

NO. 79222-4
(Formerly Court of Appeals No. 55256-2-1)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN J. LOCKE and TORI LOCKE, husband and wife
and the marital community composed thereof,

Respondents,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Petitioners,

and

JAMES SEWELL, MOLLY DOUCE, JOHN CAMERON
and "JOHN DOES" 1-5

in their individual capacities; THE STATE OF WASHINGTON,
its subdivisions and agencies; and the
WASHINGTON STATE PATROL,

Defendants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Michael Spearman, Judge

RESPONDENTS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT.....	2
A. The City’s Privileges And Immunities Argument Does Not Support Reversal.	2
1. Burden Of Proof And Presumptions In Constitutional Challenges.....	3
2. The Text Of The Privileges And Immunities Section Supports The Court Of Appeal’s Decision.	4
3. The Early Washington Cases Involving A Separate State Analysis Support The Textual Argument That An Act Is Constitutional If It Is “Uniform In Its Operation Insofar As It Operates At All.”	6
4. Oregon Privileges and Immunities Cases Also Support the Constitutionality Of The LEOFF Statute.....	12
B. The City Should Not Prevail On Other State Constitutional Claims.	14
C. The City’s Federal Constitutional Claims Are Invalid.....	17
D. The Court Of Appeals, Correctly Ruled That RCW 4.96.010 Waived The City’s Sovereign Immunity.....	18
III. CONCLUSION	20

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<u>Alton V. Phillips Co. v. State</u> , 65 Wn.2d 199, 396 P.2d 537 (1964)	10, 11
<u>Andersen, et al. v. King County</u> , 158 Wn.2d 1, 138 P.3d 963 (2006)	2, 15
<u>Bailey v. Forks</u> , 108 Wn.2d 262, 737 P.2d 1257 (1987)	19
<u>Campbell v. Dep't of Soc. & Health Servs.</u> , 150 Wn.2d 881, 83 P.3d 999 (2004)	15
<u>Davis v. State</u> , 71 Tenn. 376 (1879)	13, 14
<u>Edgar v. State</u> , 92 Wn.2d 217, 595 P.2d 534 (1979)	19
<u>Evangelical United Brethren Church of Adan v. State</u> , 67 Wn.2d 246, 407 P.2d 440 (1965)	19
<u>Fitch v. Applegate</u> , 24 Wash. 25 (1901)	9, 10
<u>Fray v. Spokane County et al.</u> , 134 Wn.2d 637, 952 P.2d 601 (1998)	1
<u>Garnett v. Bellevue</u> , 59 Wn. App. 281, 796 P.2d 782 (1990)	19
<u>Grant County Fire Protection District No. 5, et al. v. The City of Moses Lake, et al.</u> , 150 Wn.2d 791, 83 P.3d 419 (2004)	5, 7, 12
<u>Grote v. Trans World Airlines, Inc.</u> 905 F.2d 1307 (9 th Cir. 1990)	16
<u>Hansen v. City of Everett</u> , 93 Wn. App. 921, 971 P.2d 111 (1999)	2, 17
<u>Hauber v. Yakima County</u> , 147 Wn.2d 655, 56 P.3d 559 (2002)	16
<u>Heller v. Doe</u> , 509 U.S. 312 (1993)	17
<u>In re Oberg</u> , 21 Ore. 406, 28 P. 130 (1891)	12, 13, 14
<u>J&B Dev. Co. v. King County</u> , 100 Wn.2d 299, 669 P.2d 468 (1983)	19
<u>Locke v. City of Seattle</u> , 133 Wn. App. 696, 137 P.3d 52 (2006)	6, 15, 18
<u>MacPherson, et al. v. Department of Administrative Services, et al.</u> , 340 Ore. 117, 130 P.3d 308 (2006)	14
<u>McAunich v. Mississippi, etc. R.R. Co.</u> , 20 Iowa 338 (1866)	7, 8, 9
<u>McDaniels v. J.J. Connelly Shoe Co.</u> , 30 Wash. 549 (1902)	10

