NO. 38447-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, AFSCME COUNCIL 2, AND LOCAL 270 thereof,

Respondent,

v.

CITY OF SPOKANE, a Washington municipal corporation,

Appellant.

AMICUS BRIEF OF THE STATE OF WASHINGTON

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I. INTRODUCTION AND INTEREST OF AMICUS

Who decides whether collective bargaining between local government employers and public employee unions may or must occur in public? State laws, and interpretation by delegated authorities such as the Public Employment Relations Commission (PERC), are the proper authorities on that question. As is true for many events in the public employer-employee relationship, state law recognizes that public bargaining is not the norm, and if it occurs, must be by agreement of the designated employee union and the local government employer as a permissive subject of bargaining.

State law preempts the field of public employee collective bargaining through the Public Employees' Collective Bargaining Act, RCW 41.56, (PECBA), delegated authority to PERC, the Open Public Meetings Act (OPMA), and Public Records Act (PRA). Thus, local government employers cannot unilaterally impose public collective bargaining requirements on public employee unions through local charter amendment or other local

amendment, as the City of Spokane charter amendment has attempted to do here. Uniformity of access to collective bargaining for public employees is a primary goal of state laws related to public employee collective bargaining, and that uniformity would be undermined if local government entities were able to impose public bargaining on employee unions as a prerequisite to bargaining on mandatory subjects. A unilateral requirement made by a public employer is inconsistent with the uniform application of state laws related to public employee bargaining and is thus preempted.

The City of Spokane Charter Section 40 states that "the City of Spokane will conduct all collective bargaining contract negotiations in a manner that is transparent and open to public observation both in person through video streaming or playback." This type of local mandate is not capable of harmonization with state law, as on its terms it converts a permissible subject of negotiation into a prerequisite for

bargaining in conflict with the state laws addressing public employee collective bargaining.

The State has an interest in the uniform application of rules to public employee collective bargaining, a central theme of public employee collective bargaining statutes. The public is also best served by the uniform application of state rules governing whether public bargaining may be mandated by local employers. State law does not currently require public bargaining. The state laws recognize the benefits of allowing non-public communication to occur between unions and local government employers, with the candid discussion and careful deliberation that may be chilled if required to be conducted publicly by the local government employer at the bargaining table.

Given this State interest, the State focuses its amicus brief on showing why Spokane's charter amendment is preempted by state law.

II. ARGUMENT

A. State Law Preempts Open Bargaining Requirements by Local Government Entities

1. Uniformity is central to the statutory scheme regarding public employee collective bargaining; local government employers may not unilaterally impose public bargaining on public employee unions

The Superior Court correctly concluded that Section 40 of the City of Spokane Charter is preempted by state law, which occupies the field of collective bargaining between local government employers and public employee unions. Uniformity in rules applied to public employee bargaining is central to the purpose of the PECBA. This protects public employees and the provision of public services through efficient administration and negotiation of public employee collective bargaining agreements. A patchwork system of rules claiming to be able to mandate public bargaining by local government employers is inconsistent with that interest in uniformity.

To determine whether state law preempts a local ordinance or regulation, courts must evaluate whether clear legislative

intent overrides local powers to enact regulation. *See State ex rel. Schillberg v. Everett Dist. Justice Ct.*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979). "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. XI, § 11. However, "[a] state statute preempts an ordinance if the statute occupies the field or if the statute and the ordinance irreconcilably conflict." *Watson v. City of Seattle,* 189 Wn.2d 149, 171, 401 P.3d 1 (2017) (citing *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991); *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010)). Field preemption "occurs when there is express legislative intent to occupy the entire field, or when such intent is necessarily implied." *Watson*, 189 Wn.2d at 171 (citing *Brown*, 116 Wn.2d at 560). A direct conflict arises when "'an ordinance permits what state law forbids or forbids what state law permits.'" *Id*. (quoting *Lawson*, 168 Wn.2d at 682). If an ordinance "directly and irreconcilably conflicts" with a statute, it is constitutionally

invalid. *Id*. (quoting *Brown*, 116 Wn.2d at 561). However, if the statute and ordinance can be harmonized, no preemption exists. *Id*. (citing *Lawson*, 168 Wn.2d at 682).

