STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

WISCONSIN CARRY, INC. and
THOMAS WALTZ,

Petitioners-Appellants,

v. Appeal No. 2015 AP 0146

CITY OF MADISON,

Respondent-Respondent.

On Appeal from Judge Ellen K. Berz
Dane County Circuit Court
Trial Court Case No. 2014 CV 0061
Decision dated December 15, 2014

BRIEF OF RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent City of Madison ("City" or "Madison Metro") believes that this Court, like the trial court, may find oral argument helpful to decide the issues in this case.

Respondent agrees with Wisconsin Carry Inc., ("WCI") that the opinion should be published. The issue presented is one of first impression and publication of the opinion would aid circuit courts and give guidance to other publicly owned transit agencies throughout Wisconsin.

STATEMENT OF ISSUES

Based on the Circuit Court's ruling and the content of WCI's brief, the issues on appeal are more properly stated:

1. Whether Wisconsin's firearm regulation preemption statute, Wis. Stat. § 66.0409, which only preempts firearm ordinances and resolutions, applies to a local transit agency policy that is not an ordinance or resolution?

   The Circuit Court answered: No

2. Whether Madison General Ordinance § 3.14, which establishes the City's Transit and Parking Commission, is a firearm regulation under Wis. Stat. § 66.0409

The Circuit Court answered: No.

3. Even if Wis. Stat. § 66.0409 does apply in this case, whether Madison Metro's Policy excluding weapons from buses it owns and operates is more stringent than Act 35? The Circuit Court did not answer this question, but WCI's brief appears to raise it on appeal.

STATEMENT OF THE CASE

In 2011, Wisconsin enacted 2011 Wisconsin Act 35 ("Act 35"). Act 35 created for the first time a provision for Wisconsin citizens to obtain licenses to carry concealed firearms. As part of Act 35, the legislature also amended Wis. Stat. § 167.31(2)(b)2. to say that license holders "may" carry a concealed firearms in "a vehicle." Wis. Stat. § 167.31(2)(b)2. (2013).

Act 35 did not, however, remove the ability of a vehicle owner, public or private, to exclude weapons from vehicles under their operation or control. After Act 35, the Attorney General responded to a question pertaining directly to the transportation of firearms on public buses: "Can I transport weapons on public or private buses, transport vehicles or cabs?" The Attorney General answered: "[P]ublic and private entities may prohibit or restrict the

possession and transportation of weapons." (R. 10 at 58-59). Counsel for WCI has acknowledged that the Attorney General's answer to this question is persuasive. (R. 16 at 7, line 7). Nevertheless, WCI brought a declaratory judgment action against the City, seeking, among other things, a declaration that Act 35 preempted Madison Metro's longstanding policy prohibiting weapons on buses (the "Policy"). (R. 2 at 1-7).

Madison Metro moved to dismiss WCI's challenge to the Policy for failure to state a claim under Wis. Stat. § 802.06(2)(a)6. on two separate bases. (R. 3 at 1-3). First, that WCI's complaint failed to identify an ordinance or resolution subject to preemption analysis under Wis. Stat. § 66.0409. And, second, even if Madison Metro's Policy were subject to Wis. Stat. § 66.0409 analysis, that the Policy would not be preempted because it is not more stringent than Act 35.

After briefing and oral argument, the Circuit Court dismissed all of WCI's claims. (R. 14 at 1-17). The Circuit Court dismissed the challenge to the Policy on the basis that Wis. Stat. § 66.0409 only applies to ordinances and resolutions. (R. 14 at 4-8). Because the Circuit Court dismissed WCI's claim on these grounds, it did not need to

reach the issue of whether the Policy is more stringent than Act 35. On appeal, WCI argues that the Circuit Court's decision is wrong because it allows an "end run" around Wis. Stat. § 66.0409. *See* WCI's Br. at 7.

The Court of Appeals should affirm the decision of the Circuit Court, because the Circuit Court's decision honors the carefully chosen plain language of Wisconsin's firearm regulation preemption statute. Furthermore, even if Wis. Stat. § 66.0409 did apply to the Policy, the Policy would not be preempted because it is not more stringent than Act 35. If WCI wishes to change Wisconsin's preemption statute to reach a broader class of rules and policies, or if it wishes to change Act 35 to remove the ability of vehicle owners to exclude weapons from vehicles they own and operate, it ought to petition the legislature, not the courts.

