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STATE OF WASHINGTON
No. 76954-1
(Court of Appeals No. 53920-5-1)
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OF THE STATE OF WASHINGTON
CLERK

JOSEF VENTENBERGS, KENDALL TRUCKING, INC., a Washington
Corporation, RONALD HAIDER, and HAIDER CONSTRUCTION,
INC., a Washington Corporation,

Petitioners,

v.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE PUBLIC
UTILITIES, and CHUCK CLARKE, in his official capacity as Director of
Seattle Public Utilities,

WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a Waste
Management of Seattle, a Delaware Corporation,

RABANCO, LTD., a Washington corporation,

Respondents.

**SUPPLEMENTAL BRIEF OF PETITIONERS JOSEF
VENTENBERGS, KENDALL TRUCKING, INC., RONALD
HAIDER, and HAIDER CONSTRUCTION, INC.**

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I. INTRODUCTION

Josef Ventenbergs faces the loss of his livelihood because the City of Seattle has granted the exclusive right to haul construction, demolition and land-clearing waste to two large, multi-national corporations. Ronald Haider faces paying more money for less responsive service because of Seattle's actions. When the government creates a monopoly that destroys the ability of small businesspeople to ply their trade and leaves consumers with what this Court has called the "three inseparable consequences" of monopoly – "the increase of the price, the badness of the wares, [and] the impoverishment of others"¹ – that governmental action is properly analyzed not under the Equal Protection or Due Process Clauses of the U.S. Constitution, but the Privileges or Immunities Clause of the Washington Constitution. This has been the rule in this state since its founding and, as demonstrated below, remains the rule today.

In that regard, since Petitioners Josef Ventenbergs, Kendall Trucking, Inc. ("Ventenbergs"), Ronald Haider, and Haider Construction, Inc. ("Haider") filed this appeal, this Court has issued two decisions that touch upon issues raised by this case. In *Andersen v. King County*, 158 Wn.2d 1, 14, 138 P.3d 963 (2006), the plurality affirmed the holding of

¹ *City of Seattle v. Dencker*, 58 Wash. 501, 510, 108 P. 1086 (1910). Justice Dunbar, a member of the Washington State Constitutional Convention and a drafter of the Privileges or Immunities Clause, wrote the opinion in *Dencker*.

Grant County Fire Protection District v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004) (“*Grant County IP*”), that article I, section 12 of the Washington Constitution requires an independent analysis when the court considers an award of special privileges rather than the denial of equal protection. In *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219-21, 143 P.3d 571 (2006), this Court held that the right to earn a living is not a fundamental right under the Due Process Clause. While these cases will inform this Court’s analysis, the ultimate inquiries for this Court have not changed – this Court must determine (i) whether Joe Ventenbergs possesses an interest protected by the Privileges or Immunities Clause of the Washington Constitution, (ii) what standard applies to his claim, and (iii) whether the City of Seattle’s (the “City”) actions here comport with this standard. Importantly, *Andersen* and *Amunrud* have not changed the answers to these questions.

First, the history, plain meaning, and this Court’s interpretation of article I, section 12 demonstrate that Ventenbergs’ interest in practicing his profession is protected by the clause. *Amunrud* did not change, or even address, the level of protection afforded by article I, section 12, nor did it overrule the overwhelming weight of case law from this Court and the U.S. Supreme Court holding that the ability to practice one’s profession has long been recognized as a “privilege.”

Second, as affirmed in *Andersen*, an independent analysis is warranted because Ventenbergs has alleged and proved that the City has engaged in a positive grant of favoritism to Respondents Waste Management, Inc. (“Waste Management”) and Rabanco, Ltd. (“Rabanco”) to the detriment of the interests of all citizens. This independent analysis is a more searching review than the “rational basis” test employed in Fourteenth Amendment cases, but is less stringent than “strict scrutiny.”

Finally, it is clear, as discussed in the briefing before the Court of Appeals, that the City has not met this standard. It has offered only *ex post facto* health and safety rationales for its decision to close the market in hauling construction, demolition and landclearing waste (CDL) to only two companies. It has argued that state law required it to do so, when it was the City’s decision – and the City’s alone – to close the market. And it has disregarded its own employee’s testimony that the only reason the City closed the market was to keep from being sued and that any legitimate health and safety goals were not dependent on a closed market.