Here, there is both field preemption and a conflict between the charter amendment and provisions of the PECBA (RCW 41.56), and statute related to PERC's authority (RCW 41.58). Those statutes promote the state interest in statewide uniformity of public employee collective bargaining and also directs jurisdiction to PERC to determine whether actions constitute unfair labor practices (ULPs). Part of determining ULPs includes determining whether subjects are "permissive subjects" or "mandatory subjects" of collective bargaining. The field of collective bargaining is covered by state law on this topic, and the decision about who decides whether subjects are permissive or mandatory is addressed by state law, which conflicts with local rules claiming the prerogative to decide whether public bargaining may be imposed on unions.

Statewide uniformity is central to the state laws covering the field of public employee collective bargaining. The PECBA was passed to "promote the continued improvement of the relationship between public employers and their employees by providing a *uniform* basis for implementing the right[s] of public employees. . ." RCW 41.56.010 (emphasis added). This is accomplished in part by prohibiting public employers from actions that constitute ULPs, such as "[t]o interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter" or "[t]o refuse to engage in collective bargaining with the certified exclusive bargaining representative." RCW 41.56.140. The PERC statute, RCW 41.58, similarly focuses on statewide uniformity as a goal:

> It is the intent of the legislature by the adoption of chapter 296, Laws of 1975 1st ex. sess. to provide, in the area of public employment, for the more *uniform* and impartial (a) adjustment and settlement of complaints, grievances, and disputes arising out of employer-employee relations and, (b) selection and certification of bargaining representatives by transferring jurisdiction of such matters to the public employment relations commission from

> other boards and commissions. It is further the intent of the legislature, by such transfer, to achieve more efficient and expert administration of public labor relations administration and to thereby ensure the public of quality public services.

RCW 41.58.005(1) (emphasis added).

The comprehensive nature of PECBA and related statutes, and their emphasis on statewide uniformity, show the legislative intent to occupy the field of public employee collective bargaining. And specifically with respect to whether such collective bargaining must be done in public, other state laws buttress the showing of an intent to occupy the field because they specifically exempt such collective bargaining from laws that would otherwise require public bargaining and public disclosure.

For example, the Legislature excluded public employee collective bargaining sessions from the OPMA. RCW 42.30.140(4)(a). It also exempted records from bargaining sessions from public dissemination under the PRA. RCW 42.56.280; *Am. Civil Liberties Union of Washington v. City of Seattle*, 121 Wn. App. 544, 553, 89 P.3d 295 (2004). The

OPMA and PRA are further evidence that the State Legislature has occupied the field through state law. These laws recognize not that the Legislature *mandates* that bargaining must occur in private, but that state law uniformly recognizes that public bargaining is not the usual course, and that the interested parties (union and local employer) must *agree* to public bargaining for that to occur. The State Legislature has balanced the considerations related to the level of publicity or privacy required for public employee collective bargaining negotiations. The OPMA and PRA reinforce that such negotiations are not automatically public, and indicate the current state law preference to maintain this issue as a permissive subject of bargaining. There is no opening in this state statutory scheme for a local government employer to require negotiations to occur in public. The interest in statewide uniformity would be undermined by allowing local government employers to mandate public bargaining with employee unions.

2. State law and PERC decide whether a topic is a permissive subject; permissive subject designation does not make that subject vulnerable to unilateral local employer regulation

The City's arguments appear to misstate the importance of whether a matter is a mandatory or permissive subject. The City argues that the PECBA does not regulate permissive subjects. Corrected Br. of Appellant at 26. They reach the conclusion that therefore the Legislature does not occupy the field of public employee collective bargaining. *Id.* The City's initial argument is summarized in this line: "The Legislature has clearly indicated that it is not regulating permissive subjects and cannot possibly be deemed to have occupied the field in regard to permissive subjects." *Id*. On Reply, the City acknowledges that PERC does have jurisdiction over addressing ULPs related to permissive topics of bargaining. Appellant's Reply Br. at 12. However, they then argue that the existence of permissive subjects means that state law does not have uniformity, and therefore it does not occupy the field related to permissive subjects. Appellant's

Reply Br. at 15. This argument appears to be based on similar logic as the opening brief, misinterpreting the interplay of the interest in a uniform application of state law that currently recognizes public bargaining as a permissive subject.

What these arguments miss in the context of this case is that the PECBA, and authority provided to PERC to decide ULPs, direct that the state statutory scheme governs when a subject is a permissive or mandatory subject of bargaining. The state law scheme that directs how to define mandatory and permissive subjects does not just set a floor that may be expanded upon by a local government employer. State law sets the floor and the ceiling on defining permissive subjects and it limits employer conduct regarding those permissive subjects, restricting an employer from making them a condition of bargaining on mandatory subjects. Just as an employer cannot unilaterally decide that a subject is a mandatory subject of bargaining or condition bargaining on mandatory subjects based on compliance with an employer rule on a permissive topic, the

City cannot unilaterally decide through Charter amendment that public bargaining is required before engaging in mandatory subjects of bargaining, as written in Section 40.

