STATE OF WISCONSIN
SUPREME COURT

WISCONSIN CARRY, INC. and
THOMAS WALTZ,

Petitioners-Appellants-Petitioners,

v. Appeal No. 2015 AP 0146

CITY OF MADISON,

Respondent-Respondent.

On Appeal from Wisconsin Court of Appeals, District IV
2015 AP 0146
2014 CV 0061
Decision dated August 6, 2015

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

2011 Wisconsin Act 35 ("Act 35") allowed Wisconsin citizens to obtain licenses to carry concealed firearms. As part of Act 35, the legislature amended Wis. Stat. § 167.31(2)(b)2. (the "Vehicle Statute") to state that an individual "may" carry a loaded handgun in "a vehicle." *See* Wis. Stat. § 167.31(2)(b)2. (2013) (prohibiting the possession or transportation of loaded and uncased firearms in vehicles, except for loaded handguns).

While Act 35 allowed an individual to take a loaded handgun into "a" vehicle, it did not remove the ability of a vehicle owner to exclude loaded handguns from vehicles that they own. Petitioners do not contest this point of law (R. 16 at 9, lines 6-14).

After Act 35, the Attorney General responded to a question pertaining directly to the transportation of loaded handguns 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). Petitioners acknowledge that the

Attorney General's opinion related to public buses is persuasive. (R. 16 at 7, line 7).

Despite conceding that vehicle owners can still exclude weapons from vehicles that they own, and acknowledging the persuasiveness of the Attorney General's opinion that this right extends to public entities that own buses, Petitioners sued Respondent seeking a declaration that Wis. Stat. § 66.0409 (the "Preemption Statute") preempted Madison Metro's longstanding agency policy excluding weapons from buses (the "Ban"). (R. 2 at 1-7).

Respondent moved to dismiss Petitioners' challenge to the Ban under Wis. Stat. § 802.06(2)(a)6. on two separate bases. (R. 3 at 1-3). First, that the Preemption Statute only applies to ordinances and resolutions, and that the Ban is not an ordinance or resolution. And, second, that even if subject to Preemption Statute analysis, the Ban is not preempted because it is not more stringent than the amended Vehicle Statute.

Upon receiving Respondent's Motion to Dismiss, Petitioners recognized their failure to allege an ordinance or resolution subject to preemption analysis, so they filed the Amended Petition. (R. 7 at 1-6). In the Amended Petition,

Petitioners allege that Madison, Wis., Gen. Ordinances, § 3.14 (2015) ("the Ordinance"), which creates the city's Transit and Parking Commission, is the ordinance preempted in this case. (R. 7 at 2-3; *see also* R. 10 at 57 for a copy of the Ordinance). [1]

After briefing and oral argument, the Circuit Court dismissed Petitioners' challenge to the Ban on the basis that the Preemption Statute only applies to ordinances and resolutions, and that the Ban is not an ordinance or resolution. (R. 14 at 4-8). The Circuit Court further ruled that the Ordinance is not subject to preemption analysis because it is not an ordinance regulating firearms. (R. 14 at 7-8). Because the Circuit Court dismissed Petitioners' claim on these grounds, it did not decide whether the Ban is more stringent than the amended Vehicle Statute.

The Court of Appeals affirmed the Circuit Court's decision, also finding that the Preemption Statute only applies to ordinances and resolutions and, therefore, that it does not

[1] Petitioners also challenged Metro's prohibition of weapons at its bus shelters and alleged that the signs posted at the bus shelters were too small. (R. 7 at 5-6). The Circuit Court also dismissed those claims. (R. 14 at 9-17). Petitioners did not appeal the dismissal of those claims.

Furthermore, although Petitioners have mentioned the "right to bear arms" at different times during this litigation, they have never alleged a constitutional violation and acknowledge that this is not a constitutional case. (R. 16 at 19-20).

apply to the Ban. *See Wisconsin Carry, Inc. v. City of Madison*, 2015 WI App 74, ¶8, 365 Wis. 2d 71, 870 N.W.2d 675. The Court of Appeals declined to decide whether the Ordinance is an ordinance regulating firearms because it found that any such argument had been inadequately developed. *See id.* at ¶ 5. The Court of Appeals did note, however, that it was "far from obvious how preemption analysis under [the Preemption Statute] would apply to such a general ordinance." *Id.* at ¶5, n. 3. Like the Circuit Court, the Court of Appeals did not reach the issue of whether the Ban is more stringent than the Vehicle Statute. The Court of Appeals denied Petitioners' Motion to Reconsider. *See* Pet. App. at 29. The Supreme Court granted Petition for Review on January 11, 2016.

