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IN THE SUPREME COURT CLERK  
OF THE STATE OF WASHINGTON

KEVIN J. LOCKE and TORI LOCKE,  
Respondents,  
v.  
THE CITY OF SEATTLE,  
Petitioner.

MARGARET A. LINDELL, Personal Representative, for the  
Estate of GARY R. LINDELL, deceased,  
Respondent,  
v.  
THE CITY OF SEATTLE,  
Petitioner.

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**BRIEF OF AMICUS CURIAE WASHINGTON COUNCIL OF  
POLICE AND SHERIFFS, SEATTLE POLICE OFFICERS' GUILD  
AND KING COUNTY POLICE OFFICERS' GUILD**

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## STATEMENT OF INTEREST

The Washington Council of Police and Sheriffs is a labor organization representing over 4,700 law enforcement officers, including more than 80% of all sworn officers in Washington State. The Seattle Police Officers' Guild represents 1,100 officers and sergeants. The King County Police Officers' Guild represents 700 deputies and sergeants. The issues in these cases are of serious concern to Council and Guild members. The organizations oppose the contention of Petitioner City of Seattle that Rev. Code. Wash. 41.26.281 is unconstitutional. The Council and Guilds also oppose the City's contention that the provision does not waive the City's sovereign immunity from the suits it provides.

A decision in favor of the City in these cases would be harmful to the rights and interests of Council and Guild members. The Legislature provided police officers and fire fighters with a right to sue their employers for negligence in the event of workplace injury. The Legislature had good reason to do so, as will be discussed in detail herein. This important right protects employees performing hazardous work from the risk of under-compensation due to employer immunity. The Council and Guilds seek to protect this interest in this proceeding. These employees are among the few in our society who volunteer to risk serious injury and death to perform the work of protecting the rest of us. The

Legislature was entitled to select RCW 41.26.281 as one means of acknowledging and encouraging this service.

The public interest, demonstrated by the Legislature's decision to provide this cause of action, is of overriding importance. The absence of liability, and the corresponding risk of devastating injury without hope of full compensation, would undoubtedly deter employment in these dangerous positions. Without RCW 41.26.281, the cost of attracting and retaining these essential employees would be increased, and any labor shortage would be exacerbated. These workers must be compensated for the grave risks associated with their work. One way to reduce the cost of that compensation is to reduce those risks with the cause of action established by RCW 41.26.281. Without that cause of action, this cost will be reflected in the price of this labor. The Legislature was entitled to determine that this cause of action furthers its multifarious practical interests and moral responsibilities.

As the single largest representative of law enforcement officers in the state, the Council can offer significant expertise in the issues surrounding on-the-job injury to law enforcement officers. The Council and Guilds are centrally concerned with the effect of this risk upon officers, their families, and their communities. The decisive issue in this case is whether the Legislature's selection of RCW 41.26.281 to address

its legitimate concerns in this area was sufficiently reasonable to survive constitutional review. The Council and the Guilds are prepared to provide the Court with their unique perspective on the close fit between the statute and its purposes.

## ARGUMENT

Review before this Court is limited to two issues: whether RCW 41.26.281 violates article I, section 12 of the Washington Constitution; and whether the City is immune from the cause of action established by the statute. The Council will limit its argument to the state constitutional issue.

The statute survives review under section 12, whether under an independent state analysis, or traditional equal protection analysis. In any case, because the statute itself grants no rights, it is not subject to review under section 12.

### **A. RCW 41.26.281 survives review under either an independent state analysis, or a traditional equal protection analysis.**

This statute survives scrutiny under the Privileges and Immunities Clause of the Washington Constitution, whether under an independent state analysis, or under a traditional equal protection analysis. Where a challenged law grants a privilege or immunity to a minority, an independent state analysis applies. Otherwise, as in the case of

discrimination against a minority, a traditional equal protection analysis applies. The Council makes no argument with regard to the applicability of an independent state analysis. Whichever analysis is applied here, RCW 41.26.281 survives constitutional scrutiny.