ARGUMENT

I. Standard of Review

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). For purposes of the motion, the facts in the complaint are accepted as true, as are the reasonable inferences that may be drawn from such

facts. *Godoy ex rel. Gramling v. E.I. du Pont de Nemours and Co.*, 2009 WI 78, ¶ 12, 219 Wis. 2d 91, 768 N.W.2d 674 (citing *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 12, 303 Wis. 2d 34, 724 N.W.2d 827). A claim will not be dismissed as legally insufficient unless it appears certain that under no circumstances can the plaintiff recover. *See John Doe 1*, 2007 WI 95, ¶ 12.

Determining whether WCI's amended complaint states a claim upon which relief may be granted requires an interpretation of Wis. Stat. § 66.0409, M.G.O § 3.14(4)(h), and, possibly, 2011 Wisconsin Act 35. Statutory interpretation presents questions of law that the Court of Appeals reviews *de novo*. *Megal Dev. Corp. v. Shadof*, 2005 WI 151, ¶ 8, 286 Wis. 2d 105, 705 N.W.2d 645.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal citations omitted). Statutory language is given its common, ordinary and accepted meaning. *Id.* Importantly, when writing a statute, the legislature is presumed to carefully and precisely choose statutory language to express a desired meaning. *Industry to Industry, Inc. v. Hillsman Modular*

Molding, Inc., 2002 WI 51, ¶ 19 n.5, 252 Wis. 2d 544, 644 N.W.2d 236.

II. Wis. Stat. § 66.0409 only preempts enacted ordinances or adopted resolutions.

a. *The plain language of Wis. Stat. § 66.0409 shows that only ordinances and resolutions are subject to preemption analysis.*

Wis. Stat. § 66.0409 limits application of the statute to enacted firearm regulation ordinances or resolutions. Indeed, the focus of Wisconsin's firearm preemption statute has always been on firearm "ordinances" regulating the ownership of guns. In the early 1990's, Milwaukee, Kenosha, and Madison separately proposed a series of ordinances regulating gun ownership that would have been stricter than state law. *See State v. Cole*, 2003 WI 112, ¶¶60-64, 264 Wis. 2d 520, 561-565, 665 N.W.2d 328. These proposed ordinances would have banned the ownership of handguns, assault rifles, and sawed-off shotguns. *Id.* In response to these proposals, Representative DuWayne Johnsrud introduced legislation to preempt local gun ownership ordinances that are stricter than state law. *Id.* Importantly, his drafting requests specifically requested legislation to preempt "ordinances." (R. 10 at 33-35). When asked, he said

that he was sponsoring the legislation so "that individuals have the law-given ability to own a firearm if they feel it is necessary." *State v. Cole*, 2003 WI 112, ¶64.

Throughout the legislative process, nothing changed about the purpose or scope of Wisconsin's preemption statute. The law reads now as it read the day it was passed in 1995:

> "no political subdivision may *enact an ordinance or adopt a resolution* that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm…unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute."

Wis. Stat. § 66.0409(2) (2013) (emphasis added). Consistent with the language of the statute, the analysis by the Legislative Reference Bureau (LRB) explained the law's effect as prohibiting "any city, village, town or county (political subdivision) from enacting an ordinance that regulates firearms in a way that is more stringent than state law." (R. 10 at 37). Thus, the plain language and legislative history of Wisconsin's preemption statute limits the preemption analysis to "enacted ordinances" or "adopted resolutions" regulating gun ownership and not to internal policies and procedures like Madison Metro's.

This is not mere semantics. There are differences

between ordinances and resolutions on the one hand, and internal agency procedures on the other:

> "A municipal ordinance or by-law is a regulation of a general, permanent nature, enacted by the governing council of a municipal corporation. …A resolution, or order as it is sometimes called, is an informal enactment of a temporary nature, providing for the disposition of a particular piece of administrative business of a municipal corporation. …And it has been held that even where the statute or municipal charter requires the municipality to act by ordinance, if a resolution is passed in the manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance."

See Cross v. Soderbeck, 94 Wis. 2d 331, 342, 288 N.W.2d 779 (1980); *Wisconsin Gas and Electric Co. v. City of Fort Atkinson*, 193 Wis. 232, 243-244, 213 N.W. 873 (1927).

