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,

Respondents,

v.

CITY OF SPOKANE, a Washington
municipal corporation,

Appellant.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

This case relates to § 40 of the Spokane City Charter, an "open bargaining" provision that was the brainchild of organizations fundamentally opposed to public employee collective bargaining to frustrate and destroy the rights of working men and women in public employment. As Judge Kevin Korsmo recently wrote, such "open bargaining" laws are "one of the most cynical political documents drafted in modern times" aimed at destroying the public bargaining process. *Lincoln County. v. Pub. Emp. Relations Comm'n*, 15 Wn. App. 2d 143, 159, 475 P.3d 252 (2020) (Korsmo, J., concurring), *review denied*, 197 Wn.2d 1003 (2021).

As factually dubious as the City's "open bargaining" law is, it is legally preempted by clear state law. Through the Public Employees Collective Bargaining Act, RCW 41.56 ("PECBA") and the Public Employees Relations Commission statute, RCW 41.58 ("PERC"), and exemptions to the Public Records Act, RCW 42.56 ("PRA") and the Open Public

Meetings Act, RCW 41.30 ("OMPA"), our Legislature chose to occupy the field of public employee collective bargaining, providing *uniform* procedures for local government collective bargaining "to promote the continued improvement of the relationship between public employees and their employees." RCW 41.56.010. The City of Spokane's ("City") ignores this key point, as discussed here by the respondents, Local 270 of the Washington State Council of County and City Employees, AFSCME Council 2 ("Union").

The City's so-called "open bargaining" Charter provision for labor negotiations[1] contains *express, mandatory language*[2] for City labor negotiations and unions bargaining with the City

[1] Pointedly, the City has only applied this concept to labor contract negotiations; it has not adopted it generally for the negotiation of a variety of public contracts such as real estate contracts or contracts for the procurement of other goods, for example, just to name a few.

[2] In order to advance its baseless arguments on standing and preemption, the City must argue that it is entitled to *disobey* the *mandatory* directives of § 40 of its Charter. This Court should not countenance such a profoundly cynical argument.

that contradict the procedures for bargaining established in PECBA. Section 40 undercuts uniform mandates of state public employee collective bargaining and therefore violates article XI, § 11 of our Constitution because it conflicts with state law, as the trial court correctly concluded.

Moreover, the trial court correctly concluded that even if not preempted under general law, § 40 fails under article XI, § 11 because it is unreasonable.

Labor negotiations can be tough and difficult. Indeed, here, the City and the Union still do not have a contract since the last contract expired on December 31, 2020.[3] They are meant to reduce labor-management hostility and lead the parties to agree. But negotiations in a public setting will only lead to posturing and added hostility, rather than contracts. Little wonder that *nowhere* in state law is such a type of bargaining

[3] The City's interest here is delay. Even though it is highly likely it will seek Supreme Court review of this Court's decision should it lose, it did not seek direct review under RAP 4.2 initially.

authorized or even condoned.[4]

This Court should affirm the trial court's invalidation of Spokane Charter § 40, the City's so-called "open bargaining" provision, under article XI § 11 of our Constitution.

B. STATEMENT OF THE CASE

The City's brief contains an extensive discussion of the facts, br. of appellant at 3-17, but certain key facts are either omitted or glossed over. The Union supplements that factual recitation accordingly.

First, while the City recites the origin and test of Charter § 40, *id*. at 3-4, that recitation is superficial. It does not address the important point that § 40 comes from an organized effort by right wing advocates who are fundamentally opposed to public

[4] As will be discussed *infra*, our state's PRA and OPMA specifically authorize confidentiality for records and decision making meetings on such actions because of the likely adverse effect of negotiating in a public forum. Indeed, the OPMA expressly exempts collective bargaining from its open meeting requirements. RCW 42.30.140(4)(b).

employee unions and public employee collective bargaining.[5]

[5] *See, e.g.*, Dirk Vanderhart, *How a Fight Over Unions Could Change the Direction of Oregon Politics*, NW NEWS NETWORK (Jul. 30, 2018), https://www.nwnewsnetwork.org/post/how-fight-over-unions-could-change-direction-oregon-politics (last visited January 3, 2022) (Freedom Foundation CEO stating, "The Freedom Foundation has a proven plan for bankrupting and defeating government unions through education, litigation, legislation and community activation."). Indeed, the Freedom Foundation has frequently advocated public employees resisting upon representation. The Foundation targeted Washington State for its anti-union activities, funded by billionaires' dollars that it tried to hide; indeed, it set a target of shrinking public employee union membership by 127,000. *Group funded by conservative billionaires launches anti-union campaign following Supreme Court ruling*, LA TIMES (June 28, 2018) https://www.latimes.com/business/la-fi-freedom-foundation-20180628-story.html, (last visited January 3, 2022). Its CEO boasted that "The Freedom Foundation has a proven plan for bankrupting and defeating government unions through education, litigation, legislation and community activism." Greenhouse, Stephen, *The door-to-door unionkillers: rightwing foundation takes labor fight to the streets*, THE GUARDIAN (March 10, 2016), https://www.theguardian.com/us-news/2016/mar/10/union-killers-freedom-foundation (last visited January 3, 2022). Indeed, the Foundation's website lionizes how it has caused public employee union members to drop union membership thereby "defunding [government union bosses'] radical unconstitutional agenda everywhere." https://www.freedomfoundation.com/ (last visited January 3, 2022).

Nor does the City note the *mandatory* language in § 40 that provides:

- As of December 1, 2019, the City *will* conduct *all* collective bargaining contract negotiations in a manner that is transparent and open to public observation both in person and through video streaming or playback. This section does not require the City to permit public comment opportunities during negotiations.

- The City *must* provide public notice of *all* collective bargaining negotiations in accordance with the Open Public Meetings Act (RCW 42.30.060-42.30.080.)

- The City *must* publish and maintain *all* notes, documentation, and collective bargaining proposals on the City's official website within two business days of their transmission between negotiating parties.

- The City *must* publish *all* final collective bargaining agreements on the city's official website for the life of the agreement.

- Any 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.

- Open to the public observation does not include meetings

Section 40 is a tool in the Foundation's anti-public employee collective bargaining agenda.

> related to any activity conducted pursuant to the enforcement of a collective bargaining agreement (CBA) after the CBA is negotiated and executed, including but not limited to grievance proceedings.

CP 124. (Emphasis added.)

Thus, § 40 requires the City to "conduct *all* collective bargaining contract negotiations in a manner that is transparent and *open to public observations both in person and through video streaming or playback*." (emphasis added). "All" means all. No exceptions. Moreover, the City "must publish and maintain *all* notes, documentation, and collective bargaining proposals on the City's official website within two business days of their transmission between negotiating parties." (emphasis added). Again, the language is mandatory and clear. All proposals – City and Union – must be made public. No exceptions. Any negotiator (an elected official's agent) who fails to meet § 40's mandate "*shall* be referred to the City or County Prosecutors' office for appropriate action." The

mandatory[6] directives in § 40 to City negotiators are key here, as will be noted *infra*.

As the City concedes, the Union's contract with the City expired on December 31, 2020. Br. of Appellant at 4. Beginning in early November 2020, more than a year ago, the Union expressed its desire to enter into renewed collective bargaining agreements by attempting to engage in traditional labor-management negotiations for the renewal of that contract. *Id*. at 4-8. Deliberately omitted from the City's factual

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[6] In interpreting this Charter provision, its express language controls. Our Supreme Court in *Federal Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019) reaffirmed that the "bedrock principle of statutory interpretation" is the statute's "plain language." "If a statute is plain an unambiguous, its meaning must be primarily derived from the language itself." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). The use of the term "shall" means the direction is *mandatory*, not permissive. *Erector Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

Statutes or ordinances are interpreted in a fashion to avoid absurd results. *State v. Schwartz*, 194 Wn.2d 432, 443, 450 P.3d 141 (2019). The City's interpretation of § 40 as a mere aspirational goal, rather than a mandate, conflicts with its express language.

recitation is the fact that in the exchange it referenced was the insistence by City representatives that Charter § 40's "open bargaining" provisions be observed; its chief negotiator stated on December 7, 2020, for example, "that it is the City's intent to conduct collective bargaining contract negotiations in a manner that is open to the public, in compliance with the City Charter." CP 126.

As noted in the City's brief at 8-10, the City made an initial "What If" contract proposal in January 2021, without engaging in actual collective bargaining with the Union. CP 98, 163-64. The City's proposal did, in fact, insist on the application of § 40 when it *mandated* the public disclosure of all negotiating proposals, City or Union. CP 57 ("6. The parties agree to share this What-If proposal, and subsequent What-If Counter proposals with the public through the City's website and social media platforms.").

When the Union sought clarification of the City's position on § 40, CP 52, and then insisted on private

negotiations, CP 5, 55, 60, 64, the City responded on March 24, 2021 (now 5 months into the conversations on a new contract), the City made clear that it rejected private bargaining, insisting upon Charter § 40. CP 63-64 ("The City cannot agree to the Union's 11/06/20 Ground Rule proposal, and urge the Union to consider any one of the other proposals we have made, or provide some other alternative that will promote transparency and public accountability."). That the City's intent is to follow § 40, at least in part, is further evidenced by the insistence of its labor negotiator in an April 6, 2021 email that the City's proposals will be publicly posted. CP 68.

