

No. 79222-4
(Formerly Court of Appeals No. 55256-I)

No. 79381-6
(Formerly Court of Appeals No. 57725-I)

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

KEVIN J. LOCKE and TORI LOCKE, husband and wife,

CLERK
BY RONALD R. CARPENTER

FILED
SUPREME COURT
STATE OF WASHINGTON
2001 JUN -1 P 11:00

Respondents,

vs.

THE CITY OF SEATTLE, a municipal corporation, et al.

Petitioner

MARGARET A. LINDELL, Personal Representative for the
Estate of GARY R. LINDELL, deceased,

Respondent,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Petitioner

**BRIEF OF AMICUS CURIAE
WASHINGTON CITIES INSURANCE AUTHORITY**

Don G. Daniel, WSBA # 12508
Elizabeth A. McIntyre, WSBA # 25671
LAW, LYMAN, DANIEL, KAMERRER
& BOGDANOVICH, P.S.
P.O. Box 11880
Olympia, WA 98508-1880

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2001 MAY 23 P 3:03
BY RONALD R. CARPENTER
CLERK

TABLE OF CONTENTS

I. IDENTITY OF AMICUS CURIAE 1

II. STATEMENT OF THE CASE AND ISSUES 1

III. ARGUMENT 1

**A. RCW 41.26.281 is Unconstitutional Insofar as it Allows
LEOFF Members to Sue Their Municipal Employers For
Negligence 2**

**1. Application of the *State v. Gunwall* Factors Supports an
Analysis of Washington’s Privileges and Immunities
Clause that is Independent and Separate From the
Equal Protection Clause of the 14th Amendment 4**

**a. RCW 41.26.281 Impermissibly Confers a
Privilege On LEOFF Members in Violation of
Article I, Section 12 9**

**b. The Classification of LEOFF Members As
Distinct From Other Comparable Occupations
is Arbitrary and Irrational 11**

**2. Even Under a “Minimal Scrutiny” Analysis, the
LEOFF Statute is Unconstitutional 17**

**B. Oregon’s Privileges and Immunities Clause Differs from
Washington’s 18**

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

<i>Ag West Supply v. Hall</i> , 126 Or. App. 475, 869 P.2d 383 (1994)	20
<i>Altschul v. State</i> , 72 Or. 591, 596, 144 P. 124 (1914)	20
<i>Andersen v. King County</i> , 158 Wn.2d 1,138 P.3d 963 (2006)	5, 9, 10, 11, 19
<i>Birklid v. Boeing</i> , 127 Wn.2d 853, 904 P.2d 278 (1995)	3
<i>Campos v. Dep't of Labor & Indus.</i> , 75 Wn.App. 379, 880 P.2d 543 (1994)	11
<i>Cotton v. Wilson</i> , 27 Wn.2d 314, 320, 178 P.2d 287 (1947)	13, 14
<i>City of Spokane v. Macho</i> , 51 Wash. 322, 98 P. 755 (1909)	13
<i>Corfield v. Coryell</i> , 6 F.Cas. 546, 551-52 (C.C.E.D. Pa. 1823)	10, 11
<i>Ex Parte Camp</i> , 38 Wash. 393, 80 P. 547 (1905)	13
<i>Grant County Fire Protection Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004)	5, 6, 7, 8, 9
<i>Hauber v. Yakima County</i> , 147 Wash.2d 655, 660, 56 P.3d 559 (2002)	15
<i>Kaufman v. West</i> , 133 Wash. 192, 193, 233 P. 321 (1925)	13
<i>Locke v. Seattle</i> , 133 Wn.App. 696, 137 P.3d 52 (2006) 1, 2, 9, 10, 11, 15, 17, 20, 21	

