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SUPREME COURT, STATE OF COLORADO 2 East 14th Ave. Denver, Colorado 80203 Appeal from the Colorado Court of Appeals Case No. 04-CA-0457 Appeal from the Industrial Claim Appeals Office: Kathy E. Dean and Dona Halsey Workers' Compensation Claim No. 4-578-846 **Petitioners:** CITY OF FLORENCE, CIRSA, and INDUSTRIAL CLAIMS OFFICE **Respondent:** BOOTH PEPPER	▲ COURT USE ONLY ▲ Case No.: 05 SC 812
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BRIEF OF THE COLORADO MUNICIPAL LEAGUE, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

Amicus curiae, the Colorado Municipal League, pursuant to C.A.R. 29, respectfully submits this Brief in Support of Appellants City of Florence, CIRSA, and The Industrial Claims Appeals Office, hereinafter, collectively referred to as the "City," in seeking to reverse the Court of Appeals' decision which found that C.R.S. §8-40-202(1)(a)(I)(A) was unconstitutional. The Court of Appeals erred by considering Mr. Pepper's appeal in the absence of an evidentiary record addressing the constitutional issues; in failing to hold Mr. Pepper to his burden of proving the statute was unconstitutional; and by failing to apply the rational relationship test properly. In doing so, the Court of Appeals' decision inappropriately invalidated the General Assembly's determination that individual municipalities should have the right to determine, according to their own needs and abilities, whether to provide workers' compensation benefits to volunteer police officers. Unless this Court reverses the Court of Appeals' decision, Colorado municipalities will be adversely affected.

I. STATEMENT OF THE ISSUE

Whether § 8-40-202(1)(a)(I)(A), C.R.S. (2005), violates equal protection guarantees by granting counties and municipalities the option of providing workers' compensation insurance coverage to volunteer reserve police officers.

II. STATEMENT OF THE CASE

A. Nature of the Case

This case involves the constitutionality of provisions of C.R.S. §8-40-202(1)(a)(I)(A) of the Workers' Compensation Act Of Colorado, §8-40-101, *et seq*, hereinafter, the "Act." Section §8-40-202(1)(a)(I)(A) of the Act states as follows:

> (1) "Employee" means:
> (a)(I)(A) Every person in the service of the state, or of any county, city, town . . . or of any public institution or administrative board thereof under any appointment or contract of hire, express or implied. . . .Police officers and firefighters who are regularly employed shall be deemed employees within the meaning of this paragraph (a), as shall also sheriffs and deputy sheriffs, regularly employed, and all persons called to serve upon any posse. . . and all members of volunteer fire departments. . . volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams in any county, city, town, municipality . . . while said persons are actually performing duties as volunteer firefighters or as members of such volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, or volunteer search teams. . . and while engaged in organized drills, practice, or training necessary or proper for the performance of such duties. **Members of volunteer police departments, volunteer police reserves, and volunteer police teams or groups in any county, city, town, or municipality, while actually performing duties as volunteer police officers, may be deemed employees within the meaning of this**

paragraph (a) at the option of the governing body of such county or municipality.

(emphasis supplied).

B. Course Of Proceedings

Booth Pepper, an unpaid member of the volunteer police reserve for the City of Florence, submitted a claim for workers' compensation benefits in connection with his work for the City. [R. p. 26.] Respondent's claim was denied by the workers' compensation administrative law judge on the basis that the City had elected, pursuant to C.R.S. §8-40-202(1)(a)(I)(A), not to include members of the volunteer police reserves as employees under its workers' compensation coverage. [R. p. 27.] A *Corrected Specific Findings of Fact, Conclusions of Law and Order* reflecting this determination was issued on October 17, 2003. [R. pp. 31-33.]

Mr. Pepper appealed the denial to the Industrial Claim Appeals Office (*i.e.*, the "Panel"), arguing there, for the first time, that the statute upon which the administrative law judge's determination was based was unconstitutional because it denied him equal protection rights. [R. p. 45-51.] By Final Order dated February 24, 2004, the Panel affirmed the administrative law judge's decision, and the Panel ruled that it lacked jurisdiction to decide the constitutional issue. [R. pp. 59-61.]