TABLE OF AUTHORITIES, continued

	<u>Page</u>
<u>Meaney v. Dodd</u> , 111 Wn.2d 174, 759 P.2d 455 (1988).....	19
<u>Osborn v. Mason County</u> , 157 Wn.2d 18, 134 P.3d 197 (2006)	19
<u>Paulson v. Pierce County</u> , 99 Wn.2d 645, 664 P.2d 1202 (1983)	15
<u>Ravenscroft v. Water Power Co.</u> , 136 Wn.2d 911, 969 P.2d 75 (1998)	20
<u>Redford v. Spokane Street Ry. Co.</u> , 15 Wash. 419 (1896).....	6, 7, 9, 10
<u>Rui One Corp v. City of Berkeley</u> , 371 F.3d 1137 (9 th Cir. 2004)	16
<u>Seattle v. State</u> , 103 Wn.2d 663, 694 P.2d 2d 641 (1985).....	5, 17
<u>Shaughnessy v. Northland Steamship Co.</u> , 94 Wash. 325, 162 P. 546 (1917)	10, 12
<u>State Ex Rel. Bacich v. Huse</u> , 187 Wash. 75 (1936)	11
<u>State ex rel. Jarvis v. Daggett</u> , 87 Wash. 253, 151 P. 648 (1915)	10, 12
<u>State of Oregon v. Andrew Clark</u> , 291 Ore. 231, 630 P.2d 810 (1981)	7
<u>State v. Bergfeldt</u> , 41 Wash. 234 (1905)	6
<u>State v. Edmonson</u> , 291 Or 251, 630 P2d 822 (1981).....	14
<u>State v. Fraternal Knights & Ladies</u> , 35 Wash. 338, 77 P. 500 (1904)	10
<u>State v. Nichols</u> , 28 Wash. 628 (1902)	6
<u>Tacoma v. Krech</u> , 15 Wash. 296 (1896).....	6
<u>Taylor v. City of Redmond</u> , 89 Wn.2d 315, 571 P.2d 1388 (1977)	1
<u>Taylor v. Stevens County</u> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	19
<u>Vance Eugene Hunter v. State of Oregon and City of Bend</u> , 306 Ore. 529, 761 P.2d 502 (1988)	14
<u>Viking Props., Inc. v. Holm</u> , 155 Wn.2d 112, 118 P.3d 322 (2005)	15

TABLE OF AUTHORITIES, continued

Page

Other Authorities

Revised Code of Washington

4.96.010	18
41.26.281	1, 2, 18, 20

Miscellaneous

Washington Constitution, Article I, Section 12	passim
Oregon Constitution, Article I, Section 20	7
Iowa's Constitution, Article I, Section 6	7

I. INTRODUCTION

The LEOFF statute has been protecting fire fighters and police officers for more than 40 years and was first upheld by this Court in 1977.¹ In 1998, this Court construed the LEOFF statute and explained that beginning in 1977, LEOFF Plan II members such as plaintiff got reduced LEOFF benefits in exchange for industrial insurance benefits, but retained the right to sue their employers:

[t]he 1971 amendments to the Washington Law Enforcement Officers' and Fire Fighters' Retirement System Act (LEOFF) gave all police officers and fire fighters the right to sue their employers for negligence In 1977, the Legislature amended LEOFF to create two classes of members. Benefits for plan I members remained the same, while benefits for Plan II members were reduced. Plan II members, however, became eligible for industrial insurance benefits. The right to sue was not taken from them.²

(Emphasis added.) The Legislature repeatedly reaffirmed that right to sue.

Id. at 656. In 2002, this Court also unanimously held that:

... fire fighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to both collect workers' compensation and bring on related negligence suits against their employers. RCW 51.04.010, 41. 26.281.³

¹ Taylor v. City of Redmond, 89 Wn.2d 315, 571 P.2d 1388 (1977).

² Fray v. Spokane County et al., 134 Wn.2d 637, 655, 952 P.2d 601 (1998).

