

STATE OF MICHIGAN
IN THE COURT OF APPEALS

TAXPAYERS FOR MICHIGAN
CONSTITUTIONAL GOVERNMENT,
STEVE DUCHANE, RANDALL BLUM,
and SARA KANDEL,

Plaintiffs,

Case No. 334663

vs.

THE STATE OF MICHIGAN, THE
DEPARTMENT OF TECHNOLOGY,
MANAGEMENT AND BUDGET OF THE
STATE OF MICHIGAN; and the MICHIGAN
OFFICE OF THE AUDITOR GENERAL.

Defendants.

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE
THE OCTOBER 29, 2019 MANDAMUS AND JUDGMENT OF THIS COURT**

NOW COME Plaintiffs, Taxpayers for Michigan Constitutional Government, Steve Duchane, Randall Blum, Sara Kandel, pursuant to MCR 7.215(F), by and through their attorneys and for their *Brief in Support of Plaintiffs' Motion to Enforce the October 29, 2019 Mandamus and Judgment of This Court*, do hereby state as follows.

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I. QUESTIONS PRESENTED

SHOULD THE OCTOBER 29, 2019 MANDAMUS AND JUDGMENT OF THIS COURT BE ENFORCED AND DEFENDANTS STATE OF MICHIGAN AND THE DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET BE HELD IN CONTEMPT OF COURT, WHEN:

- A. DEENDANTS HAVE WILLFULLY FAILED TO COMPLY THE MANDAMUS AND JUDGMENT OF THIS COURT BY FAILING TO PREPARE REPORTS REQUIRED BY STATE LAW;
- B. AFTER THE JUDGMENT TOOK EFFECT, THE DEFENDANTS HAVE MISSED TWO DEADLINES FOR THE SUBMISSION OF SUCH REPORTS; AND
- C. DEFENDANTS HAVE HAD APPROXIMATELY TEN MONTHS TO COMPLY WITH MANDAMUS AND JUDGMENT OF THIS COURT, BUT HAVE FAILED TO DO SO.

II. STATEMENT OF FACTS

After over three years of litigation and extensive briefing on the issues, this Honorable Court entered its Opinion and Order granting Plaintiffs' request for mandamus requiring the state, its officers, and departments to comply with state law and honor the annual disclosure and reporting requirements set forth in both MCL 21.235(3) and MCL 21.241. The Opinion and Order was entered October 29, 2019.¹ The mandamus relief granted by the Opinion and Order of October 29, 2019 is now part of a final judgment of this court and is enforceable by the parties.

A. The October 29, 2019 Opinion And Order Of This Court Is A Final Judgment.

The present case arose from Defendants' violations of citizens' rights under the Headlee Amendment of the Constitution of the State of Michigan of 1963. Pursuant to Const 1963, art 9, § 32, this case was filed as an original action before this Honorable Court.

In an original action before the Court of Appeals, the court's opinion and order is its judgment. MCR 7.215(E). As a result, the court's October 29, 2019 Opinion and Order is the court's judgment in this case.

Pursuant to MCR 7.215(F)(a), a judgment becomes effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court expires, or, if an application is filed, after the Supreme Court reaches a final disposition of the case.

The time for filing an application for leave to appeal to the Supreme Court is within 42 days after entry of the court's Opinion and Order. See MCR 7.305 (C)(2)(a) & (c). Since the Opinion and Order was entered on October 29, 2019, the time for Defendants to file an application for leave to appeal the grant of mandamus relief expired on December 10, 2019.

¹ The October 29, 2019 Opinion and Order was entered following the Defendants' motion for reconsideration of this court's July 30, 2019 Opinion and Order, which had also granted the same mandamus relief to Plaintiffs.

In the present case and as discussed further below, the Defendants State of Michigan and the Department of Technology, Management and Budget (DTMB) did not file an application for leave to appeal to the Supreme Court this court's grant of mandamus. As a result, the October 29, 2019 mandamus and judgment became effective on December 11, 2019.