In its brief to this Court, Petitioners concede that the Ban is not an ordinance or resolution, but argue that the Court of Appeals' decision is wrong because it would "defy logic" not to preempt the Ban anyway. *See* Pet. Br. at 8-10. Petitioners also concede that the Ordinance does not explicitly regulate firearms, but argue that it should be preempted because it purports to vest general rulemaking authority in the city's transit commission. *See* Pet. Br. at 10-

12. Finally, Petitioners' brief raises a new issue - field preemption - that their Petition for Review did not raise. *See* Pet. br. at 12-15. The Court should strike this final issue as contrary to its January 11, 2016 Order prohibiting Petitioners from raising issues in their brief that were not raised in the Petition for Review.

This is a simple case. Wisconsin's Preemption Statute only applies to enacted ordinances or resolutions regulating firearms. Madison Metro's Ban is not an ordinance or resolution. And, no matter how Petitioners twist it, the Ordinance does not regulate firearms. Moreover, even if the Supreme Court decides that Preemption Statute analysis applies to either the Ban or the Ordinance, neither would be preempted because neither is more stringent than the amended Vehicle Statute, which preserves the ability of vehicle owners – public and private – to exclude loaded handguns from vehicles they own.

Accordingly, the Supreme Court should affirm the Court of Appeals' decision, honor the Preemption Statute's carefully chosen plain language, and leave to the democratic process and people of Wisconsin the issue of whether loaded handguns should be forced into public buses.

ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *See 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. *See 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. 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 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 12, 303 Wis. 2d 34, 724 N.W.2d 827. Determining whether Petitioners' Amended Complaint states a claim upon which relief may be granted requires an interpretation of the Preemption Statute, the Ordinance, and, possibly, the Vehicle Statute.

Statutory interpretation presents questions of law that the Supreme Court reviews *de novo*. *See 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. *See 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. *See Id.* Importantly, when writing a statute, the legislature is presumed to carefully and precisely choose statutory language to express a desired meaning. *See Industry to Industry, Inc. v. Hillsman Modular Molding, Inc.*, 2002 WI 51, ¶ 19 n.5, 252 Wis. 2d 544, 644 N.W.2d 236. As the Court of Appeals correctly pointed out: "judicial restraint dictates that courts 'assume that the legislature's intent is expressed in the statutory language' chosen by the legislature…" *Wisconsin Carry*, 2015 WI App. 74, ¶ 10 (citing *Kalal*, 2004 WI 58, ¶44).

B. The Preemption Statute does not preempt the Ban because, as Petitioners concede, the Ban is not an ordinance or resolution.

Petitioners concede that the Ban is not an ordinance or resolution, but argue "it defies logic" that the Preemption Statute would not preempt the Ban anyway. *See* Pet. Br. at 9. To the contrary, logic, the text of the Preemption Statute, Wisconsin case law on statutory interpretation, and a review of other state firearm regulation preemption statutes shows

that the Preemption Statute only applies to ordinances and resolutions, and that if the legislature had intended for the Preemption Statute to apply to agency or commission actions like the one complained of in this case, it would have said so.[2]

1. The plain language of the Preemption Statute limits its application to enacted ordinances and resolutions.

The Preemption Statute limits the application of the statute to enacted firearm regulation ordinances and resolutions. 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. *See id.* In response to these proposals, Representative DuWayne Johnsrud introduced legislation to preempt "gun control ordinances" that are more strict than state law. *See id.* Importantly, his drafting requests specifically requested legislation to preempt "ordinances." (R.

[2] The Amended Petition alleges that the Transit and Parking Commission established the Ban pursuant to the Ordinance. For purposes of a motion to dismiss, the Court must take these allegations as true. Although the distinction is not dispositive of this case, the City disputes that this is how the Ban was implemented.

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.[3]

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 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

[3] At around the same time, the legislature introduced a constitutional amendment to keep and bear arms out of concern for local ordinances that might "limit [the] right to own a gun." *See Cole*, 2003 WI 12, ¶ 65.

to "enacted ordinances" or "adopted resolutions" regulating gun ownership.