Mr. Pepper appealed the Panel's decision by filing a notice of appeal with the Colorado Court of Appeals on March 8, 2004. [R. pp. 62-70.]

C. Disposition By The Court Of Appeals

In an opinion announced on September 22, 2005, the Court of Appeals set aside the Panel's decision, holding that the statute impermissibly denied Mr. Pepper's right to equal protection guaranteed by the United States and Colorado Constitutions. Despite the absence of an evidentiary record, the Court of Appeals found that volunteer police officers "are similarly situated to all the other types of volunteers included in the statute" because all volunteers under the statute "similarly serve a vital function and are subject to similar risks and perils." *Pepper v. Industrial Claims Appeals Office*, ___ P.3d ____, No. 04-CA-0457, 2005 WL 2298149 at * 3 (September 22, 2005). While the Court of Appeals identified two purposes, encouraging volunteerism and controlling costs, which could conceivably be advanced by the statute, the Court of Appeals held that the statute was not rationally related to a legitimate governmental interest. *Id.*, at * 4. Judge Carparelli dissented from the majority decision on the basis that Mr. Pepper had not met his burden of proving that the statute was unconstitutional.

D. Statement of Facts

Mr. Pepper's claim was submitted to the workers' compensation administrative law judge on the basis of stipulated facts. [R. pp. 8-9.] The parties stipulated to the following facts: (a) Mr. Pepper was an unpaid volunteer reserve

police officer; (b) he was submitting a claim for injury in the course of such work; (c) the City of Florence chose not to cover Mr. Pepper in its workers' compensation policy pursuant to C.R.S. §8-40-202(1)(a)(I)(A); and (d) Mr. Pepper was not an employee of the City of Florence at the time of the alleged injury-causing incident. [*Id.*]

The stipulated facts contained no discussion of facts pertinent to determining whether Mr. Pepper, as a volunteer police officer in Florence, Colorado, was similarly situated to any of the other classes of volunteers set forth in C.R.S. §8-40-202(1)(a)(I)(A), either in Florence, or in Colorado generally. [*See*, R. pp. 8-9.] Thus, the stipulated facts did not address how the functions of volunteer police officers compared with the functions of other volunteers in the statute (*i.e.*, firefighters, disaster teams, ambulance teams, and rescue teams). The stipulated facts did not address how the risks and perils faced by volunteer police officers compared with the risks and perils faced by those other volunteers.

Similarly, because Mr. Pepper raised the issue of constitutionality only upon appeal to the Panel, no factual record was developed concerning potential reasons the General Assembly may have chosen to provide municipalities with the option of covering, or not covering, volunteer police officers with workers' compensation insurance. For instance, the record contains no discussion about the working

conditions of the various classes of volunteers under the statute; the availability of workers' compensation insurance for each of the various classes of volunteers; the expense of workers' compensation insurance for each class of volunteer; the prevalence of, and need for, each type of volunteer in various communities throughout Colorado; how the need for each class of volunteer might vary between different municipalities; or how volunteers' situations might compare with the situations of regularly-employed persons in the same positions. [*See Id.*]

III. SUMMARY OF ARGUMENT

The Court of Appeals' decision should be reversed, and the determination of the administrative law judge reinstated, because the Court of Appeals: (1) Should not have considered Mr. Pepper's appeal in the absence of an evidentiary record addressing the constitutional issues; (2) Failed to require Mr. Pepper to prove that he, as a volunteer police officer, is similarly situated to other classes of other classifications of persons set forth in C.R.S §8-40-202(1)(a)(I)(A); and (3) Misapplied the rational relationship test in concluding that no rational basis exists, or conceivably exists, for the classifications made by the General Assembly in enacting C.R.S §8-40-202(1)(a)(I)(A). Unless it is overturned by this Court, the Court of Appeals decision will adversely affect municipalities across Colorado.

