

## NM Supreme Court: State has authority to limit indoor dining

Written by By Matthew Reichbach NM Political Report  
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Once again, the state Supreme Court ruled unanimously in favor of the state when it came to upholding and enforcing the state public health order, this time saying not only does the state Department of Health have the authority to close or restrict indoor dining at restaurants, but that their decision to do so was not arbitrary and capricious, as argued by some restaurants.

“It is the policy of courts to uphold regulations intended to protect public health unless it is plain they have no real relation to the object to which they were enacted,” Justice Judith Nakamura said in announcing the decision.

Citing a 1939 decision, *State v. Old Abe*, Nakamura said, “Only agency action that is willful and unreasoning and done without consideration and in disregard to the facts and circumstances can be deemed arbitrary and capricious.”

The court will issue a written order at a later date.

Chief Justice Michael Vigil recused himself from the case.

Nakamura also said the court ordered the lower court that issued a temporary restraining order that allowed indoor dining to resume—which itself was stayed by the Supreme Court to allow the ban on indoor dining to continue—to vacate that order.

The court agreed with arguments that said state law allows the state of New Mexico to restrict indoor dining and other business interests, as long as it is directed at stopping the spread of a public health threat, which in this case is the worldwide COVID-19 pandemic.

The attorney for the restaurants that sought to invalidate the restrictions on their businesses had argued that the state had to rely on another aspect of the state’s public health order, regarding quarantines, for the process to close or restrict businesses.

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Nakamura said the court found those arguments “unpersuasive.”

“It is clear that the New Mexico Legislature has given the Secretary of the Department of Health this statutory authority,” she said.

### Arbitrary and capricious versus reasonable connection

A major argument for Angelo Artuso, the attorney for the restaurants, was that the state did not provide adequate rationale for the closure of indoor dining at restaurants. He frequently referred to the decision as “arbitrary and capricious” and said that since there was not sufficient rationale, it should be invalidated.

“They have to show that they’ve looked at the relevant data and provide a satisfactory explanation for why they took the action that they did,” Artuso argued. “And in this instance, it’s our position that they have not provided any satisfactory explanation for why they have closed indoor dining.”

Matt Garcia, the attorney for the governor’s office, meanwhile said the state had clearly met the standard of a “reasonable connection” between the orders regarding the restaurants and the goal of stopping the transmission of COVID-19.

“In this case, the regulatory conduct that is specifically at issue here and is part of the rift that’s before your honors is the temporary closure of indoor dining at restaurants. The intended result is the mitigation of COVID-19 transmission within our state. And I think the court can make the determination and should make the determination today that there is a reasonable relationship between that regulation and the object of that regulation.”

He also cited two federal cases, *Legacy Church, Inc. v Kunkel* and the case that made it to the U.S. Supreme Court *South Bay United Pentecostal Church v. Newsom*, which both found that restrictions to attendance at places of worship were allowable to slow the spread of COVID-19.

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In those cases, Garcia said, the courts not only gave deference to the state for combatting the public health emergency, but also looked at facts indicating COVID-19 transmission appeared to happen more frequently indoors.

He said the rate of rapid responses at restaurants when there was indoor dining was similar.

Artuso had argued that there was no way to prove that the cases that were part of the rapid responses were contracted at the restaurants while working or “if they picked it up while going to a party with their friends while they were furloughed or laid off when the restaurants were closed.”

One Justice, David Thomson, voiced concerns over fairness of the orders and over how the public health order decisions are made.

“How do we know if there is no process by which we are eliciting what those facts are and how they relate to the interest you are claiming?” Thomson asked.

Garcia again relied on the reasonable relationship, and said affidavits filed, including by Human Services Department Secretary Dr. David Scrase and those as part of the restaurants’ filings, showed a reasonable connection between the closure of indoor dining and the efforts to stem the transmission of COVID-19.

***Changes to order***

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The oral argument and decision all took place hours after the state announced changes to the public health order will take place this weekend—including allowing limited indoor dining.

The state will allow dining indoors at restaurants and other eateries for the first time since the ban went into effect in mid-July, this time at 25 percent maximum capacity, with tables still six-feet apart.

The new order will also allow for indoor services at places of worship to proceed at 40 percent capacity, increased from the current 25 percent.

The state said there will be other changes as well.

These changes wouldn't have altered the case at hand, Garcia said, since it appeared the claims sought to invalidate all restrictions at restaurants, though he said "the particular claims and claims of relief are not entirely clear for me."

He said if the state supreme court did not make a decision and remanded the case to lower courts, it could result in inconsistent decisions throughout the state.

Artuso, meanwhile, said allowing indoor dining again would not be moot because the state could still reverse this later.

"It's fully possible that a month from now that orders will be issued or changed to again completely close indoor dining," he said.

The supreme court, however, avoided this potential problem by issuing their order in favor of the state.

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The lawsuit was brought by the New Mexico Restaurant Association along with seven restaurants.

After the order by District Court Judge Raymond Romero struck down the indoor dining ban, the Supreme Court [granted an emergency request by the state to stay that order](#) .

The Republican Party of New Mexico had also supported the restaurants' efforts, as had the state House and Senate minority leaders.

Republican Party of New Mexico chairman Steve Pearce criticized the decision.

"Today's ruling is another disappointing setback in the call for equal protection under the law. The Lujan Grisham Administration's ban on in-house dining is not supported by facts or science in any way and is arbitrary and capricious," Pearce said. "This is another example of the Administration exceeding its authority and the High Court accepting it. The ruling manifests the important need for change at the polls this November, including the judiciary."

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