Thus, both ordinances and resolutions are the formal act of the legislative body of a municipality, enacting laws in the case of an ordinance, and disposing of a particular act in the case of a resolution.

The Supreme Court has noted that the key difference between ordinances, resolutions, and everything else (i.e., rules, policies, regulations) is that ordinances and resolutions are formal acts of the legislative body. *See Wisconsin Gas and Electric Co.*, 193 Wis. at 243-244. In 1995, when the legislature crafted Wisconsin's preemption statute to apply only to enacted ordinances or resolutions, it would have been

well aware of this critical distinction between ordinances, resolutions, and everything else. It also likely would have been aware that other state preemption statutes purposely reach well beyond ordinances and resolutions.

b. Many other states have purposely written firearm regulation preemption statute to reach beyond ordinances and resolutions.

Many state firearm regulation preemption statutes reach beyond ordinances and resolutions to preempt policies or administrative rules like the policy at issue in this case. For example, Arkansas' preemption statute states that local governments "shall not enact any ordinance or regulation pertaining to, *or regulate in any other manner*, the ownership, transfer, transportation, carrying, or possession of firearms, ammunition for firearms, or components of firearms, except as otherwise provided in state or federal law." Ark. Code Ann. § 14-16-504(b)(1)(A) (West 2011) (emphasis added). Florida's law applies to municipal ordinances, but also to "*any* administrative regulations or rules." Fla. Stat. Ann. § 790.33(1) (West 2011) (emphasis added). And Idaho's law states that "no city, agency, board or any other political subdivision…may adopt or enforce *any law, rule, regulation*,

or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, or storage of firearms…" Idaho Code. Ann. § 18-3302J(2) (West 2013) (emphasis added).

In Kansas, the preemption statute prohibits the adoption of ordinances and resolutions, but also says that "*no agent of any city or county shall take any administrative action*" to regulate firearms. Kan. Stat. Ann. § 12-16,124(a) (West 2013) (emphasis added). Pennsylvania puts it simply that municipalities may not "*in any manner* regulate" firearms. 18 Pa. Cons. Stat. Ann. § 6120(a) (West 2013) (emphasis added). And in Kentucky, the legislature left no stone unturned:

> "No existing or future city, county, urban-county government, charter county, consolidated local government, unified local government, special district, local or regional public or quasi-public agency, board, commission, department, public corporation, or *any person* acting under the authority of *any of these organizations* may occupy *any part of the field of regulation* of the manufacture, sale, purchase, taxation, transfer ownership, possession, carrying, storage, or transportation of firearms, ammunition, components of firearms, components of ammunition, firearms accessories, or combination thereof."

Ky. Rev. Stat. Ann. § 65.870(1) (West 2012) (emphasis added). *See also* Va. Code Ann. § 15.2-915A. (West 2012) (stating that no agent of such locality "shall take any

administrative action…"); Tenn. Code Ann. § 39-17-1314(a) (West 2013) (stating that no city "shall occupy any part of the field of regulation…"); Mich. Comp. Laws Ann. § 123.1102 (West 2013) (that that not city shall "enact…any ordinance or regulation…or regulate in any other manner."). Such broadly worded statutes signal a clear intent by each legislature to purposely reach beyond ordinances and resolutions.

c. Other courts have also recognized the difference between ordinances, resolutions and agency policies.

Meanwhile, preemption statutes in other states are like Wisconsin's statute, only preempting enacted ordinances and resolutions. For example, Oregon's preemption statute reads:

> "(2) Except as expressly authorized by state statute, no county, city or other municipal corporation or district may enact civil or criminal ordinances, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms…Ordinances that are contrary to this subsection are void."

Ore. Rev. Stat. Ann. § 166.170(2) (West 2013). A recent case before the Oregon Court of Appeals addressed whether a firearms policy was preempted under this statute. In that case, an Oregon teacher brought a declaratory judgment action alleging that the school district was preempted by the

Oregon statute from enacting an employment policy prohibiting employees from possessing firearms on district property. *See Doe v. Medford*, 221 P.3d 787, 788-789, 232 Or. App. 38 (2009) . The court addressed whether and the extent to which the state statute had a preemptive effect on such policies:

> "[T]he term "ordinance" generally is employed to refer to something that a government entity "enacts." Both in its ordinary usage and in its more specific legal sense, the term "enact" refers to lawmaking…Consistently with that usage, ORS 166.170(2) provides that counties, cities, and municipal corporations or districts may not *enact* civil or criminal ordinances" that regulate, restrict, or prohibit firearms."

