

In The Supreme Court of Wisconsin

CLERK OF SUPREME COURT
OF WISCONSIN

WISCONSIN CARRY, INC. AND THOMAS WALTZ,
Petitioners-Appellants-Petitioners,

v.

CITY OF MADISON,
Respondent-Respondent.

On Appeal from the Dane County Circuit Court,
The Honorable Ellen K. Berz, Presiding,
Case No. 14-CV-0061

NON-PARTY BRIEF OF THE ATTORNEY GENERAL
IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF INTEREST	1
BACKGROUND.....	2
ARGUMENT.....	5
I. State Law Preempts The Gun Rule	5
A. The Gun Rule Violates The First <i>Anchor</i> Test Because The Legislature Expressly Withdrew Municipalities’ Authority To Impose Additional Limitations On Citizens’ Rights To Possess And Transport Firearms	6
B. The Gun Rule Violates The Remaining <i>Anchor</i> Tests Because It “Logically Conflicts” With And Undermines The “Purpose” And “Spirit” Of The Preemption Statute	10
II. Madison’s Assertion That A Single Sentence In A Non-Binding FAQ Is An “Attorney General’s Opinion” On The Question At Issue Is False.....	13
CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>520 S. Mich. Ave. Assocs., Ltd. v. Shannon</i> , 549 F.3d 1119 (7th Cir. 2008)	8
<i>Adams v. Livestock Facilities Siting Rev. Bd.</i> , 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404	5, 6, 10, 11
<i>Altamont Gas Transmission Co. v. FERC</i> , 92 F.3d 1239 (D.C. Cir. 1996)	8
<i>Anchor Sav. & Loan Ass’n v. Equal Opportunities Comm’n</i> , 120 Wis. 2d 391, 355 N.W.2d 234 (1984).....	1, 12, 13
<i>Dana Corp. v. United States</i> , 174 F.3d 1344 (Fed. Cir. 1999)	8
<i>DeRosso Landfill Co. v. City of Oak Creek</i> , 200 Wis. 2d 642, 547 N.W.2d 770 (1996).....	6
<i>EMILY’s List v. FEC</i> , 581 F.3d 1 (D.C. Cir. 2009)	8
<i>Local Union No. 487 v. City of Eau Claire</i> , 147 Wis. 2d 519, 433 N.W.2d 578 (1989).....	10
<i>Madison Teachers, Inc. v. Walker</i> , 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337	2
<i>Nat’l Ass’n of Mfrs. v. SEC</i> , 800 F.3d 518 (D.C. Cir. 2015)	8
<i>New Eng. Legal Found. v. Mass. Port Auth.</i> , 883 F.2d 157 (1st Cir. 1989)	8
<i>Schill v. Wis. Rapids Sch. Dist.</i> , 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177	13
<i>State v. Cole</i> , 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328	4, 12
<i>Van Gilder v. City of Madison</i> , 222 Wis. 58, 267 N.W. 25 (1936).....	2
<i>Wis. Gas & Elec. Co. v. City of Fort Atkinson</i> , 193 Wis. 232, 213 N.W. 873 (1927).....	9

<i>Wisconsin's Envtl. Decade v. DNR,</i> 85 Wis. 2d 518, 271 N.W.2d 69 (1978)	11, 12
--	--------

Statutes

2015 Wis. Act 149	3
Wis. Stat. § 165.25	2
Wis. Stat. § 167.31	1, 3, 7, 10
Wis. Stat. § 175.60	1, 3, 7, 10
Wis. Stat. § 59.03	2
Wis. Stat. § 61.34	2
Wis. Stat. § 62.11	2
Wis. Stat. § 66.0409	1, 4, 6, 11
Wis. Stat. § 66.0803	2
Wis. Stat. § 66.1021	2
Wis. Stat. § 806.04	2
Wis. Stat. § 943.13	3
Wis. Stat. § 948.605	3

Constitutional Provisions

U.S. Const. amend. I	8
Wis. Const. art. I § 25	2, 5
Wis. Const. art. XI § 3	2

Other

Madison, Wis., Gen. Ordinances § 3.14 (2015)	4
<i>Rules of Conduct and Inappropriate Conduct Transit</i> <i>Exclusion Procedure,</i> Madison Metro Transit System (July 12, 2005)	4, 5
<i>Wisconsin's Carrying Concealed Weapon Law Questions</i> <i>and Answers</i> (June 1, 2013)	13, 14

