



Capacity Limits After *Tavern League v. Palm*

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In *Tavern League v. Palm*, 2021 WI 33, the plaintiffs challenged building capacity limits that were imposed by the Department of Health Service (DHS) in response to the COVID-19 pandemic. This issue brief provides background information and summarizes the Wisconsin Supreme Court's decision and the current state of the law regarding the authority to establish capacity limits.

AUTHORITY TO CONTROL COMMUNICABLE DISEASES

The Wisconsin statutes authorize both DHS and local governments to take actions to control communicable diseases in Wisconsin, including during periods when no state public health emergency declaration is in effect.¹ At the state level, DHS may “issue orders for the control and suppression of communicable diseases” and “implement all emergency measures necessary to control communicable diseases.” More directly related to capacity limits, DHS may also “forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.” [s. 252.02 (3), (4), and (6), Stats.]

Similarly, local health officials must “promptly take all measures necessary to prevent, suppress and control communicable diseases,” and may “forbid public gatherings when deemed necessary to control outbreaks or epidemics.” [s. 252.03 (1) and (2), Stats.] When issuing an order that establishes a capacity limit, a local unit of government may in some cases alternatively rely on its authority to declare and manage local emergencies under ch. 323, Stats., or on general police powers.

In *Legislature v. Palm*, 2020 WI 42, the Wisconsin Supreme Court invalidated the second “safer at home” order issued by DHS during the spring of 2020.² That order, which invoked DHS's statutory powers noted above, generally required individuals to stay at home and some businesses to cease operations. The Court held that the “safer at home” order was a “rule” for purposes of ch. 227, Stats., and was thus invalid because it was not promulgated under the rulemaking procedures under that chapter.³ The Court also interpreted DHS's statutory authority to control communicable diseases narrowly, expressing concerns about constitutional considerations that could arise as a result of a broad interpretation.⁴ The *Legislature v. Palm* decision did not directly affect local authority, but in other cases, challenges to local orders raise similar statutory and constitutional concerns.⁵

EMERGENCY ORDER #3, LEGAL CHALLENGE, AND LOWER COURT RULINGS

DHS issued [Emergency Order #3](#) on October 6, 2020. The order limited the size of public gatherings⁶ in indoor spaces throughout the state. In buildings with designated occupancy limits, the order generally limited gatherings to 25 percent of the occupancy limit for a given building or room. In indoor spaces without designated occupancy limits, such as private homes, the order generally limited gatherings to no more than 10 people. The order provided certain exemptions from those general limitations.⁷

Emergency Order #3 was set to expire on November 6, 2020. However, a week after it took effect, the Tavern League of Wisconsin and other plaintiffs filed a motion seeking a declaratory judgment and injunction barring enforcement of the order. The plaintiffs argued, in part, that the order was invalid because DHS did not promulgate it as a rule, as required under the *Legislature v. Palm* decision.

After some complicated procedural steps, including a substitution of judges and the intervention of additional plaintiffs, the Sawyer County circuit court denied the plaintiffs' motion for a temporary injunction. On appeal, the Wisconsin Court of Appeals [reversed](#) the circuit court's decision and granted the plaintiffs' motion for a temporary injunction, holding that the order was unenforceable because it had not been promulgated as a rule. DHS appealed the decision to the Wisconsin Supreme Court.

WISCONSIN SUPREME COURT DECISION

The Wisconsin Supreme Court [affirmed](#) the Court of Appeals' order in the *Tavern League* case on April 14, 2021. Four justices joined the mandate, which declared Emergency Order #3 invalid, but the Court did not issue a majority opinion. Chief Justice Roggensack announced the mandate of the Court and delivered an opinion, which was joined by Justices Ziegler and Grassl Bradley. The Chief Justice first addressed a request to dismiss DHS's appeal as moot. The opinion acknowledged that "the issue in this case is moot," because Emergency Order #3 had already expired. But the Chief Justice concluded that, although the Court typically dismisses cases that are moot, the case satisfies several exceptions to that general rule, including an exception for cases involving issues of great public importance.⁸

