CASE NO. 13-1369

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CITY OF ENGLEWOOD, a home rule municipal corporation Defendant—Appellant, v. STEPHEN BRETT RYALS, Plaintiff—Appellee	)))))))))

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge R. Brooke Jackson
D.C. No. 12-cv-02178-RBJ

Unopposed *Amicus Curiae* Brief of the
Colorado Municipal League
in Support of Defendant-Appellant
and Reversal of the Lower court

Respectfully submitted,

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Oral Argument is not requested.

November 26, 2013

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COMES NOW the Colorado Municipal League ("CML" or the "League") by undersigned counsel and, pursuant to FED. R. APP. PROC. 29, submits this brief as *amicus curiae* in support of Appellant, the City of Englewood ("the City").

All parties have consented to CML filing this brief.

STATEMENT OF IDENTITY & INTEREST OF *AMICUS CURIAE*

The League is a non-profit, voluntary association of 266 of the 271 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 100 home rule municipalities, 165 of the 171 statutory municipalities and the lone territorial charter city; all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. The League has been appearing as an *amicus* before the Colorado Court of Appeals and the Colorado Supreme Court for decades in appeals where a significant decision affecting Colorado municipalities is possible. The League, as an *amicus* in this case, will provide the Court with a statewide municipal perspective on the issues presented and assure that the general interest of the League's member municipalities is represented.

The outcome of this appeal has great implications for Colorado's cities and towns and whether Englewood's Ordinance governing sex offender residency restrictions conflicts with and therefore is preempted by the state's sex offender program. The decision in this case will have a direct impact on all cities and towns in Colorado that restrict where certain aggravated registered sex offenders may live to serve the public health, safety, and welfare and protect potential victims.

STATEMENT OF AUTHORSHIP

The Colorado Municipal League, by its undersigned counsel, prepared and submits this brief. This brief was (A) not authored by a party's counsel; (B) no party contributed money with the intention to prepare or submit this brief, and (C) no person contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case presents the question of where the line should be between the local government's interest in governing where certain registered sex offenders may live within the City and the state's interest in a sex offender program. Although the lower court acknowledged that the City had a viable local interest in legislating with respect to residency restrictions on registered sex offenders, the lower court erred when it ruled that Englewood's Ordinance 34 was in "operational conflict" with the state's program and thus, preempted. The operational conflict prong of the three part preemption analysis is described by the Colorado Supreme Court in *Board of County Commissioners of La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045 (Colo. 1992). "Operational conflict" preemption analysis occurs when a party protesting a local legislative act is unable to demonstrate either an express or implicit intent by the Colorado General Assembly to preempt local government authority. In such circumstances, courts have directed that a party protesting a local enactment must show that such enactment, in operation, "materially impairs" or "destroys" the state's interest. This high standard,

coupled with an absence of legislative intent to preempt, supports consideration of "operational conflict" preemption arguments in a manner deferential to the challenged exercise of local authority. As part of that deference, courts should not too readily find conflict between a local enactment and state statutes. Indeed, it is consistent with well-established rules of construction that state and local legislative acts be read harmoniously and effect be given to both, whenever possible.

The trial court improperly held that the Colorado Sex Offender Registration Act ("CSORA") and papers issued by the Sex Offender Management Board provide evidence of a comprehensive state sex offender program as the basis for "operational conflict" preemption of the City of Englewood's residency restrictions for certain registered sex offenders and that the program reflects a state interest that would be impaired by operation of the City ordinance. There is, in short, no conflict between Ordinance 34 here at issue and the cited statutes or sex offender program.

ARGUMENT

The League hereby adopts by reference the argument of the City of Englewood in its Opening Brief, and further submits the following argument.

I. There is no conflict between Englewood's Ordinance 34 and the state sex offender program; thus, the trial court's analysis was incorrect.

Matters of "mixed" state and local concern are areas in which both the state and the home rule municipality may legislate, and a home-rule regulation may coexist with a state regulation so long as there is no conflict. *City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003). However, in the event of a conflict, the state statute supersedes the

conflicting local regulation to the extent of the conflict. *Webb v. City of Black Hawk,* 295 P.3d 480, 486 (Colo. 2013); *City & Cnty. of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990). The trial court appropriately found that the issue at hand is a matter of "mixed" state and local concern, under Article XX of the Colorado Constitution and therefore must undergo the conflict analysis to determine whether the local legislation is preempted by state legislation. (Order at p. 19). The test for determining whether a conflict exists in matters of mixed state and local concern is "whether the ordinance in question either licenses or permits that which the state statute prohibits or whether it proscribes, burdens or limits that which the statute authorizes." *Lakewood Pawnbrokers, Inc. v. City of Lakewood,* 517 P.2d 834, 836 (Colo. 1973); *see also Denver & Rio Grande Western R.R. v. City and County of Denver*, 673 P.2d 354, 361 n.11 (Colo. 1983); *National Advertising Co. v. Dept. of Highways*, 751 P.2d 632, 638 (Colo. 1988); *Sant v. Stephens*, 753 P.2d 752, 756-57 (Colo. 1988).

