STATE OF MICHIGAN
IN THE COURT OF CLAIMS

Enbridge Energy, Limited Partnership; Enbridge Energy Company, Inc.; and Enbridge Energy Partners, L.P.,

Plaintiffs,

v

State of Michigan; Governor of Michigan; Mackinac Straits Corridor Authority; Michigan Department of Natural Resources; and Michigan Department of Environment, Great Lakes, and Energy,

Defendants.

No. 19-000090-MZ

HON. MICHAEL J. KELLY

6/27/2019 STATE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

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ORAL ARGUMENT REQUESTED

Defendants State of Michigan, Governor of Michigan, Mackinac Straits Corridor Authority, Michigan Department of Natural Resources, and Michigan Department of Environment, Great Lakes, and Energy (collectively State Defendants), by and through their attorneys, Michigan Attorney General Dana Nessel and Assistant Attorneys General S. Peter Manning, Robert P. Reichel, Daniel P. Bock, and Charles A. Cavanagh, hereby move, pursuant to MCR 2.116(C)(8), for summary disposition and state:

1. On March 28, 2019, in response to a January 1, 2019 request from the Governor for an opinion regarding the constitutionality of 2018 PA 359 (Act 359), the Attorney General issued a formal opinion, OAG No. 7309, which concluded that Act 359 violated the Title-Object Clause, article 4, § 24, of Michigan's Constitution which provides in relevant part "No law shall embrace more than one object, which shall be expressed in its title." The opinion further concluded that Act 359 would likely be held void from its inception on December 12, 2018, and that the Mackinac Straits Corridor Authority, its Board, and any actions taken by the Board pursuant to Act 359 are void from their inception.

2. On March 28, 2019, in transmitting OAG No. 7309 to the State Defendants, the Department of Attorney General advised them to refrain from any further action to implement Act 359 or the December 19, 2018 Tunnel Agreement between the Mackinac Straits Corridor Authority and Enbridge based upon that

statute, and the expressly "mutually dependent" December 19, 2018 Third Agreement between the State of Michigan and Enbridge.

3. The verified complaint filed by Plaintiffs Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P. (collectively "Enbridge") seeks a declaratory judgment that: (a) Act 359 does not violate the Title-Object Clause of Michigan's Constitution; (b) the Mackinac Straits Corridor Authority was validly formed under Act 359 and that its actions are valid and legally enforceable; and (c) that actions taken by State Defendants in December, 2018 pursuant to Act 359, including the Tunnel Agreement, Third Agreement, MDNR Easement, and Assignment of MDNR Easement Rights are valid and enforceable under Michigan law.

4. Contrary to the legal conclusions stated in the complaint, and as concluded in OAG No. 7309, subsections 14d(1), (4), and (5) of Act 359 violate article 4, § 24 of the Michigan Constitution because the substance of these provisions exceeds the scope of what is generally reflected in the title of 1952 PA 214, as amended by Act 359. In addition, §§ 14a(1) and 14a(4) also fail "title-body" review. Moreover, because §§ 14d(1) and (4) and 14a(1) and (4) cannot be severed from the remainder of Act 359, the entire Act is unconstitutional.

5. In addition to failing "title-body" review under the Title-Object Clause, Act 359 also violates the Title-Object Clause because it embraces multiple objects and is therefore unconstitutional on that ground as well.

6. Consistent with the established legal principle that an unconstitutional statute is void ab initio and relevant Michigan caselaw concerning the retroactive application of decisions, Act 359 was void from its inception on December 12, 2018, and all actions taken based upon it are likewise without legal effect.

7. Accordingly, the Mackinac Straits Corridor Authority, the Tunnel Agreement, the MDNR Easement to the Mackinac Straits Corridor Authority, and the Corridor Authority's Assignment of MDNR Easement Rights to Enbridge, all of which were based upon Act 359, are void and without legal effect.

8. By its terms, the Third Agreement "is premised upon the existence[and] continued effectiveness of . . . the Tunnel Agreement." Because the Tunnel Agreement is void, the Third Agreement is also necessarily void.

9. In addition, to the extent that the Third Agreement purports to determine that in agreeing to Enbridge's continued operation of its existing pipelines in the Straits of Mackinac until they are replaced in a tunnel, "the State has acted in accordance with and furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan," such a determination cannot legally bind the successors to the State officials who signed the Third Agreement, as it violates the reserved powers doctrine under which the State may not bargain away or relinquish its sovereign authority and perpetual duty to protect the public trust.

10. For these reasons and the reasons more fully stated in the accompanying brief in support of State Defendants' motion for summary disposition, the complaint fails, as a matter of law, to state a claim upon which relief can be granted.

11. Because, as set forth above, this is a dispositive motion involving the determination of the constitutionality of a state statute and a matter of exceptional public importance, State Defendants request, pursuant to Court of Claims Rule 2.119(A)(5), that this Court schedule this matter for oral argument.

Accordingly, State Defendants request that this Court:

A. Grant summary disposition in their favor pursuant to MCR 2.116 (C)(8);

B. Enter a declaratory judgment that:

(1) Act 359 violates the Tittle-Object Clause, article 4, § 24, of Michigan's Constitution and is, in its entirety, unconstitutional;

(2) Act 359 is void from its inception on December 12, 2018;

(3) All actions taken by the Michigan Department of Natural Resources and the Mackinac Straits Corridor Authority based upon Act 359, including the MDNR Easement, the Tunnel Agreement, and the Assignment of MDNR Easement Rights are void and without legal effect; and

(4) The Third Agreement (a) is void, by its terms because the Tunnel Agreement is void; and (b) is also without binding legal effect to the extent that it purports, on behalf of the State, to determine that Enbridge's

continued operation of its existing pipelines in the Straits is "in accordance with and furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan."

C. Grant State Defendants such other relief as this Court finds appropriate and just.

Respectfully submitted,

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Dated: June 27, 2019

LF: Enbridge Energy v SOM, et al./#2019-0254082-A-L/Motion of State Def's for Summary Disposition 2019-6-27

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6/27/2019 BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Haste makes waste. This case arises from the frantic efforts by the administration of former Governor Rick Snyder, Enbridge, and their legislative allies following the November 6, 2018 election, to enshrine in Michigan law a specific policy outcome — perpetuating the operation of unreasonably risky oil pipelines in the Straits of Mackinac for at least several years until they could be replaced in a newly constructed tunnel — that had been publicly opposed by the newly-elected Governor and Attorney General, before they took office on January 1, 2019.

In their haste, the proponents of what became 2018 PA 359 (Act 359) relied upon a legislative strategy that ran afoul of long-established requirements of Michigan's Constitution. Initially, SB 1197 as introduced on November 8, 2018, sought to graft onto the Mackinac Bridge Authority, which under 1950 PA 21 and 1952 PA 214 was charged solely with the construction and operation of a vehicle bridge across the Straits of Mackinac, a new and entirely unrelated function of acquiring a "utility tunnel" to accommodate an oil pipeline beneath the Straits.

But faced with opposition to this scheme, including from the Mackinac Bridge Authority itself, the proponents of the legislation abruptly changed course. SB 1197 was quickly amended to transfer all responsibility for the utility tunnel from the Mackinac Bridge Authority to a newly created Mackinac Straits Corridor Authority and to require that body to essentially rubber stamp -- within a matter of

days -- a new, very detailed agreement with Enbridge, all without disclosing this in the title of the legislation.

The resulting law, Act 359, violates article 4, § 24, of Michigan's Constitution, which provides in relevant part "[n]o law shall embrace more than one object, which shall be expressed in its title." Consequently, Act 359, a series of actions taken by the Corridor Authority, and agreements with the State premised upon it are void and without legal effect.

As more fully stated below, Enbridge's complaint -- which asserts that Act 359 and the related agreements are valid -- fails as a matter of law to state a claim upon which relief can be granted and the State Defendants are entitled to summary disposition under MCR 2.116(C)(8).

FACTUAL BACKGROUND

Enbridge Line 5 Pipeline and the Straits of Mackinac Crossing

Enbridge operates its Line 5 Pipeline to transport liquid petroleum products. It extends from Superior, Wisconsin, through the Upper Peninsula of Michigan, crosses the Straits of Mackinac that connect Lakes Huron and Michigan, continues to the City of Marysville in the Lower Peninsula and then beneath the St. Clair River to Sarnia, Ontario. (Complaint, paragraph 21.) At the approximately 4-mile long crossing of the Straits of Mackinac, Line 5 is divided into two parallel 20-inch diameter steel pipes (Dual Pipelines) that for most of their length lie exposed in open water, either resting upon or suspended above State-owned Great Lakes bottomlands. (Complaint, paragraph 22.) Line 5 currently transports

approximately 540,000 barrels or 22,680,000 gallons of petroleum products per day. (Complaint, paragraph 24.)

Snyder Administration Agreements with Enbridge

Between November 2017 and December 2018, the administration of former Governor Rick Snyder entered into a series of agreements with Enbridge relating to Line 5. Among other things, the First Agreement provided for Enbridge to perform an evaluation of alternatives to replace the Dual Pipelines, including constructing a tunnel beneath the lakebed to accommodate a replacement pipeline. (Complaint, paragraph 37.) The Second Agreement dated October 4, 2018 provided for Enbridge to pursue further agreements with State entities for the development of a "Straits Tunnel" that could accommodate a replacement for the Dual Pipelines and possibly electrical and communication utility lines. (Complaint, paragraph 45.) The Second Agreement specifically contemplated the possibility of a "Tunnel Project Agreement"[1] between Enbridge and the Mackinac Bridge Authority, notwithstanding the apparent absence of statutory authority for the Bridge Authority to enter such an agreement.

Mackinac Bridge Authority

The Mackinac Bridge Authority was created by 1950 (Ex Sess) PA 21, which granted it certain powers "in furtherance of the duty of the state of Michigan to provide and maintain a system of highways and bridges for the use and convenience

[1] Second Agreement, Section I.G.; https://mipetroleumpipelines.com/sites/mipetroleumpipelines.com/files/document/pdf/enbridge_2nd_agreement_10-3-2018.pdf.

of its inhabitants." MCL 254.302. As stated in its title, the principal purpose of Act 52 was "to provide for the determination of the physical and financial feasibility of a bridge connecting the Upper and Lower Peninsulas of Michigan." While the word "tunnels" appears within the statutory definition of "bridge," it is only the context of a list of structures ancillary to the highway bridge itself "forming any part thereof or connected with or used or useful in the operation thereof." MCL 254.301(c). On its face, the definition of "bridge" does not plausibly extend to a tunnel physically separated by miles from the bridge constructed to accommodate a pipeline, not motor vehicles connected to public highways.

As reflected in its title, 1952 PA 214 granted the Mackinac Bridge Authority specific authorities related to the acquisition, construction, financing, and operation of the "bridge," using the same definition as that contained in MCL 254.301(c). Like Act 21, Act 214, prior to its amendment by Act 359, had as its primary object the development of a vehicular bridge at the Straits of Mackinac and lacked any logical or legal connection to the "Tunnel Project Agreement" contemplated in the Second Agreement. Under these circumstances, it may reasonably be inferred that the Snyder Administration's plan of seeking to involve the Bridge Authority in a proposed Straits Tunnel was part of a strategy to vest State control and oversight of the project in an entity governed by several board members appointed by Governor Snyder to serve multi-year terms that would extend far beyond his term in office and who would not be directly accountable to his elected successor as governor and her differing policy preferences.

Development and Enactment of Act 359

Act 359 was introduced as Senate Bill 1197 on November 8, 2018.[2] In its original form, SB 1197 amended 1952 PA 214 to acquire and operate a "utility tunnel." It amended the title of Act 214 by changing the first clause to read: "An act authorizing the Mackinac bridge authority to acquire a bridge and a utility tunnel connecting the upper and lower peninsulas of Michigan. . . ." and inserting a new clause "authorizing the operation of a utility tunnel by the authority." It added a new Section 14 that defined "utility tunnel" and authorized the Bridge Authority to "acquire, construct, operate, maintain, improve, repair and manage a utility tunnel" and take other actions related to that purpose, paralleling provisions in Sections 4, 7, and 13 pertaining to the bridge.