<i>McDaniels v. J. J. Connelly Shoe Co.</i> , 30 Wash. 549, 71 P. 37 (1902)	12, 13
<i>Mountain Timber Co. v. Washington</i> , 243 U.S. 219, 37 S.Ct. 260 (1917)	3
<i>Paulson v. Pierce County</i> , 99 Wash.2d 645, 664 P.2d 1202 (1983)	11
<i>Sherman Clay & Co. v. Brown</i> , 131 Wash. 679, 231 P. 166 (1924)	16
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989)	4
<i>State ex rel. Bacich v. Huse</i> , 187 Wash. 75, 80, 59 P.2d 1101 (1936)	14
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	4, 5, 6, 7, 8
<i>State ex rel. v. Ramsey</i> , 48 Minn. 236, 51 N.W. 112 (Minn. 1892)	13
<i>State v. Smith, supra</i> , 117 Wn.2d 263, 814 P.2d 652 (1991)	6, 10
<i>State ex rel. Wagener</i> , 69 Minn. 206, 72 N.W. 67 (Minn. 1897)	13
<i>State v. W. W. Robinson Co.</i> , 84 Wash. 246, 146 P. 628 (1915)	13
<i>Stertz v. Industrial Ins. Comm'n</i> , 91 Wash. 588, 158 P. 256 (1916)	3
<i>Wormer v. City of Salem</i> , 309 Or. 404, 788 P.2d 443 (1990)	20
<i>Yakima County Deputy Sheriff's Ass'n v. Bd. of Comm'rs</i> , 92 Wash.2d 831, 601 P.2d 936 (1979)	11

Statutes and Regulations

Laws of 1911, c. 74, Workmen’s Compensation Act of 1911 3

Chapter 48.62 RCW 1

RCW 41.26.270 3, 4, 15

RCW 41.26.281 2, 4, 5, 6, 9, 11, 15, 17, 19, 20

RCW 51.16.035 18

WAC 296-305 18

Washington Industrial Safety and Health Act 18

Constitutional Provisions

Fourteenth Amendment to the
United States Constitution 2, 4, 5, 6, 9, 10, 14

Washington Constitution, Article I, Section 12 *passim*

Oregon Constitution, Article I, Section 20 18, 19

I. INTRODUCTION AND IDENTITY OF AMICUS CURIAE

The Washington Cities Insurance Authority (WCIA) is a self-insured property and liability risk pool organized pursuant to ch. 48.62 RCW. It has over 100 member cities ranging in populations from under 1,000 (City of George, 528) to over 80,000 (City of Kent, 81,800). Collectively, the members of the WCIA employ thousands of firefighters and law enforcement officers who belong to the Law Enforcement Officers and Fire Fighters Retirement System (LEOFF).

II. STATEMENT OF THE CASE

Amicus accepts the Statement of the Case and the Issues Presented submitted by petitioner City of Seattle in its briefs filed in connection with the consolidated matters of *Kevin Locke, et ux v. The City of Seattle, et al.* (Supreme Court No. 79222-4) and *Margaret A. Lindell v. City of Seattle*, (Supreme Court No. 79381-6). Amicus will address only the constitutional issues arising under article I, section 12 of the Washington State Constitution.¹

III. ARGUMENT

Firefighters and law enforcement officers who are members of the

¹Amicus agrees with the City of Seattle's briefing and argument regarding the sovereign immunity issue, but will not brief this issue separately.

LEOFF system receive no-fault workers' compensation benefits for job-related injuries and disease. In addition to this no-fault system of compensation, which is available to virtually all employees in the state, RCW 41.26.281 gives LEOFF members the additional right to sue their municipal employers for negligence to recover damages in excess of the amount received or receivable under the workers' compensation system.

The court of appeals in its decision in *Locke v. Seattle* erred in analyzing RCW 41.26.281 under the equal protection clause of the 14th amendment to the United States Constitution without consideration of the separate analysis required under article I, section 12 of the state constitution in situations in which a statute grants "positive favoritism" to a select group.

A. RCW 41.26.281 is Unconstitutional Insofar as it Allows LEOFF Members to Sue Their Municipal Employers For Negligence.

The workers' compensation system was one of the triumphs of the industrial age. The system arose from the years of disagreement and compromise between employers and employees. This struggle began in the 1870s with the organized labor movement and came to fruition in 1911 with the passage of the first state workers' compensation law in Wisconsin.

Washington quickly followed suit with the enactment of the Workmen's Compensation Act of 1911 (Laws of 1911, c. 74) which was the

product of a "great compromise" whereby injured workers in certain hazardous jobs were given a swift, no-fault compensation system for injuries on the job; and employers were given immunity from civil suits by workers. *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-591, 158 P. 256 (1916); *Birklid v. Boeing*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995).