IV. ARGUMENT: THE COURT OF APPEALS' DECISION SHOULD BE REVERSED

A. Standard of Review

This Court presumes that a statute is constitutional until shown otherwise by the person challenging the statute. *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 506 (Colo. 1997) (finding that provision in workers' compensation statute offsetting from disability benefits amounts recovered through unemployment benefits did not violate equal protection guarantees). Because the receipt of workers' compensation benefits is not a fundamental right, allegations that a person has been denied equal protection with respect to the receipt of workers' compensation benefits is subject to review under the rational relationship test. *Industrial Claims Appeals Office v. Romero*, 912 P.2d 62, 66 (Colo. 1996). Under a rational basis review, the person challenging the statute's constitutionality must show that the classification lacks a legitimate governmental purpose and, without a rational basis, arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated. *Romero*, 912 P.2d at 66. The party asserting the unconstitutionality of the statute bears the burden of proving its invalidity beyond a reasonable doubt. *Culver v. Ace Electric*, 971 P.2d 641, 646 (Colo. 1999).

In the context of social and economic regulation, this Court's review is especially deferential to legislative choice: "So long as it is arguable that the other branch of government had a rational basis for creating the classification, a court should not invalidate the law." *Culver*, 971 P.2d at 646 (internal quotation omitted). Thus, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it ... *whether or not the basis has a foundation in the record.*" *Heller v. Doe,* 509 U.S. 312, 320-321 (1993) (internal quotation marks and citation omitted, emphasis supplied); *Christie v. Coors Transportation Co.*, 933 P.2d 1330, 1333 (Colo.1997) (stating: "If any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist"). In cases involving social and economic benefits, "the judiciary has consistently refused to invalidate on equal protection grounds, legislation which it simply deemed unwise or unartfully drawn." *Culver*, 971 P.2d at 646 (internal quotation and citation omitted).

B. Mr. Peppers' claim was not properly before the Court of Appeals

The Court of Appeals erred in permitting Mr. Pepper to argue that the statute was unconstitutional without first requiring him to develop a factual record to support such an assertion. Cases cited by the Court of Appeals in rejecting the

City's contention that Mr. Pepper's claim was not properly before the Court in the absence of such a record do not support the Court of Appeals' determination.

In a direct appeal from administrative action, court review of factual determinations made in the administrative proceeding is limited to analysis of the record before the administrative law judge. *See, e.g., City of Boulder v. Dinsmore,* 902 P.2d 925, 927 (Colo.App. 1995). Because administrative agencies do not have authority to determine the facial constitutionality of statues or ordinances, *Horrell v. Department of Administration*, 861 P.2d 1194, 1198 (Colo. 1993), where a party claims that a statute is facially unconstitutional, it is incumbent upon that party to file a declaratory judgment action in district court where a record can be made. As this Court stated in *Kinterknecht v. Industrial Commission*, 485 P.2d 721, 724 (Colo. 1971):

> [O]ne who attacks the constitutionality of a legislative enactment has the burden of showing beyond a reasonable doubt that the law is unconstitutional. Where the constitutionality of a statute, under which an administrative agency acts, is challenged, the administrative agency cannot pass upon its constitutionality. That function may be exercised only by the judicial branch of government. In our view, legal argument alone in this case will not suffice to prove that the classification here lacks validity and a reasonable basis. It was necessary for the claimant here to endeavor to demonstrate by evidence that the statute is unconstitutional. The proper forum for this is the district

> court, where a declaratory judgment action can be initiated by him.

With the notable exception of the Court of Appeals in this case, Colorado courts have consistently followed the *Kinterknecht* decision. *Arapahoe Roofing and Sheet Metal, Inc. v. City and County of Denver*, 831 P.2d 451, 454 (Colo. 1992) (citing cases).[1] Requiring the filing of a declaratory judgment action when a claim is made that a statute is facially unconstitutional ensures that the attorney general will be made a party to the action and will have the opportunity to address the facts pertinent to such a determination as is required by C.R.S. §13-51-115.