INTRODUCTION

Madison’s Gun Rule—which prohibits citizens from carrying weapons, including handguns, on city buses—is preempted by state law under the four tests articulated in *Anchor Savings & Loan Association v. Equal Opportunities Commission*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). The Rule violates the first *Anchor* test because it bans the possession and transportation of all firearms, where the Preemption Statute expressly withdrew municipalities’ authority to regulate the “possession, bearing, [or] transportation” of firearms more stringently than state law. Wis. Stat. § 66.0409(2). State law, in turn, permits citizens to possess and transport loaded handguns and all unloaded firearms in vehicles, Wis. Stat. § 167.31(2)(b), and allows licensees to carry concealed handguns “anywhere in this state,” Wis. Stat. § 175.60(2g). Additionally, even if this Court concludes that the Rule survives the first *Anchor* test—because, for example, this Court accepts Madison’s argument that the Rule is not an “ordinance”—the Rule is still preempted under the remaining *Anchor* tests because it logically conflicts with, and undermines the purpose and spirit of, the Preemption Statute.

STATEMENT OF INTEREST

This case involves the scope and applicability of the Preemption Statute, Wis. Stat. § 66.0409(2), and more generally, the ability of the State to preempt municipal

actions, an issue in which the State has a core interest. *Cf.* Wis. Stat. §§ 165.25(1), 806.04(11). Additionally, Madison relies on a single sentence in an online FAQ issued by the Division of Law Enforcement Services, erroneously citing that sentence as an “Attorney General’s opinion.” Resp’t Br. 1–2, 18, 20, 24–25, 28, 31.

BACKGROUND

1. In Wisconsin, municipalities “are creatures of the state legislature and have no inherent right of self-government beyond the powers expressly granted to them.” *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 89, 358 Wis. 2d 1, 851 N.W.2d 337; *see also Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25, 30 (1936). Municipalities have authority only through the Home Rule Amendment, Wis. Const. art. XI § 3, general home-rule statutes, Wis. Stat. §§ 62.11, 61.34, 59.03, and other specific statutory provisions, *see, e.g.*, Wis. Stat. §§ 66.0803, 66.1021 (authorizing bus transportation systems and transit commissions). In creating the Rule, Madison did not rely upon the Home Rule Amendment, so the issue is whether the Rule is preempted under statutory home-rule analysis. *See infra* p. 5.

2. Wisconsin broadly permits firearm possession and transportation. Under the Wisconsin Constitution, “[t]he people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” Wis. Const. art. I § 25. State law allows all citizens to

possess and transport loaded handguns, and all unloaded firearms, in vehicles, Wis. Stat. § 167.31(2)(b), motorboats § 167.31(2)(a), and noncommercial aircraft § 167.31(3)(a). Additionally, a licensee—a person licensed to carry a concealed firearm under either Wisconsin’s or another State’s laws—may “carry a concealed weapon *anywhere in this state.*” Wis. Stat. § 175.60(2g) (emphasis added). This broadly permissive provision is subject only to four specific exceptions: (1) an employer may prohibit licensees from carrying firearms in the course of employment, except in licensees’ own vehicles, § 175.60(15m); (2) licensees may not carry guns into certain enumerated buildings, such as prisons, police stations, and courtrooms, § 175.60(16); (3) owners or occupiers of real property may prohibit firearms on their property, including buildings owned, occupied, or controlled by local governments, Wis. Stat. § 943.13(1m)(c); and (4) licensees may not carry firearms in or on school grounds, Wis. Stat. § 948.605(2)(b)1r.

Consistent with Wisconsin’s public policy protecting citizens’ rights to possess and transport firearms, state law prohibits municipalities from regulating firearms in ways more stringent than state statute. The Preemption Statute provides that, as relevant, “no political subdivision may enact or enforce¹ an ordinance or adopt a resolution that

¹ The “or enforce” language became effective February 8, 2016. 2015 Wis. Act 149, § 2.

regulates the . . . possession, bearing, [or] transportation . . . [of] any 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). The Legislature enacted the Preemption Statute in response to local gun regulations passed in Madison and proposed in Milwaukee and Kenosha. *See State v. Cole*, 2003 WI 112, ¶¶ 61–64, 264 Wis. 2d 520, 665 N.W.2d 328 (Prosser, J., concurring).