Senate Bill 1197 was referred to committee and was reported out as Substitute S-1 on November 29, 2018.[3] Substitute S-1 added amendments to § 5 of Public Act 214, which relates to bonds issued to finance the Mackinac Bridge construction, and specified that § 5 did not apply to the "utility tunnel" authorized in § 14.[4] Substitute S-1 was referred to committee on December 5, 2018 and was reported out as Substitute S-2 on the same day.[5]

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[2] http://www.legislature.mi.gov/documents/2017-2018/billintroduced/Senate/pdf/2018-SIB-1197.pdf.

[3] http://www.legislature.mi.gov/(S(pkxvk20044om3oo4d4tumefa))/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-16398.PDF.

[4] http://www.legislature.mi.gov/documents/2017-2018/billanalysis/Senate/pdf/2017-SFA-1197-F.pdf.

[5] http://www.legislature.mi.gov/(S(pkxvk20044om3oo4d4tumefa))/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-17081.PDF.

Substitute S-2 made very substantial changes to the content of the bill in apparent response to public opposition to the original bill by, among others, members of the Mackinac Bridge Authority itself.[6] Abruptly pivoting from the failing strategy of relying upon the involvement of the Bridge Authority to commit the State to a "Tunnel Project Agreement" by the end of Governor Snyder's term at noon on January 1, 2019, the proponents of the bill launched a new scheme: creating an entirely new entity - the Mackinac Straits Corridor Authority - whose Board members would be hurriedly appointed by the governor and then be effectively required by statute to approve, within a matter of days, a complex agreement then being negotiated by the Snyder administration and Enbridge.

Notably, Substitute S-2 made only minor adjustments to the title of the Act. It retained language from SB 1197 as introduced, authorizing the Mackinac Bridge Authority to "acquire a . . . utility tunnel," added a new clause "authorizing the creation of the Mackinac Straits Corridor Authority," and modified the other new clause in the original bill to read: "authorizing the operation of a utility tunnel by the [Mackinac Bridge] authority or the Mackinac Straits Corridor Authority."

[6] https://www.bridgemi.com/michigan-environment-watch/mackinac-bridge-authority-no-hurry-consider-line-5-tunnel-deal.

But Substitute S-2 made very extensive changes to the body of the Act, going far beyond what was disclosed in the changes to the title. Among other things:

- New Section 14d(1) provides that all duties, responsibilities, authorities and powers of the Bridge Authority related to the utility tunnel automatically transfer to the Corridor Authority Board members immediately upon their appointment.
- New Section 14d(4) provides that not later December 31, 2018, the Corridor Authority shall enter into an agreement or series of agreements for the construction, maintenance, operation and decommissioning of a utility tunnel if the governor provides by December 21, 2018, a proposed tunnel agreement meeting several very specific criteria.
- New Section 14d(5) requires the attorney general to provide for the costs of representation by an attorney chosen by the Bridge Authority or the Corridor Authority if the attorney general declines to represent either body in certain matters related to the utility tunnel.
- New Sections 14c and 14e create a Straits Protection Fund and provide for its use by the Bridge Authority or Corridor Authority for certain purposes related to the utility tunnel. Per § 14d(1), any money in the Fund would automatically transfer to the Corridor Authority Board immediately upon the appointment of its members.

On December 5, 2018, the same day it was reported out of committee, Substitute S-2 was approved by the Senate and sent to the House of Representatives.[7]

On December 11, 2018, SB 1197, as substituted, was reported from committee as House Substitute H-2, but H-2 was not adopted.[8] House Substitute H-1 was then adopted.[9] The House approved an amendment to H-1, requiring that a tunnel agreement include a plan for engaging the State's labor pool in the project, and passed SB 1197, with immediate effect.[10] The same day, it was returned to the Senate, which concurred in Substitute H-1, passed the bill and gave it immediate effect.[11]

Also that very same day, the approved Senate Bill 1197 was presented to and signed by former Governor Snyder. It was filed with the Secretary of State on December 12, 2018 and became immediately effective[12] as 2018 PA 359.[13]

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[7] http://www.legislature.mi.gov/(S(zq1f5qcbmvw0xlfx3tskp2zr))/mileg.aspx?page=getobject&objectname=2018-SJ-12-05-075.

[8] House Journal No. 78, pp 2527, 2535; http://www.legislature.mi.gov/(S(xjh1gsdroprolbusck3cn5wo))/mileg.aspx?page=getobject&objectname=2018-HJ-12-11-078.

[9] http://www.legislature.mi.gov/(S(ea342fyo2djzxnpcu4hf33u3))/mileg.aspx?page=getobject&objectname=2018-HJ-12-11-078.

[10] *Id.*

[11] Senate Journal No. 77, pp 2118-2119; http://www.legislature.mi.gov/(S(h0pbf4rubkoeacrdix4rwzka))/mileg.aspx?page=getobject&objectname=2018-SJ-12-11-077.

[12] http://www.legislature.mi.gov/(S(eaknxz0mchnleq1mvtsscjft))/mileg.aspx?page=getobject&objectname=2018-SJ-12-13-079.

[13] http://www.legislature.mi.gov/(S(2mx3eyqv3n52e3yvloe3q5vw))/mileg.aspx?page=getobject&objectname=2018-SJ-12-13-079.

Mackinac Straits Corridor Authority, Tunnel Agreement, and Related Actions

In the days that followed, former Governor Snyder appointed a series of individuals to be members of the Corridor Authority Board, two of whom withdrew and had to be replaced.[14] The third and final member of the Corridor Authority Board was appointed on December 17, 2018[15] and was confirmed by the Senate in the early morning of December 19, 2018.[16]

On December 19, 2018, 7 days after Act 359 took effect, the Mackinac Straits Corridor Authority held its first and, to date, only meeting. During that meeting it approved the 61-page Tunnel Agreement proposed by Governor Snyder that had been made public and transmitted, in draft form, to then appointed Board members on December 13, 2018.[17] Through its Chairperson, the Authority signed the Tunnel Agreement[18] and related documents, including the Assignment of MDNR Easement

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[14] https://www.9and10news.com/2018/12/18/despite-board-member-turnover-new-mackinac-straits-corridor-authority-set-to-meet-for-first-time-in-st-ignace/.

[15] http://www.michiganoilandgas.org/update_new_appointees_to_the_mackinac_straits_corridor_authority_msca_board.

[16] Senate Journal December 19, 2018 pp 2384-2385 http://www.legislature.mi.gov/(S(h4hvuictwkpjwv4b5ozrvd20))/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-19-081.pdf

[17] https://www.detroitnews.com/story/news/politics/2018/12/13/union-official-resigns-line-5-tunnel-panel/2304360002/.

[18] https://mipetroleumpipelines.com/document/tunnel-agreement-between-msca-and-enbridge-energy.

Rights to Enbridge,[19] on December 19, 2018. On the same day, former Governor Snyder, the former directors of the MDNR and MDEQ, and Enbridge signed the closely related Third Agreement.[20]

Governor Whitmer's Request for Formal Opinion by the Attorney General regarding the Constitutionality of Act 359

On her first day in office, January 1, 2019, Governor Whitmer sent a letter to the Attorney General raising a series of questions regarding the constitutionality of Act 359 and requesting a formal Attorney General opinion on them, consistent with MCL 14.32. The opinion request explicitly called into question the validity of Act 359 and of actions taken by the Mackinac Straits Corridor Authority based upon that statute.

Attorney General Opinion

On March 28, 2019, in response to the Governor's request, the Attorney General issued formal opinion No. 7309.[21] The conclusions of the opinion are summarized as follows:

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[19] Assignment of MDNR Easement Rights; https://mipetroleumpipelines.com/document/assignment-easement-rights-msca-enbridge-energy. On December 17, 2018, the MDNR had granted to the Mackinac Straits Corridor Authority an Easement to Construct and Maintain a Utility Tunnel at the Straits of Mackinac. (MDNR Easement.) https://mipetroleumpipelines.com/document/easement-underground-utility-tunnel-straits-mackinac.

[20] https://mipetroleumpipelines.com/document/3rd-agreement-between-state-michigan-and-enbridge-energy.

[21] https://www.ag.state.mi.us/opinion/datafiles/2010s/op10388.htm.

- Sections 14d(1), (4), and (5) of 2018 PA 359 violate article 4, § 24 of the Michigan Constitution because the substance of these provisions exceeds the scope of what is generally reflected in the title of 1952 PA 214, as amended by Act 359.
- Sections 14d(1), (4), and (5) of 2018 PA 359, which are unconstitutional under article 4, § 24 of the Constitution, cannot be severed from the remainder of Act 359 because doing so would be inconsistent with the intent of the Legislature.
- Any court determination that 2018 PA 359 is unconstitutional would likely apply that decision retroactively, and conclude that the Mackinac Straits Corridor Authority, its Board, and any action taken by the Board are void from their inception.

The opinion noted that because its analysis found that the three identified provisions of Act 359 failed "title-body" review under article 4, § 24 of the Michigan Constitution, it was unnecessary to address the validity of other provisions of the statute, other aspects of the Title-Object Clause, or the remaining questions raised by the opinion request, and thus did not do so.

On March 28, 2019, the Department of Attorney General transmitted copies of the formal opinion to the Mackinac Straits Corridor Authority, the Department of Transportation, the Governor, the Department of Natural Resources, and the

Department of Environmental Quality[22] with copies to counsel for Enbridge. The transmittals summarized the opinion and informally advised the respective state agency clients that actions taken pursuant to Act 395, including the Tunnel Agreement, were likely void. The correspondence advised the State recipients that they should refrain from further actions to implement Act 395 and related agreements, including the Third Agreement, which, by its terms, is expressly premised upon the effectiveness of the Tunnel Agreement.

On March 28, 2019, after the formal opinion was issued, the Governor issued Executive Directive 2019-13, which noted the constitutional infirmity of Act 359 and directed: "State departments and autonomous agencies shall not take any action authorized by, in furtherance of, or dependent upon Act 359."[23]

Enbridge Complaint

Enbridge's complaint asserts that contrary to the conclusions reached in the Attorney General opinion, Act 359 does not violate article 4, § 24 of the Michigan Constitution. It seeks a declaratory ruling to that effect, as well as a determination that the Mackinac Straits Corridor Authority and the actions of its Board, including the Tunnel Agreement and the Assignment of MDNR Easement Rights to Enbridge, are legally valid. It also seeks a declaration that the Third Agreement is valid and

[22] The Department of Environmental Quality was subsequently re-organized and re-named the Department of Environment, Great Lakes, and Energy, effective April 22, 2019, pursuant to Executive Order 2019-06.

[23] Executive Directive 2019-13; https://www.michigan.gov/documents/whitmer/ED_2019-13_Public_Act_359_of_2018_650679_7.pdf

enforceable, as well as an order enjoining Defendants from taking any action inconsistent with the Tunnel agreement, Third Agreement, MDNR Easement, and Assignment of MDNR Easement Rights.

As set forth below, the claims raised in Enbridge's complaint fail as a matter of law and, as such, are appropriately subject to State Defendants' motion for summary deposition under MCR 2.116(C)(8) for failure to state a claim upon which relief can be granted.

ARGUMENT

I. Act 359 violates the Title-Object Clause, article 4, § 24 of the Michigan Constitution because the substance of its provisions exceeds the scope of what is generally reflected in its title.

A. Standard of Review under MCR 2.116(C)(8)

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119 (1999), citing *Wade v Dep't of Corrections*, 439 Mich 158, 162-163 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. *Id.* at 120, citing MCR 2.116(G)(5).

B. Standard of Review for Constitutional Challenges to a Statute

Under Michigan law, a statute is "presumed to be constitutional" and there is a "duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003). Every "reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution" that the statute's validity will not be sustained. *Phillips v Mirac, Inc,* 470 Mich 415, 423 (2004) (quotation marks and citations omitted).

C. The Title-Object Clause

Article 4, § 24 of Michigan's Constitution provides that "[n]o law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Michigan's two previous Constitutions contained the same language set forth in the first sentence of § 24. See Const 1908, art 5, § 21, Const 1850, art 4, § 20. The second sentence, prohibiting a change of purpose, was new to the 1963 Constitution.