³ Hauber v. Yakima County, 147 Wn.2d 655, 56 P.3d 559 (2002).

(Emphasis added.) See also Hansen v. City of Everett, 93 Wn. App. 921, 926-27, 971 P.2d 111 (1999) (LEOFF right to sue provision “creates a strong incentive for improved safety”).

The Court of Appeals correctly relied on these and other findings and precedents in upholding the LEOFF statute against the constitutional and statutory challenges made by petitioner City of Seattle. The Court of Appeals decision should be affirmed for the reasons previously discussed herein.

II. ARGUMENT

A. **The City’s Privileges And Immunities Argument Does Not Support Reversal.**

In its petition, the City alleged that RCW 41.26.281 constituted a grant of positive favoritism to municipal police officers and fire fighters. That allegation may have been tailored to fit the plurality opinion in Andersen, et al. v. King County, 158 Wn.2d 1, 138 P.3d 963 (2006). In Andersen, this Court issued several opinions dealing with the privileges and immunities clause of the Washington Constitution. The plurality opinion by Justice Madsen stated that:

an independent state analysis is not appropriate unless the challenged law is a grant of positive favoritism to a minority class. In other cases, we will apply the same analysis that applies under the federal equal protection clause.

158 Wn.2d at 16. However, the opinion authored by Justice J.M. Johnson, and joined in by Justice Sanders, concurred in the judgment only. That opinion appeared not to make the distinction between grants of positive favoritism to a minority class quoted above in the plurality opinion and sets forth a “two-part analysis” relating to the privileges and immunities clause on all occasions:

- (1) Does a law grant a citizen, class, or corporation “privileges or immunities,” and if so, (2) Are those “privileges or immunities” equally available to all?

158 Wn.2d at 59. The dissent by Justice Chambers, concurred in by Justice Owens at note 3 agreed with that “analytical approach.” *Id.* at 123. It is not clear whether a majority of this Court accepts the approach of the plurality on this issue or that of the concurrence/dissent quoted above. However, the result in this case will be the same regardless which analysis is utilized. That is because the LEOFF statute meets both the independent privileges and immunities test and the federal equal protection test.

1. Burden Of Proof And Presumptions In Constitutional Challenges.

The first question in determining the constitutionality of the LEOFF statute is what burden is placed on the City in challenging its constitutionality.⁴ That question is easily answered since this Court has

⁴ The same burden applies to all constitutional challenges whether based on privileges and immunities, due process or equal protection.

repeatedly held that the party challenging a statute “must demonstrate it’s unconstitutionality beyond a reasonable doubt.”⁵ This Court sometimes has more generically referred to the burden as a “heavy burden of proof.”⁶ Related to the burden of proof is the presumption that the Legislature, which promulgated a statute, has determined the facts which justify the constitutionality of the statute.⁷

2. The Text Of The Privileges And Immunities Section Supports The Court Of Appeal’s Decision.

Article I, Sec. 12, of the Washington Constitution provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

The portions of this text are particularly relevant to this appeal. First, the text of this section only prohibits the granting of privileges or immunities which do not belong “upon the same terms” to all citizens or corporations. That means privileges and immunities may constitutionally be available to

⁵ Water Jet Workers Ass’n v. Yarbrough, 148 Wn.2d 403, 409, 61 P.3d 309 (2003); Habitat Watch v. Skagit County, 155 Wn.2d 397, 120 P.3d 56 (2005); State ex rel. P.D.C. v. W.E.A., 156 Wn.2d 543; 130 P.3d 352 (2006); Reesman v. State, 74 Wn.2d 646, 650, 445 P.2d 1004 (1968).

⁶ Philippides v. Bernard, 151 Wn.2d 376, 391, 88 P.3d 939 (2004).

