No. 100676-4

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

CITY OF SPOKANE, a Washington
municipal corporation,

Appellant.

RESPONDENTS' ANSWER TO LINCOLN COUNTY'S *AMICUS* BRIEF

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A. INTRODUCTION

Instead of filing its own *amicus curiae* brief, the Freedom Foundation uses Lincoln County ("County") as a front to advance its anti-union agenda.[1] *See* BR 4-5.[2]

The County/Foundation brief neglects to come to grips with the central issues upon which the trial court granted summary judgment – does the Public Employees Collective Bargaining Act, RCW 41.56, ("PECBA") preempt a local public

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[1] The Foundation claims in its motion for leave at 6 that no role in the voters' decision to propose the initiative or approve the enactment of Spokane Charter § 40. The Foundation was not as "hands off" as it now claims. Rather, the Foundation's own website states that it worked closely with Lincoln County in enacting its 2016 open bargaining resolution. Moreover, it states that it "has worked with numerous governments across Washington to craft transparency legislation for their community" and cites Spokane's initiative for Charter § 40 in its "Transparency Timetable." https://www.freedomfoundation.com/labor/the-city-of-spokane-passes-transparency-measure-will-government-unions-accept-the-will-of-the-voters/.

[2] Appellants' opening brief is referred herein as "BA," and their reply brief is "RB". Respondents' brief is "BR," and the County/Foundation brief is "CFB."

employee collective bargaining measure for so-called "open bargaining" where the PECBA has occupied that field requiring *uniform* procedures for public employee labor negotiations and the ordinance conflicts with state law? Is the ordinance reasonable under article XI, § 11 of the Washington Constitution?

Instead, the County/Foundation offers up a political justification for the Spokane's ("City") Charter § 40 that is largely devoid of a discussion of this Court's preemption jurisprudence and the law on reasonableness under article XI, § 11. The brief lacks any reasoned answer to any of the *amici* submissions before this Court, in particular, those of a public employer like Snohomish County or the State of Washington.

This Court should affirm the trial court's summary judgment decision.

B. STATEMENT OF THE CASE

The County/Foundation brief does not take issue with the facts set forth in the respondent Union's brief, BR 4-12, thereby

conceding the Union's description, for example, of the contents of Charter § 40 that not only mandate "open" bargaining, but make the failure of City officials to meet § 40's dictates subject to criminal penalties, and mandate that the Union publicly disclose its bargaining positions. BR 6-7. It does, however, try to slip certain new facts into the record in the appendix to its brief, in violation of RAP 10.3(a)(8). This Court should not allow such an effort, but those materials do not help the City's position, nor the County/Foundation's, in any event.

Whether Ferry County or the Pullman School District has adopted a public negotiation resolution (CFB, appendices A-B) has no bearing on whether state uniform public employee collective bargaining under PECBA preempts such illicit local activities. Indeed, the School District is not even subject to PECBA. *See* RCW 41.56.020. And certainly 48-year-old administrative decisions from another state have even less relevance to preemption under *Washington law*.

One further point on the facts raised by the CFB at 1-2, 17-

18, bears a mention. Courts often give wider latitude to *amici* as to facts not of record in the case. But RAP 10.3(a)(5) applies to *amicus* briefs. RAP 10.3(e). The County/Foundation's efforts to describe why Lincoln County has acted as it has are utterly *unsupported* by any reference to the record and the Court should disregard them.

C. ARGUMENT

(1) The County/Foundation Concede the Controlling Law on Preemption and Article XI, § 11[3]

The County/Foundation do not even reference this Court's decision in *Cannabis Action Coalition v. City of Kent,* 183 Wn.2d 219, 351 P.3d 151 (2015) wherein this Court explained that a local ordinance may be unconstitutional under article XI, § 11 because the ordinance conflicts with state law, it is an unreasonable exercise of police power, or its subject matter is not

[3] The County/Foundation do not address the City's spurious standing justiciability argument. BA 18-22; RB 5-9. If anything, the County/Foundation only lends credence to the Union's position that the controversy over Charter § 40 is a live one, requiring declaratory relief. BR 15-20.

local. *Id.* at 226. Each is an *independent* basis to invalidate a local ordinance. The County/Foundation brief fails to cite a *single case* on preemption law as set forth in the Union's brief at 20-24, thereby conceding the applicability of those principles. Each type of preemption – express, field, or conflict serves as an *independent* grounds to invalidate an illicit ordinance.