The Title-Object Clause is intended to "prevent the Legislature from passing laws not fully understood, to ensure that both the legislators and the public have proper notice of legislative content, and to prevent deceit and subterfuge." *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth,* 253 Mich App 144, 184 (2002). In the Title-Object Clause, the "framers of the constitution meant to put an end to

legislation," the passage of which was "secured through legislative bodies whose members were generally not aware of their intention and effect . . . and which was little less than a fraud upon the public." *People v Kevorkian,* 447 Mich 436, 454-455 (1994) (quoting *People ex rel Drake v Mahaney*, 13 Mich 481, 494-495 (1865). Generally, three types of challenges may be brought against statutes under the Title-Body Clause: (1) a title-body challenge, (2) a multiple-object challenge, and (3) a change-of-purpose challenge. *Kevorkian*, 447 Mich at 453.

1. Title-Body review

As noted above, OAG 7309 focused on a title-body review of certain provisions of Act 359, as does Enbridge's complaint.[24] A title-body challenge contends that "the title of the act does not adequately express the content of the law." *Kevorkian,* 447 Mich at 453; *Twp of Ray v B & BS Gun Club*, 226 Mich App 724, 728–729 (1997). Relevant to this analysis, article 4, § 24 provides that "[n]o law shall embrace more than one object, which shall be expressed in its title." Const 1963, art 4, § 24. "The 'object' of a law is defined as its general purpose or aim," and this "one object" provision "must be construed reasonably, not in so narrow or technical a manner that the legislative intent is frustrated." *Pohutski v City of Allen Park*, 465 Mich 675, 691 (2002) (citations omitted). Regarding the title, "the constitutional requirement is not that the title refer to every detail of the act; rather, '[i]t is sufficient that "the act centers to one main general object or purpose which the title

[24] A multiple-object challenge not addressed in the OAG is discussed separately in Section II, below.

comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose[.]"'" *Id.* (Citations omitted.)

Article 4, § 24 is "not a hollow formality," *Maki v East Tawas*, 385 Mich 151, 156-159 (1971), and Michigan courts have repeatedly invalidated provisions in the body of a statute that exceed the object of its title or are not germane, auxiliary, or incidental to the general purpose reflected in the title. In *Maki,* the Supreme Court sustained a title-body challenge to § 7 of 1964 PA 170 because the title provided for governmental immunity for injuries arising from negligence, but the body, in § 7 of the statute, provided for governmental immunity from *all* tort liability. *Rohan v Detroit Racing Ass'n*, 314 Mich 326 (1946) held that a provision in the body of the statute authorizing the department of agriculture to lease state-owned land for the conduct of horse racing exceeded the scope of the title which described the act as one to "provide, regulate and license the conducting of racing meets . . . ." 314 Mich at 354.

Examples of other cases invalidating statutes because the body of the act exceeded its title include *Graham v Fleming County Clerk*, 116 Mich 571 (1898) (where title provided for incorporation of "ecclesiastical bodies" but the body provided for incorporation of ecclesiastical bodies *and* any other "society for diffusing moral or religious knowledge") and *Michigan Sheriffs' Ass'n v Dep't of Treasury*, 75 Mich App 516, 524-526 (1977) (where title provided for allocation of funds for a specific purpose, but body provided for allocation of funds for additional

purposes). See also *Knott v City of Flint*, 363 Mich 483 (1961); *Klatt v Durfee*, 159 Mich 203 (1909); *Blades v Board of Water Commr's of Detroit*, 122 Mich 366 (1899); and *City of Birmingham v Oakland County*, 49 Mich App 299 (1973) (finding title-body violations).

2. The title to 1952 PA 214, as amended by Act 359

The title to Act 214, as amended by Act 359, provides in full:

> [1]An act authorizing the Mackinac bridge authority to acquire a bridge *and a utility tunnel* connecting the Upper and Lower Peninsulas of Michigan, including causeways, tunnels, roads and all useful related equipment and facilities, including park, parking, recreation, lighting, and terminal facilities; [2] extending the corporate existence of the authority; [3] authorizing the authority to enjoy and carry out all powers incident to its corporate objects; [4] authorizing the appropriation and use of state funds for the preliminary purposes of the authority; [5] providing for the payment of the cost of the bridge and authorizing the authority to issue revenue bonds payable solely from the revenues of the bridge; [6] granting the right of condemnation to the authority; [7] granting the use of state land and property to the authority; [8] making provisions for the payment and security of bonds and granting certain rights and remedies to the holders of bonds; [9] authorizing banks and trust companies to perform certain acts in connection with the payment and security of bonds; [10] authorizing the imposition of tolls and charges; [11] authorizing the authority to secure the consent of the United States government to the construction of the bridge and to secure approval of plans, specifications, and location of the bridge; [12] authorizing employment of engineers regardless of whether those engineers have been previously employed to make preliminary inspections or reports with respect to the bridge; [13] authorizing the state transportation department to operate and maintain the bridge or to contribute to the bridge and enter into leases and agreements in connection with the bridge; [14] exempting bonds and the property of the authority from taxation; [15] prohibiting competing traffic facilities; [16] authorizing the operation of ferries by the authority; [17] *authorizing the creation of the Mackinac Straits corridor authority*; [18] *authorizing the operation of a utility tunnel by the authority or the Mackinac Straits corridor authority*; [19] providing for the construction and use of

certain buildings[20][25]; and making an appropriation. [2018 PA 359, title (emphasis added; bracketed numbering added.)]

The italicized language represents the substantive amendments to the title made in Act 359. While a title need not serve as an index to all the provisions of an act, *Rohan*, 314 Mich at 355; *Twp of Ray*, 226 Mich App at 728-729, it must "'*comprehensively* declare[ ], though in general terms'" the "'main general object or purpose'" of the act. *Pohutski*, 465 Mich at 691 (citations omitted) (emphasis added). The title need not directly mention other provisions in the body of the act if those provisions "'are germane, auxiliary, or incidental to [the] general purpose[.]'" *Id.*

Here, the amendatory language in the *title* of Act 359 reflects that its main object or purpose is the acquisition of a utility tunnel at the Straits of Mackinac by the Bridge Authority and the operation of such a tunnel by either the Bridge Authority or a newly created Corridor Authority. But provisions in the *body* of Act 359 evidence a significantly different, central purpose — requiring the newly created Corridor Authority, not the Bridge Authority, to immediately enter into a very specific agreement authorizing a tunnel that would be funded and used by a private party — that is neither generally disclosed in the title of the Act nor germane, auxiliary, or incidental to the purposes stated in the title.

[25] This clause was added by 1992 PA 120, which also amended Public Act 214 to add § 32, MCL 254.332, permitting the expenditure of money for the construction of a building to be leased by the Michigan State Police.

3. Section 14d of Act 359 fails title-body review

While Act 359 added several sections to Public Act 214, the "invalidity" of § 14d "appears so clearly as to leave no room for reasonable doubt" that it violates article 4, § 24 and cannot be sustained. *Phillips,* 470 Mich at 423.

a. Subsection 14d(1)

Section 14d transfers all the Bridge Authority's duties and powers relating to a utility tunnel under § 14a, and any money in the Straits Protection Fund created by § 14c, to the new Corridor Authority Board created by § 14b upon that Board's appointment, to be exercised without any oversight by the Bridge Authority:

> All liabilities, duties, responsibilities, authorities, and powers related to a utility tunnel as provided in section 14a and any money in the straits protection fund shall transfer to the corridor authority board upon the appointment of the members of the corridor authority board under section 14b(2). The transfer of duties, responsibilities, authorities, powers, and money described in this subsection does not require any action by the Mackinac bridge authority or any other entity. The corridor authority board shall exercise its duties independently of the state transportation department and the Mackinac bridge authority. [2018 PA 359, § 14d(1), MCL 254.324d(1).]

Under § 14d(1), the Bridge Authority's initial authority to acquire the utility tunnel, and all that comes with it, is transferred automatically and completely to the Corridor Authority Board. This transfer comes without fair notice and is a surprise since clause 1 of the amended title "authori[zes] the Mackinac bridge authority *to acquire . . . a utility tunnel* connecting the Upper and Lower Peninsulas of Michigan[.]" (Emphasis added). Clause 17 of the amended title simply advises of the "creation of the Mackinac Straits corridor authority." And clause 18 thereafter "authoriz[es] *the operation of* a utility tunnel by the authority

or the Mackinac Straits corridor authority[.]" (Emphasis added.) Clause 18 suggests that either the Bridge Authority or, at some point, the Corridor Authority may operate a utility tunnel. But, the body of Act 359 contradicts the title, revealing that *all* authority with respect to the utility tunnel – from its acquisition, construction, and operation, to the purchase of property and rights in property, and the securing of permits, etc. – is immediately transferred from the Bridge Authority to the Corridor Authority upon the appointment of its Board members. The Bridge Authority has no authority to operate a utility tunnel and retains no responsibility for it.

Neither clauses 1, 17, and 18 nor any other clause in the amended title adequately encompass, or can be construed to encompass, the complete transfer of rights and duties relating to the acquisition, construction, and operation of a utility tunnel to the Corridor Authority. This transfer of authority was not "comprehensively declare[d], though in general terms" in the amended title. *Pohutski,* 465 Mich at 691–692. The constitutionality of § 14d(1) thus hinges on whether it may be considered germane, auxiliary, or incidental to the general purpose of Act 359 as articulated in the Act's amended title, such that it need not have been mentioned in that title. *Id.*

To be germane, § 14d(1) must fall within the general purpose stated in Act 359's title or be an extension of that general purpose. *Anderson v Oakland Cty Clerk,* 419 Mich 313, 328 (1984). Again, the title of Act 359 reflects that its main object or purpose is to authorize the Bridge Authority to acquire a utility tunnel,

which tunnel will then be operated by the Bridge Authority *or* the Corridor Authority. Here, the transfer of all powers and duties relating to the acquisition of a utility tunnel from the Bridge Authority to the Corridor Authority is not simply an extension of the main purpose reflected in the title. Rather, it is plain from the body of Act 359 that this transfer is a component of the central, and significantly different, purpose of the body of the Act — requiring the Corridor Authority to almost immediately enter into a specific type of agreement with a private party to acquire and operate a utility tunnel under § 14d(4). And as part of the core purpose of Act 359, the content of § 14d(1) must be reflected in the title. Because it was not, § 14d(1) is unconstitutional. Like the title in *Rohan*, the amended title to Act 359 does not provide "fair notice" of the automatic power transfer from the Bridge Authority to the newly created, and independent, Corridor Authority, nor is § 14d(1) germane, auxiliary, or incidental to the purpose reflected in that amended title. See *Rohan*, 314 Mich at 356–357.

b. Subsection 14d(4)

After receiving the transfer of powers and duties under § 14d(1), § 14d(4) required the Corridor Authority to enter into an agreement or agreements with a private party pertaining to a utility tunnel if an agreement was presented by a specific date and satisfied very specific criteria:

> Except as provided in subdivision (a), no later than December 31, 2018, the Mackinac Straits corridor authority shall enter into an agreement or a series of agreements *for the construction, maintenance, operation, and decommissioning of a utility tunnel,* if the Mackinac Straits corridor authority finds all of the following:

(a) That the governor has supplied *a proposed tunnel agreement* to the Mackinac Straits corridor authority on or before December 21, 2018. If the governor has not supplied a proposed tunnel agreement to the Mackinac Straits corridor authority on or before December 21, 2018, the Mackinac Straits corridor authority shall act on the proposed tunnel agreement no later than 45 days after the date the proposed agreement is presented. [2018 PA 359, § 14d(4), MCL 254.324d(4) (emphasis added).]

Subsection 14d(4) goes on to identify ten specific criteria that the Corridor Authority, through its Board, must find to exist in a proposed tunnel agreement before entering into an agreement. 2018 PA 359, § 14d(4)(b)–(k): (b) (allow use of tunnel by multiple utilities); (c) (require gathering of geotechnical information); (d) (build tunnel to specifications); (e) (no obligation of funds inconsistent with the act); (f) (no use of eminent domain); (g) (permits or approvals still required for construction and use of tunnel); (h) (entities using utility tunnel not exempt from taxes); (i) (tunnel agreement does not require Corridor Authority to bring or defend a legal claim); (j) (reimbursement of Bridge Authority for loss of profits due to leasing of tunnel for the transmission of data and telecommunications); and (k) (agreement to include plan to engage state's labor pool).