Notwithstanding the recitation in the City's brief at 11-17 that further conversations ensued between the Union and the City, as of this brief, no contract has been negotiated, more than *a year* since the Union's initial inquiries to the City.

The opinion of Natalie Hilderbrand, the Union's chief negotiator, is that the City has insisted on open bargaining sessions since November 2020:

> Since November 2020, it is apparent to the Union that the City insists on the application of Charter § 40 for any actual collective bargaining between the City and the Union. That insistence relates to bargaining both on mandatory and permissive topics. That insistence has frustrated any true collective bargaining that might lead to a successor labor agreement.

CP 101 (Hilderbrand dec., ¶ 32).

The Union filed the present declaratory judgment action under RCW 7.24 ("UDJA") in the Spokane County Superior Court on May 3, 2021. CP 1-6. The City moved to dismiss the action, CP 7-24, which the Union opposed. CP 225-32. The Union also filed a motion for summary judgment, CP 81-93, that the City opposed. CP 233-43.

The trial court, the Honorable Anthony Hazel, denied the City's motion and granted the Union's motion in a comprehensive oral ruling declaring § 40 unconstitutional under article XI § 11 of our Constitution either because § 40 was preempted or it was an unreasonable exercise of police power.

CP 263-93.[7] This appeal ensued. CP 300-38.

C. SUMMARY OF ARGUMENT

The Union had standing under the UDJA to challenge the constitutionality of § 40. Its case is justiciable because the Union is within the zone of interests affected by § 40 and the Union has been harmed by § 40. Even if the Union's claim were "moot," which it is not, the courts have jurisdiction to decide § 40's constitutionality because the question of its legality is likely to recur and the public interest in addressing it or similar so-called "open bargaining" mandates by public

[7] Ignoring virtually all of the trial court's other extensive reasoning for finding § 40 to have violated the Washington Constitution, article XI, § 11, the City strangely focuses entirely on the court's discussion of "exclusivity." Br. of Appellant at 37-45. As this Court can readily discern, the trial court made an extensive oral ruling, on two separate occasions, on the record, CP 268-93, 295-99, that encompassed 31 pages. The Court's reference to the union as the exclusive bargaining representative involved three pages of transcript. CP 296-98. The City completely ignores the trial court's discussion of how state law occupies the field, preempting § 40 (CP 272-81), how § 40 conflicts with state law (CP 281-83), and how § 40 is constitutionally unreasonable (CP 283-89). The Court should not be misled by such an obvious red herring.

employers in public employee collective bargaining is significant.

Section 40 is preempted under article XI, § 11 of the Washington Constitution because the State has occupied the field of public employee collective bargaining. The PECBA is intended to establish *uniform* procedures in public employee collective bargaining. The PECBA contemplates confidential bargaining, as confirmed by the exceptions in the PRA and OMPA in connection with labor negotiations—labor negotiations are exempt from OMPA's public meeting mandate, and materials generated in collective bargaining are exempt from the PRA while negotiations are proceeding. Section 40 potentially opens the door to a patchwork of local bargaining rules and contradicts the private negotiations required by general law.

Section 40 also violates article XI, § 11 because it is unreasonable. As the brainchild of anti-union advocates whose interest is to disrupt public employee unions and collective

bargaining, § 40 was the product of deliberately misleading representations to the voters and will make public employee labor contracts all the more difficult, as the City's inordinate delay of more than a year in renewing the Union's contract attests.

This Court should invalidate § 40 of the Spokane City Charter.

D. ARGUMENT

This Court has jurisdiction under RCW 7.24.020 to declare the constitutionality of Spokane Charter § 40 and it can address that issue on summary judgment. *See, e.g., First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 916 P.2d 374 (1996) (court declared local historic landmark designation unconstitutional on summary judgment). Insofar as there are no genuine issues of material fact here, this Court may determine the constitutionality of § 40 on summary judgment. CR 56(e). The City does not contest that the issues here are legal in nature

and agrees that they may be resolved on summary judgment.

(1) The Union Has Standing Under the UDJA to Challenge § 40 of the City Charter

The City offers the baseless contention in its brief at 18-23 that the present controversy is not justiciable because it does not believe the Union is "harmed," given that it has chosen to disobey § 40's mandatory directives. The City's justiciability argument is essentially a UDJA standing argument and should be analyzed by this Court accordingly. *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 493, 585 P.2d 71 (1978) ("Standing requirements tend to overlap the requirements for justiciability under the UDJA.").

Standing is clear in the declaratory judgment setting. *See, e.g.*, *To-Ro Trade Shows v Collins*, 144 Wn.2d 403, 414, 27 P.3d 1149 (2001); *Wash. State Hous. Fin. Comm'n v. Nat'l Homebuyers Fund, Inc.*, 143 Wn.2d 704, 711, 445 P.3d 533 (2014); *Wash. Bankers Ass'n. v. State*, 198 Wn.2d 418, 495 P.3d 808 (2021). Standing in this setting is *liberally* construed,

and is not intended to be a particularly "high bar" to overcome as the Supreme Court noted in its recent decision on UDJA standing that held a banking association had standing in a UDJA action to challenge the constitutionality of a statute increasing the B&O tax on wealthy financial institutions. 495 P.3d at 827.

The UDJA standing test has two parts; (1) is the interest advanced by the plaintiff within the zone of interests? (2) has the plaintiff suffered injury in fact? *Id*. Put another way, is that the test requires:

> (1)… an actual present and existing dispute, of the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

To-Ro Trade Show, 144 Wn.2d at 411.

The Union is within the zone of interests to be affected by § 40. To be blunt, the Union is plainly a party to the

bargaining process at issue, as mandated by state law, that § 40 disrupts. It is the Union's otherwise confidential bargaining proposals that will be publicly disclosed by the City under § 40's mandate. It is injured, in fact, by the City's disregard of such bargaining, as the likelihood of a fair contract will be diminished.

Confidential collective bargaining, the norm in state public employee collective bargaining, will result in a fair contract for the Union's members. Public bargaining, with its implicit invitation to posturing rather than negotiation, will not. In any event, the City itself has *admitted* in its trial court pleadings that the parties have a live dispute. CP 16 ("The City requested compliance with the will of the voters as expressed in the Charter, the Union refused to conduct transparent bargaining."). The gist of the Union's "harm" could not be more *unambiguous.* The Union believes that the "open" bargaining upon which the City insists is illegal. An *actual* dispute between the City and the Union is plainly present

leading to the fact that there is no contract.

Likewise, the Union has suffered an "injury in fact" even though the City has revealed a willingness to violate § 40 by meeting in private. CP 17. The City still intends to publicize proposals made during those initial negotiations on its website. CP 101, 222. And, importantly, whatever minor assurances of privacy received from the City for an initial meeting in this bargaining round, they violate the plain language of § 40 and could be revoked at any time in the future. This presents a justiciable controversy.

In any event, in significant public controversies, the UDJA allows for consideration of cases that are technically not "justiciable." Our Supreme Court has recognized an exception to the UDJA's standing test when a party raises an issue of broad overriding public import in *State ex rel. Distilled Spirits Inst. Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972)

where the Court stated:[8]

> Where the question is one of great public interest and has been brought to the court's attention in the action where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.

See also, Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 490, 585 P.2d 71 (1978) ("Where the question is one of great public interest … and where it appears that an opinion of the court will be beneficial to the public and to other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional

[8] This analysis is fully consistent with the Court's mootness jurisprudence discussed in *State v. Beaver*, 184 Wn.2d 321, 358 P.3d 385 (2015). The courts will consider cases that are otherwise moot and not justiciable if the claim involves continuing and substantial public interest; the factors used to analyze such an interest are: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question. *Id*. at 330.

interpretation"); *Sorenson v. Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972) (one consideration in determining the public interest implicated is the desirability of an authoritative determination for future guidance of public officers). There is no question that this issue of "open bargaining" is a recurring one,[9] or that PERC and local government officials across Washington would benefit from a decision.

This Court should reject the City's baseless procedural arguments designed to forestall consideration of § 40's clear unconstitutionality.

(2) Preemption Principles in Washington[10]

Article XI, § 11 of our state Constitution states that a

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[9] Omitted from the City's factual recitation in which it claims that claims it made efforts to bargain with the union in "good faith" is the fact that PERC specifically concluded on November 15, 2021 that Spokane County, insisting upon a "open bargaining" resolution, engaged in an unfair labor practice. *Wash. State Council of County and City Employees v. Spokane County*, 2021 WL 5570236 (PERC 2021).

[10] Below, the City did not contest the Union's recitation of these general principles of preemption law, CP 249-50, thereby conceding them.

local government "may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." The general import of this constitutional directive is that the City may only enact reasonable regulatory ordinances that do not conflict with general state law.

A local law may conflict with state law in one of three ways – the Legislature has enacted a law expressly preempting local law (*i.e.*, "express preemption"); the Legislature has enacted a law that generally preempts the field or subject matter of the law (*i.e.*, "field preemption"), or the Legislature has enacted a law that is directly contradicted by local ordinance (*i.e.*, "conflict preemption"). *Watson v. City of Seattle*, 189 Wn.2d 149, 171-76, 401 P.3d 1 (2017); *Cannabis Action Coalition v. City of Kent*, 183 Wn.2d 219, 226-27, 351 P.3d 151 (2015); *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010); *Brown v. City of Yakima*, 116 Wn.2d 556, 559-60, 807 P.2d 353 (1991).