B. The Defendants State of Michigan And The DTMB Did Not File An Application To Appeal The Grant Of Mandamus.

The Defendants State of Michigan and the DTMB did not file an application for leave to appeal the mandamus granted by the court's October 29, 2019 Opinion and Order. As a result, any issues presented by the grant of mandamus against these parties are not pending before the Supreme Court.

With respect to Plaintiffs' claims and requests for relief, the October 29, 2019 Opinion and Order is divided into five sections. See Dkt 129, Opinion and Order (On Reconsideration), at 6-12. Section E of the Opinion and Order addresses Plaintiffs' request for "a writ of mandamus to force the state and its officers and departments to honor the annual disclosure and reporting duties set forth in both MCL 21.235(3) and MCL 21.241." *Id.* at 12. The court held "[w]e grant mandamus as requested." *Id.* Neither of the concurring/dissenting opinions filed in this case specifically dissent from the grant of mandamus as stated in section E of the court's Opinion and Order. See Dkt No. 130, Opinion (On Reconsideration) (Borrello P.J., dissenting); and Dkt No. 131, Opinion (On Reconsideration) (Meter, P.M., concurring in part and dissenting in part).

The remaining sections of the October 29, 2019 Opinion and Order address Plaintiffs' requests to declare various state practices unconstitutional. Specifically, section A of the Opinion and Order provided an overview of Plaintiffs' claims. Section B addressed Plaintiffs' claim that state funding disbursed to local school districts through Proposal A and the State School Aid Act of 1979, MCL 388.1601 et seq., constitutes an unconstitutional tax shift prohibited by Const 1963,

art 9, §§ 25 and 30. Section C addressed Plaintiffs' claim that spending paid to public school academies, organized as private nonprofit corporations, cannot be included as state spending paid to units of local government when calculating § 30 obligations. Section D addressed Plaintiffs' claim that spending to fund state-mandated activities must also be excluded from calculations of state spending paid to units of local government under § 30 calculations.

While both Plaintiffs and Defendants filed applications for leave to appeal with the Supreme Court on December 10, 2019, both parties' applications expressly sought leave to appeal discrete portions of this court's October 29, 2019 Opinion and Order. Neither party sought leave to appeal section E's grant of mandamus relief and its application to the State of Michigan and the DTMB. Instead, the Defendants only sought leave to appeal Section D and application of section E to the auditor general.

The Defendants' application solely sought leave to appeal: a) section D of the court's Opinion and Order, finding that § 29 funded mandates may not be used to supplant state funding intended for local use under § 30; and b) whether the Court of Appeals erred to the extent that it held that the auditor general or the office of the auditor general is subject to mandamus relief.² The Defendants' application for leave to appeal acknowledges that they did not dispute the "substance" of the mandamus "concerning the reporting requirements of MCL 21.235 and MCL 21.241."³ Rather, they only sought leave to appeal application of mandamus to the auditor general to the extent that the mandamus applied to that office. The Supreme Court granted Defendants'

² See Dkt No 148, Application for Leave to Appeal to SCt, (assigned Supreme Court No 160660) at 28, attached as Exhibit A.

³ *Id.* at 3.

application on the two grounds noted, specifically limiting its review of section E to “whether the Court of Appeals erred to the extent it held that that auditor general or the office of the auditor general is subject to mandamus relief.”⁴

As a result, the Opinion and Order’s grant of mandamus is a final judgment with respect to the State of Michigan and the DTMB. Notably, neither MCL 21.235(3) nor MCL 21.241 impose duties on the auditor general or that office and Plaintiffs’ have never alleged that these statutes require any action by the auditor general or persons within that office.⁵

Rather, both statutes identify the persons and departments who are responsible from compliance with MCL 21.235(3) and MCL 21.241 — the DTMB and the DTMB’s State Budget Office (SBO). There is no question that the October 29, 2019 Opinion and Order is a final judgment and that it has been in effect for the State of Michigan and the DTMB since December 11, 2019.

⁴ See Dkt No , Order of the Supreme Court (granting leave to appeal to both parties on four issues) at 2, attached as Exhibit B.