Notably, the provisions of § 14d make clear that under the agreement(s) the Corridor Authority is required to enter, it is a private party (Enbridge) rather than the Authority that will both construct *and operate* the tunnel. Under Subsection 14d(4)(e), the proposed tunnel agreement must "provide[] a mechanism under which all costs of construction, maintenance, operation and decommissioning of the utility tunnel are borne by a private party and not by the Mackinac Straits Corridor

Authority. . . ." Read in the context of other statutory provisions referring to leasing, e.g., § 14a(1) ("The Mackinac Bridge Authority may enter into contracts or agreements necessary to perform its duties and powers under this act, including, but not limited to, leasing the right to use a utility tunnel . . ."), § 14d(2) (referring to "utility leasing") and § 14d(3) (referring to "leasing of space in the utility tunnel"), it is apparent that the body of Act 359 contemplated a tunnel agreement under which the private party would operate the tunnel at its own expense under a lease from the Authority, like the agreement actually proposed by then Governor Snyder and approved by the Corridor Authority.[26]

Requiring the Corridor Authority to enter into a specific tunnel agreement, as provided by the Governor and by a certain date, under which a private party, not the Corridor Authority, will construct and operate a tunnel is the central, substantive piece of this legislation. Like the power transfer in § 14d(1), it is a component of the main purpose of the body of Act 359 that was required to be reflected in the amended title in a comprehensive yet general way. *Pohutski*, 465 Mich at 691. But none of the clauses in the amended title generally reflect this purpose or can be construed to reflect this purpose. As a result, the amended title does not provide "fair notice" of an imminent tunnel agreement authorizing the construction and operation of a utility tunnel by a private party, nor is § 14d(4)

[26] Tunnel Agreement dated December 19, 2019, Sections 3.2 and 13.1; https://mipetroleumpipelines.com/document/tunnel-agreement-between-msca-and-enbridge-energy.

germane, auxiliary, or incidental to the amended title. *Rohan*, 314 Mich at 356–357. Subsection 14d(4) is thus unconstitutional.

c. Subsection 14d(5)

Finally, § 14d(5) provides that if the "attorney general declines to represent" the Bridge Authority or the Corridor Authority in a "matter related to the utility tunnel," the "attorney general shall provide for the costs of representation by an attorney . . . chosen by" the Bridge Authority or the Corridor Authority. Act 359, § 14d(5), MCL 254.324d(5). None of the clauses in the amended title adequately encompass, or can be construed to encompass, the Legislature's imposition of these unusual requirements on the office of Attorney General. Thus, to be constitutional, the provision must be germane, incidental, or auxiliary to the purpose of PA 359 identified in its title. *Pohutski*, 465 Mich at 691. But this stricture concerning a sitting Attorney General's decision-making regarding the legal representation of the Bridge Authority or the Corridor Authority cannot reasonably be considered an extension of the main purpose of Act 359 as evidenced in its title. Nor is it incidental or auxiliary to that main purpose. As a result, § 14d(5) is also unconstitutional.

Michigan law is clear that where the body of an act exceeds the general scope of what is expressed in the title, the offending provisions violate article 4, § 24. Here, §§ 14d(1), (4), and (5) of Act 359 violate article 4, § 24 because the amended title does not declare in comprehensive yet general terms the purpose of these

sections, and the provisions are not otherwise germane, incidental, or auxiliary to Act 359's main purpose as stated in its title.

4. Sections 14a(1) and 14a(4) of Act 359 also fail title-body review.

While not addressed in OAG No. 7309, at least two other provisions of the body of Act 359 fail title-body review because they exceed the scope of what was disclosed in its title.

The title of Act 359 leaves the title of Act 214 largely intact. One section of the title left intact provides that the Act authorizes the Bridge Authority to, among other things, "secure the consent of the United States government to the construction of the *bridge*" and "secure approval of plans, specifications, and location of the *bridge*." 2018 PA 359 (emphasis added). Additionally, the title of Act 359 leaves intact a section that says the Act authorizes the Michigan Department of Transportation to "enter into leases and agreements in connection with the *bridge*." *Id.* (emphasis added). The title of Act 359 indicates that these actions may be taken with regard to the bridge but makes no mention of these actions as they relate to a utility tunnel.

The body of Act 359, however, authorizes the Bridge Authority to undertake these exact actions with respect to a utility tunnel. The body of the Act authorizes the Bridge Authority to, among other things, "secure the consent of any department, agency, instrumentality, or officer of the United States government or this state to the construction and operation of a *utility tunnel*," or "secure the approval of any

department, agency, instrumentality, or officer of the United States government or this state required by law to approve plans, specifications, and location of the *utility tunnel*." 2018 PA 359 § 14a(4) (emphasis added).

Additionally, the body of the Act authorizes the Bridge Authority to "enter into contracts or agreements necessary to perform its duties and powers under this act, including, but not limited to, leasing the right to use a *utility tunnel* on terms and for consideration determined by the Mackinac bridge authority." 2018 PA 359 § 14a(1) (emphasis added).

In other words, the title of Act 359 provides that the Act authorizes certain state government agencies to enter into leases and other agreements in connection with a *bridge* and to secure necessary governmental approvals for the construction, plans, specifications, and location of a *bridge*. However, while the body of the Act contains provisions that authorize all of these actions with respect to a bridge, it also adds authorizations to perform all of the same actions with respect to a tunnel. This is not contemplated in the title of the Act and creates a situation in which the body of the Act exceeds the scope of the title.

This is directly analogous to several previously referenced cases in which Michigan courts have found provisions of acts unconstitutional where they exceeded specific, limited authorizations set forth in the title. Where the title of an act refers to regulating horse races, but the body of the act adds a provision related to leasing real estate, the excess provision exceeds the scope of the title and must be stricken. *Rohan*, 314 Mich 326. Where the title of an act refers to governmental immunity

for negligence actions, but the body adds a provision for governmental immunity from all torts, the body exceeds the title. *Maki*, 385 Mich at 156-159. Where the title of an act provides for incorporation of one specific kind of entity, but the body adds a provision for incorporation of other kinds of entities, the body exceeds the title. *Graham*, 116 Mich 571. And where the title of an act provides for boat registrations and funding for specific projects, but the body adds a provision that allocates funding generally for boating safety and law enforcement, the body exceeds the title. *Michigan Sheriffs' Ass'n*, 75 Mich App at 524-526.

Similarly, here, the title of Act 359 provides for the Bridge Authority to obtain certain governmental approvals for the plans, specifications, and construction of a *bridge*, and to enter into contracts in connection with a *bridge*, but the body, in sections 14a(1) and 14a(4), unconstitutionally expands the scope of the title by authorizing the same exact activities for a tunnel. This clearly exceeds the scope of the title, where these activities were limited to the bridge.

The only activities contemplated in the title of Act 359 that relate to the utility tunnel are the acquisition and operation of the tunnel. Because the aforementioned activities (securing governmental approvals and entering contracts related to the tunnel) are not contemplated in the title, the question becomes whether they are germane, incidental, or auxiliary to the acquisition and operation of the tunnel. They are not for two reasons. First, the Legislature clearly believed that these activities were sufficiently important to describe them separately in reference to a bridge. The canons of statutory construction require courts to

interpret legislative acts so that no part of the act is rendered nugatory. *Pohutski*, 465 Mich at 684. If entering into contracts and securing necessary approvals were included within the meanings of acquiring and operating a tunnel, then the Legislature's separate description of those activities as they relate to the bridge would be mere surplusage.

Second, while the title of Act 359 refers to acquiring and operating a utility tunnel, the body refers to securing necessary governmental approvals not only for the operation of the utility tunnel, but also for the plans, specifications, location, and construction of the tunnel. 2018 PA 359 § 14a(1). And § 14a(4) refers to entering into leases and other agreements, not limited to acquiring or operating a tunnel, but in an open-ended manner that includes leasing the right to use the utility tunnel. The title of Act 359 does not refer to any state governmental authority *constructing* the utility tunnel, nor does it refer to leasing the right to use the utility tunnel, and therefore §§ 14a(1) and 14a(4) clearly exceed the scope of the title.

5. The provisions of Act 359 that fail title-body review cannot be severed from the remainder of Act 359 and therefore Act 359 as a whole is unconstitutional.

The Legislature has provided for the severability of invalid statutes in MCL 8.5, which states that "[i]f any portion of an act . . . shall be found to be invalid . . . such invalidity shall not affect the remaining portions . . . of the act which can be given effect without the invalid portion . . . provided such remaining portions are not determined . . . to be inoperable[.]" But, even if this test can be met, invalid

provisions will not be severed if severing would be inconsistent with the "manifest intent of the Legislature." *In re request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 346 (2011); *People v McMurchy*, 249 Mich 147, 158 (1930) (When one part of a statute is held unconstitutional, the remainder of the statute remains valid unless all parts of the statute are so interconnected that the Legislature would likely not have passed the one part without the other).

With respect to title-body violations, as here, the Michigan Supreme Court has applied severability principles to strike the offending provisions while leaving the remainder of the acts intact. See *Rohan*, 314 Mich at 357–358; *Maki*, 385 Mich at 159.[27] Here, the question then is whether the remainder of Act 359 can operate without §§ 14d(1), (4), and (5), and 14a(1) and (4).

Without § 14d(1), there would be no transfer of utility tunnel powers, duties and authorities of the Mackinac Bridge Authority under § 14a to the Corridor Authority. And, without that provision and § 14d(1), the Corridor Authority would have no legal authority to enter into *any* tunnel agreement. Indeed, in the absence

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[27] The severability of a different provision of Act 359 was recently addressed by this Court in *A Felon's Crusade for Equality, Honesty, and Truth v State of Michigan, et al.*, Court of Claims Case No. 18-000269-MM. In his decision, Judge Borello concluded that the six-year terms of the Corridor Authority members provided for in Section 14b(2) of Act 359 violated Const 1963, art 5, § 3's four-year limit of the terms for state board members. But he found the provision to be severable from the balance of Act 359 since article 5, § 3's four-year term limit was self-executing and had the effect of limiting the board members to four years and, thus, did not find the Act to be unconstitutional. This result was in accord with the conclusion reached in OAG, 2005-2006, No. 7178, p 44 (August 2, 2005).

of those provisions, the Corridor Authority would have no functions to perform other than conducting its own meetings, even if it hypothetically continued to exist under § 14b. Moreover, § 14d(5) requiring the attorney general under certain conditions to provide the costs of separate legal representation to the Mackinac Bridge Authority or the Corridor Authority in a "matter related to the utility tunnel" presupposes the existence of a tunnel agreement, permit applications or approvals related to a utility tunnel, or the existence of a utility tunnel. See § 14d(5)(A)-(G).

In the absence of §§ 14d(1) and (4), it would remain hypothetically possible for the Mackinac Bridge Authority rather than the Corridor Authority, to enter into an agreement to acquire a utility tunnel under § 14a. But such an agreement would exceed the scope of Act 359's title, which limits the Bridge Authority to entering into leases and other agreements only in connection with the bridge. And, in any event, such an agreement would not be subject to the very specific timing and content requirements mandated by the Legislature in § 14d(4).

Even if it is technically possible to sever §§ 14d(1) and (4), and 14a(1) and (4), doing so would be inconsistent with the "manifest intent of the Legislature." *In re request for Advisory Opinion re 2011 PA 38*, 490 Mich at 346; *McMurchy*, 249 Mich at 158. As noted above, the central purpose of the body of Act 359 was that the Corridor Authority, not the Bridge Authority, almost immediately enter into a specific type of agreement with a private party for a utility tunnel. Without §§ 14d(1) and 14d(4), the remaining provisions of Act 359 could not achieve that objective. And, without §§ 14a(1) and (4), the requisite state government

authorities could not enter into the necessary agreements, or obtain necessary permissions, to acquire and operate the utility tunnel.

Given the significance of §§ 14d(1) and 14d(4), it cannot be concluded that the Legislature "would have passed [Act 359] had it been aware that [these sections] would be declared to be invalid and, consequently, excised from the act." *Pletz v Secretary of State,* 125 Mich App 335, 375 (1983); see also *Eastwood Park Amusement Co v Stark,* 325 Mich 60, 73 (1949) (stating general rule that unconstitutional provisions may be severed if, among other conditions, "it is clear from the [law] itself that it was the intent of the legislature to enact these provisions irrespective of the others") (citation and quotation marks omitted). Because §§ 14d(1) and (4), and 14a(1) and (4) cannot be severed from the remainder of Act 359, the entire Act is unconstitutional.