Most significantly, however, *Amunrud* does not change, and *Andersen* reinforces, the fact that the Privileges or Immunities Clause of the Washington Constitution was specifically designed to protect people like Ventenbergs and Haider – hardworking entrepreneurs who do not have the money, power, access or inclination to manipulate the legislative

process to make competing against them illegal. The framers of our state constitution could scarcely have been clearer that they intended to protect people like Petitioners from legislative decisions that reflect the promotion of the privileged few at the expense of the general welfare. It is incumbent on this Court to fulfill their promise to the people of this State.

II. ASSIGNMENTS OF ERROR

Petitioners adopt the Assignments of Error discussed in their opening brief to the Court of Appeals and in their Petition for Review.

III. STATEMENT OF THE CASE

Petitioners adopt the Statement of the Case contained in their briefs before the Court of Appeals.

IV. ARGUMENT

The City has mandated that only Rabanco and Waste Management may legally haul CDL in the City of Seattle. Although it has put forward a number of explanations why this should not matter, the fact remains that only these two companies may legally haul CDL in Seattle and that it is the City's ordinances that created this restriction. No matter what the City tries to call what it has done, it has created two monopolies. The question thus becomes, may the City constitutionally do this?

Andersen and *Amunrud* appear, at first glance, to offer contradictory guidance to analyze this question, but, in fact, these two

cases are consistent with each other because they deal with different constitutional provisions that have different aims and different standards for state conduct. First, in *Andersen*, this Court held that an independent state analysis applies under article I, section 12 where the challenged law grants a privilege or immunity to a minority class – that is, when the government engages in positive favoritism. *Andersen*, 158 Wn.2d at 18.² The plurality also re-affirmed this Court’s conclusion in *Grant County II* that article I, section 12 was specifically designed to prevent grants of special privileges to corporations and to restrain the passage of special legislation. *Id.* at 16. Thus, a plaintiff challenging a grant of favoritism will receive more than a “rational basis” analysis of her claim. In *Amunrud*, this Court held the right to earn a living is not “fundamental” under the Due Process Clause and that the courts should apply “rational basis” review to laws affecting this right. *Amunrud*, 158 Wn.2d at 220.

What level of scrutiny applies, then, when a plaintiff claims the government has granted special privileges to large corporations in a manner that interferes with his ability to pursue his profession?

² *Andersen* was a plurality decision, but it appears that a majority of this Court agrees that an independent analysis is warranted when a party claims that the government has engaged in positive favoritism. Compare *Andersen*, 158 Wn.2d at 14, with *id.* at 122 (Chambers, J., dissenting), and *id.* at 133 (Fairhurst, J., dissenting). The question in *Andersen* was whether this independent analysis applies outside of a grant of favoritism.

Below, Petitioners demonstrate that, regardless of whether the ability to pursue a profession is or is not a “fundamental” right under the Due Process Clause, it is an attribute of national or state citizenship protected by the Privileges or Immunities Clause. Because it is protected by this Clause and the Petitioners have alleged that the City engaged in favoritism, an intermediate standard, and not rational basis or strict scrutiny, applies. As discussed in Petitioners’ briefing to the Court of Appeals, the City has failed to meet this standard.

A. Ventenbergs’ Interest In Pursuing His Livelihood Is Protected By The Privileges Or Immunities Clause

In *Grant County II*, this Court held that while article I, section 12 provides independent protections from the Equal Protection Clause when the plaintiff alleges favoritism, this protection applies only when the government interferes with a “fundamental right of citizenship.” *Grant County II*, 150 Wn.2d at 814. In *Amunrud*, as noted above, this Court determined that the right to earn a living is not “fundamental” under the Due Process Clause. The Respondents will undoubtedly argue that this means that this case should proceed under the “rational basis” standard.

This would be error. This is not a case addressing the Equal Protection or Due Process Clauses. While the right to earn a living is not, according to this Court, fundamental under the Fourteenth Amendment, it

is nonetheless a fundamental attribute of an individual's national or state citizenship protected by the Privileges or Immunities Clause. This is because the Privileges or Immunities Clause protects different interests in different ways than the Fourteenth Amendment. And it is clear that, under the Clause, one's ability to earn a living has been considered to be a constitutionally protected attribute of citizenship, regardless of the level of protection provided by the Fourteenth Amendment.

