does not alter the analysis, as it was equally well-established that access so limited does not defeat an otherwise reasonable expectation in privacy." *Id.* at *5 (citing *Mancusi*, 392 U.S. at 369). These principles are applicable, but a different societal expectation applied here.

Bradshaw did not offer any evidence of a policy limiting admission into the gym or that such a policy was consistently enforced. Even assuming that Bradshaw's decision to make the front entrance of its commercial gym key card accessible is a subjective manifestation of privacy under the first prong of *Kyllo*, Bradshaw did not provide facts sufficient to establish that expectation was objectively reasonable under its second prong. 533 U.S. at 33. Rather, considering the gym's illuminated "open" sign, and the lack of evidence of any policy or practice of excluding those who wished to enter for business purposes, Bradshaw impliedly invited nonmembers with legitimate business inquiries inside.

A government inspector does not conduct a search simply by occupying a space they were impliedly invited to enter. Importantly, Bradshaw did not take

steps to prevent unauthorized entry by outsiders.[8] Business owners are required to take adequate measures to restrict the public from accessing private areas. The lock on an open business' front entrance manifests an intent to exclude trespassers, but it does not manifest an intent to exclude members of the public with legitimate business inquiries from entering the premises' front entrance area. Here, the inspectors entered to make an equivalent inquiry.

In an unchallenged finding of fact, the Board found, "For the sole purpose of obtaining consent to conduct an inspection, the [inspectors] followed into the facility a woman who was carrying a gym bag and opened the front door." CP at 32. Nothing in that finding suggests the inspectors did anything in an underhanded or improper fashion. During regular business hours, and absent evidence to the contrary, a gym owner in Bradshaw's position should reasonably expect a

[8] For example, the record does not show Bradshaw had a "members only" sign at the entrance or an enforced policy that forbids members from allowing nonmembers inside, or a screening mechanism to prohibit nonmembers (or other categories of visitors) from entering.

Notably, L&I issues a compliance manual that includes nonbinding guidance and procedures related to how to obtain consent, including when inspectors encounter a "no trespassing" sign. *See* WASH. STATE DEP'T OF LAB. & INDUS., DIVISION OF OCCUPATIONAL SAFETY AND HEALTH COMPLIANCE MANUAL 3-1 to 3-3 (Feb. 17, 2025). This compliance manual does not address the circumstances presented in this case; we accord it no weight and refer to it to provide context only. *See Seattle Bulk Shipping, Inc. v. Dep't of Lab. & Indus.*, 25 Wn. App. 2d 762, 778, 524 P.3d 733 (2023) ("The compliance manual is not binding law. It is an internal set of guidelines for the Department to follow."); *cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015) (explaining that "the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers'" (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995))).

prospective member, a hopeful vendor, or a person delivering a package, to safely grab the door and follow a key card holder inside the front entrance area to make an inquiry. The state inspectors had the same license. At the same time, we disagree with the State that the constitution permits its inspectors to go beyond the front entrance area and freely go wherever a member of the gym is entitled to access. Bradshaw has a greater privacy interest in the areas of the gym where workout equipment is used and its locker rooms because it is not customary for nonmembers to occupy such spaces without express permission.

State actors have the same license to intrude as a "reasonably respectful citizen." *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981); *see also, e.g.*, *State v. Ross*, 141 Wn.2d 304, 314, 4 P.3d 130 (2000) (state actors entered an impliedly open rear driveway at midnight "when no reasonably respectful citizen would be welcome absent actual invitation or an emergency"). An unlawful search occurs when a state actor exceeds the scope of their implicit license to enter. *Seagull*, 95 Wn.2d at 903. For example, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Jardines*, 569 U.S. at 8 (quoting *Kentucky v. King*, 563 U.S. 452, 469, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011)). That "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer)

leave." *Id.* In *Jardines*, the United States Supreme Court concluded it would not be "customary, usual, reasonable, respectful, ordinary, typical, nonalarming, etc., for a stranger to explore the curtilage of the home with trained drug dogs." *Id.* at 8 n.2.[9]

The inspectors, who entered with a limited purpose, did not exceed the limited scope of the implicit license that Bradshaw granted to members of the public who want to make legitimate business inquiries inside. Nothing in this record makes us doubt that safely grabbing the door and following a key card holder into the open gym was "customary, usual, reasonable, respectful, ordinary, typical, and nonalarming." *Id.* There is no evidence that the person the inspectors followed inside objected to their entry. No search occurred because the inspectors were lawfully present where they observed Bradshaw's employees working in violation of the emergency workplace safety rule. Importantly, once inside, instead of being asked to leave, the inspectors were told they could wait where they were, which confirms the minimal privacy interest in the space the inspectors occupied (near the front entrance). Finally, the inspectors left when they were told to.