(2) Spokane Charter § 40 Is Preempted by State Law

(a) Field Preemption

Without expressly articulating its rationale for its overall argument on preemption, the County/Foundation seems to focus its entire attention in its brief on conflict preemption, ignoring the trial court's ruling that field preemption forecloses Spokane Charter § 40. Thus, it has no answer to the principle that where the Legislature evidences an intent to occupy a field, leaving no room for concurrent local jurisdiction, a local enactment cannot stand. *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010); *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003) (intent to preempt the field gleaned

from Legislature's own expression, the statute's purpose, or other background circumstances).

Like the City, the County/Foundation seemingly have no answer to the argument that PECBA expressly preempts local ordinances. BR 25-26. Indeed, the State of Washington argued in its *amicus* brief at 4-9 that the PECBA, the Open Public Meetings Act, RCW 42.30, ("OMPA"), and the Public Records Act, RCW 42.56, preempt the field. *Id*. at 9 ("The interest in statewide uniformity would be undermined by allowing local government employers to mandate public bargaining with employee unions."). The State's assertion is entitled to deference by this Court. As the City itself noted, BA 29, citing *Teamsters Local 839 v. Benton County*, 15 Wn. App. 2d 335, 343, 475 P.3d 984 (2020), PERC's interpretation of the PECBA is entitled to "great weight and substantial deference" by the courts, given its expertise in administering that statute.

In fact, RCW 41.56.905 expressly provides for the primacy of the PECBA over all local public employee collective

bargaining enactments. The County/Foundation do not address this key statute, expressing the Legislature's intent on PECBA's breadth.

Similarly, the County/Foundation nowhere dispute the fact that the PECBA is *broad* in its scope, RCW 41.56.020, and its central legislative purpose is the establishment of uniformity of procedures in public employee collective bargaining. RCW 41.56.005; RCW 41.56.010. Snohomish County argued uniformity is critical to public employees in its *amicus* brief, stating at 1, "Snohomish County and other counties and political subdivisions similarly situated have an interest in ensuring uniform interpretation regarding the scope and limitations of its permissive bargaining obligations." Nor do the County/Foundation address this Court's precedents confirming that legislative policy of *uniformity*. *See* BR 25-33.

The Legislature *knew* how to reserve certain public employee decisions to local governments. *See*, *e.g.*, RCW 41.56.100(1) (reversing local government authority over civil

service laws). Of course, the Legislature did not do that with respect to how bargaining was to be conducted, a fact the County/Foundation consistently ignore.

The Legislature preempted the field of public employee collective bargaining in enacting the PECBA. Charter § 40 cannot stand accordingly.

(b) Conflict Preemption

The central focus of the County/Foundation brief appears to be its contention that § 40 does not conflict with the PECBA. Its argument is a mishmash that misstates prevailing law and conflates the treatment of bargaining under PECBA with the public policy of the OMPA. Despite the County/Foundation's misapprehension of Washington law, this Court should not lose sight of the central goal of the PECBA – uniformity – or the fact that no Washington decision holds that open bargaining is mandated under the PECBA. The State's *amicus* brief filed on PERC's behalf makes unambiguously clear at 10-15 that Charter § 40 conflicts with the PECBA. *Id*. at 14 ("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.").

The County/Foundation do not dispute that under conflict preemption, the basic principle is that if a local law bans what state law allows or allows what state law bans, it is preempted. BR 22-24. Indeed, only recently in *Rental Housing Ass'n of Wash. v. City of Burien*, __ Wn. App. 2d __, 2022 WL 3715061 (2022), Division I found that a local landlord-tenant law was preempted under conflict preemption principles because the ordinance forbids what state law permits. *Id*. at *4-5.

Initially, when the County/Foundation assert that the Court of Appeals/PERC have rejected facial challenges to open bargaining under PERC, CFB 4, that is misleading. In *Mason County v. Pub. Emp't Relations Comm'n*, 54 Wn. App. 36, 771 P.2d 1185, *review denied*, 113 Wn.2d 1013 (1989), the *former* version of the OMPA did not exempt labor negotiations from its

provisions. Division II there concluded that labor negotiations had to be conducted in open sessions pursuant to OMPA. *Id*. at 39. But *nothing* in that opinion indicates that an argument was made in that case that the PECBA preempted a local open bargaining ordinance. No local open bargaining ordinance was at issue there. The *only* question there was whether the failure to comply with OMPA required the voiding of the collective bargaining agreement negotiated in private. Moreover, as the County/Foundation concede, CFB 6, the Legislature *immediately* amended the OMPA to *preserve the right to private bargaining*, a fact that only reinforces the Union's argument here as to both the Legislature's intent to occupy the field of public employee collective bargaining and that open bargaining, in fact, conflicts with PECBA.