Applying this conflict test, there is no apparent conflict between the state sex offender statutes and Englewood Ordinance 34. The intention of the Colorado Sex Offender Registration Act ("CSORA") makes it clear that the policy of the state is to provide "services as may effect the successful reintegration of such offender into the community while recognizing the need for public safety." COLO. REV. STAT. § 17-22.5-403(6) (2013). The Standardized Treatment Program for Sex Offenders goes on to explain that the intent of the state is to "prevent offenders from reoffending and enhance the protection of victims and potential victims." COLO. REV. STAT. § 16-11.7-101(2)

(2013). Local registration of where convicted sex offenders live, to the extent necessary to abate harm to citizens, is expressly contemplated as CSORA outlines the role of local law enforcement as the agency for registration of sex offenders. Locales are charged with enforcing CSORA by taking sex offender registrations, maintaining and reporting registrations to the state, verifying the residential address, and issuing notifications. COLO. REV. STAT. § 16-22-105, -109 (2013). CSORA expressly states that "the law enforcement agency is not required to accept the person's registration if it includes a residence or location that would violate state law or local ordinance." COLO. REV. STAT. § 16-22-108(1)(A)(1) (2013). A role for local governments in furtherance of this policy is clearly contemplated in the state sex offender program.

The intention of the City's Ordinance is to "reduce the risk of an offense" by "sexual predators and the specified sex offenders [that] have a high rate of recidivism." Englewood Municipal Code § 7-3-1. This Ordinance was passed unanimously by the Englewood City Council as an emergency ordinance in July 2006 because the Colorado Board of Parole was planning to place a sexually violent predator at an extended stay hotel within a block of a daycare center. (Order at p. 3). Ordinance 34 does not restrict the residences of all registered sex offenders, only those of sexually violent predators and more serious sex offenders. There are more than 50 residences, and arguably more, where aggravated registered sex offenders may live in Englewood. Registered sex offenders convicted of less serious crimes may live anywhere in the City.

While both state statute and local ordinance address registered sex offenders, a city legislating in an area where the state has also legislated does not automatically constitute

a conflict. The Colorado Supreme Court has held that, "there is nothing basically invalid about legislation on the same subject by both a home rule city and the state, absent some conflict between the two regulations." *City of Aurora v. Martin*, 507 P.2d 868, 869 (Colo. 1973) (Citing *Bennion v. Denver*, 504 P.2d 350 (Colo. 1972) and *Vela v. People*, 484 P.2d 1204 (Colo. 1971)). The *Aurora* Court further explains that "the essence is whether the ordinance authorizes what the state forbids, or forbids what the state has expressly authorized. In the light of this test, it is apparent that there is no conflict between the substantive portions of the city ordinance and the state statute." *Aurora,* 507 P.2d at 870.

One searches in vain in the state sex offender statutes for any indication whatsoever that it is the policy or "interest" of the state to restrict where certain registered sex offenders may live. (Order at p. 10). The General Assembly has not addressed locational limitations for registered sex offenders, nor has the General Assembly prohibited local governments from legislating distance restrictions for registered sex offenders. In fact, in 2006, the General Assembly chose not to issue a statewide restriction on where sex offenders may live. Doubtless, there were countless public policy arguments made for and against such a proposal, but the Legislature ultimately decided not to legislate in this arena thereby continuing to allow local governments to legislate regulations on where registered sex offenders may reside.

Ordinance 34 does not authorize what the state sex offender statutes prohibit because both Englewood and the State seek to avoid recidivism of registered sex

offenders and protect potential victims. Far from conflicting with the state policy reflected in the comprehensive Colorado sex offender program, the Englewood ordinance here at issue is entirely consistent with and complementary to the state policy, and therefore, there is no conflict between the state's sex offender statutes and the City's Ordinance.

II. Alternatively, any conflict between the Englewood Ordinance and statute does not rise to the level of "operational conflict", so the trial court's conclusion to the contrary should be reversed.

After applying a home rule analysis, then the court must then determine if there is a conflict between the local ordinance and the state statute to determine if the ordinance is preempted. In *Board of County Commissions of La Plata County v. Bowen/Edwards Associates Inc.*, 830 P.2d 1045 (Colo. 1992), a case involving the appropriate division of land use authority between local governments and the state in the area of oil and gas regulation, the court set forth its three-part approach to analyzing claims of preemption of local government authority.