This is not mere semantics. There are differences between ordinances and resolutions that affect the electorate en masse, and internal agency or commission policies that do not:

> "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).

The legislature would have been well aware of this critical distinction when it wrote the preemption statute. It also would have been aware of other state preemption statutes that are not limited to enacted ordinances and resolutions.

2. Other state firearm preemption statutes specifically reach beyond ordinances and resolutions to preempt agency rules like the Ban in this case.

Many state firearm regulation preemption statutes reach beyond ordinances and resolutions to preempt firearm regulation policies or rules like the Ban 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 201) (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 expressly reach beyond ordinances and resolutions.

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 Ban 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 Ban 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. *See 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 Ban was simply not an "ordinance" that was prohibited by Oregon's firearm regulation preemption statute. *See id.* 799.

3. The Court of Appeals properly found that Wisconsin's Preemption Statute only applies to ordinances and resolutions, and, therefore, does not preempt the Ban.

As detailed above, the plain text of the Preemption Statute limits is application to ordinances and resolutions. As Petitioners concede, the Ban is not an ordinance or resolution. *See* Pet. Br. at 9. It is not a legislative enactment of the common council; it does not regulate citizens en masse who come within the municipal jurisdiction; and it does not regulate gun ownership. Instead, the Ban is a transit agency policy that applies only to individuals who choose to pay the fare and ride a bus owned and operated by Metro Transit – and it only applies while they ride the bus. There is simply no evidence in the text or legislative history of the Preemption Statute that the legislature intended to reach such agency actions. Therefore, the decision of the Court of Appeals – that the Preemption Statute does not apply to the Ban because it is not an ordinance or resolution – is correct because it simply honors the plain text of the Preemption

Statute. *See Kalal*, 271 2004 WI App 58, ¶44 (stating that courts must assume the legislature's intent is expressed in the text of the statutory language).

4. The Court of Appeals decision does not defy logic because there is nothing illogical about the plain text of the Preemption Statute.

The Court of Appeals' decision does not "defy logic." *See* Pet. Br. at 9. To the contrary, the Court of Appeals' decision honors the plain text of the Preemption Statute.

As noted above, when writing a statute, the legislature is presumed to carefully and precisely choose statutory language to express a desired meaning. *See Industry to Industry, Inc.* 2002 WI 51, ¶ 19 n.5. Given the legislature history of the Preemption Statute, and Rep. Johnsrud's stated concern about local firearm ordinances affecting gun ownership, "it is not absurd or unreasonable to suppose that our legislature drew a distinction between a municipality's broad legislative powers and a municipal agency's more limited powers." *Wisconsin Carry*, 2015 WI App. 74, ¶ 15.

Indeed, if the legislature had intended to preempt local agency or commission actions like the ones complained of in this case, it would have done so, just like all the states listed

above did. The fact that it chose not to, and that Petitioners are frustrated by the result, does not defy logic.

5. Petitioners' end-run argument is wrong because there is a fundamental difference between a city sidewalk and a city bus.

Petitioners also argue that the Court of Appeals decision must be wrong because it would authorize various city agencies to do an end-run around the Preemption Statute and "ban guns in parks, restaurants, streets, sidewalks, and stores." Pet. Br. at 9-10. Outside of this broad statement, however, Petitioners provide no specific arguments explaining how this would be so. *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).

Petitioners fail to allege what city agency or commission could create a rule banning guns on streets and sidewalks, the authority on which that agency or commission would rely, or how such an agency rule could be enforced city wide on, for example, a sidewalk. Likewise, Petitioners fail to allege what agency or commission would have the authority to require private property owners (operating a

restaurant or a store) to prohibit guns in their restaurant or store. It is not the responsibility of this Court to develop this argument for Petitioners. *See id.*

Petitioners' end-run argument is wrong because there are fundamental differences between a city bus and city sidewalk. Understanding this explains not only why Petitioners' end-run argument is wrong, but why the Attorney General's opinion that public entities can exclude loaded handguns from buses is correct.

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) (emphasis added).