Likewise, where a party is making a claim that a statute is unconstitutional as applied, which is a determination that may be made by an administrative agency, *see, e.g., Horrell*, 861 P.2d at 1198, it is still incumbent upon that party to make a factual record to support his claim. *See, e.g., Dinsmore,* 902 P.2d at 927 (Court of Appeals refused to consider factual information presented for first time on appeal). Here, however, Mr. Pepper presented no evidence before the administrative law judge to support his assertion that the statute was

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[1] Indeed, on the day that Division I of the Court of Appeals rendered its decision in this case, Division III of the Court of Appeals announced its decision in the case of *Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1082 (Colo.App. 2005), confirming that, where an evidentiary record is required to determine the constitutionality of a statute under which an administrative agency acts, the "challenge must be brought in district court."

unconstitutional. [*See*, R. pp. 8-9.] In seeking an appeal of the administrative action in this case without developing a record to support his assertions, Mr. Pepper did so at his own peril. *Pepper*, 2005 WL 2298149, at * 10 (Carparelli, J., dissenting).

In these circumstances, the Court of Appeals erred in considering Mr. Pepper's claim in the absence of an evidentiary record to support it. *See Duran v. Industrial Claim Appeals Office*, 883 P.2d 477, 485 (Colo. 1994) (Court of Appeals declined to hear the employee's claim that a workers' compensation statute was unconstitutional where the employee failed to develop a factual record regarding the constitutional issue.) The Court of Appeals' decision should be reversed.

C. The Court of Appeals erred in failing to require Mr. Pepper to present any evidence to meet his burden of proving that he was similarly situated to others under the statute

The "threshold" burden which must be satisfied by a party asserting an equal protection challenge is that the "classes created by a statute are similarly situated but nonetheless are subjected to disparate treatment." *Harris v. The Ark*, 810 P.2d 226, 230. (Colo. 1991). Here, however, the majority of Court of Appeals failed to hold Mr. Pepper to his burden of proving that he was "similarly situated."

Despite the absence of an evidentiary record, the Court of Appeals concluded that volunteer police were similarly situated to all other types of volunteers under the statute, whatever their employment relationship and specific profession, because they all "similarly serve a vital function and are subject to similar risks and perils." *Pepper*, 2005 WL 2298149, at * 3. Given the presumption of constitutionality, the government is not required to demonstrate that different classifications are *not* similarly situated for a statute to be deemed constitutional. However, to simply accept, as the majority of the Court of Appeals did, that all volunteers under the statute (*i.e.*, firefighters, disaster teams, ambulance teams, and rescue teams) are "subject to similar risks and perils" defies common sense.

Unlike police officers, firefighters, disaster teams, and ambulance teams are not expected to patrol for crimes, enforce laws, investigate criminal activity, confront suspects, and arrest them. While the service of all types of volunteers under the statute may promote the public good, given the differences in the functions served by the different types of volunteers, it is not logical to conclude that all volunteers under the statute are subject to the similar risks and perils, particularly in the absence of any evidence to support such a conclusion.

Even in comparing volunteer police officers to regularly employed police officers, conceivable bases exist for rational distinction between the two. "Unlike the police volunteers, regularly employed police have an employment relationship with the governmental entity, and, thus, are paid and have a legal obligation to perform the full scope of police duties." *Pepper*, 2005 WL 2298149, at * 6 (Carparelli, J., dissenting).

Making only a superficial analysis, the majority of the lower court justified its conclusion by stating that "[conducting] too exacting a focus on classification of claimants overlooks the fact that the Act categorizes injured workers as a whole." *Pepper*, 2005 WL 2298149, at * 2, *quoting Duran v. Industrial Claim Appeals Office*, 883 P.2d 477, 482-483. (Colo. 1994). However, the determination that individuals are "similarly situated" is not a foregone conclusion. *See, e.g., Kroupa v. Industrial Claims Appeals Office*, 53 P.3d 1192, 1997 (Colo.App. 2002) (finding that claimant had not proven that she was similarly situated and suffered disparate treatment where "she offered no support for [that] assumption.") Instead, as Judge Carparelli noted in his dissent, the "claimant's burden of proving he is similarly situated is not perfunctory and cannot be achieved without record support and proceedings that enable thorough exploration of the facts." *Pepper*, 2005 WL 2298149, at * 6.