> There are three basic ways by which a state statute can preempt a county ordinance or regulation: first, the express language of the statute may indicate state preemption of all authority over the subject platter [citations omitted]; second, preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest [citation omitted]; and third, a local law may be partially preempted where its operational effect would conflict with the application of the state statute [citations omitted].

Id. at 1056-1057.

The "operational conflict" prong of the Colorado Supreme Court's three-part preemption analysis directs courts in the critical function of determining the appropriate division of powers between the state and local governments. "Operational conflict" should be treated as a preemption standard deferential to the challenged exercise of local legislative authority, and this Court should find no conflict absent a clear showing of apparent conflict between the local law and a state interest. In elaborating on the "operational conflict" aspect of this analysis, the Court explained that:

> State preemption by reason of operational conflict can arise where the effectuation of a local interest would *materially impede* or *destroy* the state's interest [citation omitted]. Under such circumstances, local regulations may be partially or totally preempted to the extent that they conflict with the achievement of the state interest.

Id. at 1059 (emphasis added).

Finding neither express nor implied conflict between the state sex offender statutes and Ordinance 34, the lower court continued to search for a conflict between the state and local legislation in reports, white papers, position papers, and regulations issued by the Sex Offender Management Board ("SOMB") and parole supervision. (Order at p. 9-10). These "rules" are not promulgated by the State Administrative Procedure Act in Article 4 of Title 24 of the Colorado Revised Statutes, and there is no opportunity for local governments to review draft regulations and provide comments. These rules are not sufficient evidence to constitute an operational conflict with the City's Ordinance, and the trial court decision even acknowledges that the SOMB sex offender reports, papers, and regulations are not state law (Order at p. 9). Yet, the district court improperly relies

upon these rules rather than the General Assembly's pronouncement in statute to arrive at the preemption of the City's Ordinance by the "comprehensive system for regulating sex offenders." (Order at p. 20). The lower court found that the state sex offender statutes do not satisfy the threshold to constitute preemption, but the state's comprehensive sex offender program somehow does. The League disagrees with the trial court's finding that there is any conflict between the state sex offender program and Englewood's Ordinance 34.

The *Bowen/Edwards* Court articulated the standard for what must be shown to warrant preemption of the local regulation, that is, that operation of the local regulation would "materially" impair, or "destroy" the state's interest. The League urges that "operational conflict" should be construed as a standard deferential to the challenged exercise of local government authority. After all, a court only considers the possibility of operational conflict preemption after it has determined that the General Assembly has neither expressly preempted local government authority in the area in question, nor may such an intent be inferred from the statutory scheme. At this point, the party objecting to an exercise of local authority must show not simply that the local rule requires more than a state statute or rule, nor simply that the local rule might somehow complicate fulfillment of the state's interest. Rather, the party seeking preemption must demonstrate that operation of the local ordinance will "materially impede" or "destroy" the state's interest. *Bowen/Edwards*, 830 P.2d at 1059.

The General Assembly made it clear that the primary goals of CSORA and SOMB are public safety, yet the district court mandated that Englewood Ordinance 34

must take into account an individualized assessment of each convicted, registered sex offender before restricting where they may live, or else it is "fatal". (Order at p. 20, 23).

The League respectfully urges that the court, in *Bowen/Edwards*, chose its words deliberately, intending to establish a heavy burden for those seeking preemption of local government authority, when there is no evidence that the General Assembly intended such preemption. It is consistent with this deference that, in the context of an operational conflict challenge, courts not too readily find conflict between state statutes and local legislation. In such circumstances, the party seeking to avoid application of a local ordinance should be obliged to make a clear, threshold showing of apparent conflict between the local ordinance, in operation, and the specific state interest reflected in the state statutes. Deference to local legislation by courts considering "operational conflict" based preemption challenges to local ordinances is appropriate, not just because of the lack of preemptive intent on the part of the General Assembly, but also because such an approach is consistent with well-established rules governing the construction of statutes and ordinances.[1]

Under such rules, "[a] statute and an ordinance will not be held to be repugnant to one another if any reasonable construction upholding both can be reached." Norman J. Singer, *Statutes and Statutory Construction* § 30:5 (6th ed. 2000); *People v. Smith*, 971 P.2d 1056 (Colo. 1999); *Smith v. Zufelt*, 880 P.2d 1178 (Colo. 1994) (when interpreting more than one statute, court will favor a construction that avoids potential conflict