⁷ Det. Of Thorell, 149 Wn.2d 724, 749, 72 P.3d 708 (2003); State ex rel. P.D.C. v. W.E.A., *supra*, 156 Wn.2d at 556; State ex rel. Collier v. Yelle, 9 Wn.2d 317, 333, 115 P.2d 373 (1941).

a subset of citizens who meet certain qualifications so long as all meeting those qualifications are eligible. For example, privileges only available to Vietnam veterans would not automatically be prohibited by this section, even though not all citizens are veterans, so long as all such veterans are eligible. Nor would limiting admission to a state college to “top students” run afoul of this provision, even though not all citizens are top students, so long as admission is fairly available to all top students. In this case, the ability to sue their municipal employer is available to all citizens who choose to become, and qualify for, the dangerous job of municipal police officers or fire fighters.

Secondly, the text of the section also does not apply to privileges and immunities granted to municipal corporations. Such privileges include the City’s right to tax residents and use those tax proceeds to hire and use police officers and fire fighters. As explained by the Court of Appeals:

. . . article I, section 12 distinguishes between a “municipal corporation,” such as the city, and other corporations and citizens. As held in *City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985), the city “does not itself have rights under the equal protection clauses of the state and federal constitutions.” *See also Grant County Fire Protection Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004). The State grants municipal corporations many privileges and immunities that are not shared by citizens and private corporations. For example, the city of Seattle may tax its residents to raise money for activities such as fire fighting. Nothing in section 12

prohibits the State from imposing additional requirements on its municipal corporations in connection with such activities.

Locke v. City of Seattle, 133 Wn. App. 696, 706-07, 137 P.3d 52 (2006).

The legislature's power is complete except as cabined by the Washington or United States Constitutions. Nothing in the text of this section prevents the legislature from doing just what it did here – conditioning the privileges it gave the City by the right of municipal employees, when jobs require them to put themselves in harms way, to sue based on negligence if they are harmed.

3. The Early Washington Cases Involving A Separate State Analysis Support The Textual Argument That An Act Is Constitutional If It Is “Uniform In Its Operation Insofar As It Operates At All.”

Redford v. Spokane Street Ry. Co., 15 Wash. 419, 421-22 (1896)

is the earliest, still useful case⁸ counsel has found construing the Washington Constitution privileges and immunities section. Redford upheld against a “privileges and immunities challenge” the constitutionality of an 1895 statute that made it necessary for jurors not

⁸ Tacoma v. Krech, 15 Wash. 296 (1896), involving Sunday “blue laws”, was decided earlier in the same term as Redford, but contained minimal analysis and was later overruled in State v. Nichols, 28 Wash. 628 (1902) and State v. Bergfeldt, 41 Wash. 234 (1905).

“summoned upon an open venire” to be “householders”. This Court held that the constitutionality of the law was not affected:

by the further fact that that qualification is not a requisite of jurors summoned upon an open venire. The act of 1895 is uniform in its operations in so far as it operates at all, and its constitutionality is not affected by the number of persons within the scope of its operations.

Redford, *supra*, 15 Wash. at 422 (emphasis added). This Court thus recognized from the outset that privileges to a limited class may be valid if they are available “upon the same terms” to all subject to the act. That is the case here because the right to sue is available to all LEOFF members.

Redford relied upon McAunich v. Mississippi, etc. R.R. Co., 20 Iowa 338 (1866) as authority for its decision. McAunich is particularly significant because it pre-dates the 1889 adoption of the Washington Constitution and because the Iowa Constitution had a privileges and immunities section similar to Washington’s. In fact, Iowa’s Constitution, Art. I, §6, was a predecessor to Article I, Section 20 of the Oregon Constitution (State of Oregon v. Andrew Clark, 291 Ore. 231, 236, 630 P.2d 810 (1981)), and “[a]rticle 1, section 12 of the Washington State Constitution was modeled after article I, section 20 of the Oregon State Constitution.”⁹ Thus, the McAunich analysis is a sound basis for

⁹ Grant County Fire Protection District No. 5, et al. v. The City of Moses Lake, et al., 150 Wn.2d 791, 807-08, 83 P.3d 419 (2004).

determining the likely understanding of this section of the Washington Constitution at the time it was adopted.