There is no express preemption of local law in the PECBA or PERC, but field preemption and conflict preemption are implicated here. Field preemption is present when a statute evidences legislative intent to occupy the field, leaving no room for concurrent jurisdiction. *Lawson*, 168 Wn.2d at 679. The Legislature's intent to preempt the field may be gleaned from the Legislature's own expression, the statute's purpose, or other factual circumstances. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003). A careful analysis of state law suggests that it has occupied the field and Charter § 40 is preempted.

The essence of conflict preemption is "whether the ordinance permits or licenses that which the statute prohibits, and vice versa." *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960). The conflict must be direct and irreconcilable, not subject to being harmonized. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 835, 827 P.2d 1374 (1992).

In *Parkland Light & Water Co. v. Tacoma-Pierce County*

Board of Health, 151 Wn.2d 428, 90 P.3d 37 (2004), our Supreme Court addressed RCW 57.08.012, a statute giving water districts the power to control their water systems. The Tacoma-Pierce County Board of Health adopted a resolution mandating that all water providers in the County fluoridate their water. The Court held that the county's resolution was invalid under article XI, § 11 as the statute and the resolution irreconcilably conflict. *Id*. at 433-34.

Similarly, in *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007), the Court held that a city's moratoria on private development in shoreline areas conflicted with the state's constitutional authority over shorelines, the public trust doctrine, and the state Shoreline Management Act. The Court concluded that the city's moratoria on processing applications irreconcilably conflicted with state law that required the processing of such applications; the city's ordinances prohibited what state law permits. *Id*. at 698. *See also*, *Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117

Wn. App. 344, 71 P.3d 233 (2003) (ordinance providing for phasing out of existing cardrooms conflicted with statute allowing municipalities to ban cardrooms, but prohibiting any local change of scope of cardroom licenses); *Housing Authority of the City of Pasco & Franklin County v. City of Pasco*, 120 Wn. App. 839, 86 P.3d 1217 (2004) (city dissolved housing authority and created new housing authority jointly with county; ordinance conflicted with statute providing for deactivation of housing authorities).

The City does not seriously contest these broad preemption principles in its brief, br. of appellant at 22-24, although the Union argued them below. *See* CP 85-87. They constitute the law of the case.

(3) The PECBA Occupies the Field of Local Public Employee Collective Bargaining[11]

[11] To be precise, as the Union noted below, CP 87-93, "general law" for purposes of the article XI, § 11 analysis is not confined to the PECBA alone, and encompasses the actions and decisions of PERC and statutes like OMPA and the PRA. The entire range of state law on public employee collective bargaining indicates that confidential bargaining is a

Under the broad principles articulated above, the Legislature occupied the field of public employee collective bargaining, forestalling application of § 40. Alternatively § 40 conflicts with state law, as the trial court ruled. CP 268-89, 295-99.

(a) State Law Controls on Local Government Public Employee Collective Bargaining

In enacting the PECBA, RCW 41.56, and in establishing PERC, the Legislature clearly expressed its intent to occupy the field of local government collective bargaining.[12] In fact, the Legislature made that unambiguously clear when it seemingly *expressly* preempted contrary provisions of law. With some statutory exceptions, RCW 41.56.905 states: "… if any provision of this chapter conflicts with any other statute,

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foundational element to such bargaining that cannot be lightly disregarded as § 40 does. The trial court properly agreed.

[12] The City's brief deliberately ignores the statutory language of RCW 41.56 and the case law requiring *uniform* procedures in public employee collective bargaining.

ordinance, rule or regulation of any public employer, the provisions of this chapter *shall* control." (emphasis added).[13]

The reach of the PECBA is broad:[14]

> This chapter shall apply to any county or municipal corporation, or any political subdivision of the state of Washington, including district courts and superior courts, except as otherwise provided by RCW 54.04.170, 54.04.180, and chapters 41.59, 47.64, and 53.18 RCW.

RCW 41.56.020.[15]

More critically, both as to the PECBA and PERC, the Legislature has expressed a desire for *uniformity* in local government labor negotiations, a point the City fully ignores in

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[13] Although argued below, CP 89, the City's brief fails to mention this statute.

[14] The City did not deny the breadth of the PECBA or PERC's jurisdiction below. CP 247-48.

[15] The Act even extends to negotiations by certain government contractors, evidencing the Legislature's broad intended scope of the Act. *See, e.g.*, RCW 41.56.0251 (charter schools and their employees); RCW 41.56.026 (individuals providing services under RCW 74.39A); RCW 41.56.028 (family child care providers); RCW 41.56.029 (adult family care providers).

its brief. Such a vital public policy obviously undercut if every local jurisdiction like Spokane could adopt its own procedures for collective bargaining.[16]

Rather than acknowledging the policy of uniformity in public employee labor negotiations, the City suggests instead that this Court should simply assume that it and other local governments have extensive authority that should be presumed to apply. Br. of Appellant at 22-24. That argument ignores the Constitution, article XI, § 11, whose thrust is that local rules *must* give way to general state law. It ignores the express public policy outlined in PECBA the authority of PERC, and the exemptions in the PRA and OMPA for bargaining.

[16] The City has not explained any limiting principle for its position that PECBA uniformity is precisely what the Legislature intended. Thus, using its baseless claim that the procedures or ground rules are outside the purview of state law generally, under the City's rationale, a local government could enact a law mandating arbitration if the parties arrived at impasse in bargaining, or, something perhaps nearer and dearer to the Freedom Foundation's heart, a law mandating representation for non-union employees on a labor bargaining team.

Moreover, it *ignores* the fact that when it desired to do so in public employee labor law, the Legislature knew how to carve out authority for local governments; the Legislature did not give the City and other local governments any such authority on collective bargaining.

RCW 41.56.010 declares PECBA's purpose:

> The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employees and their employees by providing a *uniform basis* for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with the public.

(emphasis added). As for PERC's authority, the 1975 Legislature adopted an analogous policy of uniformity, actually transferring authority to address labor relations matters from various other entities to PERC.

> 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).

Our Supreme Court has acknowledged the necessity of *uniform* procedures for local government collective bargaining articulated in the above statutes. In *City of Yakima v. Int'l Ass'n of Firefighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 818 P.2d 1076 (1991), the Court noted that PECBA "applies to all county and municipal governments as well as many other political subdivisions of the State." *Id.* at 667. The Court further recognized that the PECBA was "to provide for a *uniform* basis for implementing" public employee's "right to join and be represented by labor organizations of their own choosing." *Id.* at 670. *Accord, PUD No. 1 v. Pub. Emp.*

Relations Comm'n, 110 Wn.2d 114, 116, 750 P.2d 1240 (1988); *Kitsap County v. Kitsap County Corr. Officers' Guild, Inc.*, 193 Wn. App. 40, 64, 372 P.3d 769, *review denied*, 186 Wn.2d 1003 (2016). "Thus, a liberal construction should be given to all of RCW 41.56 and conflicts resolved in favor of the dominance of that chapter." *Muni. of Metro. Seattle v. Div. 587, Amalgamated Transit Union*, 118 Wn.2d 639, 644, 826 P.2d 167 (1992) (quotation omitted).

This analysis is further supported by RCW 41.56.905 that provides PECBA is a remedial statute to be liberally construed to accomplish its purpose. Thus, the commands of the statute are to be liberally construed and any exceptions to it "narrowly confined." *City of Yakima*, 117 Wn.2d at 670. PECBA must be liberally interpreted to carry out the Legislature's policy of uniformity in collective bargaining procedures. And again, any conflicts between local authority or other labor statutes, and that policy of uniformity are to be "resolved in favor of the dominance of [PECBA]." *Rose v. Erickson*, 106 Wn.2d 420,

424, 721 P.2d 969 (1986) (grievance procedures in collectively bargained contract preempt statute establishing a merit system for employees at county sheriff's office); *Muni. of Metro. Seattle*, 118 Wn.2d 639 (municipality was bound by collectively bargained arbitration provision); *Peninsula Sch. Dist. No. 401 v. Pub. Employees of Peninsula*, 130 Wn.2d 401, 407-08, 924 P.2d 13 (1996) (collectively bargained justifiable cause requirement for firing a bus driver prevailed over hiring statute applicable to school districts). The preemptive effect of the PECBA is reinforced by these decisions.

Further supporting the proposition that the Legislature has occupied the field of local government labor negotiations in enacting the PECBA and PERC statutes is the fact that when the Legislature desired to delegate certain functions to local governments in that field, *it knew how to do so*, a point unaddressed by the City in its brief. In RCW 41.56.100(1), it left local government civil service laws in place:

> A public employer shall have the authority to

> engage in collective bargaining with the exclusive bargaining representative and no public employer shall refuse to engage in collective bargaining with the exclusive bargaining representative. However, a public employer is not required to bargain collectively with any bargaining representative concerning any matter which by ordinance, resolution, or charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure, and authority to the board created by chapter 41.06 RCW.

Such a statute would be *unnecessary* unless the Legislature occupied the field by adopting its policy of uniformity in local government labor negotiations. No such similar delegation of authority to local governments to adopt unique procedures for collective bargaining is found anywhere in the PECBA or PERC statutes.