1. The Interests Protected By Article I, Section 12 Are The Same Interests Protected By Art. IV, §2

In *Grant County II*, this Court adopted the reasoning of *State v. Vance*, 29 Wash. 435, 70 P. 34 (1902), to define the boundaries of article I, section 12 and to clarify that the clause protects only those rights that are “those fundamental rights which belong to the citizens of the State by reason of such citizenship.” *Grant County II*, 150 Wn.2d at 812-13 (quoting *Vance*, 29 Wash. at 458). *Grant County II* and *Vance* hold that the “privileges” and “immunities” that constitute “fundamental rights of . . . citizenship” for article I, section 12 are those “privileges” and “immunities” protected by the U.S. Constitution, specifically Art. IV, § 2:

These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein . . . By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.

Grant County II, 150 Wn.2d at 813 (quoting *Vance*, 29 Wash. at 458) (emphasis added). Thus, “privileges” and “immunities” in the state constitution are “privileges” and “immunities” protected by the U.S. Constitution, including the Privileges and Immunities Clause, Art. IV, §2. And by creating two monopolies that interfere with (and, indeed, destroy) Joe Ventenbergs’ ability to practice his trade, the City has interfered with those privileges and immunities he possesses as a citizen.

2. The Privileges And Immunities Clause Protects Interests Distinct From The Fourteenth Amendment

This Court has specifically recognized that the interests protected by Art. IV, §2 and the Fourteenth Amendment are different. In *Laborers Local Union No. 374 v. Felton Construction Co.*, 98 Wn.2d 121, 126, 654 P.2d 67 (1982), this Court analyzed the U.S. Supreme Court’s decision in *Baldwin v. Fish & Game Commission*, 436 U.S. 371, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978), and concluded that the interests described as “fundamental” under the Fourteenth Amendment are distinct from those that are “fundamental” to a person’s state or federal citizenship:

Addressing *Baldwin*’s threshold question, we must first clarify the meaning of the term “fundamental”. By using the term the *Baldwin* court revived the somewhat anachronistic discussion of the privileges and immunities clause by Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). In its use of the term, the Court did not mean to embrace the analytical structure for

identifying fundamental rights requiring strict scrutiny under the equal protection clause. To the extent the term “fundamental” is helpful, it points to those interests “basic to the maintenance or well-being of the union.”

Laborers Local, 98 Wn.2d at 126 (citations omitted; emphasis added).

Thus, that the right to earn a living is not “fundamental” under the Due Process Clause does not mean that it is not a “privilege” protected by Art. IV, §2 and, consequently, article I, section 12.³ Indeed, the purpose of Art. IV, § 2 was to protect the ability of citizens to freely move within the country without experiencing protectionist restrictions on their ability to practice their trade.

3. Art. IV, § 2 Was Designed To Protect The Ability Of Citizens To Pursue Their Trade

The purpose of the Privileges and Immunities Clause of the U.S. Constitution was to ensure that citizens of one state would not be treated as aliens in another state. *Austin v. New Hampshire*, 420 U.S. 656, 660, 95 S. Ct. 1191, 43 L. Ed. 2d 530 (1975); *Paul v. Virginia*, 75 U.S. 168, 180, 19 L. Ed. 357 (1868), *overruled on other grounds by United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944); *see also* David R. Upham, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 Tex. L. Rev. 1483, 1494

³ Petitioners have consistently urged that the courts analyze their claims under article I, section 12, and not the Equal Protection Clause. *See* Reply Br. of Petitioners to Rabanco at 10-12.

