

Michigan Supreme Court Fails to Rein In Excessive Emergency Powers

This is a recipe for more government failures

By Michael Van Beek | December 2024

A new Michigan Supreme Court decision means that controversial pandemic-era emergency policies may never face a proper judicial review and that government officials who issued them will escape accountability.

The court on Nov. 1 dismissed two important cases about the government's use of emergency powers in response to Covid-19. The majority on the court declared these cases moot because the mandates in question — making children wear masks at school and forcing restaurants to close — are no longer in effect.

The rationale for dismissing these cases is weak.

The court notes in its order that a case with “public significance that is likely to recur” should not be considered moot. It's hard to imagine a public policy more significant to the public than these pandemic mandates. Many of them directly affected the daily lives of the entire state population.

But the Michigan Supreme Court thinks these orders are not likely to be issued again. Here's hoping

they're correct, but predicting the future is hard. It is important to remember that there is nothing preventing government officials, if they wanted to, from issuing these exact orders tomorrow. There are virtually no restrictions in state law on when these emergency powers may be used.

State law says that the state health director can grant herself unilateral authority to issue mandates anytime she “determines that control of an epidemic is necessary to protect the public health.” The statute does not define these terms or provide any other

guidance on when this authority may be used. All the health director has to do to get these powers is declare there's an epidemic that needs controlling. It was with this authority

during Covid that Health and Human Services Director Elizabeth Hertel forced toddlers to wear masks, subjected teenage athletes to weekly testing, shuttered entire industries and restricted whom you could invite into your own home.

The ease with which these powers can be invoked makes them likely to occur again. It just takes the

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stroke of a pen. The majority on the court did not explain how the justices know that another pandemic will not emerge or that the state director will not issue orders similar to the ones in question.

Granting an unelected bureaucrat unchecked power to issue orders that could impact the daily lives of 10 million people violates the separation of powers principle in the Michigan Constitution. The Legislature cannot hand over its lawmaking authority to the executive branch *carte blanche*. The Michigan Supreme Court's decision to dismiss these cases sweeps this massive question under the rug.

Another major problem that will go unaddressed is the duration of these emergency powers. The statute that permits the governor to take emergency actions limits her power to 28 days. After that, the Legislature must get involved. This is what a government of checks and balances requires. There is no limit in law, however, to the health director's emergency powers. She can issue orders unilaterally for as long as she wants, since she alone determines when they are necessary. Legislators — the people voters elected to represent their interests — can do nothing about it.

The Michigan Supreme Court's decision to brush aside these important questions means the state government may never need to defend its unprecedented restriction of some of our basic rights during the Covid pandemic. Convincing the court that the issue is moot — the only argument the state has had to make — allows government officials to evade legal scrutiny of their actions.

The Supreme Court's dismissal of these cases is all the more disappointing because the state's response to

Covid-19 was a failure on many levels. State officials threw out the existing plans for responding to a pandemic and just made up their rules on the fly. They promised to “eradicate” Covid and “beat the damn virus.” They bribed us with our own freedom in an attempt to get 70% of the population to take the vaccine.

But the disease remains. And most people stopped listening to public health officials about the vaccine: Only 7% of Michigan residents are currently up-to-date with the latest Covid shot.

The failure of the state's response is further evidenced by the fact that the government officials who issued the Covid mandates almost never speak of them today. If the lockdown and pandemic edicts were effective and popular, politicians would remind voters often of how they saved the day and conquered Covid. Instead, we have silence.

The court's decision announces to public officials that they will not be held accountable for actions taken under a declared emergency. Lawsuits challenging their emergency mandates can be slow-walked until they become moot. There are dozens of emergency powers in Michigan law, so government officials have lots to choose from if they want to avoid accountability for policies they fear will be unpopular or legally dubious. Unchecked government power like this is always a recipe for disaster.

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