[9] In the context of an open business, making inquiries is what custom allows. Here, the inspectors were required to leave (and did) when it became clear they were not welcome. We do not mean to imply that an open business yields the same license to enter as the curtilage of a house. *See Ross*, 141 Wn.2d at 312.

The ACLU of WA stresses that increasingly "pervasive federal government overreach" threatens privacy. *See* Br. of Amicus Curiae ACLU of WA at 1-2 ("In the past year, federal officers have invaded childcare centers, college buildings, apartments, and workplaces in search of suspected non-citizens." (footnotes omitted)). The State says it shares ACLU of WA's concerns "regarding federal overreach." L&I's Resp. to Amicus Curiae ACLU of WA at 1. We stress the narrowness of our holding and recognize structures, policies, and customs limit how far inside a gym or other business a member of the public with a legitimate business inquiry (and therefore a state actor) can reasonably enter under the Fourth Amendment. We agree with the United States Court of Appeals for the Eighth Circuit that "[w]e do not decide today whether a member of a private club, which employs a restrictive admissions policy that it strictly and consistently enforces, has an objectively reasonable expectation of privacy therein." *Perry*, 548 F.3d at 692. We also reiterate, "What is reasonable cannot be determined by a fixed formula. It must be based on the facts and circumstances of each case." *Seagull*, 95 Wn.2d at 903 (citing *Ker v. California*, 374 U.S. 23, 33, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963)).

Under the Fourth Amendment, Bradshaw did not demonstrate a reasonable expectation of privacy in the front entrance area of its gym, and the inspectors therefore did not exceed the scope of their implicit license to enter the gym.

Everything the inspectors saw inside Bradshaw's gym was admissible because they were justified in occupying its front entrance area to seek consent to conduct an inspection of the facility.

We now turn to the cases the State cites in further support of its argument. First, the State relies on the holding in *State v. Hastings* that when "'outsiders are invited for purposes of transacting unlawful business' . . . [b]usiness transactions with the public are not 'private affairs'." 119 Wn.2d 229, 232-33, 830 P.2d 658 (1992) (quoting *Lewis v. United States*, 385 U.S. 206, 211, 87 S. Ct. 424, 17 L. Ed. 2d 312 (1966)). In that case, state actors employed a ruse to obtain an invitation into a home to buy drugs. *Id.* at 232-33. The State contends, "Tailgating to gain entry is constitutionally no different than a ruse." Suppl. Br. of L&I at 27. *Hastings* offers weak support to the State. Here, the inspectors were not actively invited inside the gym for an illegal activity, were not undercover, and did not employ a ruse to elicit an invitation. While Bradshaw's gym openly violated the emergency proclamation, it would stretch the holding of *Hastings* to apply it here. Nevertheless, the gym's illuminated "open" sign, coupled with the lack of any sign or individual prohibiting entry by nonmembers impliedly invited the public to enter inside for legitimate business inquiries.

Second, the State relies on the holding in *State v. Carter* that a privacy interest is abandoned when select members of the public are exposed to illegal

activity. 151 Wn.2d 118, 126-27, 85 P.3d 887 (2004). In that case, state actors inspected and seized an illegally modified gun that they were actively invited to handle in a class they attended off duty. *Id.* at 121, 124. Again, it would stretch the holding of *Carter* to apply it here. The inspectors were not expressly invited to enter the gym, were not off duty, and were not going to the gym on their own time.

Third, the State relies on the holding in *State v. Lakotiy* that there is no privacy interest in the common area of a gated commercial storage facility. 151 Wn. App. 699, 713, 214 P.3d 181 (2009). In that case, an individual with an access code gave state actors permission to enter the facility. *Id.* at 704. The Court of Appeals held there is "no state or federal constitutionally protected privacy interest in the common area of a gated commercial storage facility," particularly for an individual who is not renting a storage unit. *Id.* at 713. While the court did not reach the state actors' actual authority to enter the common area, it is notable that the storage facility's manager consented to the entry. *Id.* at 704. *Lakotiy* is distinguishable from this case because *Lakotiy* did not involve the facility owner's privacy. Nevertheless, *Lakotiy* supports the cases discussed above that hold that a locked door, by itself, will not establish a protected privacy interest in at least some categories of commercial premises.

Fourth, the State relies on the holding in *Peters v. Vinatieri* that there is no privacy interest in areas where some members of the public are invited to enter.

102 Wn. App. 641, 652, 9 P.3d 909 (2000). In that case, state actors entered an RV park's private road that had both a "no trespassing" sign and a sign inviting RV customers. *Peters* is distinguishable from this case because the road did not restrict the public from entering. *Peters* does support the principle that owners of commercial property must take adequate measures to restrict public access.