⁵ See Dkt No 1, Plaintiffs’ Complaint at 6-7. The auditor general’s role is independent of and unrelated to the reporting requirements of MCL 21.235(3) and MCL 21.241. At the end of each fiscal year, the director of the DTMB is required to prepare a comprehensive financial report. MCL 18.1494. As part of this process, the DTMB’s director is required to compile an itemized statement of state spending paid to units of local government and total state spending from state sources for the prior fiscal year. MCL 18.1497. The itemized statement is to ensure compliance with Const 1963, art. 9, § 30. No later than May 31 each year, the itemized statement is to be transmitted to the auditor general for review and comment before the report is then submitted to the state legislature, no later than June 30. Under this process, the auditor general’s role is to ensure that proper percentage of state spending has been paid to units of local government as required by § 30. These requirements are independent of and unrelated to the art. 9, § 29 reporting required by MCL 21.235(3) and MCL 21.241, in which the auditor general has no role.

III. DISCUSSION

Since Defendants have ignored the requirements of the mandamus and the judgment of the court, Plaintiffs seek enforcement by a finding of contempt.

A. The Defendants State of Michigan and DTMB Have Not Complied With The October 29, 2019 Mandamus and Judgment Of This Court.

To date, neither the State of Michigan nor the DTMB have complied with the mandamus relief granted by this court's judgment.

At MCL 21.235(3), state law requires that the governor's annual budget recommendation to the state legislature be accompanied by a report of the amounts required to fund each state mandate as required by art 9, § 29 and the amount of state disbursements required for all local units of government as required by art 9, § 30. The provision reads:

(3) The governor shall include in a report which is to accompany the annual budget recommendation to the legislature, **those amounts which the governor determines are required to make disbursements to each local unit of government for the necessary cost of each state requirement for that fiscal year** and the total amount of state disbursements required for all local units of government.

MCL 21.235(3) (emphasis added).

State law further identifies the department, and the office within that department, that is assigned the responsibility for developing the governor's annual budget recommendation and accompanying reports. The identified department is the DTMB and the DTMB's State Budget Office (SBO).

Under Michigan's Management and Budget Act, 1984 PA 431, the DTMB is charged with planning, preparing, and executing a comprehensive state budget and the SBO is created within the DTMB for this purpose. See MCL 18.1141(e). The director of the SBO is appointed by the governor who "establish[es] and maintain[s] an executive budget function through the" the SBO's

director. MCL 18.1323 (emphasis added). The SBO is specifically created within DTMB as the office charged with developing the governor’s annual budget recommendation. MCL 18.1341 As part of the annual budget process, the SBO’s director develops annual proposals for departmental activities, costs and financing and makes recommendations which **“shall include costs incurred by units of local government to implement state mandated programs as provided by law.”** MCL 18.1345 (emphasis added); and see also MCL 18.1341. Officials at the DTMB’s SBO are thus the persons who are charged with developing a governor’s annual budget recommendation and the accompanying report required by MCL 21.235(3).

The Governor delivered her annual budget recommendation to the state legislature on February 6, 2020. The report required by MCL 21.235(3) however did not accompany the recommendation and no such report is believed to have ever been prepared.⁶

At MCL 21.241, state law requires that a report of all art 9, § 29 mandates (funded and unfunded) be submitted to the state legislature and updated annually by January 31. The DTMB is charged with developing this report. MCL 21.241 (1) and see also MCL 21.232 (5) (defining “department” as the DTMB).

State law lists the information to be contained in this report. Specifically, the report is to contain:

- (a) The state financed proportion of the necessary cost of an existing activity or service required of local units of government by existing law.
- (b) The nature and scope of each state requirement which shall require a disbursement under section 5.
- (c) The nature and scope of each action imposing a potential cost on a local unit of government which is not a state

⁶ See State Budget Office, Executive Budget, Current Executive Budget Documents, <https://www.michigan.gov/budget/0,9357,7-379-88613_88626---,00.html> (accessed August 4, 2020) (listing and providing access to executive budget documents submitted to the state legislature).

requirement and does not require a disbursement under this act.

MCL 21.241 (1).