An employer's immunity from suit has long been considered a fundamental tenet of the workers' compensation system. See, e.g., *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234, 37 S.Ct. 260 (1917):

" . . . yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers.

At first blush, RCW 41.26.270 appears consistent with the provisions in the Industrial Insurance Act in that it allows for "sure and certain" relief for workers injured or killed on the job and purportedly abolishes "civil actions and civil causes of action by such law enforcement officer and fire fighters against their governmental employers . . ." However, the inclusion of the phrase "except as otherwise provided in this chapter" in RCW 41.26.270 essentially renders this provision meaningless because RCW 41.26.281 allows LEOFF members to sue their governmental employers for negligence for amounts in excess of the benefits received or receivable under the no-fault

compensation system in LEOFF. This allowance for LEOFF members constitutes a grant of a privilege to a select class in violation of the privileges and immunities clause of the Washington State Constitution.

1. Application of the *State v. Gunwall* Factors Supports an Analysis of Washington’s Privileges and Immunities Clause that is Independent and Separate From the Equal Protection Clause of the 14th Amendment.

Article I, section 12 of our state constitution 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.”

Though there are significant textual differences between the “privileges and immunities” clause in state constitutions and the “equal protection” guarantee of the 14th Amendment to the United States Constitution; most states, including Washington, have followed the federal tiered-scrutiny model of equal protection analysis when analyzing the state privileges and immunities clause. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 640, 771 P.2d 711 (1989).

In recent years, however, this court has held that the state constitution’s privileges and immunity clause requires an independent constitutional analysis in those situations in which a challenged law grants a

privilege or immunity to a minority class; i.e., in the event of “positive favoritism.” *Andersen v. King County*, 158 Wn.2d 1, 18, 138 P.3d 963 (2006); *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (*Grant Cty. II*).

The court in *Grant Cty. II* considered the six non-exclusive neutral criteria set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986) to conclude that challenges to the petition method for property annexation required a constitutional analysis of article I, section 12 that was separate and independent from the United States Constitution. *Id.*, 150 Wn.2d at 806. Applying these factors to the challenged LEOFF statute, RCW 41.26.281, it is clear that an independent state constitutional analysis is required.

The first two *Gunwall* factors focus on the textual differences between the state and federal constitutional provisions. *Gunwall*, 106 Wn.2d at 61. The text of Washington’s privileges and immunities clause varies significantly from the “equal protection” language in the 14th Amendment. *Grant County II, supra*, 150 Wn.2d at 806-807:

Analyzing the texts of the federal and state constitutions, it becomes apparent that the federal constitution is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens. . . Thus, *one might expect that the state provision would*

have a harder “bite” where a small class is given a special benefit, with the burden spread among the majority. On the other hand, the Equal Protection Clause would bite harder where majority interests are advanced at the expense of minority interests.

Id. (emphasis added.)

RCW 41.26.281, gives a special benefit to a small class of citizens, with the burden spread among the majority (that is, the taxpayers who are required to fund not only the no-fault workers’ compensation system but also the additional compensation for LEOFF members).

Factor three of the *Gunwall* analysis requires consideration of the constitutional history of the provision to determine whether the framers of the Washington constitution intended to confer different protection than is offered by the federal constitution. *Gunwall*, 106 Wn.2d at 61. This court analyzed the history surrounding the development of Washington’s privileges and immunities clause with the federal equal protection guarantee of the 14th amendment in *Grant Cty. II*, quoting from Justice Utter’s concurring opinion in *State v. Smith, supra*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991):

The Fourteenth Amendment was enacted after the Civil War and its purpose was to eliminate the effects of slavery. It was intended to guarantee that certain classes of people (blacks) were not denied the benefits bestowed on other classes (whites), thereby granting equal treatment to all persons. Enacted after the Fourteenth Amendment, state privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage

of others. *The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups.*

Id. (emphasis added). This court in *Grant Cty. II* thus concluded that the Washington State provision requires independent analysis from the federal provision when the issue concerns favoritism. *Id.*, 150 Wn.2d at 809. Again, this case presents such an issue of positive favoritism in that a select minority group is given a benefit that is denied to others who are similarly situated.