(2005) (“The Privileges and Immunities Clause had a simple purpose: to ensure that the citizens of each state would not be treated like aliens in the other states”). The governments of both England and the colonies placed significant disabilities upon aliens, including restricting their ability to work in certain trades. *Id.* at 1493. “Of the disabilities of alienage – and the corresponding privileges of citizenship – by far the most practically significant were economic rights.” *Id.*

In *Corfield v. Coryell*, which the Supreme Court has called “the first, and long the leading, explication of the Clause,” *Austin*, 420 U.S. at 661, Justice Washington made clear that the pursuit of a livelihood is a “privilege” with respect to which a State may not discriminate against non-residents. Justice Washington “deemed the fundamental privileges and immunities protected by the Clause to be essentially coextensive with those calculated to achieve the purpose of forming a more perfect Union.” *Id.* Although he did not enumerate every such privilege and immunity (doing so would have been “more tedious than difficult,” *Corfield*, 6 F. Cas. at 551), he did specify some, including:

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise

Id. at 552.

It is thus not surprising that the ability to pursue one's livelihood has consistently been recognized as protected by Art. IV, § 2. "Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause. Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity." *United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor*, 465 U.S. 208, 219, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984) (citations omitted); *see also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 283, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985); *Hicklin v. Orbeck*, 437 U.S. 518, 534, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978); *Baldwin*, 436 U.S. at 387. This Court has likewise stated, "From the very beginning, 'the right to ply one's trade in any State of the Nation was at the heart of the clause's guarantees.'" *Laborers Local*, 98 Wn.2d at 126 (quoting *Salla v. County of Monroe*, 48 N.Y.2d 514, 522, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979)). This Court has also concluded, "The capacity to pursue work is fundamental whether in a public or private context." *Id.*

The ability to pursue one's calling or profession is thus recognized as one of those "privileges" and "immunities" "sufficiently basic to the livelihood of the Nation," *Camden*, 465 U.S. at 221 (quoting *Baldwin*, 436

U.S. at 388), to fall under the protection of Art. IV, § 2 and, consequently, article I, section 12 of the Washington Constitution.

4. Washington State’s Privileges Or Immunities Clause Is Designed To Prevent The Grant Of Privileges To Corporations At The Expense Of The General Good

By the late 19th century, when state constitutional conventions began adding the term “privileges” and “immunities” to state constitutions, they supplemented these protections to achieve a new goal – doing away with special legislation arising from the concentration of corporate wealth. “In this same period the terms ‘privileges’ and ‘immunities’ also appear in several state constitutional provisions aimed at eliminating commercial monopolies. . . . These ‘special grants’ of ‘privileges and immunities’ were presumed to be invalid state actions that favored the few at the expense of the general public.” Barbara Mahoney, *The Meaning of the Privileges or Immunities Clause In the Washington State Constitution* 17 (2001) (unpublished manuscript available in the University of Washington Gallagher Law Library).

This populist sheen to the concept of privileges and immunities is reflected in the early decisions of this Court interpreting article I, section 12. *See* Appellants’ Br. at 21-23. The early decisions of this Court repeatedly and unhesitatingly used article I, section 12 to strike down laws that granted privileges to corporate interests at the expense of a plaintiff’s

ability to earn a living.⁴ See *Grant County II*, 150 Wn.2d at 809 n. 12 (citing *State v. Robinson Co.*, 84 Wash. 246, 249-50, 146 P. 628 (1915)); *In re Application of Camp*, 38 Wash. 393, 397, 80 P. 547 (1905); *City of Spokane v. Macho*, 51 Wash. 322, 323-326, 98 P. 755 (1909); *City of Seattle v. Dencker*, 58 Wash. 501, 504, 108 P. 1086 (1910)).⁵

Thus, at the time of this state's founding, the Privileges or Immunities Clause combined the protections of Art. IV, § 2 of the U.S. Constitution with populist opposition to large corporate interests manipulating the machineries of the state for their benefit.

5. The Clauses From Which Article I, Section 12 Was Derived Also Forbid The Creation Of Monopolies

“Washington modeled its privileges and immunities clause after Oregon’s privileges and immunities clause, art. I, § 20, which provides: ‘No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.’” *Seeley v. State*, 132 Wn.2d 776, 786 n.6, 940 P.2d 604 (1997). This Court may thus “look to interpretations of the Oregon privileges and immunities clause for guidance.” *Grant County II*, 150

⁴ State cases and statutes from the time of the constitution’s ratification are more persuasive than recent case law in determining the meaning of a particular constitutional provision. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 120, 937 P.2d 154 (1997).