As the ACLU of WA properly points out, "'the actual practice as to admitting persons into such facilities must be considered in making the determination of whether there was in fact a justified expectation of privacy therein.'" Br. of Amicus Curiae ACLU of WA at 12-13 (quoting 1 LAFAVE, *supra*, § 2.4(b)). Here, Bradshaw did not present facts regarding "the actual practice" at Anytime Fitness sufficient to demonstrate a privacy expectation, and the factual findings do not demonstrate a reasonable expectation of privacy in the front entrance area. Accordingly, the L&I inspectors did not conduct a search under the Fourth Amendment. Because Bradshaw did not adequately present an independent state constitutional analysis, we take no position on the dissent's article I, section 7 arguments.

CONCLUSION

The L&I inspectors did not exceed their statutory authority, nor did they violate Bradshaw's privacy rights when they entered the gym "at a reasonably recognizable entry point" to seek consent to conduct an inspection of the facility.

Under the Fourth Amendment, a business does not have a reasonable expectation of privacy in an area that it impliedly invites the public to enter and when there is no evidence of an enforced policy to exclude nonmembers. We reverse, vacate the trial court's order dismissing the citation, and remand to the trial court for further proceedings consistent with this opinion.

González, J.

WE CONCUR:

Stephens, C.J.

Melody, J.

Montoya-Lewis, J.

Angelis, J.

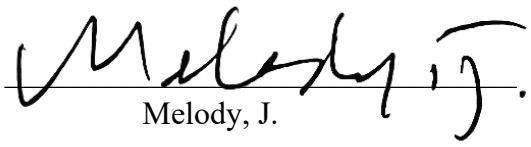
No. 104579-4

MELODY, J. (concurring) — I agree with the majority's conclusion that the Department of Labor and Industries (L&I) inspectors were authorized by statute to enter the gym and that their entry for purposes of seeking consent to inspect complied with the Fourth Amendment to the United States Constitution. I also agree that it is relevant and important to the decision here that members of the general public (the gym's customers) were using the gym and that new customers were impliedly invited to enter to inquire about membership.

Not all workplaces, though, are open to members of the public. Workers at warehouses, shipyards, construction sites, farms, and manufacturing plants—just to name a few—have rights to workplace safety even if members of the general public are not also invited to enter. Depending on the facts, L&I inspectors may be authorized by statute to enter such work sites, even if locked, at a "reasonably recognizable entry point" to request consent to inspect. RCW 49.17.070(3). Also depending on the facts, such entry may be fully compliant with the Fourth Amendment. That includes *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967), which the dissent overreads. In all six pages of *See*, there are no

facts indicating that workers or customers *ever* went inside the locked warehouse, making the case difficult to apply to the commercial gym here, which on the inspectors' arrival was active with more than a dozen customers and employees, and displayed a lit neon "open" sign. Clerk's Papers at 32.

Because I do not read anything in the majority's opinion as prejudging a future case involving a workplace that has a locked, reasonably recognizable entry point, I join the opinion in full.



Melody, J.

No. 104579-4

GORDON McCLOUD, J. (dissenting)—The question presented in this case is whether government agents may enter a locked private business to search for evidence of unlawful activity without a warrant or consent. The answer under the Fourth Amendment is no: in *See v. City of Seattle*,[1] decided over 50 years ago, the Supreme Court ruled that the Fourth Amendment protects private businesses from nonconsensual government entry without a warrant, even for the purpose of enforcing administrative safety and health regulations. U.S. CONST. amend. IV. The answer under the Washington Constitution, article I, section 7 is the same: the state's constitutional protection of the right to privacy provides more protection against government intrusion than does the Fourth Amendment. Not less.

The majority avoids this conclusion by mischaracterizing certain facts. It implies that the key card holding member who swiped the door open for herself, or the owner, impliedly invited the inspectors in despite the lock on the door and the sign with a number to call with inquiries. Majority at 2, 17. But the record does not support that characterization. It shows that the door to the business was locked, that

[1] 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

the state inspectors sought consent to enter from the business owner by calling the phone number posted at the door but got no answer, that the inspectors then "grabbed" the door after a key card holding member opened it for herself, and that inspectors got in by "tailgating" behind her. The record does *not* show that the key card holder invited them in, held the door for them to come in, or did anything else to imply that they were invited into the locked, membership-based private gym. The inspectors even testified that they entered without permission.

The concurrence avoids this conclusion by mischaracterizing the law. It implies without citation that the owner of a private business cannot block government inspectors from warrantless entries, even if they put locks on the doors to bar all trespassers. Concurrence at 1. But the Supreme Court has come to a different conclusion. It says that the Fourth Amendment protects private businesses that put locks on the door from warrantless intrusion, even for administrative searches. *See*, 387 U.S. 541. And this court has consistently said that article I, section 7 provides greater protection of the right to privacy than the Fourth Amendment.