The County/Foundation's claim that the 2017 PERC administrative ruling in *Lincoln County*, Decision 12648 (PERC 2017) rejected a facial challenge to open bargaining under PECBA, CFB 6-7, is flatly false. That decision, provided in the

appendix, says *nothing* about that issue. It is all the more misleading where Division III in *Lincoln County v. Pub. Emp't Relations Comm'n*, 15 Wn. App. 2d 143, 475 P.3d 252 (2020), *review denied*, 197 Wn.2d 1003 (2021) rejected an argument that OMPA, *not* the PECBA, preempted the County's open bargaining resolution. *Id*. at 153-54. Moreover, that court upheld PERC's determination that the County committed an unfair labor practice ("ULP") by insisting upon open bargaining as a precondition to bargaining in good faith. *Id*. at 259-60. Lincoln County's conduct prompted Judge Kevin Korsmo to observe that its open bargaining resolution was "one of the most cynical political documents drafted in modern times" when it used an OMPA *exemption* to mandate open bargaining. *Id*. at 260. PERC ordered the County to cease conditioning bargaining with the Teamsters on public bargaining. *Lincoln County v. Teamsters, Local 690*, 2021 WL 4432545 (PERC 2021). In effect, PERC *invalidated* the County's *mandatory* open bargaining resolution accordingly.

The adoption of a resolution, ordinance, or charter amendment by local governments purporting to mandate how collective bargaining is to be conducted with public employee unions essentially makes open bargaining a *mandatory* precondition to good faith negotiations. PERC has found ULPs where a public employer falls back on some local enactment as a justification for its intransigent insistence on open bargaining. *Wash. State Council of County and City Employees v. Spokane County*, 2021 WL 5570236 (PERC 2021) (County committed ULP insisting upon open bargaining per a Commissioner resolution); *Wash. State Council of County and City Employees v. Spokane County*, 2022 WL 1739801 (PERC 2022) (same).

These decisions make sense because, as the State points out in its *amicus* brief and as federal courts have long held, it is a ULP to bargain a permissive subject to impasse. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958). The policy behind this rule is to prevent parties from creating barriers to bargaining mandatory subjects. A union has

every right to say no to permissive subjects, and an employer's insistence on permissive proposals, "against the *permissible opposition* of the unions, amount[s] to a refusal to bargain." *Id.* at 348 (emphasis added); *see also, e.g.*, *Hill-Rom Co., Inc. v. N.L.R.B.*, 957 F.2d 454, 457 (7th Cir. 1992) (employer may not insist on a permissive subject of bargaining without "union…approval"). Just as the insistence upon open bargaining as a precondition to negotiations is a ULP, *i.e.* an act contrary to the PECBA, local ordinances mandating the same thing – a precondition to good faith negotiations – are in conflict with the PECBA and are preempted.

The County/Foundation make an elaborate argument on open bargaining as a "management prerogative." CFB 8-20. That argument was not made by the City, and this Court should reject it as it is raised for the first time in this case only by an amicus. *Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007).

In citing *Int'l Ass'n of Firefighters, Local Union 102 v.*

Pub. Emp't Relations Comm'n, 113 Wn.2d 197, 778 P.2d 32 (1989), a case on whether a matter is a mandatory bargaining topic, CFB 9, 11, 13, the County/Foundation argues that open bargaining is not subject to bargaining at all as a management or entrepreneurial prerogative of the County. That position contrary to the City's position that open bargaining is a permissive bargaining topic. In its reply brief, the City stated: "It is well established that open bargaining is a permissive topic over which the parties may negotiate." RB 9.

But the argument is baseless in any event, as the County well knows, despite its citation of non-Washington authority that does not specifically address open bargaining. CFB 9-11. Washington law is to the contrary. The County/Foundation attempt to revisit a decision with which they disagree. Division III *rejected* the idea that an open meeting precondition to bargaining was a "management prerogative" in *Lincoln County*:

> The County has failed to convince us that public collective bargaining is a managerial prerogative. Also, Teamsters does not contend that private

> collective bargaining is a union prerogative. We, therefore, conclude that the bargaining procedure in dispute here is not a managerial prerogative or a union prerogative. For this reason, neither the County nor Teamsters had authority to impose its preferred procedure on the other.