II. Act 359 violates the Title-Object Clause because it embraces multiple objects.

The principal object of Act 359 is the construction and operation of an underground utility tunnel by a private party through an agreement with the newly created Mackinac Straits Corridor Authority. This is clearly different from, and unrelated to, the principal object of Act 214, which is the construction and operation of a vehicular bridge by the previously created Mackinac Bridge Authority. Additionally, Act 359 contains multiple objects within itself, even without comparison to Act 214. It is apparent that Act 359 contains multiple objects and is thus unconstitutional in its entirety.

A. Legal standards by which Michigan courts review multiple object challenges

As noted above, the Title-Object Clause provides that "No law shall embrace more than one object, which shall be expressed in its title." Const 1963, art 4, § 24. The "object" of a law is its general purpose or aim. *Local No 1644 v Oakwood Hosp Corp*, 367 Mich 79, 91 (1962); *Builders Square v Dep't of Agriculture*, 176 Mich App 494, 497 (1989). A law violates the Title-Object Clause if it contains "subjects diverse in their nature, and having no necessary connection." *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 466 (1985).

Determining whether a law embraces more than one object requires examining the body of the law, not merely its title. *People v Kevorkian*, 447 Mich 436, 459 (1994). An act may not contain "two distinct and unrelated objects" even if those objects are both addressed in the act's title. *Kent County ex rel Bd of Supervisors v Reed*, 243 Mich 120, 122-123 (1928).

A law may contain all matters germane to its object and any provisions which "directly relate to, carry out, and implement the principal object." *City of Livonia*, 423 Mich at 497, quoting *Greentrees Civic Ass'n v Pignatiello*, 123 Mich App 767, 771 (1983) and *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 465 (1973).

If the Legislature enacts a new law by amending an existing law, the object of the new law must be germane, auxiliary, or incidental to that of the existing law. *Id.*, at 466. In that situation, courts look to both the existing act and the amendatory act to determine if the amendatory act embraces multiple objects. *Id.*,

at 500, see also *Hildebrand v Revco Discount Drug Centers*, 137 Mich App 1 (1984); *Keep Michigan Wolves Protected v State*, unpublished opinion per curiam of the Court of Appeals, Docket No. 328604 (Issued Nov 22, 2016) (a copy of which is attached as Exhibit 1 to this brief).

The Supreme Court has noted that the multiple-object provision of the Title-Object Clause is meant to be applied reasonably, and not restrictively, and has specifically held that, "The legislature may empower a body created by it to do everything requisite, necessary, or expedient to carry out the principal objective to be attained. Legislation, if it has a primary object, is not invalid because it embraces more than 1 means of attaining its primary object." *Kevorkian*, 447 Mich at 455, quoting *In re Brewster St Housing Site*, 291 Mich 313 (1939); see also *Kuhn v Treasury Dep't*, 384 Mich 378, 387–388 (1971); and *Local No 644 v Oakwood Hosp Corp*, 367 Mich 79, 91 (1962).

A law that contains multiple objects is void in its entirety, without consideration of whether one object may be severable, and the other object left intact. *In re Advisory Opinion (Being 1975 PA 227)*, 396 Mich 123, 131 (1976).

B. The principal object of Act 359 is a utility tunnel, whereas the principal object of Act 214 is a vehicular bridge. Therefore, Act 359 embraces an object that is diverse from and not necessarily related to the object of Act 214.

The principal object of Act 214, before it was amended by Act 359, was empowering the Mackinac Bridge Authority to construct and operate a vehicular bridge connecting the Upper and Lower Peninsulas. In fact, in its definition section,

Act 214 defines the term "Bridge" as, among other things, "the project for the acquisition of which this act is adopted." Act 214 § 1(c); Act 359 § 1(c); MCL 254.311(1)(c).

Act 359, on the other hand, has a completely different principal object that is diverse from and not necessarily connected with the Mackinac Bridge. The principal object of Act 359 centers around the construction and operation of a privately funded underground tunnel to accommodate an oil pipeline and other utilities, which was clearly never contemplated in Act 214 and its authorization of a vehicular bridge to be funded and used by the public.[28]

The term "utility tunnel" is defined, separately from the term "bridge," as "a tunnel joining and connecting the Upper and Lower Peninsulas of this state at the Straits of Mackinac for the purpose of accommodating utility infrastructure, including, but not limited to, pipelines, electric transmission lines, facilities for the transmission of data and telecommunications, all useful and related facilities, equipment, and structures, and all necessary tangible or intangible real and personal property, license, franchises, easements, and rights-of-way." 2018 PA 359 § 14(e); MCL 254.324(e). Simply put, the "utility tunnel" as defined in Act 359 is diverse from and unrelated to the "bridge" as defined in Act 214.

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[28] In its definition of the word "Bridge," Act 214 references "tunnels" and "utility lines," but only in a list of items "forming any part" of the bridge "or connected with or useful in the operation" of the bridge. 1952 PA 214 § 1(c). There is no contemplation of tunnels or utility lines independent of and unconnected to the bridge, and there is certainly no mention of oil pipelines anywhere in Act 214.

Michigan courts have repeatedly struck down legislation for less egregious multiple object violations than that found in Act 359. In *People v Carey*, the Supreme Court held that a statute that authorized the Michigan Public Service Commission to regulate motor carriers could not include a provision that gave Public Service Commission inspectors the status of peace officers, even though both the title and the body of the statute included language about inspection and enforcement. *People v Carey*, 382 Mich 285, 295-297 (1969).

Similarly, the Court of Appeals has held that a statute that regulated polygraph examiners could not include a provision that penalized employers who terminated employees based on polygraph results. *Hildebrand v Revco Discount Drug Centers*, 137 Mich App 1, 7-9 (1984). And the Court of Appeals has held that a statute that required the State of Michigan to regulate fish, wildlife, and their habitats based on sound scientific principles could not include a provision that provided free hunting and fishing licenses to members of the military. *Keep Michigan Wolves Protected, supra.*

In each of these cases, Michigan appellate courts struck down laws for containing provisions much more closely related to the law's principal object than the provisions at issue here. Act 359 took an existing law that, for over six decades, dealt solely with the Mackinac Bridge and its construction and operation by the Mackinac Bridge Authority, and grafted onto it a completely new law that deals with the construction and operation of an underground utility tunnel by a private entity through an agreement with an entirely new government agency. An

underground utility tunnel is diverse from and not necessarily related to a vehicular bridge, and it is neither germane nor auxiliary to a vehicular bridge. Act 359, therefore, embraces a completely different object than Act 214, and runs afoul of the Title-Object Clause.

C. Act 214 effectuated its principal object by assigning new powers and obligations to the extant Mackinac Bridge Authority. Act 359, on the other hand, purports to effectuate its principal object by creating the Mackinac Straits Corridor Authority, which by the terms of Act 359 is an entirely new agency of state government that operates independently from the Mackinac Bridge Authority.

Act 214 did not create the Mackinac Bridge Authority. The Mackinac Bridge Authority was created two years prior. 1950 PA 21. Act 214 merely empowered an existing governmental authority to construct and operate a vehicular bridge and to perform actions attendant thereto.

Act 359, on the other hand, creates an entirely new government agency, the Mackinac Straits Corridor Authority, to enter into an agreement with a private entity to construct and operate a utility tunnel. 2018 PA 359 §§ 14-14e. Act 359 first vests the power to construct and operate the utility tunnel in the Mackinac Bridge Authority, but almost immediately transfers that power to the Corridor Authority. 2019 PA 359 §§ 14a and 14d(1).

The Michigan Supreme Court has held that the "legislature may empower a body created by it to do everything requisite, necessary, or expedient to carry out the principal object to be attained." *Local No 644 v Oakwood Hosp Corp*, 367 Mich 79, 91 (1962). But Act 359 does not do this. Rather, Act 359 creates a new body, the

Corridor Authority, which was not contemplated in Act 214. Moreover, the Corridor Authority only has power to arrange for the construction and operation of the utility tunnel. It has no power to do anything with regard to the Mackinac Bridge which, as noted previously, is defined as "the project for the acquisition of which" Act 214 was adopted. 2018 PA 214 § 1(c); MCL 254.311(1)(c).

Act 359 not only embraces a completely new principal object diverse from Act 214, it also creates a completely new governmental authority to carry out that principal object. Aside from the almost-immediate transfer of power from the Bridge Authority to the Corridor Authority, Act 359 does nothing to connect the Corridor Authority to the principal object of Act 214. In fact, Act 359 goes so far as to specify that the "corridor authority shall exercise its duties *independently of the state transportation department and the Mackinac bridge authority.*" 2018 PA 359 § 14d(1); MCL 254.324d(1) (emphasis added).

By creating a new governmental authority that, by law, operates independently from the Bridge Authority, and empowering that new authority to conduct activities that have no relation to anything contemplated in Act 214, Act 359 embraces a principal object that is diverse from and not necessarily related to the principal object of Act 214, and thus violates the Title-Object Clause.

D. While the principal object of Act 359 is indisputably the construction and operation of the utility tunnel, the definitions section of Act 359 defines the term "Bridge" as, among other things, "the project for the acquisition of which this act is adopted." Therefore, Act 359 contains multiple objects within itself.

It cannot credibly be argued that the principal object of Act 359 is anything other than empowering the Corridor Authority to arrange for the construction and operation of an underground utility tunnel. However, Act 359 leaves Act 214's definition of the word "bridge" substantively intact. While it makes minor cosmetic amendments to this definition, Act 359 still defines the term "bridge" as, among other things, "the project for the acquisition of which this act is adopted." Act 359 § 1(c); MCL 254.311(1)(c).

In other words, Act 359 declares that its principal object is the Mackinac Bridge, despite the fact that Act 359 has nothing to do with the Mackinac Bridge and its principal object is clearly the utility tunnel. This might make sense if the Legislature had amended the definition of the word "Bridge" to include a utility tunnel, but it did not. As set forth previously, the definition of "Bridge" includes a reference to "tunnels" and a reference to "utility lines," but only "forming any part of the bridge or connected with or used or useful in the operation of the bridge." *Id.* Additionally, in Act 359, the Legislature provided a completely separate and distinct definition of "utility tunnel." Act 359 § 14(e); MCL 254.324(e).

Act 359's definition of "bridge" as "the project for the acquisition of which this act is adopted" is clearly the result of hasty legislative draftsmanship. There is no other explanation for this declaration that the purpose of Act 359 is the acquisition of the Mackinac Bridge. After all, at the time Act 359 was passed in December of 2018, the Mackinac Bridge had long since been acquired, and in fact, Act 359 has

nothing to do with the acquisition of the Mackinac Bridge and everything to do with the acquisition of the separately defined utility tunnel.

In its zeal to rush Act 359 through in the waning days of the Snyder administration, the Legislature overlooked this fatal flaw. In addition to embracing a principal object that is diverse from and not necessarily connected to the principal object of Act 214, Act 359 also embraces a principal object that is diverse from and unrelated to what Act 359 itself defines as its principal object and thus violates the Title-Object Clause.

III. Act 359, the Mackinac Straits Corridor Authority, and all State actions based on Act 359 are void from their inception.

For the reasons stated above, Act 359 is unconstitutional in its entirety. In general, an unconstitutional statute is void ab initio; it is void for any purpose and is as ineffective as if it had never been enacted. *Stanton v Lloyd Hammond Produce Farms,* 400 Mich 135, 144–145 (1977); *Dullam v Wilson,* 53 Mich 392, 409–410 (1884); *People v Gallagher,* 4 Mich 244, 280–282 (1856). Under this rule, judicial decisions declaring statutes unconstitutional have been given full retroactive application. See, e.g., *Stanton,* 400 Mich at 144–145; *Briggs v Campbell, Wyant & Cannon Foundry Co,* 379 Mich 160 (1967); *Horrigan v Klock,* 27 Mich App 107 (1970). Doing so in this context would be consistent with another general rule that judicial decisions are normally given complete retroactive effect. *Michigan Ed Employees Mut Ins Co v Morris,* 460 Mich 180, 189 (1999). "However, these rules

are not blindly followed without concern for principles of justice and fairness." *Johnson v White*, 261 Mich App 332, 336 (2004). As the Court of Appeals explained:

> In recent decades, Michigan has adopted a flexible approach to determining whether a decision should be applied retroactively or prospectively, which involves the threshold question of whether that decision is establishing a new principle of law, either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties. If the decision does not announce a new principle of law, then full retroactivity is favored. [*Michigan Ed Employees*, 460 Mich 190-191.] *Johnson* at 336.