Factor four of the *Gunwall* analysis directs examination of preexisting state law, which “may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.” *Gunwall*, 106 Wn.2d at 62. This factor requires the court to consider the degree of protection that Washington State has historically given in similar situations. With respect to this factor, the *Grant Cty. II* court concluded that pre-existing Washington law, which enforced a limitation on government to grant special privileges to certain individuals or groups, favored a separate and independent analysis of Washington’s privileges and immunities clause. *Id.*

Factor five of the *Gunwall* analysis calls for an examination of the structural difference between the federal and state constitutions. *Gunwall*, 106 Wn.2d at 62. The structural difference between the federal and state

constitutions is apparent. *Grant Cty. II*, 150 Wn.2d at 811. Where the federal constitution is a grant of enumerated powers, the state constitution serves to limit the sovereign power, which directly lies with the residents and indirectly lies with the elected representatives. Therefore, structural differences support an independent analysis. *Id.*

Finally, factor six of the *Gunwall* analysis favors independent analysis if the matters at issue are of particular state interest or local concern. *Gunwall*, 106 Wash.2d at 62. Amicus submits that matters concerning the implementation and enforcement of the state's no-fault workers' compensation system are of particular state and local interest. As the legislature declared in enacting the workers' compensation act: ". . . The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. . ." To further the goal of protecting the welfare of employees and state industries, the legislature adopted a no-fault system of compensation for injured workers that was funded by employers who in turn were immunized from common law negligence claims by workers injured on the job. A law such as RCW 41.26.281 which contravenes this required quid pro quo by giving a class of individuals the right to both collect under the no-fault compensation system and to bring a civil lawsuit against

their employer triggers significant state and local concerns and warrants an independent constitutional analysis.

The Court of Appeals in *Locke v. Seattle* failed to properly analyze the privileges and immunities clause in that it did not engage in an independent analysis of the provisions and requirements of article I, section 12 and instead interpreted the constitutional issue solely under the federal equal protection clause of the 14th amendment. When applying a separate and independent analysis of Washington's privileges and immunities clause, it is clear that the legislature's grant of positive favoritism to LEOFF members violates this constitutional prohibition.

a. RCW 41.26.281 Impermissibly Confers a Privilege On LEOFF Members in Violation of Article I, Section 12.

“For a violation of article I, section 12 to occur, the law, or its application must confer a privilege to a class of citizens.” *Grant Cty. II, supra*, 150 Wn.2d at 812. Not every statute authorizing a particular class to do or obtain something involves a “privilege” subject to article I, section 12. Instead, “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.* (citation omitted). In his concurring opinion in *Andersen v. King County, supra*, 158 Wn.2d at 60, Justice Alexander quoted from the

“classic statement of the law on privileges and immunities” set forth in *Corfield v. Coryell*, 6 F.Cas. 546, 551-52 (C.C.E.D. Pa. 1823):

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental: which belong, of right, to the citizens of all free governments; . . .

There is an important distinction between those rights deemed to be a “privilege” or “immunity” for purposes of a constitutional privileges and immunities analysis and those rights deemed to be “fundamental” for purposes of an equal protection analysis. As Justice Alexander noted in his concurring opinion in *Andersen v. King County*, 158 Wn.2d at 62, “[a]pplying the ‘equal protection’ analysis to a privileges and immunities claim, as reflected in some other opinions, amounts to rewriting constitutional text.” (citing Justice Utter’s concurring opinion in *State v. Smith*, 117 Wn.2d at 282.)

The following passage from the court of appeals decision in *Locke v. Seattle* reflects that court’s failure to recognize the distinction between “fundamental rights” under the 14th amendment equal protection clause and “privileges and immunities” under article I, section 12:

In an equal protection analysis, where a challenge to a provision does not implicate a fundamental right or suspect class, as those terms are

defined in established case law, a court shall apply ‘minimal scrutiny.’ *Yakima County Deputy Sheriff’s Ass’n v. Bd. of Comm’rs*, 92 Wash.2d 831, 835-36, 601 P.2d 936 (1979) . . . Minimal scrutiny is called for in this case because ‘no privileges or immunities,’ as that term is used in article I, section 12 are implicated. The power to bring suit for negligence against an employer – or, conversely, the right to avoid such a suit – is not a privilege or immunity under article I, section 12.