[1] "As a general rule, courts apply the same rules of construction to municipal ordinances and they do to statutes." 1A Singer, Statutes and Statutory Construction (6th ed.) §30:6, citing *Catholic Archdiocese of Denver v. City and County of Denver*, 741 P.2d 330(Colo. 1987).

between the relevant provisions); *Riley v. People*, 828 P.2d 254 (Colo. 1992) (when possible, apparently conflicting statutory provisions should be construed harmoniously together); *Sigman, et. al., v. Seafood Limited Partnership*, 817 P.2d 527 (Colo. 1991) (statutory constructions which defeat obvious intent of legislature must be avoided and courts must construe statutes harmoniously whenever possible). Courts should endeavor to avoid finding conflict between state and local legislative acts, and should attempt to harmonize and give effect to both was also part of the court's instruction in *Bowen/Edwards* and in its companion decision (issued on the same day as *Bowen/Edwards*), *Voss v. Lundvall Brothers Inc.*, 830 P.2d 1061 (Colo. 1992).

In both *Bowen/Edwards* and *Voss*, the Colorado Supreme Court strongly implied that if local regulations "do not frustrate and can be harmonized with" the state interest reflected in the statutory scheme, the local regulations will not be preempted by reason of "operational conflict." *Bowen/Edwards*, 830 P.2d at 1058; *Voss*, 830 P.2d at 1068-69.

There are, of course, appropriate circumstances in which a municipality should be obliged to answer an operational conflict preemption challenge to an exercise of its authority. The opportunity of those who have failed to show either express or implied legislative intent to preempt to launch an "operational conflict" attack on local authority should not, however, be completely unfettered. Some limit is reasonable and appropriate; however, case law requires that something more than citation of a state statute regulating the same general subject as the local regulation should be required.

Preemption challenges based on "operational conflict" are serious business. The judicial branch is being asked, in the absence of any preemptive intent by the General

Assembly, to address the division of legislative authority between two levels of government. Furthermore, the possibility of preemption challenges to all manner of municipal ordinances is of immense concern to municipalities for a very practical reason. There are now state statutes addressing virtually every potential topic of local legislation; any one or more of these statutes potentially provides the basis for an "operational conflict" preemption defense to a local ordinance violation. For example, municipalities have delegated authority to prosecute violations of the state Uniform Safety Code and the assault and battery statutes in municipal court under their general police power. COLO. REV. STAT. § 42-4-103 (2013); COLO. REV. STAT. § 31-15-103 (2013); *Haney v. City Court In and For City of Empire*, 779 P.2d 1312 (Colo. 1989); COLO. REV. STAT. § 40-2-35 (1963); *Aurora v. Martin*, 507 P.2d at 74 (Colo. 1973).

The Colorado Supreme Court gave appropriate instruction on the issue of preemption of a local home rule ordinance, "to accept the contention of (the) petitioner would be to adopt a doctrine of virtual pre-emption by the state in all matters upon which the legislature has taken cognizance through enactment of a state statute. It would also strip all of the home rule cities of the state of every last vestige of local rule and local control with the possible exception of a few regulatory and licensing ordinances." *Aurora*, 507 P.2d at 870. Failure to make such a showing of conflict should result in an end to the preemption challenge. Such a result would appropriately conserve local government and judicial resources.

None of the statutes relied upon by Appellee reveal a state interest that will be impaired in any way by operation of the City's ordinance. There is simply no conflict

here. Further exploration of whether this non-existent conflict is so substantial as to constitute a material impairment, or destruction, of the state's interest is not warranted.

There is added weight for the argument that courts should exercise deference to local legislation when a home rule jurisdiction is involved. Englewood is a home rule city, and municipal home rule is based upon the theory that the citizens of a municipality should have the right to decide how their local government is to be organized and how their local problems should be solved. The citizens of Colorado expressly recognized this in 1902 when they adopted Article XX of the Colorado Constitution. Home rule cities are granted plenary authority by the Colorado Constitution to regulate issues of local concern. *See* COLO. CONST. art. XX SEC. 6; *Bowen/Edwards*, 830 P.2d at 1055; *Leek v. City of Golden*, 870 P.2d 580, 584 (Colo. App. 1993); *Roosevelt v. City of Englewood*, 492 P.2d 65 (Colo. 1971); *Fishel v. Denver*, 108 P.2d 236 (Colo. 1940).

Surely it isn't the policy of the state to place a sexually violent predator within a block of a day care center as happened in the case at bar. The comprehensive state sex offender program does not do an adequate job of protecting citizens as the facts in the case at bar reveal. (Order at p. 3). A state program that allows for the most violent type of convicted offender to live within a block of the most vulnerable citizens can hardly be called comprehensive.