⁵ In *Grant County II*, this Court also noted that, when the government did not engage in positive favoritism, the legislation at issue was typically upheld. *Grant County II*, 150 Wn.2d at 809 n. 12.

Wn.2d at 808.⁶ The Oregon Supreme Court recognizes that “[t]he right to pursue any legitimate trade, occupation or business is a natural, essential, and inalienable right, and is protected by . . . Art. I, § 20.” *General Elec. Co. v. Wahle*, 207 Or. 302, 319, 296 P.2d 635 (1956). The court has also repeatedly held that governmental grants of monopolies violate the clause. *E.g., Hume v. Rogue River Packing Co.*, 51 Or. 237, 259, 92 P. 1065 (1907) (“[A]rticle I, § 20, of the Constitution . . . inhibit[s] the granting of a monopoly in a lawful and uninjurious business, which may be conducted as of common right.”); *White v. Holman*, 44 Or. 180, 192-93, 74 P. 933 (1904) (“[T]he Legislative Assembly . . . could not create a monopoly of a legitimate business in which every person can engage of common right”); *Eagle Cliff Fishing Co. v. McGowan*, 70 Or. 1, 15, 137 P. 766 (1914) (Oregon Constitution “forbid[s] the creation of monopolies in the pursuit of a lawful undertaking”).

Oregon’s Privileges or Immunities Clause, in turn, was taken from Indiana’s. *State v. Clark*, 291 Or. 231, 236, 630 P.2d 810 (1981). The Indiana clause’s proponent, Daniel Read, and other constitutional delegates issued repeated warnings about the need to prevent government grants of special privileges to favored business interests:

⁶ In *Andersen*, this Court held that Oregon’s constitutional analysis is not relevant in every context. *Andersen*, 158 Wn.2d at 16. However, this Court was addressing whether Oregon’s constitutional construction should apply outside of grants of favoritism, an issue not raised in this case.

[U]nless you become more watchful in your States, and check this spirit of monopoly and thirst for exclusive privileges, you will, in the end, find that the most important powers of government have been given or bartered away, and the control over your dearest interests has passed into the hands of these corporations.

1 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1850* 221-22 (1850) (quoting President Andrew Jackson, Farewell Address (Mar. 4, 1837)); *see also* 2 *id.* at 1394 (remarks of Delegate Biddle) (“[T]he proposition is a plain one, that there shall be no exclusive monopolies – no privilege granted to one man which shall not, *under the same circumstances*, belong to all men . . .”). The Indiana Supreme Court has thus held that the very “purpose of [the clause] was to prohibit state entanglement in private profit-seeking ventures and to avoid the creation of monopolies.” *Collins v. Day*, 644 N.E.2d 72, 76 (Ind. 1994).

Because article I, section 12 of the Washington Constitution draws its language and substance directly from the virtually identical clauses of the Oregon and Indiana constitutions, there can be no doubt that, like its precursors, it prohibits governmental creation of monopolies.

6. Conclusion

When the case presents an issue of a grant of positive favoritism to corporate interests, Washington’s Privileges or Immunities Clause requires

an independent analysis in which the court examines if the interest at issue is protected by Art. IV, §2 of the U.S. Constitution. Article IV, §2 protects the ability to pursue one's calling in the face of protectionist regulations. This protection is reinforced by the specific concerns of our founders that the constitution should prevent the government from granting economic benefits to moneyed interests at the expense of the general good. These protections are distinct from Fourteenth Amendment protections. This Court should therefore hold that Ventenbergs possesses an interest protected by article I, section 12.

B. Intermediate Scrutiny Or “Reasonable Grounds” Is The Appropriate Standard To Review Petitioners’ Claim

“After a court decides a separate analysis is appropriate, the court must do the separate analysis to determine whether a violation of the State Constitution occurred.” *Des Moines Marina Ass’n v. City of Des Moines*, 124 Wn.App. 282, 296, 100 P.3d 310 (2004). The first step in that analysis is to determine the proper standard for reviewing the claim.