Here, the conclusion that Act 359 is unconstitutional does not rest upon a new principle of law. On the contrary, it is based upon the application of long-standing precedent such as *Rohan, supra,* concerning the interpretation of article 4, § 24 of the Constitution. While the question presented as to Act 359 specifically is one of first impression, the conclusion that Act 359 is unconstitutional is foreseeable in light of that precedent. Thus, as a threshold matter, one would expect full retroactivity of a determination that Act 359 is unconstitutional. Moreover, Michigan caselaw regarding retroactive application of new decisions supports full retroactive application of this opinion to the date of the enactment of Act 359:

> Where the decision does reflect a new principle of law, our Supreme Court has acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy, and has employed a three-part test to determine to what extent, if any, a decision should receive retroactive application. Under this test, the Court weighs (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. [*Johnson* at *336*, internal quotations and citations omitted.]

Here, the purpose of the decision is to ensure adherence to the requirements of article 4, § 24 of the Constitution as long interpreted by Michigan courts. As such, this weighs in favor of retroactive application.

With respect to the second factor, no party who may be affected by retroactive application here could have extensively and reasonably relied upon the assumed validity of Act 359 or agreements premised upon it. Even as this legislation rapidly advanced through the Legislature in December 2018, and the proposed tunnel agreement was being considered with abbreviated public notice,[29] the validity of both the legislation and the proposed agreement was subject to intense public and legal scrutiny, foreshadowing likely legal challenges.[30] And on January 1, 2019, Governor Whitmer's request for this opinion publicly and specifically identified several potential constitutional defects in Act 359, including the violation of the Title-Object Clause of article 4, § 24 of the Constitution. Moreover, as noted above, on March 28, 2019, both OAG 7309 and Executive Directive 2019-13 were issued, publicly addressing the constitutional infirmity of Act 359. Under these circumstances, any reliance upon assumed validity of the statute was inherently

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[29] See, e.g. December 13, 2018 *Detroit News* article describing 5-day public comment period. https://www.detroitnews.com/story/news/politics/2018/12/13/union-official-resigns-line-5-tunnel-panel/2304360002/.

[30] See, e.g., December 12, 2018 *Detroit Free Press* article noting "Tunnel bill could face court challenges." https://www.freep.com/story/news/local/michigan/2018/12/12/snyder-enbridge-line-5-tunnel-bill/2288251002/ and December 18, 2018 public comment http://flowforwater.org/wp-content/uploads/2018/12/FLOW-Public-Comment-12-18-18.pdf.

very limited in time and occurred with the understanding that any action based upon it might be subsequently invalidated.

Finally, retroactive application of the determination that Act 359 is unconstitutional can have no adverse effect on the administration of justice by Michigan courts. As noted above, there is no pending litigation addressing the validity of Act 359 under article 4, § 24 of the Constitution.

For all these reasons, this Court should hold that Act 359 was void from its inception on December 12, 2018.

Where, as here, a statute is determined invalid from its inception, it necessarily follows that any entity established under or any action based upon that invalid statute is void. See, e.g., *Rohan*, 314 Mich at 358 (explaining that a lease from state department of agriculture to a racing association was void because the portion of the statute authorizing the lease was unconstitutional under the Title-Object Clause, and so the association was "merely le[ft] . . . in the position of a lessee holding under a void lease"). When on December 19, 2018, the Mackinac Straits Corridor Authority Board convened and took action to approve and enter agreements with Enbridge, it had no legal authority to do so. Specifically, both the December 19, 2018 Tunnel Agreement[31] and the Assignment of MDNR Easement

[31] Tunnel Agreement, article 3.1 and Appendix A, Assignment of Easement Right for Utility tunnel, stating that the Mackinac Straits Corridor is "acting under the authority of MCL 254.324a(1) [Section 14a(1) of Act 359] and MCL 254.324d(1) [Section 14d(1) of Act 359]." https://mipetroleumpipelines.com/document/tunnel-agreement-between-msca-and-enbridge-energy.

Rights,[32] which were expressly predicated upon Act 359, are void and unenforceable. Likewise, the December 17, 2018 MDNR Easement purporting to grant certain rights to the Mackinac Straits Corridor Authority was expressly predicated upon Act 359[33] and the creation of the grantee, the Corridor Authority, under Act 359 and is therefore also void and unenforceable.

IV. The Third Agreement is also invalid and unenforceable.

As noted above, Enbridge and the administration of former Governor Snyder entered into the Third Agreement on December 19, 2018,[34] the same day that the Tunnel Agreement was executed by Enbridge and the Corridor Authority. In a nutshell, the Third Agreement provides that, subject to specified conditions, Enbridge may continue to transport petroleum products through the existing Dual Pipelines for an indeterminate period of years, until a "Straits Line 5 Replacement

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[32] Assignment of Easement Rights for Utility Tunnel, p 1 https://mipetroleumpipelines.com/document/assignment-easement-rights-msca-enbridge-energy.

[33] The Easement for Underground Utility Tunnel at the Straits of Mackinac granted by the MDNR to the Corridor Authority recites that it is granted "FOR STATUTORY RIGHTS TO USE STATE LANDS, WITHOUT CONSIDERATION, GRANTED TO THE AUTHORITY IN MCL.254.324(a)(3) [Section 14a(3) of Act 359] AND MCL 254.324d [Section 14d of Act 359]." https://mipetroleumpipelines.com/document/assignment-easement-rights-msca-enbridge-energy.

[34] Third Agreement between the State of Michigan, Michigan Department of Environmental Quality, and Michigan Department of Natural Resources and Enbridge Energy, Limited partnership, Enbridge Energy Company, *I*nc., and Enbridge Energy Partners, L.P. dated December 19, 2018. https://mipetroleumpipelines.com/document/3rd-agreement-between-state-michigan-and-enbridge-energy.

Segment" is put into operation within the tunnel proposed to be constructed pursuant to the Tunnel Agreement.

The Third Agreement is invalid and unenforceable for at least two reasons. First, the Third Agreement and the invalid Tunnel Agreement are inextricably related and expressly "mutually dependent." Second, to the extent that the Third Agreement purports to bind the State of Michigan, in its sovereign capacity, and the successors to the Snyder administration, to a determination that continued operation of the existing Dual Pipelines is somehow consistent with the State's perpetual duty to protect the public trust, it conflicts with the public trust and reserved powers doctrine and is therefore unenforceable.

A. By its express terms, the Third Agreement cannot survive the invalidation of the Tunnel Agreement.

While embodied in two separate documents, the Third Agreement and Tunnel Agreement are unambiguously part of a single "package deal." The preamble of the Third Agreement makes clear that it is based and conditioned upon the Tunnel Agreement:

> WHEREAS, the Second Agreement remains in effect and the parties wish to supplement it pursuant to Paragraph I.G. of that Agreement by entering into this Third Agreement addressing the operation, replacement, and decommissioning of the existing Dual Pipelines at the Straits, *conditioned upon and in conjunction with*, an Agreement between Enbridge and the Mackinac Straits Corridor Authority ("Authority") to design, construct, operate, and maintain a utility tunnel at the Straits to accommodate a replacement for the Dual Pipelines and other utilities *("Tunnel Agreement");*

> WHEREAS, on December 19, 2018, Enbridge and the Authority entered into the Tunnel Agreement. [Third Agreement, p. 1 (Emphasis added)]

Article 3 of the Third Agreement itself makes clear that the Third Agreement and Tunnel Agreement are mutually dependent and inseparable:

> Article 3 Relationship to Tunnel Agreement
>
> 3.1 Agreements Mutually Dependent - This *Third Agreement is premised upon the existence, continued effectiveness of,* and Enbridge's compliance with *the Tunnel Agreement,* under which Enbridge is required to design, construct, and operate and maintain the Tunnel to accommodate the Straits Line 5 Replacement Segment that will replace the Dual Pipelines. [Third Agreement, article 3.1 (emphasis added).]

Thus, because the Tunnel Agreement is invalid and not effective, the Third Agreement, by its terms, is also necessarily invalid and ineffective in its entirety.

B. The Snyder administration could not, as a matter of law, validly bargain away the State's perpetual sovereign duty to protect the public trust. Its assertion in the Third Agreement that authorizing continued operation of the Dual Pipelines is in accordance with and in furtherance of the protection of the public trust cannot and does not bind its successors.

As noted above, the principal focus of the Third Agreement is the Snyder administration's agreement that subject to certain conditions, Enbridge may continue to operate the Dual Pipelines pending completion of the proposed tunnel and activation of a Line 5 replacement segment.

Article 4 of the Third Agreement provides in part:

> Article 4 Continued Operation of Dual Pipelines Pending Completion of Tunnel and Activation of Line 5 Replacement Segment

4.1 The State agrees that Enbridge may continue to operate the Dual Pipelines, which allow for the functional use of the current Line 5 in Michigan, until the Tunnel is completed, and the Straits Line 5 Replacement segment is placed in service within the Tunnel, subject to Enbridge's continued compliance with all of the following:

(a) The Second Agreement;
(b) The Tunnel Agreement;
(c) This Third Agreement;
(d) The 1953 Easement; and
(e) All other applicable laws, including those listed in Section V of the Second Agreement.

4.2 Provided that Enbridge complies with Section 4.1 above, the State agrees that:

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(d) In entering into this Third Agreement, and thereby authorizing the Dual Pipelines to continue to operate until such time that the Straits Line 5 Replacement Segment is placed into service within the Tunnel, the State has acted in accordance with and in furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan.

This self-serving declaration by the Snyder administration is a legal nullity that cannot restrict the State of Michigan's reserved authority and continuing duty to protect the public trust. As the Michigan Supreme Court held in *Glass v Goeckel,* 473 Mich 667, 678-679 (2005):

> [U]nder longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public. The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. (Citations and footnote omitted.)

These public rights are protected by a "*high, solemn* and *perpetual* trust which it is the duty of the State to forever maintain." *Collins v Gerhardt*, 237 Mich 38, 49 (1926). The State of Michigan did not and could not surrender its trust authority –

or the affirmative responsibilities that underpin it – when the Snyder administration signed the Third Agreement. "The state, as sovereign, cannot relinquish [its] duty to preserve public rights in the Great Lakes and their natural resources." *Glass*, 473 Mich at 679.

The agreement of the Snyder administration with itself that it was acting in accordance with the public trust in allowing the Straits pipelines to remain in operation in no way precludes the State, through its present officials, from making a contrary determination. Under the "reserved powers" doctrine, it has long been "held that certain substantive powers of sovereignty c[an] not be contracted away." *United States v Winstar Corp,* 518 US 839, 874 (1996) (*citing, inter alia, Stone v Mississippi,* 101 US 814 (1880) (state may not contract away its police power); *W River Bridge Co v Dix,* 47 US 507 (1848) (state may not contract away its power of eminent domain)). In *Aguirre v* State, 315 Mich App 706 (2016), for example, the Michigan Court of Appeals held that "Governor Granholm was without authority to contractually surrender or impede a future governor's constitutional authority to reorganize the Department [of Corrections] by guaranteeing [parole board] members a set term of appointment in contravention of a future governor's reorganization power." *Id.* at 722. It further held that "a party conducting business with the state is charged with understanding the extent of any limitations on the [contracting] official's authority to bind the state. See *Roxborough v Michigan Unemployment Compensation Com.*, 309 Mich 505, 511; 15 N.W. 2d 724 (1944)." *Id.* at 720-721.

The State's public trust authority is likewise a sovereign power that cannot be contracted away. As discussed above, the State remains under a "perpetual" duty, *Collins*, 237 Mich at 49, to safeguard that trust. The State cannot, as a matter of law, surrender that duty through a contract with Enbridge. To the extent the Third Agreement purports to bind present State officials in this regard, it is entirely lacking in force, and Enbridge may not ground any reliance interest in it. See *Aguirre*, 315 Mich App at 720-721.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, the hastily enacted Act 359 violates the Michigan Constitution and the actions premised upon it are invalid. Plaintiffs' complaint thus fails to state a claim upon which relief can be granted.