State law further requires that the report:

- (a) The identity or type of local unit and local unit agency or official to whom the state requirement or required existing activity or service is directed.
- (b) The determination of whether or not an identifiable local direct cost is necessitated by state requirement or the required existing activity or service.
- (c) The amount of state financial participation, meeting the identifiable local direct cost.
- (d) The state agency charged with supervising the state requirement or the required existing activity or service.
- (e) A brief description of the purpose of the state requirement or the required existing activity or service, and a citation of its origin in statute, rule, or court order.

MCL 21.241 (2).

No such report is known to have been prepared, updated, published, or otherwise made available to the public by the DTMB.

As a result of their continuing violations of the requirements of MCL 21.235(3) and MCL 21.241, the DTMB and the SBO have failed to comply with the mandamus and judgment of this court and should be found in contempt to enforce compliance.

B. Contempt Is The Appropriate Remedy For Noncompliance With An Order Granting Mandamus.

The court's power to punish noncompliance with its orders is an inherent power of Michigan courts. *Catsman v Flint*, 18 Mich App at 647. Statutes may also regulate the "mode of proceeding and what punishment may be inflicted." *Id.*

The Revised Judicature Act of 1961, Act 236 of 1961, (RJA) provides that this court has the power to "punish by fine or imprisonment, or both" the parties in this case "for disobeying any

lawful order, decree, or process of the court.” MCL 600.1701 (g). The mandamus and the judgement of this court are lawful orders and/or decrees of this court.

The RJA further provides that the power to punish by a finding of contempt is appropriate in all cases “where ... proceedings as for contempts have been usually adopted and practiced in courts of records to enforce the civil remedies of any parties.” MCL 600.1701(m). A finding of contempt is the traditional method that Michigan courts use to enforce mandamus and declaratory judgments.

The Michigan Supreme Court states that a finding of contempt of court “is the common method of enforcing orders in ... actions of mandamus.” *Burton v Wayne Circuit Judge*, 325 Mich 159, 165; 37 NW2d 899, 902 (1949). See also *Diamond Match Co v Powers*, 51 Mich 145; 16 NW 314 (1883) (“It is the office of mandamus to direct the will [of the court], and obedience is to be enforced by process for contempt.” *Id.* at 147); and *Catsman v Flint*, 18 Mich App 641, 643; 171 NW2d 684 (1969) (Upholding an order of the circuit court finding the defendant city in contempt for failure to comply with the court’s mandamus).

The October 29, 2019 Opinion and Order provides for mandamus as follows:

Plaintiffs seek a writ of mandamus to force the state and its officers and departments to honor the annual disclosure and reporting duties set forth in both MCL 21.235(3) and MCL 21.241. We grant mandamus as requested.

See Dkt 129, Opinion and Order (On Reconsideration), at 12.

The Michigan Supreme Court has also long recognized that where a judgment is declaratory, “enforcement is had only on subsequent application for an order in contempt.” *Wash-Detroit Theatre Co v Moore*, 249 Mich 673, 682; 229 NW 618 (1930).

Defendants State of Michigan and DTMB are in clear violation of this court's October 29, 2019 mandamus and judgment and a finding of contempt of court is the appropriate method to enforce compliance.

C. Monetary Fines And An Award Of Damages Are Appropriate At This Time.

After a finding of contempt, the court may punish the noncomplying party by fines and/or imprisonment. MCL 600.1715. Plaintiffs request that the court impose appropriate fines and enter and award of damages against the Defendants State of Michigan and DTMB and against all officers of each who are responsible, in whole or part, for preparing the required reports under MCL 21.235(3) and MCL 21.241.

A fine in the maximum amount permitted by law is appropriate in this case. State law provides for a maximum fine of \$7,500. MCL 600.1715. The fine may be imposed against each "person" who is held in contempt. MCL 600.1701. The maximum amount is necessitated by the State of Michigan and the DTMB's steadfast refusal to follow the requirements of the mandatory reporting requirements that have been in place for over three decades.