McAunich involved a challenge to a law which singled out railroad corporations and made them liable (contrary to the common law) for “any neglect of the agents, or by a *mismanagement* of the engineer or other *employees.*” McAunich, *supra*, 20 Iowa at 342 (italics in original). The railroad argued:

that the act is in conflict with article I, section 6, because the liability is not upon the same terms extended to stage companies, steamboats and other corporation employees.

Id. (underling added). The Iowa Supreme Court rejected that argument holding:

The act not only requires that there must be an employer and an employee, but that the former must be a railroad company and the latter employed about its business.

Now, if there is an employer and an employee, but no business of a railroad company to be engaged in, then the case is not within the act. But the same liability is extended by the act, ‘*upon the same terms,*’ to all in the same situation. Of the constitutionality of the act, we have no doubt.

Id. at 344 (italics in original).

This analysis relies on the same phrase “upon the same terms” employed by the Washington Constitution and is directly on point to this case. Seattle, as did the railroad company, argues that there was a violation of the privileges and immunities provision because fire fighters

and police officers employed by municipalities are being given rights not held by other employees. However, the right here is extended, as it was in McAulich, “upon the same terms” to all in the same situation, i.e., to all police and fire fighters employed by municipalities.

Washington cases, around the turn of the Twentieth century, also relied on Redford, supra, and adopted a similar analysis. For example, Fitch v. Applegate, 24 Wash. 25 (1901), involved a challenge to an 1897 statute which provided some employees a prior lien on property of their employers for wages due them. The Fitch court rejected a challenge to that law based on the Washington privileges and immunities constitutional provision. The Fitch court cited Redford and held that “[l]aws are uniformly upheld where all persons, even though they may constitute a class, who fall under the operations of the law, are treated alike.” 24 Wash. at 31-32. The Fitch court also relied heavily on Cooley on Constitutional Limitations which discussed privileges and immunities of workers and which explained:

The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required

in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge.

Id. at 32.¹⁰

The City argues that the Court of Appeal's decision is inconsistent with Alton V. Phillips Co. v. State, 65 Wn.2d 199, 396 P.2d 537 (1964) (Pet. for Review, p. 8), Shaughnessy v. Northland Steamship Co., 94 Wash. 325, 330, 162 P. 546 (1917) (City's Answer to Memorandum of Amicus, pp. 2-5) and State ex rel. Jarvis v. Daggett, 87 Wash. 253, 258, 151 P. 648 (1915) (id. at 2). However, those cases do not support the weight given them by the City.

¹⁰ In McDaniels v. J.J. Connelly Shoe Co., 30 Wash. 549, 555 (1902), this Court relied upon both Redford, supra, and Fitch, supra, in rejecting a privileges and immunities challenge to a law which placed particular limitations on only some sales, i.e., sales in bulk. This Court held that when a statute classifies among citizens:

it must appear that the classification is made upon some reasonable and just difference between the persons affected and others, to warrant classification at all; but applying this test, the act is sufficient.

McDaniels, supra, 30 Wash. at 555. See also State v. Fraternal Knights & Ladies, 35 Wash. 338, 342-43, 77 P. 500 (1904) (upholding against a privileges and immunities challenge a statute that did not apply to all corporations because of a "grandfather" clause but which "is operative alike upon all corporations similarly situated") and State Ex Rel. Bacich v. Huse, 187 Wash. 75, 80 (1936) (distinguishing between the purposes of privileges and immunities and equal protection but holding that in both instances, "legislation involving classifications must meet and satisfy two requirements: (1) The legislation must apply alike to all persons within the designated class; and (2) reasonable ground must exist for making a distinction between those who fall within the class and those who do not").

Phillips, supra, considered a privilege to a single corporation by waiving the statute of limitations just for that corporation. This Court found that special recourse to the courts by a single litigant violated article I, section 12. In doing so, this Court, relying on the language from State ex rel Bachich v. Huse, supra, explained:

Chapter 248, Laws of 1963, grants to the plaintiff, a private litigant, special recourse to the courts – a privilege which does not belong equally on the same terms to all persons and corporations in the state, similarly situated. The purpose of the constitutional provisions, as stated in *Huse*, is clearly to strike down such legislation.