I therefore dissent. The legislature can certainly adopt stringent worker protections and compel regulatory compliance. And state agents can enter even locked commercial spaces by obtaining a search warrant. But the state and

U.S. constitutions bar government agents from gaining warrantless entry into locked, private, membership-only businesses for administrative searches based solely on the inspectors' preference for immediate action. The Department of Labor and Industries' (L&I's) arguments that constitutional protections have less force because it had good intentions (enforcing worker protections), while the business owner had bad intentions (flouting worker protections), have no place in the constitutional analysis.

FACTUAL AND PROCEDURAL BACKGROUND

During the COVID-19 pandemic, Governor Inslee declared a state of emergency and ordered many businesses to close. *See* Clerk's Papers (CP) at 1343-47 (Proclamation by Governor Jay Inslee, No. 20-25.4 (Wash. May 31, 2020)). Only the essential workforce remained in place during "Phase 1"; gyms were not considered essential and could not operate during this time. *See id.* at 728. Former WAC 296-800-14035, adopted in response to the pandemic, states, "Where a business activity is prohibited by an emergency proclamation an employer shall not allow employees to perform work." Former WAC 296-800-14035(1) (2020) (Wash. St. Reg. 20-12-017, effective May 26, 2020). L&I enforced this regulation against nonessential

businesses under the general safety standard of RCW 49.17.060, which requires employers to provide safe work sites for employees. CP at 5.

Wesley Bradshaw owns Bradshaw Development Inc. (collectively Bradshaw). In 2020, Bradshaw operated several gyms under the name Anytime Fitness. *Id.* at 4. During Phase 1, L&I received a complaint that Anytime Fitness remained open. *Id.* at 4, 1100-02 (enforcement case file). In accordance with agency procedures, L&I sent a letter to Anytime Fitness instructing it to close. L&I then conducted spot checks to see if the business complied. *See id.* at 356 (declaration of Stacia E. Johnson).

Two L&I inspectors then sought consent to search the gym for evidence of unlawful activities.

The majority concludes that Bradshaw waived his right to privacy and consented to the entry, at least impliedly, by failing to introduce evidence about what locking the door to his gym really meant to him and to his private members. I therefore summarize the record evidence concerning the inspectors' entry in some detail below.

I. THE L&I INSPECTORS' ACTIONS IN THIS CASE

On June 15, 2020, L&I inspectors traveled to Selah to inspect one of Bradshaw's gyms. *Id.* at 1187 (Tr. of Admin. Hr'g). The inspectors did not apply

for a search warrant in advance. The record does not explain why. Upon arrival, the inspectors saw a lit neon "open" sign and an individual in gym clothing entering the building through a door. *Id*. The inspectors called the phone number listed on that door, but no one answered *Id*. The door was locked, so the inspectors just waited.[2] *Id.* at 1195.

While they waited, an individual used a key card to open the locked door. *Id.* The inspectors "*grabbed the door* and followed her in." *Id*. (emphasis added).

Nobody held the door open or invited them in—the inspectors themselves "grabbed" the door. Uncontested testimony from those inspectors at the administrative hearing established that they entered without permission—implied or otherwise—from anyone:

> Q: So you didn't have permission to enter that establishment; correct?
> A: No. Not at that time.
> Q: So that is correct, you did not have permission to enter Anytime Fitness in Selah on the date of the citation?
> A: Yes. That's correct.
> . . . .
> Q: Then you saw somebody walk up to the front door and bring out a key card and access the building; correct?
> A: Yes.
> Q: When they opened the door, that's when you went in?

[2] The majority asserts that "Bradshaw did not take steps to prevent unauthorized entry by outsiders." Majority at 17-18. This is not accurate; as discussed below, the record is uncontroverted that Bradshaw locked the door, ran a membership-based gym, provided entry to those with key cards, provided a telephone number for others to call, and did not answer or return the inspectors' telephone call seeking entry.

> A: At that time, my supervisor, Steve Yunker, went and said—went and grabbed the door and followed her in. So I followed.
> Q: Without permission; correct?
> A: Yes.

Id.

Once inside the "grabbed" door, the inspectors saw people using workout equipment and three employees working, including two who seemed to be signing someone up for membership. *Id.* at 1191, 1187-88. The majority cites the fact that someone seemed to be applying for membership inside to conclude that nonmembers—specifically, prospective members, hopeful vendors, and delivery people—were welcome to tailgate in through the locked door. Majority at 3-4, 18-20. But this assumes (without evidence) that prospective gym members, delivery people, and other business invitees entered the same way the inspectors entered—by tailgating behind a member with key card access. The record does not support that assumption. It is silent on this point.

Once inside, the inspectors showed their badges to an employee and requested consent to inspect. CP at 1188. The employee denied consent and instructed the inspectors to wait for the general manager, Jeff Mercer, to arrive. *Id.* Mercer arrived and denied consent, stating that it was "private property." *Id.* at 1189. One of the inspectors then suggested that they continue the conversation outside, on public property. *Id.*

L&I cited Bradshaw for a willful general violation of former WAC 296-800-14035. *Id.* at 6, 659-67.