As recognized by this court, these reporting requirements are critical to citizen's understanding and monitoring of the state's compliance with Const 1963, art 9, § 29 and § 30, both of which were adopted as part of a citizen's initiative providing for direct enforcement by citizens. See Dkt 129, Opinion and Order (On Reconsideration), at 12. Moreover, this case has been ongoing for 3 years and throughout Defendants did not substantively contest their noncompliance with the reporting requirements and did not substantively contest the requested mandamus relief against the State of Michigan and the DTMB. In spite of this, they took no steps to ensure compliance during those years or in the future. Then, after mandamus relief was granted and a judgment entered on October 29, 2019, Defendants still took not steps to comply, when they likely

knew that they had no intention of appealing mandamus against the State of Michigan or the DTMB. Still further, after the judgment became effective on December 11, 2019, the Defendants took no steps to ensure compliance before the statutory deadline of January 31, 2020 for the MCL 21.235(3) report and the February 6, 2020 deadline for the MCL 21.241 report.⁷

To date, the State of Michigan has taken no known steps to comply with the clear requirements of state law or with the mandamus and judgment of this court. As a result, fines in the maximum fine are warranted.

To achieve the punishment and deterrent effect provided by a finding of contempt, the fines must be required to be either: a) paid by the individuals from their personal funds and not from the state funds of any kind; and/or b) if paid by the state or DTMB on behalf of the individuals, then the fines must be paid to public nonprofit charitable organization such as the National Center for State Courts or the National Judicial College. The fines must be imposed in one of these manners to preserve the contempt power of this court.

Were a fine to be paid from the state treasury, on behalf of the individuals held in contempt, or were it to be deposited into the state treasury, no punishment would be imposed on the disobeying parties and officials. Under these circumstances, the state would be paying itself and there would be no incentive to comply with this court's mandamus and judgment — or other orders of this court both now and in the future. The court's inherent power to impose fines for contempt would be rendered nugatory and its inherent power to enforce orders of mandamus and declaratory judgments would materially diminish.

⁷ It is important to note that the Defendants did not fail to comply with this court's mandamus and judgment due to events caused by the ongoing COVID-19 pandemic. Plaintiffs are sensitive to the issues that the pandemic has presented to state officials. However, Defendants noncompliance occurred long before the outbreak of the pandemic in March and continues to the present and will continue indefinitely into the future if this court's order is not enforced.

Absent the power to impose meaningful fines by contempt, the only alternative is for this court to require the imprisonment of the disobeying state officials.

1. If Defendants and their officials do not fully comply within 30 days, monetary fines should be imposed.

As noted above, the state acts through officials at the DTMB and the SBO for purposes of compliance with MCL 21.235(3) and MCL 21.241 and as a result, each of the following officials should be found in contempt.⁸

- Tricia Foster, Director of the DTMB (October 29, 2019 to March 30, 2020) in the amount of \$7,500.
- Brom Stibitz, Acting Director of the DTMB (April 1, 2020 to present) and Deputy Directory of DTMB (October 29, 1919 to April 1, 2020) in the amount of 7,500.
- Chris Kolb, State Budget Director at the SBO (October 29, 2019 to the present) in the amount of \$7,500.
- Kyle Jen, Deputy State Budget Director at the SBO (October 29, 2019 to the present) in the amount of \$7,500.
- Megan Ramos, Manager Office of Budget Coordination and Development at the SBO (October 29, 2019 to the present) in the amount of \$7,500.
- Jaques McNeely, Director Office of Public Protections and Resources at the SBO (October 29, 2019 to the present) in the amount of \$7,500.
- Bethany Wicksall, Director of Legislative and External Affairs at the SBO (October 29, 2019 to the present) in the amount of \$7,500.

2. If Defendants and their officials do not fully comply within 30 days, an evidentiary hearing date should be to set to determine the amount of an award of damages.

In contempt proceedings, state law permits persons harmed by Defendants' noncompliance to recover damages, in addition to any fines or penalties. MCL 600.1721. An award for exemplary

⁸ See attached Exhibit C, Organization Charts of the DTMB and the SBO, listing officials overseeing and managing the work of these offices.

damages and attorneys' fees is appropriate in this case.