3. At issue in this case is whether state law preempts the Rule. On February 18, 1997, the Madison Common Council adopted what is now Madison General Ordinance § 3.14, creating the Madison Transit and Parking Commission (“Commission”). Madison, Wis., Gen. Ordinances § 3.14 (2015). The Ordinance empowers the Commission to “provide overall management, operation and control of the assets of the City of Madison transit and paratransit transportation system,” and “to establish such rules and procedures as may be necessary to carry out the purpose and provisions of this ordinance.” *Id.* § 3.14(4)(h). Pursuant to this city-granted authority, on July 12, 2005, the Commission adopted certain “rules of conduct” for its Madison Metro municipal bus system. *Rules of Conduct and Inappropriate Conduct Transit Exclusion Procedure*, Madison Metro Transit System (July 12, 2005).² The Rule is one of these “rules of conduct” and prohibits citizens from

² <https://www.cityofmadison.com/metro/howtoride/codeofconduct.cfm>

bringing weapons, including “pistols,” onto city buses. *Id.*, IV. Violation of the Rule can result in exclusion from city services and criminal trespassing charges. *Id.*, VI and VIII.

ARGUMENT

I. State Law Preempts The Gun Rule

Madison’s Gun Rule—as an “action of the political subdivision [that] has the force and effect of law,” *Adams v. Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶32 n.18, 342 Wis. 2d 444, 820 N.W.2d 404—is preempted under statutory home-rule analysis if it satisfies any of the four *Anchor* tests: “(1) whether the legislature has expressly withdrawn the power of political subdivisions to act; or (2) whether the political subdivision’s actions logically conflict with the state legislation; or (3) whether the political subdivision’s actions defeat the purpose of the state legislation; or (4) whether the political subdivision’s actions are contrary to the spirit of the state legislation.” *Adams*, 342 Wis. 2d 444, ¶ 32.³ A straightforward application of this analysis mandates that the Rule is preempted for four independently sufficient reasons.

³ *Anchor* applies where state legislation is, at minimum, a “mixed bag” provision that involves some matters of statewide concern. *Adams*, 342 Wis. 2d 444, ¶¶ 29–32. Here, the Preemption Statute’s requirement of uniform, statewide protections of citizens’ rights to possess and transport firearms involves an issue of statewide concern, especially because “the right to keep and bear arms” is protected by the Wisconsin Constitution. Wis. Const. art. I § 25.

A. The Gun Rule Violates The First *Anchor* Test Because The Legislature Expressly Withdrew Municipalities’ Authority To Impose Additional Limitations On Citizens’ Rights To Possess And Transport Firearms

The first *Anchor* test is satisfied when the “plain language” of state law “requires [the] conclusion” that “the legislature has expressly withdrawn the power of municipalities to act.” *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 657, 547 N.W.2d 770 (1996). For example, in *DeRosso*, this Court held that the Legislature expressly withdrew municipalities’ authority to act by providing that certain facilities may be exempted from municipal approval requirements. *Id.* at 657. Similarly, in *Adams*, this Court held that the Legislature expressly withdrew municipalities’ power to act in the field of livestock facility siting by creating uniform state standards that all municipalities must follow and requiring municipalities to grant facility permits. 342 Wis. 2d 444, ¶ 36.

The Preemption Statute is more “express[]” in withdrawing municipal authority than the statutes at issue in *DeRosso* and *Adams*. The Preemption Statute provides that “no political subdivision may enact or enforce an ordinance or adopt a resolution that regulates the . . . possession, bearing, [or] transportation . . . [of] any 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). This language unambiguously

withdraws municipalities' authority to regulate firearm "possession" and "transportation" more stringently than state law.

The Preemption Statute thus "expressly" withdraws Madison's authority to ban the possession and transportation of firearms on city buses, preempting the Rule. State law allows citizens to possess and transport loaded handguns and all unloaded firearms in vehicles, Wis. Stat. § 167.31(2)(b), and specifically permits licensees to carry concealed handguns "anywhere in this state," subject only to four inapplicable exceptions, Wis. Stat. § 175.60(2g)(a). The Rule's blanket ban on the possession and transportation of *all* firearms on city buses—*e.g.* vehicles—is "more stringent" than these permissive state law provisions.

Madison raises three arguments as to why it believes the Preemption Statute does not expressly preempt the Rule. All of these arguments lack merit.