The *Duran* decision does not support the Court of Appeals' action. In *Duran*, the contested classification was between classes of injured workers with the only distinction between classes being the degree of injury to the workers (*i.e.*, partial loss of use of an extremity as compared to total loss of use). *Duran*, 883 P.2d at 479. It was in that narrow context that this Court stated that a determination that workers in both categories were not "similarly situated" "required too exacting a focus on the *injury* creating the classification." *Duran*, 883 P.2d 477 at 482 (emphasis added).

Here, the distinction in classifications is not based simply on the *degree* of impairment between two injured workers. Rather, the statute at issue creates classifications between different types of workers. Different types of workers, who perform different functions and have different employment statuses, are not similarly situated.

Where a statutory classification does not subject similarly situated persons to disparate treatment, no equal protection violation occurs. *See, e.g., People v. Young*, 859 P.2d 814, 817-818 (Colo. 1993); *Board of County Commissioners v. Flickinger*, 687 P.2d 975, 982 (Colo. 1984). Because the Court of Appeals did not require that Mr. Pepper produce evidence to meet his "threshold burden" of proving that he was similarly situated to all of the other classifications of persons

in the statute, both in Florence and throughout Colorado, the Court of Appeals' decision should be reversed.

D. The Court of Appeals erred in determining that the statutory classifications in C.R.S §8-40-202(1)(a)(I)(A) do not conceivably bear a rational relationship to a legitimate government purpose

The Court of Appeals' decision should also be reversed because the Court of Appeals misapplied the rational relationship test. While the Court of Appeals correctly identified two legitimate purposes, encouraging volunteerism and controlling costs, which could conceivably be advanced by the statute, the Court of Appeals did not properly assess whether the statute was rationally related to these legitimate interests. Under appropriate analysis, it is clear that the statute advances these legitimate governmental interests, and the Court of Appeals should not have found the statute unconstitutional.

1. **Encouraging Volunteer Police**

The Court of Appeals correctly acknowledged that "municipalities have a legitimate interest in encouraging individuals to volunteer for dangerous activities that benefit the community." *Pepper*, 2005 WL 2298149, at * 3, *citing Parker Fire Protection District v. Poage*, 843 P.2d 108 (Colo.App. 1992). However, the Court of Appeals failed to address whether this legitimate need of municipalities was rationally related to the classifications in the statute, focusing instead on the

question of whether cost control was advanced by the statute. *See Pepper*, 2005 WL 2298149, at ** 3-4. Indeed, while the statute promotes the legitimate governmental goal of encouraging volunteerism, the Court of Appeals' decision finding the statute unconstitutional stifles the goal.

Though the City of Florence chose not to provide workers' compensation coverage to its volunteer police, it is not a foregone conclusion that every other municipality in the state makes the same election.[2] Recognizing the need of municipalities to have flexibility in utilizing volunteer police officers and in providing benefits to them, the General Assembly empowered the individual municipalities to determine for themselves whether to provide workers' compensation benefits to their volunteer police based on each particular municipality's needs and abilities.

A number of conceivable reasons exist as to why one municipality may elect to provide workers' compensation benefits to volunteer police while another municipality may not. For instance, the number of volunteer police needed likely varies by municipality, as do the conditions of employment (*e.g.*, required training, required supervision, required number of hours needed for such work, *et cetera*).

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[2] In this respect, the Court of Appeal's determination that the statute is facially unconstitutional is clearly overbroad.

Moreover, as population changes and crime rates change, these needs are likely to vary even within a single community. In the face of such variables, the availability and the costs of obtaining such coverage may vary widely from municipality to municipality, and within a single municipality over time. Some communities, particularly smaller ones, may simply not have the funds to provide benefits to volunteer police. Presumably, it was consideration of factors such as these which informed the General Assembly's determination that municipalities needed the ability to decide whether to provide workers' compensation benefits to volunteer police. *See Culver*, 971 P.2d at 646 ("So long as it is arguable that the other branch of government had a rational basis for creating the classification, a court should not invalidate the law")(internal quotation omitted).