II. L&I CITES BRADSHAW'S BUSINESS BASED ON WHAT ITS INSPECTORS SAW INSIDE AND CONFLICTING DECISIONS ABOUT THE CITATION'S VALIDITY FOLLOWED

Bradshaw challenged the citation before an industrial appeals judge (IAJ). The IAJ vacated the citation on the ground that L&I failed to establish that employees were working at the gym in violation of the governor's directives. *Id.* at 4. L&I appealed to the Board of Industrial Insurance Appeals. *Id.* at 16. The Board upheld the citation, reasoning that because the inspectors had the right to be where they were while they waited, their observations were admissible to prove that employees were working in the facility. *Id.* at 9.

Bradshaw appealed the Board decision to the superior court, which reversed. *Id.* at 1-2. The superior court ruled that while the inspectors entered through a reasonably recognizable entry point within the meaning of the applicable statute, that statute allowed such entry only to obtain consent, so the inspectors' observations while they waited and were ultimately denied consent were inadmissible. *Id.* at 1293-94.

The Court of Appeals affirmed, but on different grounds—and that is the decision we review. *Bradshaw Dev., Inc. v. Dep't of Lab. & Indus.*, 34 Wn. App. 2d 705, 571 P.3d 300 (2025). That court held "that tailgating behind an entrant who opened an outside door with her keycard constituted an unreasonable point of entry," thus violating the statute, which in turn "violated the fitness club owner's reasonable expectation of privacy" under the state and U.S. constitutions. *Id.* at 708.

L&I obtained review of that decision. 5 Wn.3d 1042 (2026).

ANALYSIS

I. THE STATE BEARS THE BURDEN OF PROVING A WARRANT OR AN EXCEPTION TO THE WARRANT REQUIREMENT; HOLES IN THE RECORD MUST BE INTERPRETED AGAINST L&I, NOT AGAINST BRADSHAW

The majority assumes that the statute permitted the inspectors to enter through the locked door as a "reasonably recognizable entry," within the meaning of the applicable statute, and focuses on the constitutional challenges to the inspectors' entry instead. I do the same.

We begin with some basics that apply to both the state and federal constitutional claims. Under federal law, "'searches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few . . . exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338,

129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). The same is true under the Washington Constitution's article I, section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) ("Any analysis of article I, section 7 in Washington begins with the proposition that warrantless searches are unreasonable per se." (citing *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996))).

Under the Fourth Amendment, this privacy protection "applies to commercial premises as well as to homes." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978). The same is true under the Washington Constitution. *Dodge City Saloon, Inc. v. Wash. State Liquor Control Bd.*, 168 Wn. App. 388, 396, 288 P.3d 343 (2012) ("[A]rticle I, section 7 protections against unreasonable searches and seizures extend to administrative or regulatory searches of commercial property." (citing *State v. Browning*, 67 Wn. App. 93, 95, 834 P.2d 84 (1992))).

This rule applies with full force to searches conducted to enforce administrative regulatory schemes, like the search at issue in this case. *Camara v. Mun. Ct.*, 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (holding that "administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when

authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in [prior decisions] for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections"), 540 ("[W]e therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection."); *see also Dodge City Saloon, Inc.*, 168 Wn. App. at 396; *Browning*, 67 Wn. App. at 95.

To be sure, these constitutional protections apply slightly differently in the regulatory context. In this context, the government inspectors need not submit the same level of proof to establish "probable cause" for the issuance of a warrant as they do in the criminal context. *See*, 387 U.S. at 534.

But the government is always the party that bears the burden of proving that it had either a warrant or consent to enter. That's true under federal constitutional law. *Arkansas v. Sanders*, 442 U.S. 753, 759-60, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979) ("[B]ecause each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence

of a warrant have been carefully delineated and 'the burden is on those seeking the exemption to show the need for it.'" (quoting *United States v. Jeffers*, 342 U.S. 48, 51, 72 S. Ct. 93, 96 L. Ed. 59 (1951))), *overruled in part on other grounds in California v. Acevedo*, 500 U.S. 565, 579, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991). That's also true under state constitutional law. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999); *Hendrickson*, 129 Wn.2d at 71; *State v. Budd*, 185 Wn.2d 566, 573, 374 P.3d 137 (2016) ("As it is an exception to the warrant requirement, the State bears the burden of proving voluntary consent . . . .").

In other words, the State bears the burden of proving the consent exception to the warrant requirement. Given that burden, when deciding both the constitutional and the statutory issues, any holes in the record on whether the search was consensual count against L&I, not against Bradshaw.