First, Madison primarily argues that the Rule is not preempted because it not an "ordinance" or "resolution" under the Preemption Statute. Resp't Br. 8–17. The necessary upshot of this argument is that, while Madison's Common Council cannot enact ordinances specifically regulating possession and transportation of firearms more stringently than state law, the Council can authorize its subordinate bodies to enact binding rules that achieve the same result.

This argument violates the bedrock principle that what a governmental body “cannot do directly, it also cannot do indirectly.” *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1129 (7th Cir. 2008); *accord Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (“the Commission was indeed attempting to do indirectly what it could not do directly”); *Dana Corp. v. United States*, 174 F.3d 1344, 1349 (Fed. Cir. 1999) (“The Commissioner cannot do indirectly . . . what the Commissioner cannot do directly”); *New Eng. Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 174 (1st Cir. 1989) (“Massport cannot do indirectly what it is forbidden to do directly.”).

The First Amendment—which Madison repeatedly cites in its brief, Resp’t Br. 18–20, 29—provides a particularly relevant illustration of this principle. That Amendment declares that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. It is well accepted that when an executive agency—created and empowered by Congress—adopts a regulation abridging free speech, that regulation is invalid under the First Amendment, even though a regulation is not a “law” “ma[d]e” by “Congress.” *See, e.g., EMILY’s List v. FEC*, 581 F.3d 1, 18 (D.C. Cir. 2009), *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 530 & n.32 (D.C. Cir. 2015).

This well-established principle that a governmental body cannot evade limitations on its authority by delegation

to another governmental actor is fatal to Madison's "ordinance" argument. The Madison Common Council could not have enacted an ordinance banning all firearms on city buses because such an ordinance would be more stringent than state law. *See supra* p. 7. Since the Council cannot do indirectly what it cannot do directly, the Commission—a body created and empowered by the Council—similarly cannot enact or enforce a binding rule that bans all firearms on city buses.

Second, Madison argues that it has the same authority to ban firearms from its property as does a private property owner. Resp't Br. 18–20, 28–31. But the cases Madison relies upon to support this argument address the entirely inapposite question of when individual rights give way to the government's rights as property owner under the First Amendment. Resp't Br. 18–19, 29. None deal with the situation at issue here: the State has explicitly withdrawn from municipalities the authority to limit citizens' rights, without providing any exemption for conduct taking place on the relevant municipally owned property—*e.g.*, buses. As this Court has explained, "[i]n dealing with municipalities which are creatures of the Legislature, the same constitutional restrictions do not apply that would apply in the case of private corporations, and for that reason the Legislature has very broad powers." *Wis. Gas & Elec. Co. v. City of Fort Atkinson*, 193 Wis. 232, 213 N.W. 873, 879 (1927). This means that Madison's arguments about the

right of private property owners to exclude firearms from their own vehicles are entirely beside the point.

Third, Madison argues that the Rule is not explicitly preempted because it is not more stringent than state law. Resp’t Br. 24–31. This is simply wrong. State law allows citizens to possess and transport firearms in vehicles, Wis. Stat. § 167.31(2)(b), and allows licensees to carry concealed handguns “anywhere in this state,” Wis. Stat. § 175.60(2g). The Rule is clearly more stringent because it does not permit any firearms in certain vehicles, which are undisputedly located “in this state.” See *supra* p. 7.

B. The Gun Rule Violates The Remaining Anchor Tests Because It “Logically Conflicts” With And Undermines The “Purpose” And “Spirit” Of The Preemption Statute

Even if this Court agrees with Madison’s argument regarding the Preemption Statute’s text—for example, if this Court finds that the Statute does not “expressly” apply under the first *Anchor* test because of the “ordinance” language, *but see supra* pp.7–9—the Rule would still violate the three remaining *Anchor* tests. See, e.g., *Local Union No. 487 v. City of Eau Claire*, 147 Wis. 2d 519, 525–26, 433 N.W.2d 578 (1989). Specifically, the Rule “logically conflicts” with, and undermines the “purpose” and “spirit” of, the Preemption Statute. *Adams*, 342 Wis. 2d 444, ¶ 32.

1. The Rule violates the second *Anchor* test because it “logically conflicts” with state law. *See Adams*, 342 Wis. 2d 444, ¶ 32. For example, in *Wisconsin’s Environmental Decade v. DNR*, this Court held that a broad grant of power to DNR to supervise chemical treatment of state waters logically conflicted with any municipality’s claimed authority to prevent chemical treatment entirely. 85 Wis. 2d 518, 535, 271 N.W.2d 69 (1978).