Phillips, 65 Wn.2d at 202 (emphasis added). This Court thus viewed the issue as whether privileges were distributed “equally on the same terms” to those “similarly situated.” That is classic “minimal scrutiny” equal protection, as well as privileges and immunities, language. It was only because the statute at issue there did not apply on the same terms to those similarly situated that it was found unconstitutional. In the present case, the privilege is not given to a named individual, but is given to a group of similarly situated police officers and fire fighters whom the legislature reasonably could find were not similarly situated to other employees because of the danger of their occupation. Moreover, the privilege in this case is available “on the same terms” to all who become municipal police officers or fire fighters.

While the City states that Shaughnessy, supra, “held that workers compensation statutes must provide immunity from suit in order to comply with” article I, section 12 (City’s Answer to Memorandum of Amicus, p. 4), and implies that Jarvis, supra, says the same (id. at 2), neither case so held. Rather, both cases were statutory construction cases, and made no constitutional holding. For example, the strongest statement in Jarvis is:

If the act were given this construction, it might well be doubted whether it would not offend against that provision of the fourteenth amendment to the Constitution of the United States which provides that:

No state shall make or enforce any law which shall 'deny to any person within its jurisdiction the equal protection of the laws.'

Jarvis, supra, 87 Wash. at 258.

4. Oregon Privileges and Immunities Cases Also Support the Constitutionality Of The LEOFF Statute.

The significance of Oregon cases to this issue derives from the fact, quoted above, that the Oregon Constitution was the primary source of the Washington Constitution’s privileges and immunities section. Grant County, supra. The earliest Oregon case dealing with this issue was decided just two years after the adoption of the Washington Constitution, In re Oberg, 21 Ore. 406, 28 P. 130 (1891). In Oberg, a constable was convicted of arresting a sailor as an absconding debtor in violation of a law prohibiting such arrests. The constable argued that the law was

unconstitutional as a special immunity for seamen. In rejecting that claim, the Oregon Supreme Court said:

All sailors of a seagoing vessel within the prescribed limits are treated alike, and entitled to enjoy the privileges or immunities granted. The act prescribes the same rule of exemption to all persons placed in the same circumstances. It does not grant to a sailor immunity from arrest for debt, and refuse it to his neighbor, if they be similarly situated. The same privilege or immunity is extended by the act to all in the same situation. Any person who is a sailor may enjoy the immunity, and any citizen desiring such immunity may have it in the words of the constitution, "upon the same terms," by becoming a sailor. While one may enjoy the benefit of the exemption, and another may not, this results not because the statute favors one, and discriminates against another, but because one brings himself within its terms, and the other does not.

21 Ore. at 408 (emphasis added). This analysis applies equally to the present case and strongly supports the constitutionality of the LEOFF statute against a privileges and immunities challenge. In this case, any citizen may obtain the privilege of suing an employer for negligence by becoming a police officer or fire fighter.¹¹

Oberg relied on Davis v. State, 71 Tenn. 376 (1879), a decision of the Tennessee Supreme Court which pre-dated the creation of the Washington Constitution. The Davis court construed an analogous state constitutional provision, and held:

¹¹ Of course, there are qualifications for such a job much as there were qualifications to become a sailor.

[t]his clause of the constitution only prohibits the suspension of a general law or the grant of privileges, immunities or exemptions to an individual or individuals. It does not prohibit legislation for the benefit of classes composed of any members of the community who may bring themselves within the class.