1. “Rational Basis With Bite”

As is discussed in Petitioners’ briefs to the Court of Appeals, the proper standard for analyzing a claim under the independent protections of Article I, section 12 is neither rational basis nor strict scrutiny, but something in between. *See* Appellants’ Br. at 23-24; Appellants’ Reply to

Rabanco at 10-12. Specifically, in the earlier case of *Grant County Fire Protection District Number 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) (“*Grant County I*”) (in a portion of the decision not affected by the grant of reconsideration that led to *Grant County II*), this Court noted that these early decisions applied article I, section 12 to regulatory statutes that granted an economic benefit and required that acceptable regulatory distinctions must rest on ““real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.”” *Id.* at 732 (quoting *State ex rel. Bacich v. Huse*, 187 Wash. 75, 84, 59 P.2d 1101 (1936)). Justice Madsen further described the standard as differing from “rational basis” by requiring a real justification addressing an identified problem related to the subject matter of the act:

As to this inquiry, early cases indicate that the constitutional standard is not the same as the present equal protection “rational basis” test, where any conceivable legislative reason for a classification will suffice. Instead, the cases indicate a classification must rest on some real difference between those within and without the class that is relevant to the apparent or asserted purpose of the legislation.

Grant County I, 145 Wn.2d at 741 (Madsen, J., concurring in part and dissenting in part).

This level of analysis is similar to that employed by the U.S. Supreme Court under Art. IV, §2. Like the Privileges or Immunities

Clause, the federal Clause is not an absolute protection. *See Toomer v. Witsell*, 334 U.S. 385, 396, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

Nonetheless, a State policy that discriminates against non-residents will survive if the State can prove that “there is a substantial reason for the difference in treatment” between residents and non-residents and that “the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.” *Piper*, 470 U.S. at 284.

2. Reasonable Grounds Do Not Permit The State To Manufacture *Ex Post Facto* Justifications

Given this standard, this Court should reject the Respondents’ invitation to conjecture, speculation, and purposeful disregard of fact. As noted by Justice Madsen, to survive a Privileges or Immunities Clause challenge, the government may not rely on “any conceivable” justification. Again, Privilege and Immunities cases are instructive in this regard. Under Art. IV, § 2, to survive a challenge, the government must show that its justification actually exists and that the non-residents targeted for discrimination are a “peculiar source” of the problem:

[T]he privileges and immunities clause . . . does not preclude discrimination against citizens of other States where there is a “substantial reason” for the difference in treatment. [T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. As part of any justification offered for the discriminatory law,

nonresidents must somehow be shown to constitute a peculiar source of the evil at which the statute is aimed.

Camden, 465 U.S. at 222 (emphasis added; internal quotation marks and citations omitted; second alteration in original).

In this light, this Court should not dismiss the actual reason for the City's closing the market in favor of its after-the-fact justifications. As Justice Madsen pointed out, this Court may not speculate as to "conceivable" justifications that have no grounding in reality. As discussed in Petitioners' opening brief, the facts of this case reveal one purpose behind the City's actions: to avoid a lawsuit from two large and powerful companies seeking to protect their state-granted monopoly.

3. This Standard Is Sufficiently Deferential To Permit Regulations Protecting Workers' Rights

In *Amunrud*, this Court declined to examine regulations affecting the right to earn a living using strict scrutiny because to do so "would ... strip individuals of the many rights and protections that have been achieved through the political process." *Amunrud*, 158 Wn.2d at 230. However, the intermediate standard set by article I, section 12 is sufficiently deferential to allow legitimate regulations aimed at protecting the general public to survive, while providing the courts with some mechanism with which to strike down special legislation granting monopolies. For instance, because the law at issue in *Amunrud* was not

the result of favoritism, it would not have been subject to article I, section 12's more searching review. The intermediate standard thus preserves judicial deference to legitimate health and safety regulations and fulfills the founders' vision of a government free from corporate manipulation.

C. The City's Actions Fail Rational Basis Review

Even if this Court were to review this case under the "rational basis" standard, the City's actions would fail. Under rational basis, "the classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives." *In re Personal Restraint Petition of Stanphill*, 134 Wn.2d 165, 175, 949 P.2d 365 (1998). As discussed in the briefing below, the City's restriction on the market was wholly irrelevant to the achievement of any legitimate state objective.

V. CONCLUSION

This Court should reverse the Court of Appeals' decision.

RESPECTFULLY submitted this 5th day of February 2007.

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