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)

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 issues have been raised in this case, these cases illustrate the 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 city agency can control what paying passengers bring onto a city bus, a city agency cannot control what citizens carry down a sidewalk or street in the city at large. Only the legislative body, empowered to enact legislation on the public at large, has the power to do that, subject to reasonable constitutional constraints. Accordingly, Petitioners' attempt to map an end-run by comparing an agency bus policy to a sidewalk policy fails from the start. More importantly, as argued more fully below, this line of cases supports the accuracy of the Attorney General's conclusion that a public vehicle owner may exclude loaded handguns from buses it owns just as a private individual may. (R. 10 at 58-59).

In the end, Petitioners "defy logic" and "end run" arguments cannot supplant the plain text of the Preemption Statute.

C. The Ordinance is not a firearm regulation ordinance subject to preemption analysis.

In the alternative, Petitioners argue that the Ordinance is a firearm regulation ordinance subject to preemption analysis because it purports to authorize the Transit and Parking Commission to promulgate rules related to firearms. *See* Pet. Br. at 11.[4] This is a circular argument because, even as proposed by Petitioners, it ultimately leads back to whether the Preemption Statute reaches agency or commission actions, which, as shown above, it does not.

Petitioners' alternative argument is no clearer now than it was when made to the Court of Appeals. First, Petitioners again fail to explain how such a general ordinance could be considered a "firearm regulation" or "gun control ordinance" as originally proposed by Representative Johnsrud and adopted by the legislature. On its face, the Ordinance bears no resemblance to the firearm ordinances regulating the ownership of handguns, assault rifles, and sawed-off shotguns the legislature worried about in 1995. The word firearm

[4] Here again, Petitioners gloss over whether the Ban, or an ordinance like it, would be more stringent than the Vehicle Statute. *See* Pet. Br. at 11 (stating "It is clear that…the Madison Common Council lacks the authority to pass an ordinance or resolution that regulates carrying weapons on busses."). Throughout this litigation Petitioners have failed to offer any argument regarding this issue. The City will address this issue below in the event the Court reaches.

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.

To support their purported authority argument, Petitioners pose a puzzling hypothetical. According to Petitioners, if this Court decides that the Ordinance is not a firearm regulation under the Preemption Statute, then a City could easily escape preemption analysis by simply passing other general ordinances that do not explicitly ban weapons. *See* Pet. Br. at 12. For example, Petitioners propose, a city could enact "an ordinance that 'frightens the public.'" *Id.* According to the Petitioners, this hypothetical ordinance would "not mention weapons explicitly[, but would allow a city to prosecute] people seen openly wearing firearms in holsters on their waistbands if anyone in the public testified as having been frightened by seeing the firearm." *Id.*

The puzzling thing about Petitioners' hypothetical is that it is not a hypothetical. The City of Madison, like most every city across this state, already has a Disorderly Conduct ordinance that generally prohibits frightening or disturbing people. *See* Madison, Wis., Gen. Ordinances, §

24.02(1)(2015). In 2009, the Attorney General wrote to law enforcement agencies and explained the Department's opinion that "mere open carry of a firearm, absent additional facts and circumstances, should not result in a disorderly conduct charge." *See Open carrying of firearms legal, Van Hollen says*, Milwaukee Journal Sentinel, April 20, 2009, at 1 (http://www.jsoline.com/news/wisconsin/43302252.html). The legislature codified this opinion as part of Act 35 in Wis. Stat. § 947.01(2) (2013) . The significance of this as it relates to this case is that neither the Attorney General's opinion nor the resulting codification has anything to do with preemption. The analysis depends on the factual circumstances of each case, not on whether a general disorderly conduct ordinance is subject to the Preemption Statute. *See id.*

The point petitioners continue to miss is that the Preemption Statute only applies to firearm regulation ordinances and resolutions, not to local agency or commission actions. Petitioners certainly would not contend that the Ordinance would be preempted if the Ban did not exist. To underscore this point, the Court need look no further than Petitioners' original Complaint, which does not mention the Ordinance at all. Accordingly, the Ordinance is not a firearm

regulation ordinance subject to preemption analysis.

The Circuit Court correctly rejected Petitioners' strenuous attempt to turn the Ordinance into a firearm regulation ordinance. (R. 14 at 7-8). The Court of Appeals failed to discern a developed argument regarding the same or how such a general ordinance could possibly be subject to preemption analysis. *See Wisconsin Carry*, 2015 WI App 73, ¶5, n.3. Petitioners' argument to the Supreme Court remains undeveloped. If anything, it has become even more vague and confusing. The Supreme Court should reject it.