71 Tenn. at 379 (emphasis added.). That is also the situation here since a citizen may become a police officer or fire fighter employed by a municipality. The Oregon Supreme Court has reiterated on many later occasions the concept embodied in Oberg and Davis that there is no violation of privileges and immunities if a privilege or immunity is granted to an open class, i.e., a class which is open to other citizens.¹²

B. The City Should Not Prevail On Other State Constitutional Claims.

The City's petition also raised due process and equal protection claims. With regard to equal protection claims, this Court has established that legislation:

... will survive a constitutional challenge if the legislation applies alike to all within the designated class, there are reasonable grounds to distinguish between those within and

¹² E.g., Vance Eugene Hunter v. State of Oregon and City of Bend, 306 Ore. 529, 532-34, 761 P.2d 502 (1988) (“[a] privilege created by a statute must be available to all on the same terms. State v. Edmonson, 291 Or 251, 630 P2d 822 (1981). Facially, the statute applies the same standard to all. Any person convicted under state statutes is entitled to use the procedures of the Post-Conviction Hearing Act and no one convicted under a city ordinance may do so”); MacPherson, et al. v. Department of Administrative Services, et al., 340 Ore. 117, 129-30, 130 P.3d 308 (2006) (“[p]laintiffs correctly note that this Court has stated that ‘laws which are left open for individuals voluntarily to bring themselves within a favored class do not violate Article I, section 20.’ Wilson v. Dept. of Rev., 302 Ore. 128, 132, 727 P.2d 614 (1986)”).

those without the class, and the classification bears a rational relationship to a legitimate government purpose. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 739, 57 P.3d 611 (2002); *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998).

Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 900, 83 P.3d

999 (2004). As to due process:

A governmental action meets the requirements of substantive due process under the state and federal constitutions if the action (1) serves a legitimate public purpose, (2) is reasonably necessary to the achievement of that purpose, and (3) is not unduly oppressive upon a particular individual. *See, e.g., Rivet v. City of Tacoma*, 123 Wn.2d 573, 581, 870 P.2d 299 (1994) (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-31, 787 P.2d 907 (1990)).

Viking Props., Inc. v. Holm, 155 Wn.2d 112, 131, 118 P.3d 322 (2005).

Consistent with the plurality opinion in Andersen, the Court of Appeals utilized an equal protection analysis in rejecting the City's argument:

... that the LEOFF statute violates article I, section 12 of the state constitution⁵ by requiring the city to pay worker's compensation benefits to LEOFF Plan 2 members without giving the city any corresponding immunity from suit.

Locke, supra, 133 Wn. App. at 706 (footnote omitted). The Court of Appeals correctly utilized a "minimal scrutiny" analysis for this claim. It relied, inter alia, on Paulson v. Pierce County, 99 Wn.2d 645, 664 P.2d 1202 (1983) ("minimal scrutiny applies in article I, section 12 challenge when counties, but not municipalities, were immune from liability for

flood control activities”). Furthermore, if the City’s obligation to pay money were held to be a “fundamental interest”, calling for a higher level of scrutiny, then the higher level of scrutiny would be the rule rather than the exception.

Grote v. Trans World Airlines, Inc. 905 F.2d 1307 (9th Cir. 1990) and Rui One Corp v. City of Berkeley, 371 F.3d 1137 (9th Cir. 2004), also support the use of a “minimal scrutiny” analysis. In Grote, the court rejected the plaintiff’s argument that to provide the protection of the Federal Employees Liability Act (“FELA”)¹³ to railroad employees, but not to airline employees, would violate the equal protection clause, stating:

Because the challenged classification does not “interfere[] with the exercise of a fundamental right or operate[] to the peculiar disadvantage of a suspect class”, the statute withstands scrutiny if it has some rational basis.

Grote, 905 F.2d at 1310. In Rui One Corp v. City of Berkeley, supra, the court applied minimal scrutiny in a case in which only a small number of employers were required to pay a higher wage and also denied a due process challenge. 371 F.3d at 1154-56.

Among the facts supporting the challenged classification are the following:

- The vital and dangerous nature of the police and fire fighter’s work. 133 Wn. App. at 708, citing, Hauber, supra.

¹³ FELA permits covered employees to sue their employer.

- The statute creates a strong incentive for improved safety. Id., quoting Hansen, supra.
- The protection granted the City from product liability claims, vis-à-vis, their employees. Id. at 709.
- The LEOFF formula in terms of subrogation or collateral source “treats municipal defendants more favorably than most other tortfeasors or subrogors.” Id.