The Michigan Supreme Court identifies the "type of conduct which would give rise to the threshold of injured feelings necessary to support and award of exemplary damages." *Veselenak v Smith*, 414 Mich 567, 574; 327 NW2d 261 (1982). The defendant's conduct must be voluntary; inspire feelings of outrage; and demonstrate a reckless disregard of the plaintiff's rights. *Id* at 574-575. Each of these elements is present at this time. Defendants, who are the state itself, have willfully failed to comply with this court's mandamus and judgment inspiring feelings of outrage and demonstrating a clear wanton disregard of the Plaintiffs' rights. As a result, Plaintiffs seek exemplary damages as compensation for injuries suffered, not as punishment.

Plaintiffs request that a date be set for an evidentiary hearing on the amount of such damages in the event that the Defendants fail to comply with this court's mandamus within 30 days following a hearing on this motion.

3. Plaintiffs Are Entitled To Recover Reasonable Attorneys' Fees And Costs Related To The Present Motion.

Plaintiffs are entitled to recover reasonable attorneys' fees and costs in bringing this motion. Michigan courts recognize that under MCL 600.1721, recoverable damages may "include attorney fees incurred as a result of the contemptuous conduct." *Plumbers & Pipefitters Local Union No 190 v Wolff*, 141 Mich App 815, 818; 369 NW2d 237 (1985) (citing *White v Wadhams*, 211 Mich 658, 666-667; 179 NW 245 (1920); and *Local 214, State, County & Municipal Workers v Genesee County Bd of Comm'rs*, 401 Mich 408, 410-411; 258 NW2d 55 (1977)).

CONCLUSION

Plaintiffs are cognizant of the difficulties facing state officials during the spring of this year and into the present. The Defendants however were in knowing violation of the reporting requirements for years prior to the October 29, 2019 mandamus order. Following the order and even after the effective date of the court's judgment, the Defendants took no action to comply with the reporting requirements and ignored the January 31, 2020 and February 6, 2020 deadlines for compliance. In short, Defendants have been in violation long before the pandemic arose and have made no attempts to comply during the ensuing months. Defendants will continue to do so, until the court's mandamus and judgment is enforced by this court.

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court enter an order finding the Defendants State of Michigan and DTMB, and responsible state officials, in contempt of court as a result of their noncompliance with the October 29, 2019 mandamus and directing preparation and submission of the required reports within 30 days thereafter and that if Defendants do not prepare and submit the required reports within that time frame, monetary fines will be imposed and a hearing date to determine the amount of an award for exemplary damages will be set. Plaintiffs further request attorneys' fees and costs related to this motion.

Respectfully Submitted,

By: /s/ John C. Philo
John C. Philo (P52721)
SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
4605 Cass Avenue, Second Floor
Detroit, Michigan 48201
(313) 993-4505/Fax: (313) 887-8470
Co-Counsel - Attorneys for Plaintiffs

John E. Mogk (P17866)
Wayne State University Law School
471 W Palmer Ave.
Detroit, MI 48202
(313) 577-3955
Co-Counsel - Attorneys for Plaintiffs

Tracy Anne Peters (P76185)
Tracy A Peters PLLC
3494 Harvard Rd
Detroit, MI 48224-2340
(313) 693-5155
Co-Counsel - Attorneys for Plaintiffs

Date: August 12, 2020.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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CONSTITUTIONAL GOVERNMENT,
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STATE OF MICHIGAN; and the MICHIGAN
OFFICE OF THE AUDITOR GENERAL.

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2020, I electronically filed the attached *BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR AND ORDER TO ENFORCE THE OCTOBER 29, 2019 MANDAMUS AND JUDGMENT OF THIS COURT* with the Clerk of the Court using the MiFILE e-filing system, which will send notification of such filing to all electronic case filing participants and attorneys of record.

Respectfully Submitted,

By: /s/ John C. Philo
John C. Philo (P52721)
SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
4605 Cass Avenue, Second Floor
Detroit, Michigan 48201
(313) 993-4505/Fax: (313) 887-8470
Co-Counsel - Attorneys for Plaintiffs

Date: August 12, 2020