Finally, as will be discussed *infra* in connection with conflict preemption, the Legislature has enacted exemptions to the PRA and OMPA, evidencing its intent that labor negotiations can be conducted privately and records generated in connection with such negotiations are not to be disclosed

publicly during such negotiations.

In sum, state law, not a patchwork quilt of local laws, governs the conduct of local government public employee collective bargaining.

(b) The City's Argument on PECBA

The City argues that PECBA does not occupy the field of public employee collective bargaining, although it neglects to expressly analyze PECBA's specific statutory directions on bargaining. Br. of Appellant at 23-37. Instead, it attempts to argue that PECBA does not occupy the field by erroneously asserting that PECBA does not address permissive topics of bargaining, *id.* at 25-31, and cherry-picking PERC decisions to sustain its fanciful claim that § 40 can be "harmonized" with the express definitions of collective bargaining that are to be applied uniformly to *all* public employee collective bargaining. *Id*. at 31-37. The trial court correctly rejected the City's approach. This Court should do so as well.

In order to support its claim that the Legislature did not

occupy the field of public employee collective bargaining, the City cites general decisions on bargaining of non-mandatory topics and *Lincoln County v. Teamsters, Local 690*, 2018 WL 4292910 (2018), a decision partially *overruled* by this Court. At that, it quotes only selectively from the PERC decision in *Lincoln County* and largely ignores this Court's decision. PERC there addressed OPMA's (not general state law's) possible preemption of a Lincoln County commissioner *resolution* and it declined to find OPMA preempted the resolution while noting at *5 that the Legislature has exempted collective bargaining from OPMA. PERC also stated there "that collective bargaining has historically taken place in private meetings" and "that the National Labor Relations Board and federal courts have opined that collective bargaining occurs best when it is conducted off the record, in the sense that the sessions are not transcribed or recorded." Ultimately, this Court, like PERC, concluded that the County committed an unfair labor practice by imposing open bargaining by

commissioner resolution. *Lincoln County*, 15 Wn. App. 2d at 157.

Simply ignored in the City's analysis is Judge Korsmo's compelling concurring opinion that observed that the County's so-called open bargaining resolution was "one of the most cynical political documents drafted in modern times," *id*. at 159 (Korsmo, J., concurring), because it takes an OMPA *exemption* and uses it to create an open meeting "mandate."[17] Judge Korsmo explained that the County's resolution ran afoul of state law:

> In essence, this was a local attempt to amend state labor law by requiring that labor negotiations be conducted on the County's terms. The County had no authority to impose any conditions on negotiations. The Public Employees' Collective Bargaining Act (PECBA), chapter 41.56 RCW, was developed "to promote the continued improvement of the relationship between public employers and their employees by providing a *uniform basis*" for organizing and representation. RCW 41.56.010 (emphasis added). It should go

[17] This is similar to what § 40's proponents did, as the trial court observed in concluding § 40 was unreasonable. *See infra*.

> without saying that requiring employees in some counties to bargain under local ordinances and others under state law cannot constitute "uniform" bargaining. To that end, we should recognize that the PECBA preempts the field of public bargaining.
>
> 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 160-61.

Neither PERC's decision nor this Court's opinion addressed field preemption or conflict preemption arising out of PECBA itself or the PERC statutes. Also, most critically, *a resolution is not a charter provision that has the force of law*.

Second, to advance its argument that state law has not fully occupied the field of local government collective bargaining, the City essentially asserts that PERC has no jurisdiction over bargaining on permissive topics of negotiation.

Br. of Appellant at 24-30. It baldly asserts: "The PECBA regulates mandatory but not permissive subjects of bargaining." *Id.* at 25. Not only is this argument a diversion from the question of whether state law generally (PECBA, PERC, PRA, OMPA) has occupied the field of public employee collective bargaining, it is also unsupported. PERC *routinely* addresses unfair labor practices related to permissive topics of bargaining. This Court need look no further than cases like *Pasco Police Officers Ass'n v. City of Pasco*, 132 Wn.2d 450, 938 P.2d 827 (1997), and to note that PERC addresses unfair labor practice complaints arising out of permissive issues in collective bargaining. The City mistakes the fact that certain bargaining issues beyond wages and hours and terms/conditions of employment are "permissively" bargained for the notion that they are beyond the purview of state law.

The authorities the City cites, in fact, do not help it. No case cited by the City even hints that PERC lacks authority to address problems in collective bargaining relating to permissive

topics of bargaining. Indeed, our Supreme Court held in *Pasco Police Officers Ass'n* that far from lacking jurisdiction over such bargaining, it would be an unfair labor practice, subject to PERC's jurisdiction, for a party to bargain to impasse over a permissive subject of bargaining. Further, and closer to the point for this case, courts have authority to analyze in the context of a declaratory judgment action whether certain *structural* aspects of bargaining are so central to state policy on collective bargaining as to become a part of state labor law that may not be diminished at the local level. For example, *in Municipality of Metro. Seattle v. Division 587, Amalgamated Transit Union*, 118 Wn.2d 639, 826 P.2d 167 (1992), Metro contracted for interest arbitration in a collective bargaining agreement with the union, and then attempted to renege on the contract by filing a lawsuit challenging the legality of the interest arbitration provision *to which it agreed*. The Supreme Court stopped that effort, noting that such a provision was not "arbitrary or unreasonable," and no statute expressly prohibited

such a provision. *Id*. at 646. The Court expressed no reservation about PERC's authority to address such a permissive topic of bargaining.

Similarly, in *Lincoln County*, both PERC and this Court reaffirmed PERC's role in addressing permissive bargaining, noting that a party may commit an unfair labor practice by bargaining a permissive issue to impasse. 15 Wn. App. 2d at 152. PERC expressly indicated that it had the authority to order parties to cease and desist, and to bargain in good faith on *permissive* topics like ground rules for bargaining. *Nowhere* did PERC assert it had "no authority" over collective bargaining on permissive topics like the City has claimed.

The PERC decisions cited by the City similarly do not support its position. Far from evidencing any hint that PERC lacked authority over complaints involving bargaining on permissive topics or that PECBA somehow exempted permissive topics of bargaining from its reach, those decisions evidence PERC's involvement on permissive topics of

bargaining. Contrary to the City's assertion that PERC stated it had no jurisdiction over a breach of agreement as to ground rules in *Seattle Cmty. Coll. Fed'n of Teachers v. Comm. Coll. Dist. 6*, 2003 WL 21658684 (2003), PERC there ruled that the Union's complaint regarding the District's bargaining position on ground rules was meritorious. Similarly, in *Sumner Police Guild v. City of Sumner*, 1998 WL 208718 (1998), PERC exercised jurisdiction over bargaining ground rules finding that the city committed an unfair labor practice by conditioning mandatory bargaining topics "upon the conclusion of bargaining permissive topics, *i.e.,* 'ground rules,' that establish *how* the parties will bargain." *Id.* at *9 (PERC's emphasis). Recently, in *Wash. State Council of County and City Employees*, PERC yet again exercised jurisdiction over an unfair labor practice involving Spokane County's "open bargaining" resolution, reaffirming its jurisdiction over permissive bargaining topics. 2021 WL 5570236 at *6.

Simply put, the City fails to cite to this Court any

language in the PECBA or PERC's statute denying PERC jurisdiction over permissive topics of bargaining like ground rules. It cites no court case or PERC decision so holding either. Rather, court and PERC decisions clearly demonstrate that PERC routinely exercises authority over disputes on bargaining ground rules.

Moreover, not to be lost sight of, the City cites *no authority* that detracts from the trial court's determination that the broad scope of state law in PECBA, PERC's authorizing statutes, PRA, and OMPA occupies the field of local government public employee collective bargaining. The Legislature preempted the field here precisely because it enacted comprehensive legislation in PECBA, entrusting its enforcement to PERC. The thrust of PECBA/PERC is statewide *uniformity* in public employee collective bargaining procedures. It made clear that the *norm* of collective bargaining was negotiation in private, *exempting* such negotiations from the reach of both the OPMA and PRA statutes designed to

promote openness in government.

In sum, state law has occupied the field, thereby preempting Charter § 40 under article XI, § 11.

(4) Spokane Charter § 40 Conflicts with General Law[18]

Spokane Charter § 40 also conflicts with controlling state law because § 40 purports to prohibit what state authorizes. *City of Bellingham*, 57 Wn.2d at 111. The City's argument in its brief at 30-36 that § 40 and state law can coexist is a non-starter. The trial court attempted to harmonize § 40 with PECBA, and could not. CP 277-81.

The cases cited by the City again fail to support its position. The City relies its lengthy discussion of an overruled Court of Appeals decision to claim that state collective bargaining law can be "harmonized" with § 40. The City seems to contend that if the Union merely said "no" to open

[18] Below, the City did not address the Union's conflict preemption analysis at all. CP 249-50.

bargaining, § 40 of the Charter somehow no longer applies.[19]

Left unaddressed by this limp analysis of § 40 is the fact that sections B and C of that measure *mandated* that all negotiations be posted online and directed that City officials failing to conduct public bargaining would be prosecuted for their "crime." Not only does the City seem to lack the courage of its convictions, it again ignores the language of § 40 itself. *All* collective bargaining between the City and its union must be done publicly. *All* offers must be revealed publicly. *Nothing* in the Charter provision limits its application to round one of bargaining any more than anything in § 40 limits its application to bargaining over mandatory topics.

