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In the Supreme Court of Wisconsin

Wisconsin Carry, Inc. and Thomas Waltz,

Petitioners-Appellants-Petitioners

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 Petitioners

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I. Wisconsin Law Preempts the Ban

Madison has had three chances now to explain how it is that the Transit and Parking Commission has the power to do something that the Madison Common Council cannot (in the Circuit Court, in the Court of Appeals, and now in this Court). It still, however, declines to do so. By now it is clear there is a simple reason: Madison has no explanation.

The Commission derives all its power from the Common Council. The Common Council has no power to ban guns on buses. The Commission bans guns on buses. Madison sees no problem with this. Instead, it repeatedly chides WCI for saying that the Commission's ban "defies logic," without even attempting to explain why that is not an accurate conclusion. Just as the Attorney General lacks the power to do what he is not statutorily authorized to do (*see State v. City of Oak Creek*, 2000 WI 9, ¶53, 232 Wis. 2d 612, 605 N.W.2d 526), Madison cannot do what it lacks the power to do.

Unable to provide a cogent explanation of how the Commission developed additional powers out of thin air, Madison resorts to chicanery. It claims WCI calls the Attorney General's FAQs (that say a public entity may ban guns on buses) "persuasive."

Untrue. When Madison first cited the FAQ, WCI responded that it was only "persuasive authority," ***as opposed to binding authority.*** *See Juneau Country Star-Times v. Juneau County*, 2013 WI 4, ¶36, FN 18, 345 Wis.2d 122, 824 N.W.2d 457 (2013) ("The Attorney General's opinion, advice, and brief are not binding on this court, but we may give them persuasive effect.") Madison is either being obtuse or deceptive in failing to recognize the phrase "persuasive authority" as a term of art, not to be separated into its diction subparts and repurposed.

To be clear, not only does WCI not believe the FAQ is persuasive, WCI believes it is incorrect. The Preemption Statute, Wis.Stats. § 66.0409(2) states,

> Except as provided in subs. (3) and (4), 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, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

Madison's reading of the Preemption Statute is that Madison may regulate carrying guns any way it wants to as long as it doesn't pass a resolution or adopt an ordinance that on its face regulates carrying guns. Madison does not consider that perhaps the legislature used the

words it used because cities regulate via ordinances and resolutions. There is no other way for a city to regulate. Rules such as the Ban come about only via authority granted by an ordinance.

It may not have occurred to the legislature that Madison was so opposed to following the dictates of the law that it would resort to the duplicity present in this case. On one hand, Madison says it has not passed any ordinances or adopted resolutions regulating carrying guns, so it has not exercised powers it does not have. On the other hand, Madison says its "rule" that regulates carrying guns is perfectly enforceable and completely within its powers.

Madison cannot, of course, have it both ways. There can be only one source for the Commission's alleged power to ban guns on buses – an ordinance or resolution. When Madison passed MGO 3.14, it granted certain powers to the Commission. Clearly, Madison could not grant to the Commission the power to do something that Madison itself lacked. The bucket of powers given by the Common Council to the Commission must have been a subset of the total powers of the Common Council. The Common Council has no power to regulate carrying guns on buses, so the bucket of powers it handed to the Commission also lacked that power.

II. Preemption Applies to All Ordinances and Resolutions

Madison asserts that the Preemption Statute is clear and susceptible to only one meaning using just the plain words of the Statute. Then Madison inexplicably follows with pages and pages of legislative history, attorney general FAQs, and meanings of laws in other states to attempt to explain the intent of the legislature in passing the Preemption Statute.

Madison argues that the Ordinance empowering the Commission to promulgate the Ban is not preempted because it is not a "firearm regulation" or "gun control ordinance." As support for this argument, Madison relies heavily on the so-called "legislative history" of the Preemption Statute and what the legislator who introduced the bill creating the Preemption Statute intended.

Apparently Madison only chooses to rely on the words of the Preemption Statute when they are helpful. When they are not, only then does Madison conclude that resorting to legislative history is necessary to understand the meaning of the Preemption Statute (implying that the words of the statute are not so clear after all).

Nowhere in the Preemption Statute do the words "firearm regulation" or "gun control ordinance" appear. Nevertheless, Madison has concluded that only "firearm regulations" and "gun control ordinances" are preempted. One cannot help but wonder what

the outcome would be if Madison passed an ordinance banning guns throughout the city, and included a provision saying "This is not a firearm regulation or a gun control ordinance."