Id. at 793.

The court concluded from the language of the statute it was clear that, when used in Oregon's preemption statute, an ordinance is something "enacted" into law by governmental entities acting in their legislative capacities. *Id.* The Court also took guidance from the statute's legislative history, noting that the focus of the Oregon legislature in passing the state's preemption statute was to avoid "a patchwork quilt" of local government laws inconsistently regulating firearms:

> "The legislative history, then, shows that the legislature was concerned with the relatively narrow problem of local governments enacting a patchwork of conflicting laws concerning firearms. We have found nothing in that legislative history suggesting that the legislature intended the scope of its declaration of preemption in

> ORS 166.170(1) to reach more broadly."

Id. at 798-799. Based on its consideration of the ordinance's language and legislative history, the court ruled that the school district's employment policy was simply not an "ordinance" that was prohibited by Oregon's firearm regulation preemption statute. *Id.* at 799.

d. Wisconsin's preemption statute does not preempt local policies like Madison Metro's

Like the policy at issue in the Oregon case, it is undisputed that Madison Metro's Policy is an agency policy, not an ordinance or resolution. The Policy is not a legislative enactment of the common council; it is not intended to regulate citizens generally who come within the municipal jurisdiction; it does not regulate gun ownership. Instead, the Policy is a transit agency operational policy that applies only to individuals who choose to pay the fare and ride the bus.

Moreover, the language and legislative history of Wisconsin's preemption statute, like the language and legislative history of the Oregon statute, shows that the Policy is not the type of regulation the state legislature intended to prevent when it specifically requested legislation to preempt "ordinances" regulating the ownership of firearms.

When writing a statute, the legislature is presumed to carefully and precisely choose statutory language to express a desired meaning. *Industry to Industry, Inc.* 2002 WI 51, ¶ 19 n.5. If Wisconsin's legislature had intended for Wisconsin's statute to reach beyond ordinances and resolutions, it could have done so. Since it did not, courts must presume it did not intend to reach local agency policies like the one at issue in this case. And, since Madison Metro's Policy is a policy, not an ordinance or resolution, it is not subject to preemption analysis.

III. The Circuit Court correctly decided that M.G.O. § 3.14 is not a firearm regulation ordinance subject to preemption analysis.

WCI's initial Complaint identified no ordinance or resolution that is subject to preemption analysis. (R. 2 at 1-7). Prompted by the City's Motion to Dismiss, WCI amended its Complaint to allege that Sec. 3.14(4)(h), Madison General Ordinances, is the ordinance preempted in this case. (R. 7 at 1-9).

As it did in the Circuit Court, WCI argues that M.G.O. 3.14(4)(h) is a firearm regulation because it purports to authorize the Transit and Parking Commission to promulgate

rules. *See* WCI's Br. at 7. *See also* Madison General Ordinance § 3.14(4)(h) (2014) (also included at R. 10 at 57). The Circuit Court ruled this ordinance would not be preempted because "it does not regulate firearms." (R. 14 at 7-8).

As the Circuit Court recognized, WCI's argument must fail because on its face M.G.O. § 3.14(4)(h) is simply not a local firearm ordinance at all. It bears no resemblance to the firearm ordinances regulating the ownership of handguns, assault rifles, and sawed-off shotguns the legislature was worried about in 1995. The word firearm appears nowhere in its text. It has nothing at all to do with firearms. Instead, it authorizes the Transit and Parking Commission to make rules regarding parking, transit, and paratransit.

Furthermore, by arguing that M.G.O. § 3.14(4)(h) is preempted because it purports to authorize the Transit and Parking Commission to create a local firearm regulation (even though it does not say that), WCI completely misses the point. Wis. Stat. § 66.0409 does not preempt delegations of authority. It preempts ordinances or resolutions that actually regulate firearms. Since, as shown above, Wis. Stat. §

66.0409 does not reach rules, policies, or the acts of committees and commissions, M.G.O. § 3.14(4)(h) would not be preempted even if the Transit and Parking Commission acted pursuant to this alleged purported authority.