"All" in § 40 means what it says: All bargaining between the City and its unions must be undertaken in public, *contrary to state law*. The ultimate fallacy of the City's argument is that in order for "harmonization" to occur, the City must *disobey* §

[19] This assertion is contradicted by the fact that the Union said "no" repeatedly to open bargaining, but the City steadfastly refused to take § 40 off the table. CP 101.

40.

Moreover, the very definition of collective bargaining in the PECBA expressly contemplates two parties to the negotiations – labor and management – and not an audience. RCW 41.56.030 defines collective bargaining as

> the performance of the mutual obligations of the *public employer* and the *exclusive bargaining representative* to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.

(emphasis added); *see also*, RCW 41.56.030(12)-(13) (defining "public employee" and "public employer").[20] *Nothing* in the statute contemplates that anyone other than public employers/public employees are to be involved in the

[20] These statutes are not addressed in the City's brief.

bargaining process.[21]

In *Lincoln County*, this Court declined to find that *OMPA* preempted a County "open bargaining" law. It did not address the question of whether state public employee bargaining laws occupied the field. The Court affirmed a PERC ruling that the County engaged in an unfair labor practice by insisting upon open bargaining. The Court pointedly held that public collective bargaining is not a managerial prerogative. 15 Wn. App. 2d at 157. As noted by the majority in *Lincoln County*, and by Judge Korsmo in his vigorous concurrence, OPMA does not apply to labor negotiations, and does not support the

[21] This policy favoring private collective bargaining to promote the free exchange of views is evident elsewhere. Federal courts have long recognized that the presence of third parties has a "tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining…It may cause parties to talk for the record rather than to advance toward an agreement…he proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations" *N.L.R.B. v. Bartlett-Collins Co.*, 639 F.2d 652, 656 (10th Cir. 1981) (citing recommendations from the National Labor Relations Board "and numerous experts in the field of labor relations" in dispute over presence of court reporter) (citations omitted).

County's contention that OPMA requires open bargaining. *Id*. at 153 n.3, 159-63 (Korsmo, J., concurring).

That § 40 conflicts with collective bargaining as prescribed by state law is further reinforced by the fact that records central to collective bargaining fall outside our PRA.[22] In *ACLU v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004),[23] Division I held the PRA inapplicable to a city's list of negotiation topics exchanged with its police union, reasoning that such lists fell within the deliberate process exception to PRA disclosure in RCW 42.56.280.[24] That exemption is

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[22] The City's brief neglects to address the PRA and OMPA exceptions.

[23] *Accord*, *ACLU v. City of Seattle*, 151 Wn. App. 1016 (2009), *review denied*, 168 Wn.2d 1010 (2010).

[24] RCW 42.56.280 states:

> Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency

designed to protect "the give and take of deliberations that are necessary to formulate agency policy." *Id*. at 549. To invoke the exception, the agency must show:

> [1] the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; [2] that disclosure would be injurious to the deliberative or consultative function of the process; [3] that disclosure would inhibit the flow of recommendations, observations, and opinions; and [4] … that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.

Id. Division I readily concluded that disclosure of such core bargaining-related information "would be injurious to the deliberative or consultative function and inhibit the negotiation process." *Id*. at 553. This would be even more true in opening up the *entire* negotiation process:

> The problem with the ACLU's position on this issue is that it fails to recognize that labor negotiations are an ongoing process in which the City's negotiators, like the Guild's representatives, must respond to the ever-changing tableau of

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> action.

> collective bargaining. The City's negotiators are not free to adopt their own strategies and priorities for the City Council. Rather, they must confer with the governing body on a regular basis to adopt and respond to the proposals and counterproposals that emerge from sessions at the bargaining table. This ongoing process involves negotiators and City officials in what is the essence of the deliberative process. Until the results of this policy-making process are presented to the City Council for adoption, politicization and media comments will by definition inhibit the delicate balance–the give and take of the City's positions on issues concerning the police department.

Id. at 553-54. As the Court noted, "[p]ublic scrutiny of contract issues discussed prior to completing negotiations might be misconstrued, and disclosure would hinder a vital part of the bargaining process–the free exchange of views, opinions, and proposals." *Id*. at 553 n.20.[25]

[25] Courts have held that the PECBA is not a statute that justifies exemption of records from PRA disclosure generally, *SEIU 775 v. State, Dep't of Soc. & Health Servs.*, 198 Wn. App. 745, 396 P.3d 369, *review denied*, 189 Wn.2d 1011 (2017), and that emails unrelated to the core bargaining process must be disclosed, *Serv. Employees Int'l Union, Local 925 v. Univ. of Wash.*, 193 Wn.2d 860, 447 P.3d 534 (2019) (emails of faculty members re: union organizing). But the narrow focus of the deliberative process exemption to PRA sustains the principle

Notably, when tasked with mediating a labor impasse, PERC itself mandates that contract mediations are "not...open to the public" and forbids its mediators from disclosing any information acquired during the mediation to anyone "outside the mediation process for any purpose." WAC 391-55-090; *see also*, WAC 391-08-810(2) (agency records are exempt from public disclosure to "respect the confidential nature of [labor] mediation"). This further shows the uniform premise in this state that labor negotiations are private.

In sum, the City's mandatory open collective bargaining charter provision on labor negotiations conflicts with state policy on collective bargaining in general law and is therefore invalid under article XI, § 11, as the trial court correctly ruled.

(5) Spokane Charter § 40 Violates Article XI, § 11 Because It Is Unreasonable

The trial court determined that § 40 also violated article XI, § 11, even if the preemption analysis did not apply. CP

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that collective bargaining sessions themselves are meant to be private.

283-89. The court specifically noted that proponents of § 40 engaged in "material and misleading representations" of OMPA to the public in securing its enactment, CP 285, describing the proposition as "very deceptive," CP 284, stating:

> Unlike Charter 40, Proposition 1 referenced the entire Open Public Meeting Act, which again, in turn, expressly excludes collective bargaining in the public sector. Again, this Court finds this Chapter to be clearly and plainly unreasonable independent of any constitutional analysis. The voters authorized compliance with the Open Public Meeting Act, which excludes collective bargaining given the language and appropriate interpretation of law.

CP 286 .

Washington courts have long held that a local enactment may violate article XI §11 if that local enactment is *unreasonable.* As noted by the Supreme Court in *Detamore v. Hindley*, 83 Wash. 322, 326-27, 145 Pac. 462 (1915), local governments may exercise police powers "so long as the subject matter is local, the regulation is *reasonable* and consistent with general laws." (emphasis added). *See also,*

Patton v. City of Bellingham, 179 Wash. 566, 38 P.2d 364 (1934) (the grant of police power to city carries with it the necessary implication that its exercise must be reasonable). A local enactment must be clearly and plainly unreasonable to be outside the Legislature's grant of police powers to local governments. *City of Seattle v. Hurst*, 50 Wash. 424, 457, 97 Pac. 454 (1908).

Our courts have declared local ordinances to be an unreasonable exercise of police powers in numerous circumstances. *See, e.g., Lenci v. City of Seattle*, 63 Wn.2d 664, 388 P.2d 926 (1964), *overruled on other grounds, Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2018) (ordinance limiting access to auto wrecking yards to a single access per public way was unreasonable and void).

The trial court found § 40 to be unreasonable because the ballot question was intentionally misleading as to the OPMA, stating: "… the voters deserve to consider propositions that are free from material and misleading misrepresentations of state

law." CP 285. The trial court was correct in so concluding and that analysis further supports the principles that § 40 is unconstitutional and void.

E. CONCLUSION

The trial court properly discerned that Spokane's Charter § 40 is invalid. It is unconstitutional under article XI, § 11 of our Constitution because the Legislature has preempted the field of local government labor negotiations in enacting the PECBA and 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.

This Court should affirm the trial court's order invalidating § 40 of the Spokane Charter.

This document contains 9,040 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 3rd day of January, 2022.

Respectfully submitted,

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APPENDIX

HONORABLE TONY HAZEL
Hearing Date: August 13, 2021
With Oral Argument

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, AFSCME COUNCIL 2, AND LOCAL 270 thereof, Plaintiffs, v. CITY OF SPOKANE, a Washington municipal corporation, Defendant.	No. 21-2-01183-32 [~~PROPOSED~~] ORDER ON PARTIES' MOTIONS

THIS MATTER having come on regularly for hearing before the Court on Plaintiffs' motion for summary judgment, and the defendant City's motion to dismiss and the Court having reviewed the record herein and the material submitted by the parties concerning this motion, including:

1. Plaintiffs' Motion for Summary Judgment;
2. Declaration of Natalie Hilderbrand;
3. City's Opposition to Plaintiffs' Motion for Summary Judgment;
4. Plaintiffs' Reply on Motion for Summary Judgment;

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5. City's Motion to Dismiss;

6. Declaration of Meghann Steinolfson;

7. Plaintiffs' Answer to the Motion to Dismiss;

8. City's Reply in Support of Motion to Dismiss. and all other materials submitted by parties.

This Court, now being fully advised, in the premises for the motion, hereby:

ORDERS, ADJUDGES, AND DECREES that the City's motion to dismiss is DENIED, and the Plaintiffs' motion for summary judgment is GRANTED. § 40 of the Spokane Charter is unconstitutional. The City of Spokane is enjoined from enforcing § 40 of its City Charter.