Locke v. Seattle, 133 Wn.App. at 707.²

The right conferred on the select class of LEOFF members by RCW 41.26.281 to institute and maintain actions against their governmental employers for negligence indeed implicates a fundamental right of citizenship and as such is a “privilege” for purposes of article I, section 12. See, *Corfield v. Coryell*, *supra*, as quoted by Justice Alexander in *Andersen v. King County*, (“privileges and immunities” include the right “to institute and maintain actions of any kind in the courts of the state . . .”)

b. The Classification of LEOFF Members As Distinct From Other Comparable Occupations is Arbitrary and Irrational.

Respondents contend that the LEOFF statute does not violate article I, section 12 because the “privilege” extended to LEOFF members to sue

²The *Locke* court cited *Paulson v. Pierce County*, 99 Wn.2d 645, 664 P.2d 1202 (1983) and *Campos v. Dep’t of Labor & Indus.*, 75 Wn.App. 379, 880 P.2d 543 (1994). The courts in both *Paulson*, 99 Wn.2d at 652, and *Campos*, 75 Wn.App. at 385 applied a federal equal protection analysis to the challenged legislation and did not address the separate privileges and immunities clause in article I, section 12.

their governmental employers for negligence while also collecting employer-funded workers' compensation benefits applies "upon the same terms" to all LEOFF members. In other words, as respondents propose in their Supplemental Brief at p. 4-5, a statute may confer privileges and immunities upon a subset of citizens who meet certain qualifications so long as all meeting those qualifications are eligible.

Respondents' argument in this regard rests on the premise the LEOFF members constitute a class unto themselves; and because all LEOFF members are equally entitled to sue their employers for negligence, the law does not violate Washington's privileges and immunities clause. This argument is legally flawed and fundamentally unsound because there is no principled rationale for distinguishing between LEOFF members and others who are similarly situated – that is, other employees who also receive no-fault benefits under the workers' compensation system.

The Washington Supreme Court has long recognized that while legislation may properly bestow privileges and immunities upon a particular classification of citizens; "it must appear that the classification is made upon some reasonable and just difference between the persons affected and others, . . ." *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 555, 71 P. 37

(1902).³

In *City of Spokane v. Macho*, 51 Wash. 322, 98 P. 755 (1909), the court struck down as an unconstitutional violation of the privileges and immunities clause a law that imposed a criminal penalty upon employment agents who willfully deceived a client. As the court explained:

When exercising its power to regulate a business, the municipality may classify subjects of legislation, but the law must treat alike all of a class to which it applies, ***and must bring within its classification all who are similarly situated or under the same condition . . .*** ‘The classification must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar.’”

Id., 51 Wash. 324-325 (emphasis added.), citing *State ex rel. v. Ramsey*, 48 Minn. 236, 51 N.W. 112 (Minn. 1892) (“Such law must embrace all and exclude none whose condition and wants render such legislation necessary or appropriate to them as a class.” (citation omitted).) See also, *Cotton v.*

³For example, the court in *Ex Parte Camp*, 38 Wash. 393, 80 P. 547 (1905) held that a law prohibiting the peddling of fruits and vegetables unless the goods were grown by the peddler violated article I, section 12 because the distinction between those who grow their own produce and those who are selling produce grown by others is “arbitrary and no proper basis for classification.” *Id.*, quoting *State ex rel. Wagener*, 69 Minn. 206, 72 N.W. 67 (Minn. 1897). See also, *State v. W. W. Robinson Co.*, 84 Wash. 246, 146 P. 628 (1915) (declaring unconstitutional an act that authorizes cereal and flour mills to sell mixed and unmixed feeding stuffs, while requiring other persons selling the same feeding stuffs to comply with the provisions of the act); *Kaufman v. West*, 133 Wash. 192, 193, 233 P. 321 (1925) (a law restricting where owners, occupants, visitors, and employees of an apartment house may park violates article I, section 12 in that the law is “unjust, unreasonable, and discriminatory, in that it does not operate alike on all persons and property under the same circumstances and conditions.”)

Wilson, 27 Wn.2d 314, 320, 178 P.2d 287 (1947) (a law requiring defense workers injured while riding as a passenger in a “victory motor vehicle” to prove gross negligence rather than simple negligence “is arbitrary and a grant of privilege and immunity to all other defense workers riding as paid passengers in all other types or classes of motor passenger carriers for hire.”)