Chief Justice Roggensack's opinion then analyzed whether Emergency Order #3 constituted a rule for purposes of administrative rulemaking requirements under ch. 227, Stats., like the "safer at home" order invalidated in *Legislature v. Palm*. Dismissing arguments that sought to distinguish the capacity limits in Emergency Order #3 from the more sweeping restrictions under the "safer at home" order, the Chief Justice concluded that Emergency Order #3 was a rule and was thus invalid because DHS did not follow the rulemaking process under ch. 227, Stats.⁹ In a short concurring opinion, Justice Hagedorn agreed with the Court's mandate but did not join the Chief Justice's opinion. He explained that, although he had disagreed with the Court's holding in *Legislature v. Palm*, its application to the *Tavern League* case is "plain." However, he opined that the *Legislature v. Palm* reasoning need not be "further extend[ed]."¹⁰

CURRENT STATE OF THE LAW ON CAPACITY LIMITS

The lack of a majority opinion in *Tavern League* means that there are limitations on the conclusions that can be drawn from this decision. However, the decision makes clear that DHS would need to promulgate any future order imposing a building capacity limit as a rule, by adhering to the procedures in ch. 227, Stats. Because local governments are not subject to administrative rulemaking requirements, the decision does not directly affect local authority to impose capacity limits.

Whether any more substantive limitations apply to either state or local authority to impose building capacity limits is less clear. Because the Court resolved *Tavern League* on rulemaking grounds, it did not directly address whether a properly promulgated rule establishing capacity limits would have been authorized. If DHS were to impose capacity limits through the rulemaking process, any legal challenge to those limits may compare or contrast capacity limits from the more sweeping "safer at home" restrictions invalidated in *Legislature v. Palm*, including by citing DHS's more specific statutory authority to limit public gatherings. A legal challenge to local capacity limits could raise analogous questions.

¹ In [Fabick v. Evers](#), 2021 WI 28, the Wisconsin Supreme Court invalidated the state of emergency declaration that had been in effect, holding that the statutes do not allow the Governor to declare successive states of emergency in response to the same condition. For additional analysis, see [Legislative Council, Fabick v. Evers, Issue Brief \(April 2021\)](#).

² The "safer at home" order generally required all individuals within the State of Wisconsin to stay at home or at their place of residence and directed all "non-essential" nonprofit and for-profit businesses to cease operations at Wisconsin facilities.

³ State agencies promulgate administrative rules pursuant to rulemaking authority conferred by the Legislature, subject to legislative oversight and promulgation procedures under ch. 227, Stats. For purposes of ch. 227, Stats., "rule" is defined, in pertinent part, to include a "general order of general application that has the force of law."

⁴ For a more detailed summary of the Court's decision, see [Legislative Council, Legislature v. Palm, Issue Brief \(May 2020\)](#).

⁵ See, e.g., *Yandel v. City of Racine*, Case No. 20-CV-1045 (July 1, 2020); *Gymfinity v. Dane County*, Case No. 20-AP-1927 (Dec. 21, 2020).

⁶ The order defined "public gathering" as an indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public and brings together people who are not part of the same household in a single room.

⁷ The order provided exemptions for schools, day care centers, health care and human services operations, government and public infrastructure operations, and places of religious worship, areas of the Capitol controlled by the Legislature or the Wisconsin Supreme Court, and political rallies and other gatherings protected by the First Amendment.

⁸ The Court observed that because Emergency Order #3 "charts a course that the Secretary-designee will repeat with future orders ... it is important to confirm, once again, that [the order] is beyond the power that the legislature delegated to the Secretary-designee." [*Tavern League*, 2021 WI 33 at ¶ 16.]

⁹ A dissenting opinion, authored by Justice Ann Walsh Bradley and joined by Justices Dallet and Karofsky, reiterated disagreement with the statutory analysis in *Legislature v. Palm* and distinguished the broader statutory authority relied on for the "safer at home" order from the more specific statutory authority relied on for Emergency Order #3.

¹⁰ *Tavern League*, 2021 WI 33 at ¶ 38.