**B. RCW 41.26.281 is constitutional under an independent state analysis.**

Article I, section 12 provides that “[n]o 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.” This Court has held that “an independent state analysis applies under article I, section 12 only where the challenged law grants a privilege or immunity to a minority class, i.e., in the event of positive favoritism.” *Andersen v. King County*, 158 Wash.2d 1, 18, 138 P.3d 963, 973 (Wash. 2006). If such an analysis is applied, it should conclude that this statute does not discriminate with regard to “privileges and immunities,” as interpreted by this Court.

Under an independent state analysis, “[f]or a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens.” *Grant County Fire Protection District v. City of Moses Lake*, 150 Wash.2d 791, 812 83 P.3d 419, 428 (2004) (*Grant County II*). But “privilege” as used in that rule does not apply to just any privilege.

In this regard it must be remembered that not every statute authorizing a particular class to do or obtain something involves a "privilege" subject to article I, section 12. Instead, as this court made quite clear early in this State's history, the terms "privileges and immunities" pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship.

*Id.* 812-13.

Thus, even when an independent state analysis is initially warranted because a minority is granted a special benefit, that benefit may or may not be the kind of "privilege" to which this provision applies. Only if the "privilege" pertains to a fundamental right will the classification violate the privileges and immunities clause on an independent state analysis. The independent state analysis can thus be understood as inquiring whether a minority has been granted some unfair advantage with regard to a fundamental right. Only licensed cab drivers can drive cabs, and only licensed physicians can perform surgery. These minority groups are granted a special privilege. But because these activities do not involve the exercise of a "fundamental right," the independent state analysis does not find a violation in such cases.

In *Grant County II*, this Court was faced with the more difficult determination whether the right to commence municipal annexation proceedings, vested by statute in a minority of land-owners of the area proposed for annexation, involved a fundamental right and was thus an

unconstitutional grant of a special privilege under an independent state analysis. Even though that case involved important political rights, this Court held that the privilege granted did not involve a fundamental right or attribute of citizenship. *Id.* at 813.

The City argues here that the rights to sue and immunity from suit involved in a workers' compensation system are fundamental, and thus that distinctions among classes with regard to these rights are unconstitutional on an independent state analysis. It may be true that these rights and immunities are more important than, for instance, the right to drive a cab or the right to perform surgery, though taxicab drivers and surgeons would disagree with that premise. However, the precise contours of these rights are well within the legislative sphere of authority. When the Legislature draws lines among those who can sue and be sued in specifically defined circumstances, it is defining everyday, non-fundamental rights and immunities. For this reason, the distinction between employers subject to suit under RCW 41.26.281 and those not subject to suit is not a distinction with regard to a fundamental right, as required to find a violation of article I, section 12 under an independent state analysis. Just as in *Grant County II*, there is no fundamental right of state citizenship at issue in this case, and the claim of a violation of article I, section 12 must fail for this reason. See *Paulson v. Pierce County*, 99

Wash.2d 645, 664 P.2d 1202 (1983)(County immunity constitutional despite city liability for same conduct); and *Campos v. Dep't of Labor & Indus.*, 75 Wn.App. 379, 880 P.2d 543 (1994) (Bar to suit for workers' compensation benefits did not implicate article I, section 12 privilege or immunity).

The City emphasizes language from *Shaughnessy v.*

*Northland S.S. Co.*, 94 Wash. 325, 162 P. 546 (Wash. 1917) stating that a workers' compensation system

manifestly contemplates that all employers and all employes who are compelled to come under the act and have their rights each as against the other controlled and determined by its provisions shall enjoy such privileges and immunities equally, in harmony with the guaranty of section 12 of article 1 of our state Constitution.

*Id.* at 330.