These same facts also undercut the City’s claim that its due process rights have been violated because there is no “quid pro quo.” There in fact is a quid pro quo, e.g., immunity from product liability suits. The fact that the City’s “quid” may be less than that of some other employers, does not make the statute unconstitutional. As discussed in earlier briefs, there is a considerable variation in the “quid” provided in connection with workers compensation laws among the several states. That does not make the laws unconstitutional.

C. The City’s Federal Constitutional Claims Are Invalid.

This Court held in Seattle v. State, 103 Wn.2d 663, 668, 694 P.2d 2d 641 (1985), that the City “does not itself have rights under the equal protection clauses of the state and federal constitution.” (Emphasis added). The City thus cannot complain that it is denied equal protection because it is treated differently from other employers. Even if it did have equal protection rights, the Supreme Court in Heller v. Doe, 509 U.S. 312, 320 (1993), stated:

. . . a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *See, e. g., Nordlinger v. Hahn*, 505 U.S. 1, 11, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992); *Dukes, supra*, at 303, 49 L. Ed. 2d 511, 96 S. Ct 2513. Further, a legislature that creates these categories need not “actually articulate at any time the purpose or rationale supporting its classification.” *Nordlinger, supra*, at 15, 120 L.Ed.2d 1, 112 S. Ct. 2326.

The facts listed in the bullet points, *supra*, as well as the analysis and cases regarding the state equal protection and due process claims also apply to the federal equal protection and due process claims, and call for upholding the constitutionality of the statute.

D. The Court Of Appeals Correctly Ruled That RCW 4.96.010 Waived The City’s Sovereign Immunity.

The Court of Appeals correctly rejected the City’s interpretation of RCW 4.96.010 which would have erased 40 years of reliance by municipal police officers and fire fighters and would have meant that RCW 41.26.281 was a meaningless act because the City’s sovereign immunity was not waived for any claim under that section. This Court should not find the statute to be a meaningless act particularly because, as the Court of Appeals pointed out, “the legislature is not presumed to do a meaningless act.” *Locke, supra*, 133 P.2d at 704.

The Court of Appeals correctly relied on this Court’s holding that RCW 4.96.010:

... was not intended to create new duties where none existed before. Rather, it was to permit a cause of action in tort if a duty could be established, just the same as with a private person.

J&B Dev. Co. v. King County, 100 Wn.2d 299, 305, 669 P.2d 468 (1983), *reversed on other grounds by* Meaney v. Dodd, 111 Wn.2d 174, 759 P.2d 455 (1988), and Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988). See also Garnett v. Bellevue, 59 Wn. App. 281, 285, 796 P.2d 782 (1990), and Osborn v. Mason County, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (quoting J&B Dev. Co.).

The City ignores J&B Dev. Co., and bases its argument on Evangelical United Brethren Church of Adan v. State, 67 Wn.2d 246, 407 P.2d 440 (1965) and Edgar v. State, 92 Wn.2d 217, 595 P.2d 534 (1979). However, both of those cases were cited in J&B Dev. Co., *supra*, so this Court obviously thought the above quoted portion of J&B Dev. Co. was consistent with those cases. Moreover, this Court in Evangelical, *supra*, made largely the same point when stating:

Essentially, then, the official conduct giving rise to liability must be *tortious*, and it must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation.

Id. at 252-53 (italics in original).

The Court of Appeals also correctly pointed out citing, *inter alia*, Bailey v. Forks, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987), that one

situation in which a government agency acquires a special duty of care to a “limited class of potential plaintiffs” rather than to the public at large is when a statute evinces an intent to protect a particular class of persons. See also Ravenscroft v. Water Power Co., 136 Wn.2d 911, 929, 969 P.2d 75 (1998). In this case RCW 41.26.281 evinces such an intent.

III. CONCLUSION

For the foregoing reasons, and the reasons previously argued, the trial court’s judgment and the Court of Appeal’s decision, should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of **March, 2007**.


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