

Evers says state Supreme Court ruling against stay-at-home order means 'chaos'

Posted on Wednesday, May 13, 2020

A split state Supreme Court on Wednesday struck down the Evers administration's latest stay-at-home order, ruling it should've been issued as a rule to give lawmakers oversight of the process dictating precautions to deal with the COVID-19 pandemic.

Conservatives Pat Roggensack, Rebecca Bradley, Daniel Kelly and Annette Ziegler also ruled DHS Secretary Andrea Palm's exceeded her authority in confining people to their homes except in certain circumstances, forbidding non-essential travel and closing many businesses.

The ruling takes effect immediately and leaves Wisconsin without a state directive requiring precautions to limit transmission of the disease.

Gov. Tony Evers slammed the order, saying the state was making good progress in managing COVID-19, but the GOP lawsuit leading to the order undercut that work.

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"Today, Republican legislators convinced four members of the Supreme Court to throw the state into chaos," Evers said.

He added, "Republicans own that chaos."

GOP lawmakers had asked the court for an injunction preventing enforcement of the order, but to stay that to provide time to work out a deal with the Evers administration.

But the conservative majority noted more than two weeks had passed since it began considering the case, denying the request. That left Wisconsin with no state directive in place limiting how businesses operate or requiring social distancing amid the ongoing pandemic.

“Therefore, we trust that the Legislature and Palm have placed the interests of the people of Wisconsin first and have been working together in good faith to establish a lawful rule that addresses COVID-19 and its devastating effects on Wisconsin,” the majority wrote. “People, businesses and other institutions need to know how to proceed and what is expected of them. Therefore, we place the responsibility for this future law-making with the Legislature and DHS where it belongs.”

While Evers, Senate Majority Leader Scott Fitzgerald and Assembly Speaker Robin Vos have met while the case was pending, there have been no public signs of any negotiations on a proposal to replace the order if it were struck down.

In a joint statement, Fitzgerald, R-Juneau, and Vos, R-Rochester, encouraged Evers to “to work with us to begin promulgating rules that would provide clear guidance in case COVID-19 reoccurs in a more aggressive way.”

Otherwise, they said businesses can safely reopen using best practices put forward by the Wisconsin Economic Development Corp. and said residents can continue on their own to follow social distancing, telecommuting and other practices to minimize the spread of the disease.

“This order does not promote people to act in a way that they believe endangers their health,” they said.

On a late Wednesday call, Evers again said GOP legislative leaders haven’t provided a plan on how they would deal with COVID-19. He said the administration on Thursday will issue the framework of an emergency rule to put new regulations in place. But he cautioned that process wouldn’t be quick.

During oral arguments before the court last week, the GOP’s attorney estimated it would take 12 days to draft an emergency rule and put it in place. Lawmakers then have oversight of the rule one it’s published.

“This isn’t going to be an overnight thing and in the meantime, we’re going to have 72 counties doing their own thing,” Evers said. “We were in a good place. We’re no

longer in a good place.”

Evers originally declared a public health emergency March 12 and then followed that up with the first stay-at-home order, which went into effect March 25. It closed schools, restricted travel, banned gatherings of 10 or more people and only allowed what were deemed “essential” businesses to continue operating. The second order, which Palm under separate powers granted to DHS under Wisconsin statutes, largely extended the initial directive.

But the majority ruled Palm should’ve issued the directive through the emergency rule process, which gives legislators input. Allowing Palm to issue the order would mean empowering an unelected official to create laws that subject people to imprisonment for failing to obey. For a violation of an agency’s order to constitute a crime, it must be promulgated as a rule, the court found.

“Rulemaking exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin,” the court ruled.

Liberal Justice Rebecca Dallet, writing in dissent, slammed the majority for falling “hook, line, and sinker for the Legislature’s tactic to rewrite a duly enacted statute through litigation rather than legislation.” She argued the Legislature granted the DHS broad secretaries in state statute only for the conservative majority to ignore the law.

“This decision will undoubtedly go down as one of the most blatant examples of judicial activism in this court’s history. And it will be Wisconsinites who pay the price,” Dallet wrote.

The impact of the court’s ruling on the lives of Wisconsinites, who have been under a stay-at-home since March 26, was still being fleshed out late Wednesday. The Tavern League of Wisconsin told members they could open immediately, but urged them to follow guidance the Evers administration had offered on how to minimize the risks of spreading COVID-19.

Meanwhile, the Wisconsin Association of School Board said in a statement it was still reviewing the decision, but believed it didn’t cover a portion of Palm’s order that directed schools to close.

The court's ruling also doesn't impact the power of local officials to issue their own orders. Dane County quickly announced it would impose restrictions through May 26 similar to what was included in the DHS order.

The high-profile case generated a series of writings from the seven-member court. While Roggensack, the chief justice, wrote the majority opinion, she also offered a concurring ruling to state she would've stayed the ruling until May 20, adding she is "appreciative of the concerns raised by COVID-19 and the possibility of throwing the state into chaos."

Rebecca Bradley and Kelly each wrote concurring opinions and signed onto the other's writing.

Meanwhile, Ann Walsh Bradley wrote a dissent that fellow liberal Dallet joined, and Dallet wrote one that Bradley joined.

Those liberal justices also signed onto the dissent written by conservative Brian Hagedorn, a former chief legal counsel to then-Gov. Scott Walker.

Hagedorn, the newest member of the court, wrote he doesn't believe lawmakers had standing to bring suit.

Writing the court is not "here to do freewheeling constitutional theory" or "step in and referee every intractable political stalemate," Hagedorn wrote he believed Palm didn't need to issue the order as an emergency rule, subject to legislative review.

What's more, he didn't believe lawmakers had standing to file the suit because it challenged "executive branch enforcement of clearly on-point statutes." Instead, he wrote, someone who could allege an injury due to the order should've filed the challenge.

"The legislature may have buyer's remorse for the breadth of discretion it gave to DHS in Wis. Stat. § 252.02," Hagedorn wrote. "But those are the laws it drafted; we must read them faithfully whether we like them or not."

His dissent brought sharp rebukes from fellow conservatives Rebecca Bradley and Kelly.

Rebecca Bradley wrote his "53-page opinion contains no constitutional analysis whatsoever, affirmatively rejects the constitution, and subjugates liberty" while

spurning “more than two centuries of fundamental constitutional law as well as the Wisconsin Constitution’s guarantee of liberty.”

Kelly, who last month lost his bid to retain his seat on the court, accused his colleague of being condescending while providing no “justification for this insult, and there appears to be none.”

Read the decision [here](#).