D. Even if the Preemption Statute does apply to the Ban, the Ban is not preempted because it is not more stringent than the Vehicle Statute.

Throughout this litigation and again in its brief to the Supreme Court, Petitioners make various statements that it is "clear" the City could not establish the Ban after Act 35. *See* Pet. Br. at 9, 11; *see also* Pet. Br. to the Court of Appeals at 10. However, Petitioners have provided no authority or argument showing how the Ban, or an ordinance just like it, is more stringent than the amended Vehicle Statute.

Meanwhile, the Attorney General has stated just the opposite of Petitioners' conclusion: that after Act 35 "public

and private entities may prohibit or restrict the possession and transportation of weapons." (R. 10 at 58-59).

Given that Petitioners continue to make this legal conclusion without support, the City will address it in the event the Court takes up the issue of whether the Ban is more stringent than the amended Vehicle Statute.

1. Under the Preemption Statute, political subdivisions may enact ordinances or resolutions that are not more stringent than state law.

The Preemption Statute specifically allows political subdivisions to enact ordinances or resolutions that are not more stringent than state law. *See* Wis. Stat. § 66.0409(2)(2013). Petitioners have consistently ignored the "more stringent than" portion of the Preemption Statute.

To determine if one law is more stringent than another, courts must decide if the two laws conflict. "[M]unicipalities 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." *Milwaukee v. Childs Co.*, 195 Wis. 148, 217 N.W. 703 (1928). To determine whether a local ordinance conflicts with state law, courts must first interpret the laws alleged to contradict each other.

Statutory interpretation "begins with the language of the statute." *Kalal*, 2004 WI 58, ¶45, ¶47. Beyond the language of the statute, "scope, history, context, and purpose" of the statute help discern the legislature's intent when passing the law." Id. at ¶48. Using these tools of interpretation, courts "should not construe laws to reach absurd results." *Id.* "Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent." *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 Assoc. v. Equal Opportunities Com*., 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, to determine if the Ban is more stringent than the Vehicle Statute, the court must compare the two.

2. The purpose of the Ban is to exclude weapons from city-owned buses.

The parties do not dispute that the purpose of the Ban is to exclude weapons from city buses. The Ban does not prohibit weapons in any other vehicle or in any other place. It

only applies to people who choose to pay the fare and ride the bus, and it only applies while they are riding the bus.

Nor do the parties dispute that the purpose of the Vehicle Statute is to allow individuals to carry loaded handguns in a vehicle. However, in amending the Vehicle Statute, the legislature changed very little of the law's language. Today's law remains prohibitory, but with an exception allowing individuals to carry a loaded handgun in "a" vehicle. The language of the statute is clear: a person "may" transport a loaded handgun 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. Perhaps most importantly, the new law does not 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.

In other words, the new law does not force loaded handguns into all vehicles. Vehicle owners may still exclude handguns if they wish. Madison Metro has done so by maintaining its longstanding policy prohibiting weapons on buses.

3. Petitioners concede that the Vehicle Statute does not remove the ability of a vehicle owner to exclude weapons from vehicles that they own.

As noted above, nothing in the new law removes the ability of vehicle owners to exclude loaded handguns from vehicles that they own. Petitioners do not contest this basic point, even as it relates to cars, buses, taxis, delivery trucks, and school buses used for public transportation. (R. 16 at 9-10). Yet, despite the Attorney General's instruction otherwise, Petitioners appear to contend that under Act 35 public entities that own vehicles should be treated differently than private individuals.

4. Petitioners fail to explain how Act 35 treats public vehicle owners any differently than private vehicle owners in this regard.

Given Petitioners' concession that the amended Vehicle Statute does not remove the ability of a private vehicle owner to exclude weapons, the key question is whether the new law treats public vehicle owners any differently than private vehicle owners?

In its Brief to the Circuit Court, Petitioners answered this question by stating that the "government does not have rights." (R. 9 at 4). When pressed at oral argument,

Petitioners' responded that the difference is that a bus is owned by a political subdivision. (R. 16 at p. 25, line 10-14).

However, as detailed above, Petitioners' general statements conflict with the opinions of the United States Supreme Court, which has long recognized the right of governments to control property that it owns, including public buses. *See Lehman*, 418 U.S. at 303. As the *Adderly* court explained:

> "[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, 385 U.S. at 47 (emphasis added).