The Circuit Court correctly rejected WCI's strenuous attempt to turn M.G.O. § 3.14(4)(h) into a firearm regulation ordinance. This Court should similarly reject it.

IV. WCI's inaccurate citation to Georgia's preemption statute misleads the Court and proves Madison Metro's point.

WCI's brief alleges that Georgia's preemption statute, O.C.G.A. § 16-11-173(b)(1) (2014), is "identical" to Wisconsin's statute in that it only applies to ordinances or resolutions. *See* WCI's Br. at 8.

However, this is simply not true. If the ellipses in WCI's quote are removed, the Georgia statute actually reads: "Except as provided in subsection (c) of this Code section, no county or municipal corporation, by zoning or by ordinance or by resolution, *nor any agency, board, department, commission or authority of this state, other than the General Assembly, by rule or regulation*, shall regulate in any manner: …(B) the possession, ownership, transport,

carrying, transfer, sale, purchase, licensing, or registration of firearms…" O.C.G.A. § 16-11-173(b)(1) (2014) (emphasis added indicating the portion of the statute WCI omitted).

Thus, a reading of the entire Georgia statute cited by WCI reveals that Georgia's statute is more like Kentucky's statute than Wisconsin's statute. This, of course, supports Madison Metro's contention that if Wisconsin had wanted its preemption statute to reach beyond ordinances and resolutions, it could have done so like so many other legislatures have done. It also renders irrelevant WCI's subsequent discussion of *Sturm Ruger v. City of Atlanta.*

V. WCI's argument that the Circuit Court's decision authorizes an end run around Wisconsin's preemption statute is undeveloped and wrong.

a. The Court is under no obligation to develop WCI's end-run argument.

WCI ultimately argues that the Circuit Court's decision is wrong because it effectively authorizes various city agencies to do an end-run around Wisconsin's preemption statute and "ban guns in parks, restaurants, streets, sidewalks, and stores." WCI's Br. at 7-8. Outside of this broad statement, however, WCI provides little in the way of specific argument regarding how this could actually

happen. *See, e.g., Olson v. Red Cedar Clinic,* 2004 WI App 102, ¶ 11, 273 Wis. 2d 728, 733, 681 N.W.2d 306 (stating that the court need not consider arguments broadly stated but not specifically argued).

For example, WCI fails to allege what city agency or commission would have the authority to create a rule banning guns on streets and sidewalks, what authority that agency or commission would rely on to do so, or how such a rule could be enforced city wide if it was not, in fact, contained in an ordinance enacted by the Common Council. Likewise, WCI fails to allege what agency or commission has the authority to create a rule prohibiting a private property owner (operating a restaurant or a store) from allowing guns on their property, or how such a rule could ever be enforced if it were not contained in an ordinance. In any event, it is not the responsibility of this Court to develop this argument for WCI. *Id.*

Of course, WCI cannot develop its argument because only the Common Council, through the enactment of a formal ordinance, could actually impose such regulations on the general public's right to use the sidewalks and streets, or on a private restaurant or store owner's ability to manage their

property. Understanding this point is to understand why the legislature, concerned with local ordinances prohibiting gun ownership, would have found it unnecessary in 1995 to include commissions and agencies in the preemption statute. It understood that agencies and commissions simply do not have the authority to create such far-reaching regulations.

b. Although undeveloped, WCI's argument illustrates why the Circuit Court's decision is not a license for a city-wide end-run gun ban.

Though undeveloped, WCI's argument illustrates the inherent difference between publicly owned buses and sidewalks or streets. The United States Supreme Court has long protected a government's ability to restrict use of its own property. Even in the face of fiercely protected constitutional rights like the First Amendment right to free speech, the Court is unwavering:

> "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated…[t]he United States Constitution does not forbid [it.]"

Adderley v. State of Fla., 385 U.S. 29, 47, 87 S. Ct. 242, 247, 17 L. Ed. 2d 149 (1966). Fifteen years later, the Supreme Court rejected a free speech claim for the right to place unstamped literature in United States Postal Service

mailboxes, holding the First Amendment "does not guarantee access to property simply because it is owned or controlled by the government." *U. S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129, 101 S. Ct. 2676, 2685, 69 L. Ed. 2d 517 (1981) (emphasis added). Importantly, the Supreme Court has also specifically addressed public buses, distinguishing them from other types of government property like city parks and sidewalks. Under its analysis, public buses are so distinct from traditional public forums that they are subjected to lesser First Amendment scrutiny:

> "[h]ere we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce…[A] city transit system has the discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles."

