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Supreme Court issues opinion on state's authority to restrict business operations during public health emergency

SANTA FE – The governor and Department of Health have legislatively granted authority to restrict or close businesses through an emergency public health order rather than imposing such restrictions through a rulemaking process, the state Supreme Court concluded in an opinion issued today.

The Court's unanimous written opinion provides the detailed legal reasoning for an oral decision issued from the bench in August that upheld a ban on indoor dining the state had imposed a month earlier because of the increasing spread of COVID-19.

A group of businesses challenged the restrictions in a lawsuit brought in district court in Carlsbad, prompting Gov. Michelle Lujan Grisham to petition the state's highest court to resolve the dispute. After the Supreme Court agreed to consider the case, the state Republican Party, House and Senate GOP leaders and Eddy County were allowed to submit written legal arguments against the business restrictions.

The Court determined that the July 13, 2020 emergency public health emergency order's temporary closure of indoor dining at restaurants and brewpubs was lawfully issued under authority granted by the Legislature and was not "arbitrary and capricious."

The Court concluded that the Department of Health was not required to follow administrative rulemaking procedures, which can be lengthy and require a public hearing, to impose the emergency public health restrictions on indoor dining. The Court also rejected arguments that it should declare an "end date" to the authority of the governor and secretary of health to issue emergency orders so the Legislature could address the coronavirus pandemic through its lawmaking role.

The Court noted that the state has issued more than three dozen amended or supplemental emergency orders "in response to the swiftly changing dynamics of a novel, dangerous, and highly communicable disease." The state's emergency public health orders, the Court explained, establish a "series of temporary requirements to meet a crisis" immediately and do not serve the same function of a rule that guides the government on how to respond to a new health threat in the future.

The July public health order also "does not work a fundamental disruption of the balance of powers between the branches of government in the context of this public health crisis," the Court stated.

"New Mexico has not entered a 'new normal,' nor do the temporary emergency orders constitute 'long-term policy' decisions. New Mexico remains in a state of emergency," the Court concluded in an opinion by retired Justice Judith K. Nakamura. "The argument that special sessions of the Legislature should be used in lieu of Petitioners' emergency orders is so facially unworkable that it only reinforces the conclusion that it was appropriate for the Legislature to grant the executive branch ample authority to immediately and flexibly respond to a public health emergency."

Justice Nakamura retired from the Court several months after justices heard oral arguments in the public health case and announced their decision from the bench. Chief Justice Michael E. Vigil did not participate in the case.

Justice David K. Thomson wrote a specially concurring opinion "to express my concern that the broad and vague statutes that grant emergency powers to the Governor combined with the deference given to the executive to act in times of emergency may pose potential long-term consequences to our system of checks and balances."

"While I entirely endorse the conclusion the majority reaches in this case, I respectfully disagree that 'New Mexico has not entered a 'new normal,"' Justice Thomson wrote. "The majority's holding should not communicate that executive or legislative responses to the pandemic will always receive the same level of judicial deference as when the crisis first emerged. In addition, I believe we must be wary of the precedent we set beyond the scope of the COVID-19 crisis."

The executive branch of government must have some flexibility to act during public health emergencies, Justice Thomson wrote, but "this does not relieve the executive of its obligation to show, subject to scrutiny and verification, that the stated emergency and the means to address it are reasonable."

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To read the decision in *Lujan Grisham v. Romero*, No. S-1-SC-38396, please visit the New Mexico Compilation Commission's website using the following link:

https://nmonesource.com/nmos/nmsc/en/item/492963/index.do