This analysis, which was not made by the Court of Appeals, demonstrates that the statute is rationally related to advancing the legitimate governmental interest of encouraging individuals to volunteer for police service. In failing to conduct this analysis, the Courts of Appeals erred, and its decision should be reversed. *See, Duran*, 833 P.2d at 483 (finding that injured worker failed to present "empirical evidence" to support his "repeated assertions" that no rational basis existed for governmental classification, but "common sense" supported the General Assembly's determination).

2. **Controlling Costs**

Despite acknowledging that municipalities have "a legitimate interest in controlling their costs" *Pepper*, 2005 WL 2298149, at * 3, the Court of Appeals wrongly concluded that the statute was not rationally related to advancing that interest. The Court of Appeals' decision likened the classifications made by the statute in question to the classifications made by the statute in *Romero*, stating: "Both statutes completely eliminate benefits for a particular group of injured workers while affording coverage to similarly situated workers." *Pepper*, 2005 WL 2298149, at * 4. However, the classification in *Romero* was based upon the age of the worker. Here, the classification is based upon the type of worker. In these circumstances, *Romero* is simply not on point.

The workers' compensation statute at issue in *Romero* provided for the termination of permanent total disability benefits when the claimant receiving such benefits reached aged 65. *Romero*, 912 P.2d at 66. Persons receiving other types of disability benefits, however, including permanent partial disability benefits, continued to receive those benefits after they reached aged 65. *Id.* Two reasons were proffered as bases for the statutory distinction. First, it was argued that the distinction was made to prevent the recovery of duplicate benefits, as persons reaching aged 65 receiving permanent total disability benefits would be eligible to

receive social security disability benefits. *Romero*, 912 P.2d at 67. Second, it was argued that ceasing permanent total disability benefits for workers over aged 65 would permit those recipients, and recipients of other benefits, to receive a cost of living increase. *Id.*

Addressing the first reason, this Court found that social security benefits did not serve the same purpose as workers' compensation benefits. *Romero*, 912 P.2d at 68. Thus, no duplicate recovery would be made if a person over aged 65 continued to receive permanent total disability benefits as well as the federal benefits. *Id.* Addressing the second reason, this Court found that age was an "arbitrary, unfair, and irrational," means of distinguishing between workers. *Romero*, 912 P.2d at 69.

The classification under the statute at issue is based upon differences in the types of workers and, therefore, is unlike the impermissible classification in *Romero*. The classification here is conceivably based on differences in functions of the positions; differences in the risks of the positions; differences in the nature and scope of the positions; and differences in the municipalities' needs to utilize persons in different positions. Such classifications are not fairly characterized as "arbitrary" as was the classification in *Romero*. Here, the General Assembly has not used "age" as an arbitrarily means of eliminating benefits for some workers so

that other benefits could be provided to similarly situated workers. The workers here are not similarly situated, and the classifications bear a rational relationship to legitimate governmental purposes.

In relying on *Romero* despite the significant factual differences between that case and the present one, the Court of Appeals erred. *See, e.g., Duran*, 883 P.2d at 485 (finding that legislature's distinction in the Workers' Compensation Act between workers with partial and total injuries was rationally related to "interests in efficiency and fairness."); *Pace*, 938 P.2d at 506 (holding that statutory classification was rationally related to legitimate governmental interest, despite "some inequities" created by the classification). In concluding that the classifications here were unconstitutional, the Court of Appeals misapplied the rational relationship test, and its decision should be reversed.