The reality is that the Preemption Statute applies to all ordinances and resolutions that have the preempted ***effect,*** regardless whether they fall under the undefined penumbra of being "firearm regulations" or "gun control ordinances." After all, even assuming *arguendo* that the Common Council did not have to intention of banning guns on buses, the Common Council did, implicitly, grant the power to the Commission to ban guns. To the extent that it did, the ordinance doing so is preempted.

Consider if the Commission decided it needed more money to finance its operations, but it did not want to ask the Common Council for more money and did not want to raise fares. Instead, the Commission imposed a new sales tax in the City of Madison and relied on its enabling ordinance (MGO 3.14) as authority to do so. Would Madison argue that MGO 3.14 is not a tax ordinance, so it must be okay for the Commission to impose the tax?

III. Madison Rejects the Court of Appeals' Opinion

Perhaps recognizing the slippery slope created, Madison has rejected the Court of Appeals' opinion that sanctioned the potential for multi-agency gun bans. Madison argues that it is not clear how agencies

could, for example, "require private property owners to prohibit guns in their restaurant or store."

Once again, Madison has re-cast WCI's argument to one of Madison's own choosing. What WCI argued was that an agency could itself ban the guns, not that it could require the property owner to ban them. No one would doubt the power of the Public Health Department to ban dogs in restaurants, but Madison apparently cannot comprehend that the same department could ban guns in restaurants.

WCI explained in its Reply Brief in the Court of Appeals:

> Madison … feign[s] ignorance 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 fact of a state statute preempting such action.

Reply Brief in Court of Appeals, pp. 8-9 [emphasis supplied]. Thus, even though Madison knows full well the argument WCI is making, it once again pretends not to know how it could happen, what agencies could do it, and that it would be a ban imposed by the agency, not by the underlying restaurant or store owner.

IV. The "Vehicle Statute" Is Inapplicable

Madison continues to try to justify the Ban based on a theory that it is no more stringent than the "vehicle statute," Wis.Stats. § 167.31(2)(b). Rather than helping Madison's position, the Vehicle Statute reinforces WCI's theory.

Prior to 2011 Wisconsin Act 35, it was a generally illegal to carry a firearm in a vehicle that was not unloaded, encased, and not within ready access of the driver. With the passage of Act 35, the prohibition no longer applies to handguns or unloaded (but not encased) long guns. Wis.Stats. § 167.31(b)(1). Madison completely mischaracterizes § 167.31 as a "permissive" statute, and even (mis)quotes it as saying that a person "may carry" a loaded handgun in a vehicle. Section 167.31 remains a "prohibitive" statute, that says "no person may possess" a firearm in vehicle ***unless*** it is unloaded or a handgun. *Id.*

Of course, the actual wording of the statute completely undermines Madison's theory. The Ban is more stringent than the vehicle statute, in that it bans any firearms on buses (regardless of loaded or encased condition) and the vehicle statute does not.

The Preemption Statute has a "savings clause" for ordinances that are the same as, similar to ***and*** no more stringent than, a state statute. Wis.Stats. § 66.0409(2) [emphasis applied]. Madison

chooses to ignore the first two items in the conjunctive, requiring that any ordinances "saved" must be the same as or similar to (in addition to being no more stringent than) a state statute. Of course, Madison has no hope of arguing that the Ban is the same as or similar to the generalized state regulation of transporting firearms, let alone that the Ban is no more stringent than state law. Madison's vehicle statute argument is a non-starter.

V. Field Preemption is Not Outside the Petition

Finally, Madison argues that WCI's "field preemption" argument is outside the Petition for Review. Madison overlooks, however, that WCI raised preemption in the petition, and continues to argue for preemption. Field preemption and express preemption are just two different flavors of the same ice cream.

Conclusion

For the foregoing reasons, the judgment of the circuit court and the Court of Appeals should be reversed and the case remanded for further proceedings.

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Certificate of Service

I certify that on March 18, 2016, I served a copy of the foregoing

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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 2,023 words.

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

I certify that this Brief was mailed via Priority Mail to the Clerk of this Court on March 18, 2016.

/s/ John R. Monroe

John R. Monroe