In the Court of Appeals of Wisconsin

District IV

Wisconsin Carry, Inc. and Thomas Waltz,

Petitioners-Appellants

v.

The City of Madison, **Respondent-Respondent**

Appeal No. 2015AP000146

Appeal from the Judgment of the Dane County Circuit Court, The Hon. Ellen K. Berz

Reply Brief of Appellants

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Statement of Issues

Appellants Wisconsin Carry, Inc. and Thomas Waltz (collectively, "WCI") observe that Madison has restated the issues presented, presumably because Madison lacks confidence about the case if the issues remain framed as WCI framed them. With all due respect to Madison, however, this is WCI's appeal and WCI has stated the issues it is appealing. Madison could have chosen to cross appeal and framed its own issues if it had chosen to do so. It is not free to change WCI's issues on appeal into straw men that Madison may more readily attack.

Argument

WCI will reply to Madison's Response in the order of the arguments raised by Madison, and using Madison's enumeration.

I. WCI Agrees That Review Is De Novo

Madison states that review in this case is an interpretation *de novo* of law. WCI agrees.

II.The Policy of the State Is To Limit Local Regulation of Firearms

Madison begins Part II of its brief by claiming the "plain language" of Wis.Stats. § 66.0409 supports its position. Its theory is that Madison may not pass ordinances or resolutions regulating firearms, but it is free to regulate them in any other manner. In other words, even though State occupied the field of firearms regulations, it intended to allow Madison to regulate firearms indirectly by banning them from Madison's buses.

Madison's position leads to an absurd result. The Common Council, under Madison's theory, lacks the power to ban guns on buses[1], but a department within the city has that power. Despite what Madison calls the "plain language," it is absurd to believe that departments within a city have power to do things the city itself cannot do. To avoid an absurd result, this Court must interpret a statute "in a

[1] Madison disputes even this conclusion, but that dispute is discussed below.

way that harmonizes the provisions of the statute and gives effect to every word." *State v. Gilbert,* 2012 WI 72, ¶ 39, 342 Wis. 2d 82, 816 N.W.2d 215.

Madison attempts to prove the meaning of Wisconsin's preemption statute by comparing it to statute's of other states. The implication is that other states have worded their statutes differently, so Wisconsin's must mean something different. Madison fails, however, to present information on what the statutes in other states mean. Even if Madison provided such information, though, the fact that different language in different states means the same thing that WCI urges Wisconsin's language means would not be helpful.

A more reasonable reading of the statute is that Madison is preempted from regulating firearms more strictly than they are regulated by the state, regardless of the means chosen by Madison to do so.

*III. **MGO 3.14(4)(h) Authorizes Illegal Action***

Madison insists that MGO 3.14(4)(h) is not a "firearms ordinance." While this may be true, it is also irrelevant. Madison assumes, without support, that Wis.Stats. § 66.0409 applies only to ordinances that use the word "firearm," thus leaving clever cities the freedom to regulate firearms if they can craft language avoiding using that word. Writing ordinances is not a game of Taboo[2]. An ordinance that has the effect of what is preempted is preempted regardless of the words chosen to do so.

[2] Taboo is a parlor game manufactured by Hasbro, in which a player tries to get his teammates to say a given word without saying any of five related words that are "taboo."

By enacting § 66.0409, the legislature withheld Madison's authority to regulate firearms. Madison may not avoid the reach of the statute by creating a department and authorizing that department to promulgate regulations that Madison lacks the power to create directly. It is illogical to suggest that Madison's transit agency has powers that Madison itself does not have.

*IV.**Madison Cites the Wrong Version of Georgia's Preemption Statute***

Madison confuses the current version of Georgia's preemption statute with the version of the statute that was in effect at the time of the Court of Appeals of Georgia's decision in *Sturm, Ruger & Co. v. City of Atlanta*, 253 Ga.App.713, 560 S.E.2d 525 (2002). At the time of the decision of *Sturm, Ruger,* Georgia's preemption statute provided:

> **16-11-184. Regulatory authority of political subdivisions; limitations.** (a) (1) It is declared by the General Assembly that the regulation of firearms is properly an issue of general, state-wide concern. (2) The General Assembly further declares that the lawful design, marketing, manufacture, or sale of firearms or ammunition to the public is not unreasonably dangerous activity and does not constitute a nuisance per se. (b) (1) No county or municipal corporation***, by zoning or by ordinance, resolution, or other enactment***, shall regulate in any manner gun shows, the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms, components of firearms, firearms dealers, or dealers in firearms components. (2) The authority to bring suit and right to recover against any firearms or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit created by or pursuant to an Act of the General Assembly or the Constitution, or any department, agency, or authority thereof, for damages, abatement, or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition to the public shall be reserved exclusively to the state. This paragraph shall not prohibit a political subdivision or local government authority from bringing an action against a firearms or

> ammunition manufacturer or dealer for breach of contract or warranty as to firearms or ammunition purchased by the political subdivision or local government authority.