PERC has the authority to determine *whether* a subject is or is not a mandatory or permissive subject of bargaining. Through state law, PERC "is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders." RCW 41.56.160. When a subject has been determined to be permissive, parties are not permitted to condition bargaining on that term. *Lincoln Cnty. v. Pub. Emp. Rel. Comm'n,* 15 Wn. App. 2d 143, 157, 475 P.3d 252 (2020), *review denied*, 197 Wn.2d 1003, 483 P.3d 774 (2021) (citing *UPS Supply Chain Sols., Inc.,* 366 N.L.R.B. No. 111, slip op. at 2, 2018 WL 3032952). The City's argument seems to be saying that "permissive" means that it is open to regulation by a local government employer. That misses the mark on the importance of a determination that a topic is permissive. Designating a topic as a permissive subject of bargaining does not leave it open to

legislation by a local employer; the state law statutory scheme determines whether a topic is permissive or mandatory, a determination that is not open to local government regulation converting it into a requirement.

An employer may not "refuse to engage in collective bargaining with the certified exclusive bargaining representative." RCW 41.56.140. PERC has held that the matter of public or private bargaining is a permissive subject. An employer who conditions negotiations on public bargaining engages in a ULP. *See Lincoln Cnty. v. Teamsters Local 690*, 2018 WL 4292910 (2018). Similar to the county resolution as described in the concurring opinion in *Lincoln County*, the Spokane City Charter amendment is "a local attempt to amend state labor law by requiring that labor negotiations be conducted on the [local government's] terms." *Lincoln Cnty. v. Pub. Emp. Rel. Comm'n*, 15 Wn. App. 2d 143, 160, 475 P.3d 252 (2020) (Korsmo J., concurring), *review denied*, 197 Wn.2d 1003, 483 P.3d 774 (2021).

Local governments cannot mandate public bargaining with their public employee unions, whether through a management decision or change to local government charter or resolution. Just as a local government employer cannot unilaterally decide to convert a permissive subject of bargaining into a requirement, a local government charter amendment or other local law cannot make the same impermissible rule. *See Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005) ("[T]he people's legislative power is coextensive with the legislature's."). Simply put, a City Charter amendment cannot take action the City could not take directly as an employer.

There is no indication the legislature intended to allow local government employers to deviate from the uniform scheme of rules related to bargaining with their public employee unions; on the contrary, the interest in uniform application of state law appears throughout the PECBA, OPMA, and PRA. Section 40 adds a unilateral condition that the City has placed on bargaining. It restricts the ability of unions to not have a permissive subject

of bargaining unduly interfere with bargaining over mandatory subjects. A local government employer cannot usurp the roles laid out in state law, such as delegation to PERC, to decide that public bargaining is a condition to bargain with its public employees. This is in conflict with the PECBA and state law scheme governing public employee collective bargaining. Because of the preemption of the field and conflict with the statutory scheme, Section 40 should be invalidated.

3. Section 40 cannot be harmonized with state law as suggested by the City by amending Section 40 to require only that the City attempt to bargain it as a permissive subject.

The City argues that section 40, "as implemented by the City" does not conflict with state law. Appellant's Reply Br. at 2, 20-21. But the only way that the City can harmonize Section 40 is by ignoring its language mandating public bargaining, effectively changing the clear mandate to merely a statement of policy or preference. Specifically, the City asks the court to "harmonize Section 40 with the PECBA as the City has done," which is by treating the topic of public bargaining as a

permissive subject, not a requirement. Appellant's Reply Br. at 21.

The language of the charter amendment makes the City's argument untenable. Section 40 comes with required language – "will conduct." The violation of Section 40 potentially subjects officials to ethics and criminal violation: "[a]ny elected official or an elected official's agent who is determined by the City Ethics Commission to have participated in any collective bargaining negotiation in violation of this charter amendment shall be referred to the City or County Prosecutors office for appropriate action." Section 40(E). This kind of restriction imposed by a local government employer cannot be squared with state law. If this language is not a hollow threat of action, it certainly as written would have a chilling effect on the willingness and ability of future City officials to follow the required course of treating public bargaining as a permissive subject under state law. As written, Section 40 is preempted, and there is no harmonization

that can occur with a unilateral local employer requirement for public bargaining.