Thus, this Court appeared to categorize rights and immunities under that workers' compensation system as being "privileges and immunities" as contemplated by article I, section 12. But in light of subsequent precedent refining and delimiting the concept of "privileges and immunities" for this purpose to fundamental rights, this dictum from *Shaughnessy* must be disregarded, insofar as it implies a contrary position. *Grant County II*, 150 Wn.2d. at 812-13; *Campos*, 75 Wn.App. 379 at 387 (Applying minimum scrutiny because workers' compensation did not affect fundamental

rights). Moreover, this passage applies strictly to the workers compensation statute before the Court in 1917, which was very different from the system at issue today.

The City also relies on *Alton V. Phillips Co. v. State*, 65 Wash.2d 199, 396 P.2d 537 (Wash. 1964) for the proposition that the restriction of the right to sue to this minority implicates “privileges and immunities” as contemplated by article I, section 12. But *Alton V. Phillips Co.* is readily distinguishable. The legislation at issue in *Alton V. Phillips Co.* was special legislation permitting a single, specifically identified state contractor to sue the state despite the expiration of the otherwise applicable limitations period. The fact that the special bill at issue in *Alton V. Phillips* affected just one corporation showed that it was based on no generally applicable distinction between that corporation and others. Here, a broad class of citizens is granted the right to sue, a grant based on a rational legislative decision. This case does not involve the completely arbitrary special legislation benefiting one individual or corporation at issue in *Alton V. Phillips*.

Finally, even if this statute implicated bona fide “privileges and immunities” as those terms are defined in the Court’s precedent, this statute would survive an independent state analysis. Section 12 prohibits the grant of privileges or immunities to a class of citizens that “upon equal

terms” shall not equally belong to all citizens. But the right to sue described by RCW 41.26.281 is available to anyone who seeks and obtains covered employment. Anyone who does so can have the benefit of the right of action, and no one who does not do so can have it. In that sense, the privilege is available on equal terms to all citizens. The “equal terms” language in Section 12 permits some privileges and immunities to be distributed unequally, so long as the terms of that distribution, upon which the privileges and immunities are available, do not differ from one class of citizens to another. Here, there is no class of citizens who may not, upon the same terms as current police officers and fire fighters, become police officers and firefighters (other than those citizens whose exclusion from such work is otherwise constitutionally permissible). Any citizen who fulfills these terms will then be entitled to the many special benefits available to such employees, including the right of action described by RCW 41.26.281.

**C. RCW 41.26.281 is constitutional on a traditional equal protection analysis.**

Where an independent state analysis is not warranted, the Court “will apply the same analysis that applies under the federal equal protection clause.” *Andersen* at 16. On that analysis, the level of scrutiny to be applied “depends on whether a suspect or semi-suspect classification

has been drawn or a fundamental right is implicated; if neither is involved, rational basis review is appropriate.” *Id.* at 18 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996); see also *Yakima County Sheriff’s Assoc. v. Yakima County*, 92 Wn.2d. 831, 835, 601 P.2d 936, 938 (Wash. 1979).

No fundamental right or suspect class is involved here. The statute is therefore constitutional if it is rationally related to a legitimate state interest. This statute is rationally related to numerous such interests, including full compensation for injured law enforcement officers and fire fighters; recognition of the special conditions in which they work; and attraction of qualified applicants to this important work.

**1. The statute is rationally related to a legitimate state purpose.**

Under rational basis review, RCW 41.26.281 is constitutional if it is rationally related to a legitimate state purpose. *Romer*, 517 U.S. at 631. Under minimal scrutiny, a challenged statute will not be invalidated “unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective.” *Paulson v. Pierce County*, 99 Wash.2d at 652 (citing *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1104-05 (1961)). Here, there are many readily identifiable legitimate state purposes that are directly promoted by the LEOFF legislation.

RCW 41.26.281 recognizes the hazards of the professions of law enforcement and fire protection, and provides a tort remedy to employees in those professions. It is well within the Legislature's prerogative to allow public safety workers a cause of action in negligence in addition to workers' compensation coverage. The enhanced risk to life and limb presented by this work, as compared to general employment, is more than adequate to warrant this distinction.