253 Ga.App. at 715 [emphasis supplied]. That statute was later renumbered to O.C.G.A. § 16-11-173 and it has been amended multiple times. The version quoted by Madison is the 2014 version, and the statute was amended again this year by the Georgia general assembly.

Madison's citation to the later versions is irrelevant. WCI's point in citing the 1999 version is that the 1999 version very closely tracked Wisconsin's statute. In the *Sturm, Ruger* case, the Court of Appeals of Georgia interpreted Georgia's statute, which only says in its text "ordinance, resolution, or enactment," to prohibit the City of Atlanta from bringing a ***lawsuit*** against a gun manufacturer. That is, the Georgia court did not read the statute to apply literally to only ordinances, resolutions, or other enactments of Atlanta. Instead, the statute applied to civil litigation brought by Atlanta. The Court reasoned that "The City may not do indirectly that which it cannot do directly." 253 Ga.App. at 718.

WCI's point is that Madison is prohibited from directly regulating the carrying of firearms. It logically follows that Madison also may not indirectly regulate the carrying of firearms by creating a department with regulatory authority and purporting to empower the department to regulate carrying firearms.

V. ***Madison's Other Potential End Runs Are Real***

Madison dismisses WCI's argument that Madison could, under Madison's theory, regulate carrying firearms throughout the city. Madison does so by

feigning ignorance of the jurisdiction of its own commissions and departments. Based on a review of Madison's own web site (www.cityofmadison.com/agencies), it appears the following agencies have jurisdiction over the areas listed in WCI's opening Brief:

Restaurants	Public Health
Groceries	Public Health
Streets	Streets and Recycling
Parks	Parks

Madison fails to offer any arguments why, for example, the parks department could not promulgate a rule banning carrying firearms in parks. Indeed, under Madison's theory, it could do so even in the face of a state statute preempting such action.

VI. ***Madison's "Property Rights" Theory Is Preempted***

Madison's final argument is that under a "property rights" theory, Madison retains the right to prohibit people from carrying firearms on its own buses. In support of this argument, Madison goes into an unnecessary discussion of the history of Wisconsin laws pertaining to firearms in vehicles and of federal jurisprudence relating to government control of its property.

Those discussions are unnecessary because of the preemption statute. It is not necessary to evaluate whether, if there were no preemption statute, what Madison could or could not regulate. The fact is, there is a preemption statute and

it clearly says Madison may not regulate carrying firearms more strictly than state restrictions.

As Madison points out, Wisconsin used to prohibit carrying (loaded or unencased) firearms in vehicles, but it no longer does so. Therefore Madison's ban on carrying firearms in buses has become more stringent than state law and it is preempted. It is wholly unimportant what the Supreme Court of the United States says governments may do ***generally*** with their own property. In this instance, the State of Wisconsin has told Madison it may not regulate carrying firearms.

Under Madison's theory, the parks, streets, and sidewalks owned by Madison are fair game for a gun ban, even though state law preempts such bans. State law makes room for Madison to regulate carrying firearms in Madison's ***buildings.*** There is no provision for Madison to regulate carrying firearms in public outdoor spaces.

Conclusion

State law preempts Madison's regulation of carrying firearms more stringently than the state does. State law does not ban carrying firearms on buses, so Madison may not do so. Because Madison regulates carrying firearms more stringently than state law, Madison's ban on carrying firearms is preempted. The decision of the Circuit Court should be reversed, with instructions to enter judgment in favor of WCI.

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Certificate of Service

I certify that on May 18, 2015, I served a copy of the foregoing via U.S. Mail upon:

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/s John R. Monroe
John R. Monroe

Certifications:

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 1,830 words.

I certify that the text of the electronic copy of the Reply Brief of Appellant is identical to the text of the paper copy of the Reply Brief of Appellant.

/s/ John R. Monroe

John R. Monroe