The court's oral ruling on August 13, 2021 is incorporated herein. Hearing from 8/26/21 is also incorporated.

DONE IN OPEN COURT this 26th day of August, 2021.

HONORABLE TONY HAZEL
Judge

Presented by:

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

COUNTY OF SPOKANE

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WASHINGTON STATE COUNCIL OF COUNTY AND CITY EMPLOYEES, AFSCME COUNCIL 2, AND LOCAL 270 thereof, Petitioner(s), v. CITY OF SPOKANE, a Washington municipal corporation, Respondent(s).	Cause No. 21-2-01183-32 **COPY**

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BEFORE: THE HONORABLE TONY D. HAZEL

DATE: AUGUST 13, 2021

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(AUGUST 13, 2021.)

(AFTERNOON SESSION; 2:29 P.M.)

THE COURT: Thank you, Counsel, appreciate it.

At this time, the Court is ready to rule. First of all, I just want to start off again -- this is the third compliment I've paid to the lawyers, but I appreciate your arguments today. I can see that both lawyers were well prepared. That's not always the case on all hearings. We have quite heavy dockets. I can also tell that both parties put a lot of work into this, and I appreciated your work very much in preparing. I assure both parties I read everything that was provided, including all the emails. I read all the cases. I also did additional research.

I think it's important to remind everyone what the function of the judiciary is. That function, in the context of analyzing disputed interpretations of statutes and ordinances between parties, is to give a judicious reading, which is an objective reading, applying standard legal principles of statutory constructions in whatever controversy is before the Court and also to apply any case law precedent from higher courts directly relating to the controversy. Here, the Court is also to apply constitutional analysis. The Court was very mindful and attempted to be very disciplined in analyzing this case because both parties are entitled to a fair hearing on the

merits of the law.

I understand there are lots of important interests at stake here, but that did not come into the Court's consideration. The Court did its best here to evaluate this objectively and to come up with what I believe is an appropriate legal interpretation and decision. Your arguments were informative to the Court, so, again, I express my appreciation.

The first issue the Court will resolve is whether this case is ripe. First of all, procedurally, there's been a concession regarding the City's 12(b)6 motion that this is now converted into a summary judgment motion, and the Court agrees that's appropriate. So the first foundational issue on summary judgment is whether this controversy is ripe and justiciable or justifiable; it's used in three terms under our jurisprudence. The City argues this issue is not ripe.

First, the Court would point to RCW 7.24.020, and that gives the Court statutory authority to make a decision "whenever a right, status, or other legal relations are affected by a statute or municipal ordinance, and the constitutionality, construction, or validity of an ordinance needs to be determined." In this Court's view this case is ripe. Again, it's blatantly ripe in the Court's view because the position taken by the City is that City Charter 40 is a valid local legislative action.

When you look at the Charter's language, it is designed to

be mandatory. It indicates and, again, I'm quoting from Section 40 of the Charter: "Opening Collective Bargaining Negotiations.

A: As of December 1, 2019, 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 and through video streaming or playback. This section does not require the City to permit public comment opportunities.

B: The City of Spokane shall provide public notice of all collective bargaining negotiations in accordance with the Open Public Meetings Act.

C: The City of Spokane shall publish and maintain all notes, documentations, and collective bargaining proposals."

Rather than going through the remaining language, it's clear to this Court and especially in light of Provision E of Charter 40: "where any elected official or any elected official's agent who is determined by the City's Ethics Commission to have participated in collective bargaining in violation of this chapter amendment shall be referred to City or County's Prosecutor's office for appropriate action." That Charter 40 was intended to be mandatorily applied and enforced as evidenced by its express terms.

This Charter is also presumptively valid at the start of this analysis, and that's the appropriate presumption afforded

by law, and also given that it's presumptively valid, there is a ripe, absolutely ripe disputed issue here because if valid, the City could enforce this, and there's certainly mandatory language contained within Charter 40 that could be imposed at any time.

The Court also notes that the passage of Charter 40 has actually affected and impacted the negotiations. This was the position statement of the City during opening negotiations, and it has caused some delay with respect to negotiating this particular provision related to implementing City Charter 40. And given language in "E" and given the context of the words "all" within City Charter Section 40, and in light of the City's position at bar that Charter 40 is valid, it certainly then applies to all aspects of collective bargaining as expressed by this charter's provisions. The issue is therefore ripe; it's affected the bargaining position, and it's appropriate for the Court to give this the appropriate judicial interpretation by applying rules of statutory construction, constitutional analysis, and applying case law where applicable. There is also a strong possibility that this issue of enforcement will continue to resurface, which also makes this ripe independently.

So then we now turn to the other summary judgment issues before the Court. And, again, the Court finds there is an actual controversy affecting the rights of the parties here,

and there's a genuine and current dispute between the parties that is not just hypothetical.

The impact of Charter 40 to the current collective bargaining has been -- it has certainly affected the permissive bargaining aspects related to the ground rules negotiations.

So the Court next then has to decide what has been asked and raised in the disputed summary judgment motion, which requires this Court to decide whether the field of collective bargaining between public employers and public employees is preempted by PECBA and is field and conflict preemption applicable. I reject the notion that there's express preemption as no express provisions of preemption are reflected in PECBA. That's clearly not the case. So express preemption would not apply here, and the Court has to decide whether or not there's field preemption and also whether there's conflict of law preemption.

Under the legal concept of field preemption, when the state legislature intends to pass law at the state level to occupy or regulate a particular field of law which by its provisions leaves no room for concurrent jurisdiction, local legislative authority is then prohibited for that field. Instead, all legislative action is reserved within that field exclusively for the state legislature. Conflict preemption, which is distinct from field preemption, is triggered when a local ordinance or charter irreconcilably conflicts with state law and the two cannot be harmonized. State law trumps local

legislative authority by operation of law prioritization when the legislature has expressed that intention.

First, I want to talk about some of the important statutes that are relevant to the issue of preemption and analyzed here. Collective bargaining for public agencies is defined in PECBA under RCW 41.56.030, and it's defined within that section in Section (4), and it reads:

"Collective bargaining means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith;" and it goes on.

I need to point out the term "exclusive" because the Court is asked to make statutory interpretation and whenever there's a dispute over statutory interpretations the Court has to apply the standard rules of statutory construction to resolve these conflicting and disputed interpretations, and if the Court ignores or otherwise fails to give meaning to an expressed term within a statute, it fails in its interpretive analysis. Whenever a term is not specifically defined within a statute, it must then be given its common ordinary definition, also taking into account the provisions of the statute as a context. In other words, the dictionary definition or literal meaning of the word needs to be considered here given the context. The context is also illuminated by the intent section of PECBA, and part of the expressed intent of PECBA is to improve the

relationships between public employers and those employees and to create uniformity. So the legislature didn't just simply set out to create uniformity; they also set out to create a uniform statewide system designed to decrease the hostilities and potential antagonism between the employer and the public employees for most public institutions within our state.

So the Court has to interpret that term "exclusive" also within that context of the legislative expressed intent. The term "exclusive" is not specifically defined within the statute and so the Court should assign that term its ordinary dictionary meaning unless it results in an absurdity. Let's look at the definitions of what "exclusive" means under common dictionary terms.

Definition No. 1: Oxford University definition of exclusive means: "Excluding or not admitting other things."

Definition No. 2 under Oxford: "Restricted or limited to the person, group, or area concerned."

Another definition: "Excluding others from participation. Not admitting of something else. Shutting out all others from a part or share."

Macmillan dictionary definition: "Limited to a particular person, thing, or group and not shared with others."

Merriam Webster: "Excluding or having power to exclude."

"Limiting or limited to possession, control, or use by a single individual or group."

"Excluding others from participation."

All of the definitions I could find -- and, again, the term "exclusive" is being used as an adjective within the statute. The Court also pays attention to grammar when interpreting statutes. The noun in this statutory phrase is the representative, the verb is bargaining, and the adjective is exclusive. So this is clearly in the context of an adjective, and a definition consistent with an adjective for that word should be applied. There is one noun definition of the word "exclusive," and that noun definition happens to deal with an inapplicable media context, in other words, an "exclusive media interview." All other definitions are adjectives for this particular word, and if you look at all the definitions, they are consistent in connotation with those that have been read by the Court today with little variation across numerous dictionaries. The City argues that the term "exclusive" means within PECBA and refers only to the designated union representative. However, the legislature selected the term "exclusive" for a reason as it could have easily referred to or utilized "designated union representative" or "duly authorized union representative" or something similar rather than use the specific term "exclusive." The common definition of "exclusive" and the legislature's selection of that specific term is instructive to this Court in light of the intent section of the PECBA statute found in RCW 41.56.010. Also, the

term "bargaining representative" is defined specifically in PECBA, which does not include the term "exclusive." Thus, the inclusion of that term "exclusive" in PECBA should be viewed independently from the definition of "bargaining representative" for purposes of analyzing PECBA.