15 Wn. App. 2d at 157.

And the County seeks to pound a square peg into a round hole in making its argument. Open bargaining is not like a government's right to determine its budget, for example. CFB 12. Elected officials are entrusted by the law with such budgetary authority, not public employee unions. But unions *are* entrusted by the PECBA with the responsibility of negotiating labor contracts. Their opposites in such negotiations – public employers – cannot dictate the terms of the unions' participation in negotiations. As Judge Korsmo stated:

> The resolution is a local attempt to control the ground rules for negotiation in violation of state labor law. Just as the County could not pass a resolution stating that no represented employee would receive a raise from the County, it cannot condition negotiations on compliance with its chosen bargaining rules. The County's resolution is no more effectual than a resolution requiring

> bargaining in Times Square at midnight New Year's Eve or in Tahiti the following day.

Id. at 161.

Ultimately, public employers and their unions are free under PECBA to negotiate in public or in private, as they may choose, but local enactments that presume to mandate open bargaining as a precondition to negotiations, or that mandate the public disclosure of union bargaining positions, are in conflict with the PECBA, as PERC has ruled in finding such efforts to be ULPs. Simply put, under the City's and the County/Foundation's analysis, Charter § 40 would allow what state law as applied in PERC and Division III in *Lincoln County* has declared to be illegal, a ULP. It is preempted accordingly.

(3) Charter § 40 Is Unreasonable

The County/Foundation have no answer to the trial court's determination that Charter § 40 violates article XI, § 11 because it is unreasonable. CP 283-89.[4] Instead, it makes a general

[4] The City tries to avoid the trial court's ruling on this

argument that § 40 advances a public policy of transparency. CFB 17-20. In so doing, it deliberately, and erroneously, conflates the public policies of the PECBA and OPMA. The OPMA specifically provides that labor negotiations are *exempt* from its reach and it was unreasonable for the measure's proponents to *mislead* the voters that the OPMA mandated public bargaining, as the trial court determined. CP 286.

The County/Foundation's effort, BA 17-18, to elevate "transparency" as a justification for its legally spurious position, BA 17-20, is more of the same misleading OMPA argument for

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subject by claiming the Union raises the issue for the first time on appeal. RB 21. Just as appellate courts have inherent authority to raise issues *sua sponte* to provide for effective review, *Dalton M LLC v. No. Cascade Trustee Services, Inc.*, 20 Wn. App. 2d 914, 941-43, 504 P.3d 834 (2022), a trial court has the authority to decide a matter *sua sponte* grounds within the pleadings, as the trial court did here. *State v. Evans*, 100 Wn. App. 757, 763-68, 998 P.2d 373 (2000). That does not violate RAP 2.5(a).

Ironically, the County/Foundation brief belies the City's argument that the Union's argument § 40 was the brainchild of anti-union advocate "is borne of fantasy." RB 22.

Charter § 40 that Judge Korsmo and the trial court both decried respectively as unreasonable and/or misleading for the voters in deciding upon the initiative that enacted Charter § 40.

Any collective bargaining agreement will be debated and voted on in public under the OMPA, RCW 42.30.020(3), in any event.

And, further evidencing the unreasonableness of Charter § 40, the PECBA establishes uniform procedures calculated to lead to negotiated contracts with public employee unions after good faith bargaining. Local government measures like Charter § 40 do the *opposite* of that. They are local government – initiated unfair labor practices. They are intended to frustrate contracts with public employee unions in order to ultimately destroy them. The Foundation's own website says no less in its remarkable anti-union animus. BR 5 n.5. This Court facilitates the PECBA's ultimate goal of labor peace in public employment by rejecting the City's, and the County/Foundation's, arguments on § 40.

D. CONCLUSION

The trial court properly discerned that Spokane's Charter § 40 is unconstitutional under article XI, § 11 because the Legislature has preempted the field of local government labor negotiations in enacting the PECBA/PERC statutes, and because it conflicts with state law that contemplates local government collective bargaining must be undertaken privately. It also violates article XI, § 11 because it is unreasonable.

Nothing provided in the County/Foundation *amicus* brief should dissuade this Court from affirming the trial court's well-reasoned order invalidating § 40 of the Spokane Charter.

This document contains 3,125 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 14th day of September, 2022.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Respondents' Answer to Lincoln County's Amicus Brief*** in Washington Supreme Court, Cause No. 100676-4 to the following:

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

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September 14, 2022 - 3:46 PM

Transmittal Information

Filed with Court:	Supreme Court
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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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