E. Unless it is reversed, the Court of Appeals' decision will detrimentally effect municipalities across Colorado

The statutory provision which the Court of Appeals found unconstitutional was enacted as an amendment to the Workers' Compensation Act in 1977. *Pepper*, 2005 WL 2298149, at * 9 (Carparelli, J., dissenting, discussing the legislative history of the provision). No decisions reported prior to the Court of Appeals' decision in this case have questioned the constitutionality of the amendment. Thus, in making budgetary, staffing and other planning decisions

relating to use of volunteer police, municipalities across Colorado have been relying on the presumptive constitutionality of the statute for more than a quarter of a century. The Court of Appeals' decision effectively "changes the rules" overnight. If the rules are to be changed, the proper entity to do so is the legislature.

The immediate impact of the Court of Appeals' decision on municipalities which have elected not to provide workers' compensation benefits to their volunteer police is substantial. Under the Court of Appeals' decision, such municipalities, regardless of their existing budget plans or funds, must now immediately obtain workers' compensation coverage for their volunteer police. However, given the state of the record, it is not clear whether such coverage is even offered by all insurers of municipalities, what such coverage costs, and whether insurers place conditions on municipalities seeking such coverage. *Pepper*, 2005 WL 2298149, at * 9 (Carparelli, J., dissenting).

As a practical consequence of the Court of Appeals' decision, some municipalities may simply have no other option but immediately to forego using volunteer police officers because they cannot afford coverage or cannot obtain coverage. Obviously, this is not a desirable result and works against the goal of encouraging persons to volunteer for police service, which even the Court of

Appeals acknowledged was of legitimate interest to the government. *See Pepper*, 2005 WL 2298149, at * 3. The consequences of the Court of Appeals' decision will be even more severe in those communities which must rely more heavily on the service of volunteer police.

However, the detrimental consequences of the Court of Appeals' decision are not limited to municipalities which presently employ volunteer police but which do not provide benefits to them. Instead, because the lower court found that the statute was *facially* unconstitutional, even municipalities which currently provide benefits for volunteer police are affected, having lost the discretion provided to them under the statute. Whereas the General Assembly determined that it was imprudent to impose a "blanket" requirement on all municipalities to obtain workers' compensation coverage for volunteer police, the Court of Appeals' decision now mandates such coverage.

The factors which could have influenced the General Assembly's classifications in the statute (*e.g.*, the variation in populations and associated crime rates between municipalities and within municipalities over time; variations in the need for volunteer police services between municipalities and within municipalities over time; the availability of regularly employed police officers in municipalities; *et cetera*), are within the knowledge of the local municipal leaders. The General

Assembly empowered such leaders to evaluate these factors in determining whether to provide benefits to volunteer police. However, under the Court of Appeals' decision, municipal leaders have been deprived of the discretion given them by the statute.

Thus, while this Court has always recognized that "it is not the function of [the courts] to rewrite legislation," *Duran*, 883 P.2d at 483, and that great deference should be accorded to the General Assembly respecting statutes involving "social and economic benefits," *Culver*, 971 P.2d at 646, the Court of Appeals' decision ignores these principles and throws the planning and budgets of Colorado's municipalities into turmoil. Unless this Court reverses the Court of Appeals' decision and reinstates the determination of the Panel, municipalities across Colorado will be significantly harmed.

V. CONCLUSION

In enacting C.R.S. §8-40-202(1)(a)(I)(A), the General Assembly recognized that municipalities need flexibility in determining whether to provide benefits to volunteer police. In making their staffing and budgetary decisions, municipalities have been relying upon the statutory scheme for decades. In finding the statute unconstitutional, the Court of Appeals has thrown the budgets and planning of municipalities into turmoil, and had denied municipalities the flexibility they need

in utilizing volunteer police. The Court of Appeals erred by considering Mr. Pepper's appeal in the absence of an evidentiary record to support his assertion that the statute was unconstitutional; in failing to hold Mr. Pepper to his burden of proof; and in misapplying the rational relationship test. Under these circumstances, the League respectfully requests that this Court reverse the Court of Appeal's decision, and reinstate the determination of the Panel.

Respectfully submitted this 27th day of April 2006.

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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 27th day of April 2006 a true and complete copy of the foregoing was filed with the Court and served on those named below via US Mail:

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