Upon applying rules of statutory constructions, it's clear to this Court that the legislature did intend for these negotiation meetings to be exclusive; they would not have used that word otherwise. Regardless, the legislature is on notice regarding judicial rules of statutory construction. In applying basic rules of statutory construction, it is clear the legislature -- it may not have been ever raised before in our courts; this is obviously a matter of first impression, but when I apply just basic common principles of statutory construction to this statute that's the result and appropriate interpretation. The common definition for the term "exclusive" should be given meaning and effect. This interpretation does not lead to an absurd result given the expressed purpose of PECBA.

We're all trained in law school that when a term is not defined, and the context is not otherwise made clear, you apply the common definition within the context of the statute. The term "exclusive" is not just expressed here in PECBA in this particular definition section. I want to turn to RCW 41.56.100, and this is the section of PECBA that deals with the

obligations of the employer. In other words, the statute is mandating these obligations upon the public employer within this specific section of PECBA.

Section 1 reads plainly: "A public employer shall have the authority to engage in collective bargaining with the exclusive bargaining representative and no public employer shall refuse to engage in collective bargaining with the exclusive bargaining representative."

So not only is the term "exclusive" cited in a definitional section of PECBA defining public collective bargaining, it is cited in other contexts where obligations are expressed and the repeated use of the word exclusive is continually used by the legislature. This interpretation and assignment of the term's ordinary meaning do not result in any inconsistency with other provisions of PECBA.

Again, the express provisions of this chapter under RCW 41.56.905 indicate that all the provisions pertaining to PECBA shall be liberally construed to carry out the intent of the chapter and also directs that any conflict with an ordinance shall be resolved in favor of PECBA. This Court rules with respect to conflict preemption that it's clear -- and, again, the Court will attempt to harmonize this to show its thought process, but ultimately that harmonization fails -- and I'll go over that analysis, but conflict preemption certainly applies. The Court also rules that field preemption also exists

independent of the Court's interpretation of the term "exclusive."

Our Supreme Court has declared that state labor law is preempted by federal law. So, in other words, our State Supreme Court has acknowledged that the area or legal field of labor law is preempted by federal law. However, they specifically cited in case dicta -- and I'm going to give myself permission to do an edit on the record because I want to appropriately cite the case, so I'm going to insert the appropriate citation. [Insert edit: *Navlet v. Port of Seattle*, 164 Wash. 2d. 818,197 P.3d, 221 (2008)] I will provide an email to parties with that appropriate citation -- but the Supreme Court articulated that although federal labor law preempts the field of state labor law, PECBA concerns the narrower field of collective bargaining in the context of the public sector. There's a reference to that by our Supreme Court. It makes sense in light of PECBA's provisions that collective bargaining of all public employers and employees at the subdivision level occupies its own narrow field of law given the state interests of uniformity as expressed by our legislature in PECBA and the statewide regulating structure of PERC.

Now, admittedly, the case I referenced did not expressly state that the field was preempted; it simply said and referred to PECBA as applicable to the area of public sector collective

bargaining. The issue at bar was not before the Supreme Court. A plain reading of PECBA clearly indicates its mandatory application throughout the state; it applies on or to all county and municipal corporations and any political subdivisions of the State of Washington, including district courts, superior courts, except as otherwise provided. This is further evidence of legislative intent to define and occupy or otherwise reserve a field of law for statewide regulations as all provisions in PECBA are mandatory, and the legislature directs that PECBA would trump local legislative actions in conflict. No exceptions or room is made for local legislative actions or modifications. The legislature did not leave room for concurrent jurisdiction in the narrow field of public sector collective bargaining as their stated purpose was to create uniformity at the state subdivision level.

And, again, the additional intent behind the statute was also to promote the continued improvement of the relationships between public employers and their employees and provide a statewide uniform process. This is a permissible state interest and state legislative prerogative. This issue about public meetings and collective bargaining is not a new issue; it's been around for decades. The legislature in this Court's view considered this, and that's why they likely inserted the word "exclusive" into the statute. Alternatively, a compromise between legislators may have resulted in the resulting language

and inclusion of the that term. The National Labor Relations Board has had publications regarding the argument, the position taken by some that public negotiations can have a negative impact on public policy or is bad public policy as referenced in Judge Korsmo's concurring opinion in *Lincoln*. It is not the place of this Court to supplement or otherwise insert its own opinions about the policies debated; rather, the Court instead attempts to decipher the intent of the legislature by applying rules of statutory construction and then also must adhere to the priority of state law principles per our state constitution. The numerous statutory schemes that relate to access to the public all contain provisions providing exceptions for public collective bargaining, which further persuades this Court that the legislature had contemplated this issue.

This is a matter of first impression; I'll also acknowledge. In all the case law research that I could do and in considering what was provided to the Court, I could not find ever where the higher courts had definitely decided the issue of whether PECBA occupied the field or otherwise preempted the field of public sector collective bargaining, but this Court's conclusion is that PECBA does just that. Again, there's field preemption because of PECBA's intent and because it limits itself to and defines the field of public sector collective bargaining processes and is made mandatory by its express provisions. It

has express provisions that forbid anything but negotiation meetings with the exclusive bargaining representatives. And, again, I emphasize the word "exclusive" as stated by the legislature and assigned its ordinary meaning.

PECBA conflicts specifically with Charter 40, but in order to determine that conflict, the Court had to attempt to first harmonize it, so let's articulate that attempt. I did my best to objectively see if Charter 40 could be harmonized with PECBA and other statutory schemes.

Again, Section 40 of the City Charter reads, Open Collective Bargaining Negotiations, Section A: "As of December 1, 2019, the City of Spokane will conduct all collective bargaining contract negotiations -- emphasis on "all" -- in a manner that is transparent and open to public observation both in person and through video streaming or playback." It cannot be reconciled as it conflicts with the express provisions of PECBA and the determination under ordinary statutory construction rules in the view of the Court. "This section does not require the City to permit public comment." Again, all of Section A cannot be harmonized given its expressed terms. There's no discretionary or permissive use by the City anywhere within Charter 40. This was a mandatory and obligatory Charter that the City, by its own words elected, was mandated to be used for all aspects of collective bargaining.

Again, B of Charter 40: "The City of Spokane shall provide

public notice of all collective bargaining negotiations in accordance with the Open Public Meetings Act." Contrary to the arguments by the City that the intent of Charter 40 was only for the City to be able to publish certain documents concerning their offers, which they would be in their rights to do so; of course, the Court agrees with that position, but nevertheless, this Charter mandates that all collective bargaining negotiations be in accordance with the Open Public Meetings Act. Interestingly enough, it also contains a material misstatement of the law as Section B mandates that they shall provide public notice of all collective bargaining negotiations in accordance with the Open Public Meetings Act, and as previously determined by Division III, the Open Public Meetings Act expressly excludes public sector collective bargaining. So by its reliance on the Open Public Meetings Act, it contains a misstatement of law as it ties itself to the provisions of the Open Public Meeting Act. It otherwise cannot be harmonized, that section, because it mandates "all" aspects.

C: "The City of Spokane shall publish and maintain all notes documentations, collective bargaining proposals, on the City's official website within two business days of their transmission between the negotiating parties." Again, reference to "all;" it cannot be harmonized on its language.

D: "The City of Spokane shall publish all final collective bargaining agreements on the city's official website for the

life of the agreement." Again, reference to all but this provision was already required or at least permitted under state law regardless of the Charter.

E: Again, that's the provision where any elected official not following Charter 40 can be referred to the prosecutor's office for appropriate action. Again, it indicates the mandatory application of this provision, not the discretionary or permissive use by the City by its own express terms. This is not reconcilable with PECBA.

There's no severance provision within City Charter 40 or applicable to Charter 40, so if any one of these fails, it all fails because the Charter did not insert a severance section nor any preservation or savings language.

Finally, Section F: "Open to public observation does not include meetings related to any activity conducted pursuant to the enforcement of a collective bargaining agreement." Again, no severance provision. Of course, the parties could do that without Charter 40, but Section 40 is, again, it's in conflict with state law in the view of this Court as it requires all aspects of collective bargaining to be non-exclusive. It otherwise modifies or disrupts the uniformity intended by PECBA and is therefore irreconcilable.

There's also a doctrine found in law, and this was not raised by the parties, but the Court couldn't help but notice when conducting its research that there's a doctrine contained

in our Washington jurisprudence that if a local ordinance or charter is unreasonable on its face, it can also be void. So in an alternative position, the Court also wants to point out the nature of Charter 40, which in this Court's view makes it unreasonable.

First of all, the procedural history of Charter 40 gives us some important context. And, again, when I'm talking about the unreasonableness doctrine regarding local ordinances, I'll cite to *Seattle v. Hurst*, 50 Wash. 424, 97 P. 454 (1908); *City of Spokane v. Bostrom; City of Tacoma v. Vance*, 6 Wash. App. 785, 496 P.2d 534; and also *Greco v. Parsons*.

There are ample indications in case law that there is the doctrine of unreasonableness on its face, and Proposition 1, again, was a proposition on the ballot back in 2019, and it stated the following for the voters' consideration:

"The Charter Amendment Regarding Open Government and Transparency in City Government: Shall the Spokane City Charter be amended to require all collective bargaining negotiations be transparent and open to the public observation, requiring public notification of such meetings as required by the Washington State Open Public Meetings Act and require all contracts be available for public review and observation on the City's website?"