The majority flips that burden of proof on its head. It does so with the following bit of logic: "gym owner[s] in Bradshaw's position should reasonably expect" certain business invitees—delivery people, prospective members, hopeful vendors—to enter by tailgating, majority at 18, and therefore gym owners in Bradshaw's position should "reasonably expect" agents of the State seeking evidence of regulatory violations to do the same thing.

There are two problems with this logic. The first problem is that the majority fails to prove its foundational factual premise, i.e., that gym owners in Bradshaw's position reasonably expect a limited subset of the public—delivery people, hopeful vendors, and prospective members—to enter via tailgating (rather than by calling the number posted on the door). The second problem is that even if a business owner should reasonably expect one small subset of the public—certain business invitees—to enter by tailgating, that does not support the legal conclusion that the business owner must therefore reasonably expect government agents seeking evidence of unlawful behavior to enter by tailgating also. The latter is different from, and far more intrusive than, the former.

Under controlling Supreme Court precedent, that difference matters. In *Florida v. Jardines*, the Supreme Court explained that the fact that the curtilage of a home is impliedly open to certain people (e.g., invited guests, solicitors, servicepeople) does not mean that the same curtilage is open to government agents seeking to conduct a search. 569 U.S. 1, 8-9, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013). A police officer may approach a home and knock because "that is 'no more than any private citizen might do.'" *Id.* at 8 (quoting *Kentucky v. King*,

563 U.S. 452, 469, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011)). But that's all. As the *Jardines* Court explained,

> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. . . . The scope of a license [to enter]—express or implied—is limited not only to a particular area but also to a specific purpose. . . . Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

Id. at 9.

Thus, even if Bradshaw's business was somehow impliedly open to members of the public inquiring about membership, as the "open" sign might indicate, it does not follow that it was impliedly open to government inspectors seeking consent to investigate alleged violations.[3]

II. BUSINESS OWNERS HAVE CONSTITUTIONAL RIGHTS TO PRIVACY IN THE PARTS OF THEIR COMMERCIAL PROPERTY THAT ARE "LOCKED." THE GYM DOOR WAS LOCKED. THUS, THE INSPECTORS' ENTRY VIOLATED THE STATE AND U.S. CONSTITUTIONS

A. Under the Fourth Amendment, Business Owners Have a Reasonable Expectation of Privacy in the Parts of Their Commercial Property That Are "Locked"

[3] This is true even though the inspectors entered Bradshaw's business, rather than his home or the curtilage of his home. The principle quoted above, that the scope of a license to enter depends on the purpose of entry, was not limited to searches of a home.

As discussed above, the Fourth Amendment right to privacy extends to commercial properties. *New York v. Burger*, 482 U.S. 691, 699, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

To be sure, the business owner's legitimate expectation of privacy under the Fourth Amendment extends only to the parts of the business "which are not open to the public." *Id.*; *See*, 387 U.S. at 545.

But the Supreme Court has clearly ruled that when a business's building is "locked," that business is "not open to the public." *See*, 387 U.S. at 545-46. The *See* Court's beginning statement of the issue in that case confirms this; it summarizes, "Appellant [business owner] seeks reversal of his conviction for refusing to permit a representative of the City of Seattle Fire Department to enter and inspect appellant's *locked commercial warehouse* without a warrant. . . ." *Id.* at 541 (emphasis added). The *See* Court's concluding paragraph summarizing its holding confirms this, too; it states, "Therefore, appellant [business owner] may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's *locked warehouse*." *Id.* at 546 (emphasis added).

The facts in *See* are the same in relevant respects as the facts in this case. See denied the Seattle Fire Department inspector's request to inspect his locked

commercial warehouse without a warrant. *Id.* at 541. The City then arrested See and charged him with violating the ordinance that allowed fire inspectors to enter all nonresidential buildings to inspect for compliance with fire safety regulations. *Id.* See was convicted; the Washington Supreme Court rejected See's constitutional challenges and affirmed. *Id.* at 542.

The U.S. Supreme Court reversed. It held that the inspectors' entry violated the Fourth Amendment: "[t]he businessman . . . has a constitutional right" against "unreasonable official entries upon his private commercial property." *Id.* at 543. Further, "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." *Id*. at 545. Indeed, "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises." *Id*. at 544.

The facts of this case are basically the same. It is undisputed that Bradshaw's business was locked. *See* bars state investigators from entering a locked portion of a business without a warrant (or consent or some other exception to the warrant requirement). It follows that the L&I inspectors violated Bradshaw's Fourth Amendment rights when they got past the locked door by grabbing the door from a key card holding member of the private business.