Lehman v. City of Shaker Heights, 418 U.S. 298, 303, 94 S. Ct. 2714, 2717, 41 L. Ed. 2d 770 (1974). In that case, the court protected a city's policy to exclude political advertisements from its buses, respecting the "city's conscious decision to limit access [to buses] in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.* at 304.

Although no constitutional arguments have been made in this case, these cases illustrate the fundamental difference

between a city bus, owned and operated by a municipal transit agency in a propriety capacity, and a city sidewalk, street, or park that is open to the public subject only to reasonable constitutional restraints. While a transit agency, acting alone, can control what paying passengers bring onto its buses, the same agency cannot control what its paying passengers carry down a sidewalk or street in the city at large. Only the legislative body, empowered to enact formal legislation on the public at large, has the power to do that. Accordingly, WCI's argument that the Circuit Court's decision in this case necessarily means that the City, through various agencies and commissions, will now be able to do an end-run and ban the "carrying firearms anywhere in Madison…without passing a resolution or ordinance banning such carry" is nonsense. *See* WCI's Br. at 10.

VI. WCI's final argument incorrectly presumes the Common Council would lack the authority to enact the Policy and raises an issue the Circuit Court did not decide.

The final page of WCI's brief asserts that "the better reading of the statute is that, if the common council lacks the authority to enact the ban, *which it clearly does*, then commissions created by the common council cannot have the

authority to do that which the common council cannot." *See* WCI's Br. at 10 (emphasis added).

WCI's assertion makes the legal conclusion that the common council would lack the authority to enact the Policy. However, no court has ruled on that issue. To the contrary, the Attorney General stated just the opposite, that "public and private entities may prohibit or restrict the possession and transportation of weapons." (R. 10 at 58-59). Under this guidance, the common council would have the authority to enact such a Policy.

Obviously, this Court could take up this issue as part of its *de novo* review. Given the way WCI framed its issue statement, the content of its brief, and the fact that it makes this legal conclusion with little to no accompanying authority or analysis, the City will briefly address this issue, which it fully briefed and argued to the Circuit Court. (R. 10 at 9-18; R. 16 at 1-27).

a. Even after Act 35, the common council could enact the Policy.

WCI's legal conclusion is wrong because even after Act 35 the common council could enact an ordinance similar to Metro Transit's Policy. Generally, "municipalities may

enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with…the state legislation." *See Milwaukee v. Childs Co.*, 195 Wis. 148, 217 N.W. 703 (1928) . An ordinance is valid where:

> "The city does not attempt to authorize by . . . ordinance what the legislature has forbidden; nor does it forbid what the legislature has expressly licensed, authorized, or required. Under those circumstances there is nothing contradictory between the provisions of the statute and of the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail."

See Fox v. Racine, 225 Wis. 542, 546-547, 275 N.W. 513 (1935). *See also DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996); *Anchor Sav. & Loan Ass'n. v. Equal Opportunities Com'n.*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984) (stating that the principle announced in *Fox* is still the rule when addressing the whether state legislation preempts a municipal ordinance.).

In this case, the question is then whether Metro Transit's Policy excluding weapons from buses it owns and operates contradicts or is more stringent than the provisions of Act 35 that allow individuals to carry weapons in a vehicle.

b. WCI agrees that Act 35 maintains a vehicle owner's right to exclude weapons from vehicles they own or operate.

Metro Transit's policy does not contradict and is no more stringent than Act 35, because Act 35 did not remove the ability of vehicle owners, public or private, to exclude weapons from vehicles that they own.

Before Act 35, Wisconsin prohibited the transportation of firearms in vehicles: "no person *may*… transport a firearm…in or on *a* vehicle, unless the firearm is unloaded and encased." *See* Wis. Stat. § 167.31(2)(b) (2010) (emphasis added). The Wisconsin Supreme Court upheld the law banning guns in vehicles, in part, on the basis that loaded guns in moving vehicles put the public at risk. *See State v. Cole*, 2003 WI 112, ¶ 49. As part of Act 35, the legislature amended Wis. Stat. § 167.31(2)(b) to say that "no person *may*… transport a firearm…in or on *a* vehicle, unless…the firearm is unloaded or is a handgun." See Wis. Stat. § 167.31(2)(b) (2013) (emphasis added).