The Legislature described the purpose of Chapter 41.26 as follows:

The purpose of this chapter is to provide for an actuarial reserve system for the payment of death, disability, and retirement benefits to law enforcement officers and fire fighters, and to beneficiaries of such employees, thereby enabling such employees to provide for themselves and their dependents in case of disability or death...

RCW 41.26.020.

A similar expression of legislative purpose applies to Chapter 41.37, which provides a special retirement system for certain public safety employees:

It is the intent of the Legislature to establish a separate public safety employees' retirement system for certain public employees whose jobs contain a high degree of physical risk to their own personal safety and who provide public protection of lives and property...

RCW 41.37.005. The central issue in this case is whether legislative purposes like these can form a rational basis for laws treating public safety workers differently from others.

The City argues that the risks of public safety jobs cannot form a rational basis for RCW 41.26.281, because other workers in especially hazardous jobs are equally exposed to the risk of under-compensation by the normal rules of workers' compensation. Brief of Appellant at 20. But be that as it may, the proper level of scrutiny is rational basis review. The classification need not be narrowly tailored or substantially related to its purposes. Rational basis review permits the Legislature to address its goals by methods that are over- or under- inclusive. See, e.g., *Railway Express Agency, Inc., v. New York*, 336 U.S. 106 (1949) (under-inclusive regulation upheld); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (over-inclusive regulation upheld).

Another legitimate state purpose promoted by RCW 41.26.281 is the inducement of qualified individuals to seek employment in these fields. On a regular basis, news articles describe a crisis in law enforcement recruiting, with law enforcement jobs going unfilled across the nation. *E.g.*, <http://www.rand.org/commentary/052306WP.html>. The Legislature has the full authority to recognize that deterrents to public safety careers should be eliminated wherever possible in order to ensure the best qualified candidates consider public safety careers. The Legislature also has the power to offer enhancements to public safety officers, enhancements that can include the right to sue contained in RCW

41.26.281. The Council believes that the impact of RCW 41.26.281 is significant in the employment context. However, even if the impact is very small, it still constitutes a rational relationship between the statute and the legitimate state purpose of promoting employment in these fields.

Many more legitimate purposes for RCW 41.26.281 can be identified. For instance, the statute deters employer negligence. It is no answer to point out that the statute does nothing to deter equally harmful employer negligence in non-covered workplaces. The Legislature is entitled to address problems piecemeal, at its discretion. Moreover, the Legislature is entitled to recognize the sacrifices of the men and women who serve the public in public safety jobs.

On numerous occasions, this Court has observed the presence of this classification, and commented upon its rational basis. On none of these occasions has the Court taken the opportunity to criticize the classification. For instance, in *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002), the Court noted that this classification was justified “because of the vital and dangerous nature” of this work. *Id.* at 660. Similarly, the Court noted the distinction without any hint of criticism when it observed that the statute was enacted “to provide greater benefits to injured police officers and firefighters than they would receive under

the workers' compensation system." *Fray v. Spokane County*, 134 Wn.2d 637, 643, 952 P.2d 601 (1998).

For the foregoing reasons, RCW 41.26.281 survives review under article I, section 12, whether under a traditional equal protection analysis, or an independent state analysis.

**D. If RCW 41.26.281 is constitutionally infirm, so are many other similar provisions.**

**1. On the City's theory, other law applicable to public safety employees would be suspect.**

The City's argument proves too much. It attacks the distinction between the work performed by law enforcement officers and firefighters, and that of other workers. The City argues that treating police officers and fire fighters differently from other workers is unconstitutional because there is no rational basis for doing so, since some other employees work under similarly hazardous conditions. But if that is the case, the many other ways in which government treats these employees differently must also be unconstitutional.