Accordingly, State Defendants request that this Court:

A. Grant summary disposition in their favor pursuant to MCR 2.116 (C)(8);

B. Enter a declaratory judgment that:

(1) Act 359 violates the Title-Object Clause, article 4, § 24, of Michigan's Constitution and is, in its entirety, unconstitutional;

(2) Act 359 is void from its inception on December 12, 2018;

(3) All actions taken by the Michigan Department of Natural Resources and the Mackinac Straits Corridor Authority based upon Act 359, including the MDNR Easement, the Tunnel Agreement, and the Assignment of MDNR Easement Rights are void and without legal effect; and

(4) The Third Agreement (a) is void, by its terms because the Tunnel Agreement is void; and (b) is also without binding legal effect to the extent that it purports, on behalf of the State, to determine that Enbridge's continued operation of its existing pipelines in the Straits is "in accordance with and furtherance of the public's interest in the protection of waters, waterways, or bottomlands held in public trust by the State of Michigan."

C. Grant State Defendants such other relief as this Court finds appropriate and just.

Respectfully submitted,

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Dated: June 27, 2019

LF: Enbridge Energy v SOM, et al./#2019-0254082-A-L/Brief in Support of Motion for SD 2019-6-27

Exhibit 1

STATE OF MICHIGAN

COURT OF APPEALS

KEEP MICHIGAN WOLVES PROTECTED,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, DEPARTMENT OF NATURAL RESOURCES, and NATURAL RESOURCES COMMISSION,

Defendants-Appellees.

UNPUBLISHED
November 22, 2016

No. 328604
Court of Claims
LC No. 15-000087-MZ

Before: OWENS, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

This appeal arises from constitutional and statutory challenges to 2014 PA 281 (hereinafter PA 281), which amended various sections of the Natural Resources Environmental Protection Act (NREPA), MCL 324.101 *et seq*. Plaintiff, Keep Michigan Wolves Protected (KMWP), appeals as of right the opinion and order of the Court of Claims concluding that PA 281 does not violate Michigan's Constitution or statutes, and granting summary disposition in favor of defendants, the State of Michigan, the Department of Natural Resources, and the Natural Resources Commission, pursuant to MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). For the reasons set forth below, we conclude that PA 281 violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 2 § 24.

I. FACTS

The United States Congress enacted the Endangered Species Act of 1973, 16 USC 1531-1544, in part to authorize the determination and listing of species as endangered; the wolf was listed as an endangered species in 1978. 43 Fed Reg 9607 (March 9, 1978). On December 28, 2011, the United States Fish and Wildlife Service renamed what was previously listed as the Minnesota population of the gray wolf as the Western Great Lakes Distinct Population Segment, expanding the population to include, in relevant part, all of Michigan. The federal government removed gray wolves from the federal endangered species list for the newly organized area, returning wolf management to Michigan. 76 Fed Reg 81666 (December 28, 2011).

On December 28, 2012, the Governor signed into law 2012 PA 520 (hereinafter PA 520). PA 520 amended the NREPA in part by adding the wolf to the definition of "game," MCL 324.40103(1)(jj), and proclaiming the necessity of sound management of the wolf population, including the use of hunting as a tool to minimize negative encounters between wolves and humans, livestock, and pets, MCL 324.40110b(1). To effectuate the required sound management, PA 520 authorized the establishment of a wolf hunting season, MCL 324.40110b(2), and a wolf management advisory council, MCL 324.43540e.

In response, plaintiff initiated a statewide referendum petition drive to reject PA 520 by statewide vote at the November 4, 2014 general election.[1] Plaintiff collected the requisite signatures on referendum petition sheets and submitted them to the Board of State Canvassers for certification of the signatures in March 2013. On May 22, 2013, the Board of State Canvassers certified the signatures and ordered the question of whether to reject PA 520 onto the November 4, 2014 general election ballot. As a result of these measures, PA 520 was rendered ineffective unless approved by a majority of the voters in the November general election.[2] Const 1963, art 2, § 9 ("No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election"); MCL 168.477(2).

On May 8, 2013, while the Board of State Canvassers was engaged in certifying the signatures on the referendum petition challenging PA 520, Michigan's Governor signed into law 2013 PA 21 (hereinafter PA 21) and 2013 PA 22 (hereinafter PA 22). PA 21 reenacted and published MCL 324.40103 as amended by PA 520, i.e., the list of game species with "wolf" added, MCL 324.40103(1)(kk), and granted the Natural Resources Commission (NRC) concurrent authority with the Legislature to designate a species as game and to establish the first open season for that animal, MCL 324.40110(1). The act required the NRC to follow principles of sound scientific management in the exercise of its authorized regulation of the taking of fish in the State. MCL 324.48703a. PA 21 also provided, subject to certain conditions, that qualified

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[1] Pursuant to Const 1963, art 2, § 9,

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for the initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

[2] At the general election, the voters rejected PA 520 by way of Proposal 14-1.

members of the military could obtain game and fish licenses free of charge. MCL 324.43536a(1). The Legislature later amended this section to specify that the free-license offer applied to members of the military stationed outside of Michigan. MCL 324.43536a(1) as amended by 2013 PA 108 (hereinafter PA 108). PA 22 also amended NREPA, declaring that citizens of Michigan have a right to hunt, fish, and take game subject to regulations and laws. MCL 324.40113a(3).

In response, plaintiff initiated a referendum petition drive to reject PA 21.[3] Plaintiff submitted the referendum petition to the Board of State Canvassers for certification of its signatures in March 2014. The Board certified the signatures on May 6, 2014, and ordered the question of whether to reject PA 21 onto the November 4, 2014 general election ballot. Consequently, operation of PA 21 was rendered ineffective unless approved by a majority of the voters in the November general election.[4] Const 1963, art 2, § 9; MCL 168.477(2).

In December 2013, before plaintiff submitted the referendum petition for PA 21 to the Board of State Canvassers, ballot question committee Citizens for Professional Wildlife Management (CPWM) circulated a petition to initiate the Scientific Fish and Wildlife Management Act, which would become PA 281, the law at the center of this appeal. The initiative petition reenacted portions of PA 520, which was scheduled for a referendum vote, and PA 21, for which a referendum petition was circulating. Specifically, the initiative reenacted those portions of PA 520 and PA 21, as amended by PA 108, that, among other things, listed wolf as a game species, gave the NRC joint authority with the Legislature to name new game species and authorize the first open season for new game animals, and offered free game and fish licenses to qualified members of the military. In addition, the initiative appropriated $1 million to manage invasive species, prominently mentioning Asian carp as included in the category of invasive species. Further, Enacting § 1 indicated that, if voters rejected by referenda vote any portions of PA 520 or PA 21[5] not amended by PA 281, the voter-rejected portions "shall be deemed to be reenacted pursuant to this act." In other words, even if voters rejected PA 520 and PA 21 at the general election, those portions of the rejected laws that were incorporated into PA 281 would nevertheless survive.

On May 27, 2014, after certification of the referendum petition challenging PA 21, CPWM submitted the initiative petition signatures to the Board of State Canvassers. The Board certified the signatures and forwarded the initiated law to the Legislature to enact or reject the law as written within the next 40 session days. Const 1963, art 2, § 9. Michigan's Senate adopted the initiated law on August 13, 2014 and the House of Representatives adopted the initiated law on August 27, 2014. The law was designated as PA 281 on September 9, 2014. Because of the $1 million appropriation in PA 281, the new law could not be the subject of a referendum. Const 1963, art 2, § 9 (excluding from the power of referenda "appropriations for state institutions or to meet deficiencies in state funds").

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[3] Referenda petitions were not launched to challenge PA 22 or PA 108.

[4] At the general election, the voters rejected PA 21 by way of Proposal 14-2.

[5] The petition also included PA 22 and PA 108, which have not been challenged.

At the November 4, 2014 general election, a majority of voters rejected both PA 520 and PA 21.

PA 281, which reenacted portions of voter-rejected PA 520 and PA 21, including the addition of wolf to the list of game species, took effect on March 31, 2015.[6]

The following month, plaintiff filed the underlying complaint challenging the constitutionality of PA 281. Plaintiff alleged improprieties in the collection of signatures for the initiative law. Specifically, plaintiff claimed that petition circulators "routinely told electors targeted for signature that [PA 281], if adopted, would provide for free hunting licenses for veterans or prevent invasive species in Michigan's lakes, without mentioning that [PA 281] would permit the hunting of wolves, transfer traditional legislative powers to the Natural Resources Commission, or overturn two pending referenda votes in November 2014." Plaintiff further alleged that, because the title of the initiative law did not inform the public or the Legislature of these effects of the proposed law, PA 281 violates the Title-Object Clause of Michigan's Constitution, Const 1963, art 4, § 24. Plaintiff also alleged that the act violates article 4, § 25 of Michigan's Constitution because, although the petition represented to voters that additions were highlighted, the petition neither highlighted "wolf" to signal it as an addition to the game species list, nor republished in full PA 520 and PA 21. Defendants responded by filing a motion for summary disposition under MCR 2.116(C)(8), to which plaintiff responded by requesting summary disposition in its favor under MCR 2.116(I)(2) (opposing party entitled to judgment).

The Court of Claims granted defendants' summary disposition motion. The court found that the general purpose of PA 281 is to "manage fish, wildlife, and their habitats" and that all of the law's provisions relate to this purpose, and concluded that the law did not violate the single-object requirement of the Title-Object Clause. The court further concluded that the absence of any reference in the title to putting "wolf" back on the list of game species did not violate the Title-Object Clause because putting wolf on the game list by reenacting all or portions of PA 520 and PA 21 was "germane, auxiliary, or incidental" to managing wildlife. For the same reason, the court concluded that the act was not rendered constitutionally defective by the failure to mention the decision-making role of the NCR in the management of fish, wildlife, and their habitats. The court noted that Enacting § 1 properly indicated the public acts that PA 281 was

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[6] Meanwhile, the United States Humane Society and others sued the United States Department of the Interior, challenging the National Fish and Wildlife Services delisting of grey wolves in the Great Lakes region, including Michigan, from the endangered species list. The rule was ultimately vacated and Great Lakes wolves were ordered back on the endangered species list. *Humane Society of the United States v Jewell*, 76 F Supp 3d 69 (D DC, 2014). As a result, the National Fish and Wildlife Service issued a final rule on February 20, 2015, reinstating wolves as an endangered species in the western Great Lakes, including Michigan. Even though the *Jewell* decision currently prevents wolves from being hunted in Michigan, a genuine case and controversy exists nevertheless because PA 281 still identifies wolves as game species and the *Jewell* decision could be overturned on appeal, by Congress, or regulatory action.

reenacting, and that the constitution does not require the title to specifically mention how PA 281 affects the outcome of "prior referenda votes."[7] Rejecting plaintiff's argument that PA 281 was constitutionally invalid and violated MCL 168.482(3) because the initiative petition did not highlight "wolf" to indicate that it was new text in the list of game animals, the court reasoned that plaintiff failed to cite any authority that the sections cited mandated such identification of new text. Also rejecting plaintiff's argument that the act violated Const 1963, art 4, § 25 because it failed to republish the full text of the public acts that it purported to reenact, the court pointed out that § 25 does not require republication of the full, original text of an amended section, but only the text as amended.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review de novo the grant or denial of a motion for summary disposition to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and "may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 119 (quotation marks and citations omitted). We also review de novo whether a statute violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24. *Boulton v Fenton Twp,* 272 Mich App 456, 464; 726 NW2d 733 (2006). A statute that is challenged as violative of the Title-Object Clause is construed with all possible presumptions in favor of constitutionality. *Pohutski v Allen Park*, 465 Mich 675, 690; 641 NW2d 219 (2002). " 'A statute is presumed to be constitutional and it will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt.' " *Hildebrand v Revco Discount Drug Ctrs*, 137 Mich App 1, 6; 357 NW2d 778 (1984), quoting *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 342; 22 NW2d 433 (1946).

B. TITLE-OBJECT VIOLATION

The Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24, provides in relevant part:

> No law shall embrace more than one object, which shall be expressed in its title.