The lower court found conflict operationally, the minimum threshold for a conflict to exist because there was no declaration of statewide concern; yet, in operation, Ordinance 34 impeded the state's scheme. *Amicus* submits that there is no evident state scheme because the state program was placing a violent sex offender next to a daycare.

Since the state program wasn't working effectively, the Englewood City Council acted to promulgate effective local regulation of this sexually violent predator. Why would this Court defer to a state scheme that encourages this type of obvious danger to occur?

It is well established that statutes will be construed in light of the intent of the General Assembly and the object to be obtained. *Mishkin v. Young*, 107 P.3d 393 (Colo. 2005); *Lobato v. Industrial. Claim Appeals Office*, 105 P.3d 220 (Colo. 2005). Here, as with the comprehensive state sex offender program in this appeal, there is simply no conflict whatsoever between the City's residency restriction for certain registered sex offenders ordinance and the purposes served by the sex offender statutes.

III. Should this Court choose to uphold the decision of the lower court, it should provide appropriate direction for municipalities drafting sex offender ordinances.

The trial court Judge Jackson opened the door to the City redrafting its ordinance, but the explanation that "the Court is not declaring that the City of Englewood cannot adopt any ordinance relating to sex offender residency" provides little meaningful direction as to how to do so. Judge Jackson explains that an effective ban of "all felony (and many misdemeanor) sex offenders from living within its boundaries" without an individualized assessment is preempted. (Order at p. 23). Englewood did not prohibit all registered sex offenders from living in the City. The state sex offender statutes reflect the policy of protecting public safety, yet the lower court seems to require an individualized assessment.

An articulation of how to make a distinction assessing the "nature of the offense, the treatment the offender has received, the risk that he or she will reoffend against

children, and the evaluation and recommendations of qualified state officials" would be immensely useful in redrafting an ordinance that is compliant with the comprehensive state scheme. (Order at p. 23). The trial court decision leaves Englewood and other municipalities to wonder what constitutes a permissible restriction on where certain aggravated registered sex offenders who have been convicted of serious offenses may live.

The lower court recognizes that the City of Englewood had a viable local interest in legislating with respect to residency restrictions on registered sex offenders (Order at p. 18) and makes mention of Englewood rewriting Ordinance 34 so as not to conflict with the state program, but the court provided scant evidence as to how to do so. (Order at p. 23). Englewood was faced with a real situation with the potential to harm its most vulnerable population, so this City and other municipalities that are similarly situated shouldn't be left to guess at what constitutes a permissible restriction on where registered sex offenders may live.

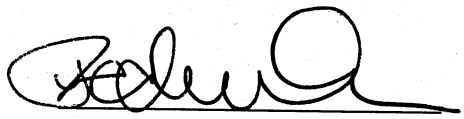
CONCLUSION

In order to support preemption of the local regulation, under this standard deferential to local regulation, it must be shown that operation of the local regulation in question would "materially" impair, or "destroy" the state's interest. Englewood Ordinance 34 neither "materially" impairs, nor "destroy[s]" the state's interest, and therefore, it should be upheld.

WHEREFORE, for the reasons stated herein and in the brief of the City of Englewood, the League respectfully urges this Court to reverse the decision of the United States District Court for the District of Colorado.

Respectfully submitted this 26th day of November, 2013.

COLORADO MUNICIPAL LEAGUE



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Fed. R. App. P. 29(c) & (d) and Fed. R. App. P. 32(a)(7)(C)(i), including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with Fed. R. App. P. 29(d).

   Choose one:

   [√] It contains 4,655 words.

   [ ] It does not exceed 15 pages.

2. The brief complies with C.A.R. 28(k).

   [√] For the party raising the issue:

   It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

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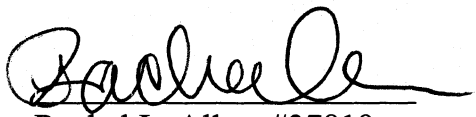

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing ***Amicus Curiae*** **Brief of Colorado Municipal League**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Trend Micro Client/Server Security Agent version 16.2.7001, Virus Definition File updated 11/18/2013 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /S/ Rachel L. Allen
(DIGITAL)

CERTIFICATE OF SERVICE

I hereby certify that on November 26th, 2013, a true and correct copy of the foregoing was filed with the Court and served via CM/ECF Electronic Document Filing System on the parties named below:

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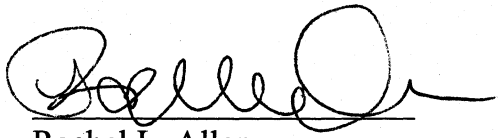

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