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**Gov. Evers asks Supreme Court to take over case challenging indoor capacity limits**

*By WisPolitics.com*

Gov. Tony Evers’ administration is asking the state Supreme Court to take over a challenge to the limits on indoor public gatherings in Wisconsin, arguing the case involves “immediate, life-threatening public health conditions.”

The request, if granted, would put two of Evers’ attempts to curtail the virus before the high court — the capacity limit and the mask mandate.

The 3rd District Court of Appeals recently placed the order on hold as it reviews a circuit court judge’s ruling that had upheld the order.

At the heart of that case is a dispute over whether the Evers administration should’ve issued the limits on public, indoor gatherings through the administrative rules process, which gives lawmakers oversight of agency actions.

In May, the state Supreme Court in a 4-3 ruling overturned an extended stay-at-home order, finding it should’ve been issued through the administrative rules process.

But the state Department of Justice argued that ruling didn’t address a statute giving the DHS secretary, Andrea Palm, the power to close “schools and forbid public gatherings in schools, churches and other places to control outbreaks and epidemics.”

DOJ argued the limits on public, indoor gatherings were issued under that statute and the court needs to clarify whether its May ruling applies to that provision in state law as well.

It also argued the case would eventually end up before the justices anyway, regardless of what the 3rd District decides.

“And every day of delay is a day that more and more Wisconsinites are infected, hospitalized, and killed by COVID-19,” DOJ wrote in arguing the court should take the appeal directly.

Meanwhile, the state Supreme Court is moving quickly to hear a challenge a Waukesha County businessman filed to Evers’ statewide mask mandate, setting oral arguments in the case for Nov. 16.

In the 4-3 ruling, the court agreed to take original jurisdiction in the suit filed by Jere Fabick that argues Evers exceeded his authority in declaring multiple health emergencies to deal with the COVID-19 pandemic. The suit argues Evers was only able to declare one public health emergency and then needed the Legislature’s approval to extend it beyond a 60-day window.

To date, Evers has declared three public health emergencies related to the pandemic. The second and third orders were the foundation for his mask mandates.

The court directed parties to address whether the mask mandate was authorized under state law. The court also wants the parties to weigh in on whether the statute used to issue the order is “an unconstitutional delegation of legislative power to the executive branch.”

The court also denied a request from the conservative Wisconsin Institute for Law and Liberty to combine a challenge it filed in Polk County to Evers’ mask mandate with the Fabick suit. In that case, a judge declined to bar enforcement of the order.

In her dissent, Justice Rebecca Dallet complained taking original action in the Fabick suit was the “latest step in the majority’s efforts to transform this court from one of last resort to the first stop for any discontented Wisconsinite.”

Conservatives have gone directly to the state Supreme Court in a string of cases, often with WILL as counsel. That includes last month agreeing to take original action in a challenge to a Dane County order impacting private schools, in October 2019 to several budget vetoes Evers issued, and in April 2018 in an attempt to force then-state Superintendent Evers to submit DPI’s proposed administrative rules to the governor’s office for review.

Dallett, joined by fellow liberals Ann Walsh Bradley and Jill Karofsky, argued the Polk County case should’ve been allowed to play out in the lower courts before the justices stepped in.

“Our original-action jurisdiction is not meant to allow a single, disgruntled taxpayer to jump the line to achieve a desired outcome,” Dallet wrote. “The lower courts should be permitted to carry on without unnecessary and premature interruptions.”

The court also put on hold the Polk County suit pending a ruling in the Fabick case.

*The Capitol Report is written by editorial staff at WisPolitics.com, a nonpartisan, Madison-based news service that specializes in coverage of government and politics, and is distributed for publication by members of the Wisconsin Newspaper Association.*

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