As the court explained in *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936):

To comply with [article I, section 12 of the State Constitution and the Equal Protection clause of the 14th amendment], 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.

At issue in *Bacich* was a law that limited the issuance of licenses to operate gill nets for catching salmon to those who held such a license in either 1932 or 1933. In striking down this law as unconstitutional, the court held:

A classification, to be legal and valid, must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act in respect to which the classification is made. The distinctions giving rise to the classification must be germane to the purposes contemplated by the particular law and may not rest upon a mere fortuitous characteristic or quality of persons, or upon personal designation. In short, the classification cannot be an arbitrary selection.

Id. 187 Wash. at 83-84.

RCW 41.26.281 violates article I, section 12 because it singles out LEOFF members from the larger classification of employees covered under the IIA and bestows a privilege upon that select subclassification. There is no principled reason to distinguish between LEOFF members and other workers who receive workers' compensation benefits, and in fact the legislature has expressly declared that LEOFF members are like other workers in the state with respect to their receipt of workers' compensation benefits (and the employers' corresponding immunity from suit):

The legislature of the state of Washington hereby declares that *the relationship between members of the law enforcement officers' and firefighters' retirement system and their governmental employers is similar to that of workers to their employers* and that the sure and certain relief granted by this chapter is desirable, and as beneficial to such law enforcement officers and firefighters as workers' compensation coverage is to persons covered by Title 51 RCW

RCW 41.26.270 (emphasis added.)

The court of appeals in *Locke v. Seattle*, applying an equal protection "minimal scrutiny" analysis to the challenged legislation, held that there was a rational basis to provide LEOFF members the "extra protection" of being allowed to sue their employers for negligence because of the "vital and dangerous nature of their work." *Id.*, 133 Wn.App. at 707, citing *Hauber v. Yakima County*, 147 Wash.2d 655, 660, 56 P.3d 559 (2002). However, there

is no reasonable ground for distinguishing between LEOFF members and the countless other employees in the state who also perform “vital and dangerous” work and yet are denied a right of recovery beyond that afforded through the IIA.

Loggers, miners, truckers, and utility line workers all perform work that is both vital and dangerous, and yet they are limited to the recoveries available to them under the workers’ compensation system if they are injured or killed in the line of duty. Moreover, it is important to recognize that the workers’ compensation act originally applied *only* to “extrahazardous” occupations. Thus it is inconsistent with the historical underpinnings of the IIA to carve out an exemption from the exclusive remedy provision for one group of employees based on the supposed danger inherent in the job.

As this court noted in *Sherman Clay & Co. v. Brown*, 131 Wash. 679, 684, 231 P. 166 (1924), when a law makes a general classification which covers all persons within the class, “it cannot thereafter, without being guilty of discrimination, exempt a part of those of the general class covered by the ordinance from the operation of such ordinance.” Washington’s workers’ compensation laws apply to all employees in the state (with limited exceptions not applicable here), including LEOFF members. All employees

in the state falling within the parameters of the workers' compensation law are precluded from suing their employers in negligence. Amicus submits that RCW 41.26.281 violates article I, section 12 by creating a special privilege for one select group of employees.

2. Even Under a “Minimal Scrutiny” Analysis, the LEOFF Statute is Unconstitutional.

Even if the proper level of scrutiny to be applied to RCW 41.26.281 is the deferential “minimal scrutiny” used to analyze equal protection claims when no suspect class or fundamental right is implicated, the statute is still unconstitutional. For class-based legislation to pass a minimal scrutiny analysis, it must bear a rational relationship to the purposes of the statute. The court of appeal in *Locke v. Seattle, supra*, surmised that RCW 41.26.281 served a twofold purpose: 1) to provide “extra protection” for LEOFF members because of the “vital and dangerous nature of their work”; and 2) to create a “strong incentive for improved safety.” *Id.* 133 Wn.App. at 708 (citations omitted).