In the present case, state law expressly allows all citizens to possess and transport firearms in vehicles, and allows licensees to carry concealed handguns “anywhere in this state,” subject only to four irrelevant exemptions. *Supra* p. 3. The Preemption Statute makes clear that the “logic” of these provisions applies to municipalities as well. *See* Wis. Stat. § 66.0409(2). The Rule “logically conflicts” with the Preemption Statute by prohibiting all citizens from possessing and transporting all firearms in certain vehicles—city buses—where state law expressly allows such possession and transportation.

2. The Rule also fails the third *Anchor* test because it defeats the “purpose” of the State’s uniform regime of firearm possession and transportation. *Adams*, 342 Wis. 2d 444, ¶ 32. In *Wisconsin’s Environmental Decade*, this Court determined that even if the municipal action at issue did not logically conflict with state law, allowing a city to prevent chemical treatment that DNR had authorized would frustrate DNR’s water management

program and thus defeat the legislative purpose of the statute. 85 Wis. 2d at 535–36.

The “purpose” of the Preemption Statute is to prevent “[c]ities like Madison [from] creating a patchwork of regulations across the state” and to ensure that “individuals have the law-given ability to own a firearm if they feel it is necessary.” *Cole*, 264 Wis. 2d 520, ¶ 64 (Prosser, J., concurring). State law, in turn, broadly permits citizens to carry firearms in vehicles, and allows licensees to “carry a concealed weapon anywhere in this state.” See *supra* pp. 2–3. The Rule undermines this legislative purpose by designating additional places in the State where citizens cannot carry firearms.

3. The Rule violates the fourth *Anchor* test because it undermines the spirit of the State’s policy in favor of freedom of firearm possession and transportation. In *Anchor*, the State had adopted a detailed regime regulating the savings and loan industry. *Anchor*, 120 Wis. 2d at 397–98. The city, however, sought to regulate a state-chartered savings and loan operation based on a city ordinance addressing discriminatory lending. *Id.* at 395–96. This Court held that the city’s actions were “contrary to the spirit of the state’s structure of all aspects of credit and lending by savings and loan associations” because the Legislature had “adopted as law a complete, all-encompassing plan for the treatment of applications for

and granting of loans by savings and loan associations.” *Id.* at 397–403.

Here, the State has similarly adopted a comprehensive regime of firearm regulation, while prohibiting municipalities from imposing more restrictive limitations. *See supra* pp. 2–4. The Rule is contrary to the spirit of state law, especially the Preemption Statute, because the Rule imposes additional burdens on citizens’ rights to possess and transport their firearms.

II. Madison’s Assertion That A Single Sentence In A Non-Binding FAQ Is An “Attorney General’s Opinion” On The Question At Issue Is False

Madison’s brief repeatedly and erroneously places significant reliance on what it represents is an “Attorney General’s opinion.” *See* Resp’t Br. 1–2, 18, 20, 24–25, 28, 31. While opinions of the Attorney General are properly afforded deference, *see Schill v. Wisconsin Rapids School District*, 2010 WI 86, ¶ 106, 327 Wis. 2d 572, 786 N.W.2d 177, what Madison cites is not an “Attorney General’s opinion.” Rather, it is a one-sentence entry in a 56-page online FAQ document, written by the Division of Law Enforcement Services within the Department of Justice. *Wisconsin’s Carrying Concealed Weapon Law Questions and Answers* (June 1, 2013), at 45.⁴ The document contains no legal reasoning and does not cite the Preemption

⁴ <https://www.doj.state.wi.us/sites/default/files/dles/ccw/ccw-faq.pdf>

Statute or the *Anchor* test. *Id.* The FAQ also contains a conspicuous disclaimer—*directly following the table of contents*—stating: “this document does not constitute either an informal or formal opinion of the Wisconsin Attorney General, [and] does not constitute legal advice or guidance.” *Id.* at 7. Accordingly, Madison’s repeated reliance on this document as an “Attorney General’s opinion” is entirely inappropriate.

CONCLUSION

The decision of the court of appeals should be reversed.
Dated this 16th day of March, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,995 words.

Dated this 16th day of March, 2016.

MISHA TSEYTLIN
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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, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 16th day of March, 2016.

MISHA TSEYTLIN
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