This is a very deceptive proposition by its own language. It indicates in its own language to the voters a question about

whether the voters should require what's already required by law. The indication and conveyed inference poses the question, should these meetings be conducted as required by the Washington State Open Public Meetings Act, but, in fact that statute expressly excludes collective bargaining, so it's a material misstatement of the law contained within the proposition as proposed to the voters. And, again, the inapplicability of the Open Public Meetings Act has been determined by higher courts. For the record, I'm citing to the *Lincoln* case and Korsmo's concurring opinion, and the majority's decision. The Washington State Open Public Meetings Act does not apply to collective bargaining by its own express terms.

Independent from constitutional and preemptive analysis, the voters deserve to consider propositions that are free from material and misleading misrepresentations of state law. In addition, when a proposition limits and ties itself to the requirements expressed in state RCWs by referencing such RCWs without qualification, the proposition should only be enforceable per the express terms of that RCW. See RCW 1.12.028. Here, the voters of Spokane authorized open collective bargaining only to the extent consistent with the Open Public Meeting Act according to the expressed terms of Proposition 1. Any enforcement inconsistent with the Open Public Meeting Act is unreasonable based on the expressed terms

of Proposition 1. Unlike Charter 40, Proposition 1 referenced the entire Open Public Meeting Act, which again, in turn, expressly excludes collective bargaining in the public sector. Again, this Court finds this Charter to be clearly and plainly unreasonable independent of any constitutional analysis. The voters authorized compliance with the Open Public Meeting Act, which excludes collective bargaining given the language and appropriate interpretation of law.

Because of the field preoccupation, because of the conflict preemption, again both field preemption and conflict preemption apply; this Charter is also unconstitutional because it violates and is in conflict with Article 11, Section 11 of the Washington State Constitution, which indicates that local municipalities cannot enact ordinances that are contrary to general law.

We have expressions in all sorts of state statutes, including PECBA itself, that it was contemplated that collective bargaining in the public sector be exclusive, and all other provisions of the Open Public Meetings Act, Public Disclosure Act, they all make exceptions and provide for a measure of privacy for these public sector bargaining scenarios, and there's likely a reason for that, and the reason for that is the legislature of Washington has recognized that while transparency in local government is exceptionally important to the public, and that's why they crafted these

numerous statutes to mandate that any final actions are to be transparent, any final decisions need to be in view of the public. We have open courts, we have open city council meetings, any final decisions would be viewed in public, and we have extensive public disclosure laws, but there's also the reality of human nature that the legislature likely contemplated. A reality in the context of collective bargaining in the public sector which could increase hostilities, cause unnecessary delays, and have a chilling effect on open communications between the parties during negotiations, or otherwise decrease the efficiencies intended by the uniform process for bargaining and ultimately such conflicts could, under a worst-case scenario, result in disrupting critical government functions, infrastructure, or vital services.

And, again, their purpose of enacting PECBA was also to improve the relationship between the public employer, not antagonize that relationship, and by conducting these meetings in the open it can be used as an antagonistic tactic which can lead to increased hostilities. That's just the honest reality. It can also be used under the guise of transparency to create favorable positions in bargaining contrary to state laws' intentions. That is how the Court sees the legislative intent after objective analysis, and it is also unreasonable facially, and it also violates the state constitution. Numerous

statutory schemes enacted by the legislature would unravel if one party could unilaterally impose public negotiations.

I am granting summary judgment. There are no material facts in dispute. All inferences have been drawn in favor of the nonmoving party, and in this particular case, the Court has presumed that Charter 40 is valid, and beyond a reasonable doubt, it does not pass constitutional muster. It's in conflict with general state laws clearly on its face and by application under the facts before the Court. Summary judgment is granted in favor of the Union. PECBA preempts the field of collective bargaining between cities and unions. There is no room for concurrent jurisdiction, and PECBA also conflicts with Spokane City Charter 40, and PECBA trumps the ordinance as it is state law. The uniformity intended by the legislature should be maintained as PECBA preempts this field.

Counsel, again, fourth expression of appreciation because I really did appreciate your work, and I thought both parties performed very well today. I appreciate your professionalism and the work you've put in on behalf of your clients. That is the decision of the Court today.

Counsel, at this time, I would like to have any findings condensed into written Findings and Conclusions of Law. Mr. Talmadge, as the prevailing party, I would ask that you draft them in accordance with this Court's oral ruling; a transcript can be provided to assist you. The Court reserves

the right to edit your proposed findings. We can have a presentment hearing if there's any disagreement regarding those final written findings. I would like that sent to me in Word editable format so that I can ensure that it is, again, consistent with the Court's oral ruling today and with the Court's intentions. We can set a presentment hearing.

Do you have any opposition to that, Mr. Talmadge?

MR. TALMADGE: No, Your Honor.

I was going to ask would it be preferable to you to simply annex your oral ruling to the written proposed order on summary judgment I sent to your staff yesterday?

THE COURT: We certainly could do that. If that's your preference, we certainly could do that.

I do want to make another point in the absence of written conclusions because this is what caused me some confusion when initially analyzing this particular scenario. There are examples in case law where the parties have bargained with respect to bargaining in public. It's never been controversial under general legal principles that a party can bargain away their statutory right. They can certainly do that if both parties agree. It is impermissible for one party to unilaterally impose a condition by local legislative action, and so I wanted to reconcile that aspect as well because initially, it caused me confusion seeing cases where these parties were, in fact, negotiating away or agreeing to bargain

in public. And, frankly, it could be to the advantage of the Union in certain circumstances and an advantage to the City in certain circumstances, and that may be in fair play during ground rule negotiations. I'm not indicating that the parties can't bargain away their statutory rights; I want to make that clear, but it cannot be unilaterally mandated due to PECBA. One additional comment I would make is PECBA and PERC were in part enacted because of the legislative recognition that public employers and public employees are not on equal footing in negotiations. Thus, allowing the employer to affect negotiation conditions unilaterally by legislative action also appears directly contrary to the purposes for which PECBA was enacted, which was instead to create a uniform system for statewide regulation. It might be a more accurate and precise statement of law to indicate PECBA and PERC combine to preempt the field of public sector collective bargaining for all subdivisions within the state.

MR. TALMADGE: I think that well understood on the part of the Union, Your Honor, we've got the clear-cut direction from you.

THE COURT: With that, Counsel, I'll leave it to you. I'm happy to publish the -- if that's how you'd like to proceed and just rely on my oral ruling and attach and incorporate, that's fine. I was allowing an opportunity if you wish to provide additional Findings and Conclusions of Law. It's up to you on

how to proceed on that as the prevailing party.

MR. TALMADGE: Your Honor, just putting on my appellate cap for just a moment, the courts have often said that in the context of appellate review and orders on summary judgment, the findings of fact are considered superfluous by the appellate courts. The courts are guided by the oral rulings of the Court, so I think probably in order to have your oral ruling really stick, it would be better to attach it, to annex to a traditional order on summary judgment.

THE COURT: Very well. Of course, Mr. Talmadge, we will proceed in that fashion then. You are correct.

Do you have a proposed order that was provided to the Court?

MR. TALMADGE: We sent that to the Court yesterday.

THE COURT: Okay.

MR. TALMADGE: And if the Court were to interlineate that its oral ruling is incorporated by reference, that would probably do the trick.

THE COURT: Okay. This might be it right here.

Counsel, I don't have that in hand; it was not in my materials. I have the City order denying plaintiffs; I don't have your proposed order. I'm not indicating it wasn't sent, but it didn't get to me for some reason.

So, Counsel, would you do the Court a courtesy and resend that to the Court?

Have you reviewed that, counsel for the City?

MS. GOLDMAN: Yes, Your Honor.

THE COURT: Is there any objection to approving that as to form only?

MS. GOLDMAN: Not as described by Mr. Talmadge; simply granting summary judgment for the City pursuant to the Court's oral ruling, which is described and attached hereto or something like that. We have no objection to form.

THE COURT: Okay. Thank you very much.

MR. TALMADGE: Why don't I try to draft something, Your Honor, that adds that language by incorporation of your oral ruling and get that to you on Monday, if that's okay.

THE COURT: No problem, Mr. Talmadge. Thank you.

Before we conclude the record, are there any other findings or clarifications being requested by the parties at this time?

MR. TALMADGE: No, Your Honor.

THE COURT: Thank you.

MS. GOLDMAN: Thank you, Your Honor.

THE COURT: Thank you, Counsel, for your work.

(Proceedings Concluded.)

C E R T I F I C A T E

I, TAMMEY MCMASTER, do hereby certify:

That I am an Official Court Reporter for Spokane County Superior Court, sitting in Department No. 6, at Spokane, Washington;

That the foregoing proceedings were taken on the date and time as shown on the cover page hereto;

That the foregoing proceedings are a complete, true, and accurate transcription of the requested proceedings, duly transcribed by me or under my direction, and may include alterations made by the judicial officer as authorized by statute.

I do further certify that I am not a relative of, an employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 25th day of August, 2021.

Tammey McMaster

Tammey McMaster, CCR No 2751
Official Court Reporter
Spokane County, Washington

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Brief of Respondents*** in Court of Appeals, Division III Cause No. 38447-1-III to the following:

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Original E-filed with:
Court of Appeals, Division III
Clerk's Office

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.

DATED: January 3, 2022 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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