In fact, governments own and operate all kinds of property, including buildings, garages, snowplows, ambulances, buses, fire trucks, and park shelters. And governments can control this property for reasons explained by the Unites States Supreme Court. Thus, it is insufficient for Petitioners to simply say that governments have no rights or that the city is a political subdivision.

To be successful, Petitioners must show how Act 35 removes from the City the power to control the property it owns (in this case, buses). To do that, they must show how

Act 35 treats public vehicle owners differently than private vehicle owners.

5. The Ban is not more stringent than the Vehicle Statute because, just like private vehicle owners, public vehicle owners may exclude weapons from vehicles that they own.

Nothing in the amended Vehicle Statute or any part of Act 35 signals that the legislature intended to treat political subdivisions that own vehicles any differently than private individuals who own vehicles.

First, Act 35 does not affirmatively say that guns must be allowed on public buses. In fact, Act 35 does not mention buses at all.

Second, Act 35 actually signals an intention to respect the property rights of private individuals and governments that own and operate vehicles. For example, Wis. Stat. § 175.60(15m)(b)(2013) allows an employee (public or private) to carry a gun in a vehicle during the course of their employment, but only in their "*own* motor vehicle." This means that, as an employer, governments can exclude weapons from vehicles it owns.

Finally, reading Act 35 under Petitioners' analysis (that private, but not public, vehicle owners can exclude

weapons) leads to absurd results, including:

- Act 35 would allow Madison Metro to prohibit its employees (ie, bus drivers) from carrying loaded handguns on buses, but not its passengers;

- Given that it is legal under Act 35 to ban guns at bus shelters, (R. 14 at 8-11), Act 35 would allow Metro Transit to ban loaded handguns at bus shelters, where passengers wait for buses, but not on the buses;

- Petitioners' analysis would require that Madison Metro let gun carrying passengers ride its buses that travel within 1000 feet of a school, where guns are banned. *See* Wis. Stat. § 948.605(2)(a) (2013) (prohibiting guns within 1000 feet of a school); and

- Under Petitioners' analysis, Madison Fire Department ambulances (also "vehicles") could not prohibit weapons even though the hospitals they drive to can.

These absurd results are avoided with the more reasonable interpretation that, like private vehicle owners, public vehicle owners can also exclude weapons from vehicles they own.

Petitioners have not attempted and cannot show that the Ban is therefore more stringent than the Vehicle Statute. Indeed, both laws can coexist. Accordingly, the Attorney General's opinion that after Act 35 public entities may restrict or prohibit the transportation of weapons makes sense and is correct. (R. 10 at 58-59).

E. The Supreme Court should strike Petitioners' field preemption argument because they did not raise this issue in their Petition for Review.

In its January 11, 2016 Order granting Petition for Review in this case this Court ordered that Petitioners' "may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court." *See* Order Granting Petition for Review, p. 1 (citing Wis. Stat. § 809.62(6) (2015)); *see also United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶ 17, 349 Wis. 2d 587, 836 N.W.2d 807 (declining to address an issue not raised in the petition for review). The Court did not order that any further issues be briefed.

Despite this specific order from the Court, Petitioners' brief raises a third issue, field preemption, that was neither raised nor argued in the Petition for Review. *Compare* Pet. Br. at 4, 12 *and* Pet. for Review, p. 3-8. Indeed, the Petition for Review only raises and argues Petitioners' end-run and purported authority issues. *See* Pet. for Review, p. 3-8.

Since Petitioners have now raised this issue in direct contradiction to the Order of this Court, the City requests that

the Court strike and ignore this argument.[5]

F. Even if the Court does not strike the field preemption argument, the Preemption Statute and Wis. Stat. 175.60(2g)(a) do not occupy the field of firearm regulation.