As mentioned above, the majority's main argument against this conclusion is that opening the business to one subset of the public essentially opens it to all parts of the public, including government inspectors. Majority at 18 ("The lock on an open business' front entrance manifests an intent to exclude trespassers, but it does not manifest an intent to exclude members of the public with legitimate business inquiries from entering the premises' front entrance area."). As I mentioned above, the Supreme Court says otherwise; *Jardines* clearly held that although private curtilage is impliedly open to certain invitees, that doesn't mean it's open to government agents seeking to conduct a search. Simply put, opening one's private property to one subset of the public—members or invitees—does not necessarily open it to government agents trying to search for evidence of regulatory violations.

The fact that Bradshaw's business was a private gym while See's business was a private warehouse is irrelevant.[4] L&I has not argued that gyms fall within

[4] The concurrence asserts, "Not all workplaces . . . are open to members of the public. Workers at warehouses . . . have rights to workplace safety even if members of the general public are not also invited to enter. Depending on the facts, L&I inspectors may be authorized by statute to enter such work sites, even if locked, at a 'reasonably recognizable entry point' to request consent to inspect." Concurrence at 1 (quoting RCW 49.17.070(3)). The fact that all workers have a right to workplace safety does not mean that all government agents have a right to enter without a warrant. The statute at issue even says this—it provides a procedure for agents to use to get a warrant when they can't get consent. The concurrence continues, "[S]uch entry may be fully compliant with the Fourth Amendment." *Id*. That conclusion conflicts directly with *See*, which explicitly held that the

the narrow category of dangerous, "closely regulated" industries, which lack this broad scope of Fourth Amendment privacy protections. *E.g.*, *Burger*, 482 U.S. 691 (vehicle dismantling business falls within "closely regulated" business exception to Fourth Amendment's protections).

B. Locks Also Signify an Assertion of the Right to Privacy Under the State Constitution

The Court of Appeals analyzed the state constitutional issue and concluded that the L&I inspectors' entry violated the state constitutional right to privacy. *Bradshaw Dev., Inc.*, 34 Wn. App. 2d at 723. We granted review of that holding, also—regardless of the limited scope of the briefing on this topic.

As discussed above, Washington courts have already held that "article I, section 7 protections against unreasonable searches and seizures extend to administrative or regulatory searches of commercial property." *Dodge City Saloon, Inc.*, 168 Wn. App. at 396.

Washington courts have also held that the state constitutional right to privacy protects against regulatory inspections absent a warrant or an exception to the warrant requirement: "[i]nspections for health, safety, and other violations of municipal codes must be conducted pursuant to a warrant, or

---

Fourth Amendment protects locked private "warehouses" from government inspectors' warrantless entries.

fall within one of the narrowly drawn exceptions to the warrant requirement." *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 183, 931 P.2d 208 (1997) (citing *Camara*, 387 U.S. at 534). Thus, despite the majority's reliance on foreign authority for the rule that inspectors are just as welcome as regular business invitees to tailgate behind a private club member, Washington authority is to the contrary.

The State cites several state court decisions to support its claim that Bradshaw waived his right to privacy in the gym by opening it to a subset of the public. But the decisions it cites do not support its argument. For example, in *State v. Lakotiy*, 151 Wn. App. 699, 704, 214 P.3d 181 (2009), the court examined whether police officers' entry into the common area of a commercial storage facility violated the article I, section 7 privacy right of the defendant they arrested there (who did not lease a storage unit from the facility). Because that case was not brought by the storage facility owner or even by the lessee of a storage unit, it does not tell us much about whether the officers' entry—had it targeted the business owner—would have violated the owner's article I, section 7 rights.

L&I further argues that a trio of state appellate court cases—*State v. Hastings*, 119 Wn.2d 229, 232, 830 P.2d 658 (1992), *State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887 (2004), and *Peters v. Vinatieri*, 102 Wn. App. 641, 651-52, 9 P.3d 909

(2000)—undermine Bradshaw's claim that he retained a state constitutional right to privacy in his business despite the fact that members had permission to enter. Suppl. Br. of L&I at 22-25.

Even the majority agrees that those three decisions are distinguishable. None present the circumstances here, that is, government agents entering without an invitation and going through a locked door by tailgating behind a member with a key.

Let's take *Hastings*, 119 Wn.2d at 229. In that case, two undercover officers knocked at the door of a suspected drug distribution house, stated that they wanted to buy drugs, and were invited inside the house. We held that when outsiders "'are invited for purposes of transacting unlawful business,'" a government official "'may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant,'" and the occupants lack a reasonable expectation of privacy in what the invitees then observe. *Id*. at 232 (quoting *Lewis v. United States*, 385 U.S. 206, 211, 87 S. Ct. 424, 17 L. Ed. 2d 312 (1966)). In other words, inviting undercover officers inside one's home to conduct illegal business "'break[s] the seal of sanctity and waive[s]'" the right to privacy that normally protects private homes. *Id.* (quoting *Lewis*, 385 U.S. at 213 (Brennan, J., concurring)). Because the owners consented to the undercover officers'

entry by explicitly inviting them in, and because the owners were openly conducting illegal business inside, the owners waived their right to privacy.