As written, Section 40 contains mandatory language requiring bargaining to occur publicly, which is not capable of harmonization with the state law that preempts the field of public employee collective bargaining. Although courts construe statutes and city charters to avoid unconstitutionality, the unambiguous language here simply cannot be stretched that far. *See Davis v. Cox*, 183 Wn.2d 269, 282, 351 P.3d 862 (2015), *overruled on other grounds*, *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 191 Wn.2d 392, 440 n.15, 423 P.3d 223 (2018) ("And because the statute contains no ambiguity, we cannot use the doctrine of constitutional avoidance to press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.")

Indeed, the City's own attempts to "harmonize" Section 40 with state law, through its actions and its arguments, demonstrate that Section 40 irreconcilably conflicts with state

law. That is, the gist of the City's position is that it properly recognized that if it complied with what Section 40 actually says, that it would be violating state law by demanding that the Union submit to a unilaterally imposed condition before it would bargain with them. Thus, according to the City's description of the course of bargaining,[1] the City chose instead to attempt to negotiate a public-bargaining ground rule rather than insisting upon it, in spite of what Section 40 mandated. This is an example of conflict preemption: Section 40 mandates something that state law prohibits. *See Watson*, 189 Wn.2d at 171 (holding a direct conflict arises when "an ordinance permits what state law forbids or forbids what state law permits.") (citations and internal quotes omitted). That the City may prudently choose to follow state law rather than its conflicting charter does not change the fact that

[1] This brief does not take a position on the underlying facts or other issues in this matter related to those facts. The Union asserts that the City insisted upon bargaining publicly. Under either position, Section 40 is not capable of harmonization with state law.

the charter does conflict with state law; rather, it shines a spotlight on that conflict.

The City cites to *City of Seattle,* in which the Court read together partially conflicting charter amendment sections to harmonize the overall purposes of supporting uniform personnel procedures and the recognition of the right to collectively bargain. *City of Seattle v. Auto Sheet Metal Workers Local 387,* 27 Wn. App. 669, 680, 620 P.2d 119 (1980), *overruled on other grounds by City of Pasco v. Pub. Emp. Rel. Comm'n,* 119 Wn.2d 504, 833 P.2d 381 (1992). There, the Court revised a section that "preclud[ed] ratification of any contract inconsistent with the charter and the charter amendment's requirement of uniform procedures on personnel matters," limiting this language to only those matters that were not the proper subject of collective bargaining. *Id.* This harmonization was an internal harmonization where there was ambiguous meaning within the charter amendment itself, and appropriate application of the offending section to some personnel matters. Here, the language

of the City's amendment to Section 40 requiring public bargaining upon potential referral for ethics or criminal violations cannot be harmonized with state law like the internal harmonization that occurred in the *City of Seattle* case. The City's argument in the reply brief appears to be requesting that the Court excise completely from Section 40 the "will conduct," and referral to ethics or criminal prosecution, and instead replace those with a reading that would remove the language or reading in additional language to Section 40 to require only that the City *attempt* to bargain about the permissive subject of public bargaining. Such a reading by the Court would fundamentally change Section 40, and goes far beyond what the Court should do to interpret a law to avoid constitutional issues. *See Davis,* 183 Wn.2d at 282.

III. CONCLUSION

The State, as amicus, supports affirming the Superior Court ruling finding Section 40 of the Spokane City Charter to be preempted by state law. Public bargaining requirements

imposed by local government employers are not consistent with the state statutory scheme that preempts the field of public employee collective bargaining. Uniformity is central to the purpose of the state laws on this topic, for precisely the reasons the parties are here now. The same rules apply to all public employers; they may not condition bargaining of mandatory subjects upon a local management decision, rule, charter amendment, mandate, or regulation that requires unions to negotiate in public. The State has a strong interest in maintaining that uniform system of the application of rules to public employee collective bargaining.

Section 40 of the Spokane City Charter also conflicts with state law, which determines who gets to decide whether public bargaining may be mandated by local government employers. The provision of Section 40 requiring public bargaining cannot be harmonized with state law, and is therefore invalid.

This document contains 3452 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of February, 2022.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of February, 2022, at Olympia, Washington.

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February 17, 2022 - 1:30 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
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Appellate Court Case Title:	Washington State Council of County & City Employees v. City of Spokane
Superior Court Case Number:	21-2-01183-8

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