Field preemption is one of three ways that courts recognize preemption can occur. *See M&I Marshall & Ilsley Bank v. Guaranty Financial, MHC*, 2011 WI App 82, ¶22, 334 Wis. 2d 173, 800 N.W.2d 476. When deciding whether a regulatory scheme occupies a field of regulation courts must start with a presumption against preemption, unless complete preemption "was a clear and manifest" purpose of the legislature. *See id.*

Petitioners appear to allege field preemption on the basis that the Preemption Statute and Wis. Stat. § 175.60(2g)(a) allowing concealed carry create a regulatory scheme that occupies the entire field of firearm regulation. *See* Pet. Br. at 12-13. However, as shown above in Sections I and II**,** the Preemption Statute only preempts ordinances and resolutions that are more stringent than state law. Therefore,

[5] To the Court of Appeals, Petitioners argued the *Sturm v. Ruger* case within the context of their end-run argument. *See* Pet. Br. to Court of Appeals, p. 6-7. However, as this court has noted, there is a difference between making an argument and raising an issue. *See State v. Weber*, 164 Wis. 2d 788, 789, 476 N.W.2d 867, 868 (1991)(stating that the "issue" before the court was the one "presented in the state's petition for review.").

the Preemption Statute allows regulations like the Ban in this case because 1) it is not an ordinance or resolution, and/or 2) it is not more stringent than state law. The Preemption statute also allows political subdivisions to enact ordinances or resolutions that are not more stringent than state law. This is true for all firearm regulations, not just those involving concealed carry. Thus, with regard to all areas of firearm regulation, Wisconsin's Preemption Statute allows for additional regulation and stands in stark contrast to Kentucky's preemption statute, which, for example allows for no other regulation whatsoever.

Petitioners next argue that the phrase "anywhere in the state" in Wis. Stat. § 175.60(2g)(a) evidences the legislature's intent to occupy the entire field of firearm regulation. *See* Pet. Br. at 13. This suggestion fails for at least two reasons. First, the only purpose of Wis. Stat. § 175.60(2g)(a) is to allow concealed carry in the state. Petitioners would surely acknowledge that concealed carry is a relatively small portion of the entire field of firearm regulation. Second, Petitioners have already acknowledged that "anywhere in the state" does not literally mean anywhere not expressly exempted by the statute, since anywhere would include the private buses, taxis,

and other vehicles from which Petitioners concede handguns may be excluded. (R. 16 at 9-12).

Petitioners cite the Georgia case of *Sturm Ruger v. City of Atlanta* for the proposition that the state has fully occupied the field of firearm regulation. *See* Pet. Br. at 14. However, as the Court of Appeals correctly noted when Petitioners argued this same case within the context of its end-run argument, "the Georgia court made this statement in the context of addressing whether the City itself could bring a lawsuit against gun manufactures. There was no issue in *Sturm* regarding preemption of local agency power to regulate firearms." *Wisconsin Carry*, 2015 WI App 74, ¶12 (internal citations omitted).

The Oregon case discussed above is more on point than *Sturm* because it squarely addresses the issue of whether a preemption statute that only mentions ordinances and resolutions preempts a local policy like the Ban. *See Supra Part B.2.* In *Doe*, the court ruled that Oregon's preemption statute, which only mentioned ordinances and resolutions, does not preempt a school district policy prohibiting employees from carrying guns on district property because such a policy is not an ordinance or resolution. *See Doe v.*

Medford, 221 P.3d 787, 788-789, 232 Or. App. 38 (2009).

Just like the policy in that case applied only to those who worked at the school district, the bus rule in this case only applies to people who choose to pay the fare and ride the bus. Since the two statutes Petitioners allege create a scheme occupying the entire field of firearm regulation clearly leave room for additional regulations, it cannot be said that they, working together, express a "clear and manifest" purpose to occupy the entire field of firearm regulation.

G. If Petitioners want to change the Preemption or Vehicle Statutes, they should petition the legislature, not the courts.

As shown above, Petitioners cannot show that the Ban is subject to analysis under the Preemption Statute because the ban is not an ordinance or resolution. Further, Petitioners cannot show that even if the Ban is subject to preemption analysis, that it is more stringent than the amended Vehicle Statute. Accordingly, the Court of Appeals properly affirmed the Circuit Court's dismissal of this claim.

If Petitioners want to expand the reach of the Preemption Statute, or amend the Vehicle Statute to force guns into all cars, buses, and taxis, it ought to petition the

legislature, not the courts.

For the Supreme Court to re-write these statutes within the context of this case would require it to ignore its own long-standing principles of statutory interpretation and the plain text of the statute; and it would deprive the people of Wisconsin the right to democratically decide if public buses are an appropriate place for loaded handguns.

CONCLUSION

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

Dated this 4th day of March, 2016.

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 7,372 words.

Dated this 4th day of March, 2016

_____

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § RULE 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 4th day of March, 2016

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ELECTRONIC FILING CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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