The State asserts that *Hastings* establishes that "inviting outsiders to transact business is enough" to defeat a privacy interest. Suppl. Br. of L&I at 23. That's incorrect. *Hastings* establishes that explicitly inviting agents of the State into your home to conduct illegal business waives the right to privacy. In this case, even the L&I inspectors testified that they were not invited inside—they entered without any explicit permission.

Similarly, in *Carter*, 151 Wn.2d 118, two Pierce County Prosecutor's Office investigators attended a firearms training class in a private classroom in Kitsap County. The instructor displayed a firearm to the class and invited the students to handle it. The investigator-students recognized it as an illegally modified AR-15 rifle. The students reported it, and the State charged the instructor with possessing a machine gun. He moved to suppress the evidence on the ground that the investigator-students violated his right to privacy. *Id.* at 123-24. The Court of Appeals disagreed. It held that Carter "cannot claim his private affairs were disturbed when he voluntarily placed the gun on a table in open view of the class and then invited the class members to handle and explore the gun." *Id.* at 126. Crucially, the investigators were invited members of the firearms class; they did not

gain entry by tailgating behind others. The court continued, "Carter did nothing to exhibit a privacy interest in the AR-15. In fact, he did just the opposite" by putting the rifle in open view and encouraging the class to examine it. *Id.* By contrast, here, Bradshaw locked the gym and did not invite the inspectors inside.

In the third case—*Peters*, 102 Wn. App. 641—the court mainly addressed a federal civil rights claim alleging violations of the Fourth Amendment. It did not discuss article I, section 7 at all. And on the Fourth Amendment question, the court concluded that Peters had no objectively reasonable expectation of privacy in an access road near his recreational vehicle park in part because a large billboard on the property advertised commercial services. *Id.* at 652. Unlike the circumstances here, there was no locked gate preventing access to the road.

In sum, Washington appellate court decisions recognize that the state constitutional right to privacy extends to one's business. They also hold that the state constitutional right to privacy protects against more than just warrantless searches for evidence of crimes; it protects against warrantless searches for compliance with regulatory schemes, too. Those Washington decisions certainly acknowledge that an owner waives the right to privacy by explicitly inviting the public to enter. But those decisions have never held that the business owner waives the right to privacy when they secure the business's premises with a locked door and then decline to invite

government agents in. This court should reaffirm those holdings. We can do no less, knowing that article I, section 7 is at least as protective of privacy rights as the Fourth Amendment—and as discussed above, the Fourth Amendment provides just such a right to privacy.

III. WE SHOULD REJECT L&I'S ARGUMENT THAT GOVERNMENT POLICY PREFERENCES CAN LIMIT STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRIVACY

Finally, L&I argues that the right to privacy is not implicated here because "L&I is not Immigration and Customs Enforcement, and its inspectors act only to protect the safety and health of Washington's workers." L&I's Resp. to Amicus Curiae Am. C.L. Union of Wash. Found. at 2.

But the federal constitutional right to privacy applies to all, even those who commit a crime. In fact, the exclusionary rule was designed to protect people charged with crimes from government overreach. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). And in Washington, the state constitutional right to privacy protects against government intrusion, regardless of the good faith or bad faith of the government actors. *State v. Afana*, 169 Wn.2d 169, 181, 233 P.3d 879 (2010) (no "good faith" exception to article I, section 7's "nearly categorical exclusionary rule"). So, L&I's argument that its investigators' entry was constitutional because they were acting with the good

intention of protecting workers, while Bradshaw was supposedly acting with the bad intention of flouting the law, must fail.

The State, along with the concurrence, also argues that respecting privacy rights will impede efforts to enforce worker protection laws. *See* Revised Pet. for Rev. of L&I at 15-17; concurrence at 1. We should reject the argument that policy preferences—in this case, L&I's preference for efficiency in enforcement—trump the constitutional right to privacy.

CONCLUSION

L&I inspectors entered a private gym, through a locked door, without a warrant, by grabbing the door after a member of the private gym opened it with her own private key card. Controlling U.S. Supreme Court precedent holds that the Fourth Amendment protects businesses from intrusion by government regulatory inspectors without a warrant (or an exception to the warrant requirement). Controlling U.S. Supreme Court precedent also holds that opening a private space to one subset of the public does not automatically open it to a very different group—government agents searching for evidence. That means that L&I is the party that bears the burden of proving an exception to the warrant requirement in this case. It failed to do so.

I therefore respectfully dissent. I would affirm the Court of Appeals decision that this search violated the Fourth Amendment and article I, section 7. I would reaffirm the rule that government regulatory agents cannot enter locked private property—a privately owned, locked, membership-based business—without a warrant (or consent).

Gordon McCloud, J.

Johnson, J.

Whitener, J.

Mungia, J.