The state has provided special retirement plans, civil service systems, and collective bargaining systems for public safety employees and other public employees working in high-risk positions. See, e.g. RCW Chapters 41.26; 41.37; and 41.56.430-950. Each of these special systems includes special administrative or judicial process that is unavailable to

other workers, just like RCW 41.26.281. *See, e.g.,* RCW 41.37.130; RCW 41.56.450. Moreover, the Legislature has provided very different wage and hour rules for these employees, and corresponding special rights of action and special immunities. *See, e.g.* RCW 49.46.130 (5). The Court should also note the special civil service requirements for law enforcement officers, codified under chapters 41.12 and 41.14. And there are also strict educational requirements imposed upon law enforcement officers in Chapter 43.101 and the rules promulgated under its authority. *See, e.g.* WAC 139-05-200.

Washington law provides numerous other examples of special treatment for public safety employees. These include the Firemen's Relief and Pensions Acts of 1947 and 1955 (RCW Chapters 41.16 and 41.18); RCW Chapter 41.20, entitled Police Relief and Pensions in First Class Cities; and Chapter 41.72, establishing the Law Enforcement Medal of Honor. Even Congress has enacted special benefits for public safety officers, through the Public Safety Officers' Benefits Act (PSOBA), 42 U.S.C. §§ 3796-3796c. These statutory distinctions are all based on the special risks and importance associated with public safety work. If the special nature of this work does not form a rational relationship between these other legal distinctions and legitimate state purposes, then these

distinctions must also be unconstitutional denials of equal protection. That result is highly implausible.

The purpose of each of these provisions is to address the special risk of injury and death associated with this work. If that purpose is not legitimate, or if it is not sufficiently related to the methods employed, then each of these special provisions is unconstitutional along with RCW 41.26.281 itself. The City is of course correct that other kinds of work involve similar or greater risk of injury and death. That cannot possibly bar the Legislature from enacting provisions addressing the risk faced by these workers, without also enacting identical provisions for the benefit of all other workers in hazardous jobs.

**2. On the City's theory, FELA and the Jones Act would be suspect.**

The City's argument would undermine the constitutional footing of all the myriad special obligations and privileges provided for public safety employees by law. It would also undermine other notable exceptions to workers' compensation immunity. For instance, the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, "makes railroads liable to their employees for injuries resulting in whole or in part from the negligence of the railroad." *Norfolk Southern Ry. Co. v. Sorrell*, 127 S.Ct. 799, 802 (2007). But under the City's argument, burdening railroads in this way

without similarly burdening any other employer would be an unconstitutional denial of equal protection. FELA is constitutional for precisely the same reason as RCW 41.26.281: just like public safety workers, the heightened risk of railroad work forms a perfectly rational basis for treating railroad workers differently from other employees.

Similarly, Congress enacted the Jones Act, 46 U.S.C. § 688, in 1920 to remove a pre-existing common law bar to suit for negligence under maritime law. The U.S. Supreme Court had ruled in *The Osceola*, 189 U.S. 158 (1903), that seamen were “not allowed to recover an indemnity for the negligence of the master, or any member of the crew.” *Id.* at 175. The Jones Act eliminates that bar, providing seamen with heightened legal protections “because of their exposure to the perils of the sea.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995).

The same considerations underlying RCW 41.26.281 form the rational basis of many other legal provisions establishing special rights and benefits for public safety employees and employees in other hazardous fields. Each of these would be undermined by the City’s theory.

## CONCLUSION

RCW 41.26.281 does not violate article I, section 12 of the Washington Constitution. Because of the unique importance and heightened risk of public safety work, the Legislature’s decision to

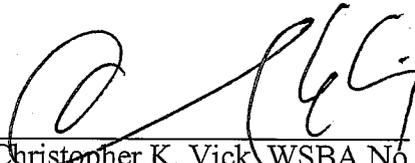
provide this right of action is entirely reasonable. The statute promotes full compensation of injured workers, promotes employment in these important fields, deters employer negligence, and recognizes the special sacrifices of the men and women who risk injury and death in public safety employment. For all these reasons, the Court should hold that RCW 41.26.281 is constitutional.

Dated this 17 day of May, 2007.

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