Even if there was legislative support for this conclusion, there is no rational relationship between the statute and these stated purposes. As addressed above, it is irrational to create privileges for LEOFF members based on the “vital and dangerous” aspects of their jobs when others perform

jobs that are every bit as vital and dangerous and yet are not given this “extra protection.” Moreover, to the extent that this legislation is designed to encourage “improved safety” among LEOFF employers, this argument must fail. The incentive for workplace safety is already incorporated into the IIA in that premiums are collected from employers based in part on their loss history. All employers falling within the IIA have an incentive to reduce the number of industrial injuries in order to lower their costs. See, RCW 51.16.035 (affirming that a recognized principle of the workers compensation system is to “stimulate and encourage accident prevention.”)⁴

2. Oregon’s Privileges and Immunities Clause Differs from Washington’s.

Respondents rely on several cases interpreting the privileges and immunities clause found in article I, section 20 of the Oregon state constitution in support of their argument that RCW 41.26.281 does not violate Washington’s privileges and immunities clause. (Respondents’ Supplemental Brief at pp. 12-14.)

Though Washington’s privileges and immunities clause may have

⁴Safety as it relates to fire fighting is already addressed and heavily regulated. See, WAC 296-305 (Safety Standards for Firefighters). The LEOFF statutes do not provide any further incentive that is not addressed by the Washington Industrial Safety and Health Act (WISHA).

been patterned after article I, section 20 of the Oregon constitution, there are significant differences not only in the text of the clauses but in their historical roots. As explained in Justice Madsen's plurality opinion in *Andersen v. King County*:

While derived from Oregon's provision, however, Washington's privileges and immunities clause is not identical to Oregon's. Article I, section 12's reference to corporations is not found in the Oregon provision. This difference in language shows our state's framers' concern with "undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority." (citations omitted). . . . Accordingly, although plaintiffs urge that we apply an independent state analysis under article I, section 12 like Oregon's independent analysis in every context, we decline to do so because our state provision has different language and a different history.

Id. 158 Wn.2d at 15-16.⁵

The concept underlying Washington's privileges and immunities clause is undue favoritism which arises when a privilege or immunity is granted to a minority class ("a few"). *Andersen v. King County, supra*, 158 Wn.2d at 16. The focus in Oregon in analyzing class-based legislation is whether the class affected by the legislation is defined by antecedent personal or social characteristics that exist apart from the law itself; that is, a "true

⁵As further noted in *Andersen*, Washington's constitution was adopted over two decades after the Oregon State Constitution and in the interim the 14th Amendment was adopted, providing federal constitutional protection from discrimination under state laws.

class.” *Ag West Supply v. Hall*, 126 Or. App. 475, 480, 869 P.2d 383 (1994); *Wormer v. City of Salem*, 309 Or. 404, 788 P.2d 443 (1990) (rejecting any judicial role in reviewing the propriety or desirability of legislation that did not distinguish based on a “true class”.)

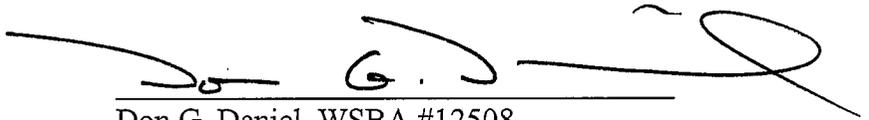
Washington courts do not limit constitutional review under article I, section 12 to those situations in which a “true class” is affected. Rather, Washington courts will conduct an independent constitutional analysis in those situations in which the law grants “positive favoritism” on a select few -- as the LEOFF statute at issue does here.

Moreover, even Oregon's early cases recognize that a law granting a particular individual a right to sue violates the privileges and immunities clause of the state constitution because such a law confers a privilege that is not extended to others. *Altschul v. State*, 72 Or. 591, 596, 144 P. 124 (1914).

IV. CONCLUSION

Amicus respectfully requests that this Court reverse the Court of Appeals decision in *Locke v. Seattle* and hold that RCW 41.26.281 is an unconstitutional violation of article I, section 12 of the Washington State Constitution.

Respectfully Submitted this 3rd Day of May, 2007.



Don G. Daniel, WSBA #12508
Law, Lyman, Daniel, Kamerrer & Bogdanovich
P.O. Box 11880
Olympia, WA 98508-1880
(360) 754-3480
Attorneys for Amicus Curiae
Washington Cities Insurance Authority



Elizabeth A. McIntyre, WSBA #25671
Law, Lyman, Daniel, Kamerrer & Bogdanovich
P.O. Box 11880
Olympia, WA 98508-1880
(360) 754-3480
Attorneys for Amicus Curiae
Washington Cities Insurance Authority