In fact, the legislature changed very little of the law's language. Today's law remains prohibitory, but with an exception allowing an unloaded firearm or handgun in "a" vehicle. The language of the statute is clear: a person "may"

transport a handgun gun in "a" vehicle. The law does not say a person may transport a handgun in "any" vehicle. It does not say that a person may transport a handgun in "all" vehicles. It does not say that vehicle owners who do not want handguns in vehicles that they own are powerless to exclude them. And it certainly does not say that a person *must* be allowed to transport a handgun in a taxi cab, city bus, or any other form of public transportation.

Thus, nothing about the plain language of the statute removes the ability of a vehicle owner to exclude weapons from vehicles that they own or operate. WCI does not contest this basic point. At oral argument, WCI acknowledged that the new law would not prevent a private vehicle owner - even one operating a public transportation business - from excluding weapons from vehicles that they own or operate. (R. 16 at 9).

c. WCI fails to explain how Act 35 treats public vehicle owners any differently than private vehicle owners.

The key question then is how does the new law treat public vehicle owners any differently than private vehicle owners? In its Brief to the Circuit Court, WCI stated that the difference is that "government do not have rights." (R. 9 at

4). When pressed on the question at oral argument, WCI responded that the difference is that a bus is owned by a political subdivision. (R. 16 at p. 25, line 10-14).

First, as detailed above, the United States Supreme Court has long recognized the right of governments to control property that it owns, including public buses. In fact, governments own and operate all kinds of property, including buildings, garages, snowplows, ambulances, fire trucks, and park shelters. Thus, it is insufficient for WCI to simply say that governments have no rights.

Furthermore, simply stating that the difference is that a bus is owned by a political subdivision also does not answer the question. It is worth reiterating the United States Supreme Court's long-held position regarding the ability of a government to control property under its control:

> "[t]he State, *no less than a private owner of property*, has power to preserve the property under its control for the use to which it is lawfully dedicated…[t]he United States Constitution does not forbid [it.]"

Adderley v. State of Fla., 385 U.S. 29, 47, 87 S. Ct. 242, 247, 17 L. Ed. 2d 149 (1966) (emphasis added).

In the City's view, for WCI to show that the legislature intended to treat public vehicle owners differently than

private vehicle owners they would have to point to language in Act 35 that does so.

d. Nothing in Act 35 signals the legislature's intent to treat public vehicle owners differently than private vehicle owners.

Nothing in the amended language of Wis. Stat. § 167.31(2)(b) signals that the legislature intended to treat political subdivisions that own vehicles any differently than private individuals who own vehicles. In fact, just the opposite is true. As the City argued to the Circuit Court, the broader provisions of Act 35 specifically respect the property rights of individuals and governments to exclude weapons from buildings and vehicles that they own. *See* Wis. Stat. § 943.13(1m)(c) (making it unlawful for an individual carrying a firearm to enter or remain on certain property of another (including government buildings) after notification by the owner or occupant of the property); Wis. Stat. § 175.60(15m)(b)(2012) (limiting an employee's right to carry a gun in a vehicle during the course of employment to working being done in "the licensee's *own* motor vehicle.").

The point is that while Act 35 would preempt a city from enacting an ordinance prohibiting a licensee from taking a firearm in their own vehicle, nothing about Act 35 removes

the ability of a vehicle owner, public or private, from excluding weapons from its own vehicles. Therefore, if a political subdivision were to enact a law like Madison Metro's Policy excluding weapons from its vehicles, it would be no more stringent than state law, and would therefore not be preempted. This is why the Attorney General provided the guidance that he did when he opined that, after Act 35, public entitles may restrict or prohibit the transportation of weapons. (R. 10 at 58-59). And this is why WCI's assertion that "the common council [clearly] lacks the authority to enact the Ban" is simply wrong.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court affirm the decision of the Circuit Court.

Dated this 1st day of May, 2015.

CITY OF MADISON

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 5,606 words.

Dated this 1st day of May, 2015

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. §809.19(12) . I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of May, 2015

_____

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