This constitutional provision requires that (1) a law must not embrace more than one object, and (2) the object of the law must be expressed in its title." *Pohutski*, 465 Mich at 691. The purpose of the provision is to ensure that legislators and the public receive proper notice of

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[7] Although the referenda votes on PA 520 and PA 21 took place in November 2014, prior to the March 2015 effective date of PA 281, the votes took place after circulation of the initiative petition and adoption of the initiated law by the Legislature. The stated intent of the initiative petition's Enacting § 1 was to neutralize in advance any rejection by the voters of PA 520 and PA 21 by reenacting all or portions of those laws in PA 281.

legislative content and to prevent deceit and subterfuge. *Id.* The Title-Object Clause lends itself to three types of challenges: "(1) a multiple-object challenge, (2) a title-body challenge, and (3) a change of purpose challenge." *HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 556; 595 NW2d 176 (1999). The instant plaintiff raises multiple-object and title-body challenges.

The object of a law is its general purpose or aim. *Pohutski*, 465 Mich at 691. A multiple-object challenge asserts that the body of the subject legislation embraces more than one object. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 439; 878 NW2d 891 (2015) (quotation marks and citation omitted). The "one object" provision must be construed reasonably, not in so narrow or technical a manner that the legislative intent is frustrated." *Pohutski*, 465 Mich at 691. An act "may authorize the doing of all things which are in furtherance of the general purpose of the Act without violating the 'one object' limitation of [the Title-Object Clause]." *Id.* (quotation marks and citation omitted). Thus, legislation is not invalid simply because it contains more than one means of attaining its primary object. See *Id.* "However, if the act contains "subjects diverse in their nature, and having no necessary connection,' " it violates the Title Object Clause." *Id.*, quoting *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 499; 378 NW2d 402 (1985).

To determine the object of the law, we examine the law's body and title. *HJ Tucker*, 234 Mich App at 557. The title of PA 281 states:

> An initiation of legislation to enact the Scientific Fish and Wildlife Conservation Act. This initiated law would ensure that decisions affecting the taking of fish and wildlife are made using principles of sound scientific fish and wildlife management, to provide for free hunting, fishing and trapping licenses for active members of the military, and to provide appropriations for fisheries management activities necessary for rapid response, prevention, control and/or elimination of aquatic invasive species, including Asian carp, by amending 1994 PA 451, entitled "Natural resources and environmental protection act," sections 40103, 40110, 40113a, 43536a and 48703a (MCL 324.40103, 324.40110, 324.40113a, 324.43536a and 324.48703a), section 40103 as amended by 2012 PA 520 and 2013 PA 21, section 40110 as added by 1995 PA 57 and amended by 2013 PA 21, section 40113a as amended by 1997 PA 19, 2013 PA 21 and 2013 PA 22, section 43536a as amended by 2004 PA 545, 2013 PA 21 and 2013 PA 108, and section 48703a as added by 2013 PA 21.

Three of the five provisions amended by the Act reiterate that the management of fish and wildlife and their habitats will be conducted according to sound scientific principles, with two suggesting various means to achieve that end. MCL 324.40110(1) twice indicates that the NRC has a duty to render decisions that are based on "principles of sound scientific wildlife management." MCL 324.40113a(1)(b) stresses that "conservation of fish and wildlife populations of the state depended upon the wise use and sound scientific management of the state's natural resources." MCL 324.40113a(2) and MCL 324.48703a(2) state that, when exercising its exclusive authority to regulate the taking of game and of fish respectively, the NRC "may take testimony from department personnel, independent experts, and others, and

review scientific literature and data, among other sources, in support of its duty to use principles of sound scientific management."

From our examination of the title and the body of PA 281, we conclude that the act's general purpose, or object, is to ensure that decisions affecting the management of fish, wildlife, and their habitats are to be governed by sound scientific principles. This purpose is clearly reflected in the law's title and body, and it also comports with defendants' position at oral argument that the purpose of PA 281 is to remove politics and other non-scientific considerations from the management of fish, wildlife, and their habitats, and to place management of these natural resources on a scientific footing. That the title and body also mention providing free licenses to active members of the military and an appropriation for management activities related to invasive species does not violate the single-object requirement of the Title-Object Clause as long as these provisions further the act's general purpose. *Pohutski*, 465 Mich at 691.

Plaintiff contends, however, that the provisions allowing for free hunting, trapping, and fishing licenses to qualified active members of the military, MCL 324.43536a, and appropriating $1 million to address the threat of invasive fish species, MCL 324.4873a(2)(d), violate the single-object requirement because they have no necessary connection to each other or to the act's general purpose. See *Livonia*, 423 Mich at 499. With respect to the latter provision, to the extent that invasive fish species threaten the habitat of native fish species, an appropriation of funds to "implement management practices" necessary to respond to the threat of invasive specifies arguably is at least germane to the scientific management of fish, wildlife, and their habitat. See *Pohutski*, 465 Mich at 691. Considering that an act may authorize all things in furtherance of its general purpose without violating the single-object requirement, and given the presumption of the act's constitutionality, *id.*, we conclude that the provision appropriating $1 million to respond to the threat of invasive fish species does not introduce a second object. Thus, the appropriation provision does not violate the Title-Object Clause.

We agree with plaintiff, however, that the act's amendment to MCL 324.43536a, which provides free hunting, trapping, and fishing licenses to qualified active members of the military, has no necessary connection to the scientific management of fish, wildlife, and their habitats. Defendants argue that the section is germane to the object of PA 281 because it dictates "who can do the actual taking (licensing)." We disagree. The Act's amendment of MCL 324.43536a does not establish criteria for obtaining or losing a license. Rather, it amends slightly a provision from PA 21, as amended by PA 108, that eliminated the $1 license fee previously paid by qualified active members of the military stationed outside of Michigan. See MCL 324.43536a(1), as amended by 2003 PA 4 and 2004 PA 545 (identifying the fee for licenses as $1). Defendant fails to explain how a $1 reduction in fees for game and fish licenses for active-duty members of the military, who maintain Michigan residency for purposes of obtaining a driver's license or voter registration but may be stationed outside of Michigan, furthers the Act's purpose of providing for the scientific management of fish, wildlife, and their habitats. Thus, we agree with plaintiff that the provision of free licenses to active members of the military is not germane to the scientific management of fish, wildlife, and their habitats, nor does it directly

relate to, carry out, or implement this principal object of PA 281.[8] *Gillette*, 312 Mich App at 440. Consequently, we conclude that the inclusion of this provision in PA 281 violates the single-object rule of the Title-Object Clause.

Enacting § 2 of PA 281 indicates that if any part of the act is found unconstitutional, that part may be severed from the remaining portions of the act and the act implemented to the maximum extent possible. Severability is possible in the context of a single-object violation, as we discussed in *Seals v Henry Ford Hosp*, 123 Mich App 329; 333 NW2d 272 (1983). At issue in *Seals* was whether the 1976 Elliot-Larson Civil Rights Act (ELCRA) required invalidation after the Legislature adopted two provisions related to polygraphs in separate amendments to the ELCRA in 1978 and 1979. The trial court held that the amendments were not germane to the ELCRA, and thus, their inclusion violated the single-object requirement in the Title-Object Clause. Relying on a prior observation by our Supreme Court that severability was not available where a law violated the constitution's single-object requirement, the trial court declined to sever the offending provisions and ruled that the ELCRA was unconstitutional. *Seals*, 123 Mich App at 332-333; see *In re Advisory Opinion (Being 1975 PA 227)* [*PA 227 I*], 396 Mich 123, 130-132; 240 NW2d 193 (1975), supplemented sub nom *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465; 242 NW2d 3 (1976) (indicating that severability was not an option to remedy a law with multiple objects because it could not be determined which object was intended by the Legislature).

Adopting the reasoning the Supreme Court employed in *PA 227 I*, but not its dicta, we held in *Seals* that the test for severability is "whether it can be presumed that the Legislature 'would have passed the one [provision] without the other.' " *Seals*, 123 Mich App at 335, quoting *People v McMurchy*, 249 Mich 147, 159; 228 NW 723 (1930), quoting 1 Cooley on Constitutional Limitations (8th ed), pp 362-363. That the Legislature had passed the ELCRA prior to amending it by adding the polygraph provisions clearly supported the presumption that the polygraph provisions were unrelated to the Legislature's intent to pass the ELCRA. Accordingly, we determined the polygraph provisions to be severable from the ELCRA. *Seals*, 123 Mich App at 335-336.

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[8] In contrast to the principal object of PA 281, which requires the implementation of sound scientific principles when making decisions affecting the taking of fish and wildlife, PA 520 and PA 21 each had a much broader purpose of amending 1994 PA 451, and thus, the umbrella of potentially germane issues was much wider.

In the instant case, we are not dealing with passage of a law with a single-object, to which the Legislature later added amendments that resulted in a law with multiple-objects. PA 281 is more like the multiple-object law our Supreme Court analyzed in *PA 227 I*,[9] than the ELCRA we analyzed in *Seals*. Thus, following our reasoning in *Seals* requires us to conclude that we cannot presume that the Legislature would have passed PA 281 without the provision allowing free hunting, trapping, and fishing licenses for active members of the military.

As our Supreme Court noted in *PA 227 I*, "[a] prohibition against the passage of an act relating to different objects expressed in the title makes the whole act void" because " '[i]t is impossible to tell which object was intended by the legislature, and in such case both fall under the same condemnation.' " *PA 227 I*, 396 Mich at 130-31, quoting *Skinner v Wilhelm*, 63 Mich 568; 3 NW 311 (1886). In the case of PA 281, it is impossible to tell what weight the provision of free game and fish licenses to qualified active members of the military exerted in the Legislature's passage of PA 281. In other words, we cannot presume that the Legislature would have passed PA 281 without the provision offering free game and fishing licenses to qualified active members of the military. *Seals*, 123 Mich App at 335. The draw of a provision providing free fish and game licenses to some of our State's active members of the military requires no explanation. Whereas the appeal of ensuring that sound scientific principles govern the management and taking of fish and wildlife, and providing funds to respond to the threat of invasive fish species doubtless would find a measure of support, the broad appeal of a provision conveying a benefit to active members of the military cannot be doubted.

The basis of PA 281 was a reenactment of portions of PA 520 and PA 21, suspended laws which, by the time the Legislature received the initiative petition, were scheduled for referenda votes at the impending general election. Certainly, a Legislature may reenact a law while a referendum process regarding the law is pending. *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 86; 610 NW2d 597 (2000). However, given the potential for voter rejection of the laws underlying PA 281, and of voter discontent with a decision to enact a third law reenacting provisions of these suspended laws, we cannot presume that the Legislature would have passed PA 281 without the added enticement of conferring a benefit to some of the State's active-duty military personnel.[10]

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[9] At issue in *PA 227 I* was whether a law for the purpose of regulating political activity that also "required designated individuals to file financial disclosures for themselves and members of their immediate families" and "the registration and reporting of lobbying activities" violated the single-object requirement of the Title-Object Clause. *PA 227 I*, 396 Mich at 127.

[10] In *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 101; 610 NW2d 597 (2000), we agreed with the following observation from *McBride v Kerby*, 32 Ariz 515, 530; 260 P 435 (1927), overruled on other grounds by *Adams v Bolin*, 74 Ariz 269; 247 P2d 617 (1952).]

> Legislators as a rule are anxious to obey what they honestly believe to be the real wishes of their constituents, and we think it very unlikely that a Legislature which had been told twice by its constituents they did not desire a certain law would

Moreover, we cannot presume that the initiative petition would have garnered the signatures necessary for it to be presented to the Legislature for consideration without this provision.[11] In short, because we cannot presume that the Legislature would have passed the initiated law without the provision allowing free game and fish licenses to qualified active members of the military, we conclude that this provision cannot be severed from PA 281, and, consequently, that PA 281 is unconstitutional.

C. ARTICLE 4, § 25 VIOLATION

Given our disposition of the Title-Object issue, our discussion of plaintiff's remaining claims will be brief. Plaintiff contends that PA 281 violates Const 1963, art 4, § 25, and MCL 168.482(3) because the act and petition were deceptive and confusing. Specifically, plaintiff claims that article 4, § 25 was violated because the petition failed to properly identify the changes it made to NREPA, and to republish in their entirety the prior acts that PA 281 reenacted.[12] We disagree.

Plaintiff's complaint centers on PA's amendment of MCL 324.40103(1), which lists the animals designated as game. Plaintiff contends that because PA 520 and PA 21 listed the animals in a different order, and because the petition purportedly reenacted both public acts, the petition also should have republished both acts, not just the list as it appeared in PA 21. Failure to do this made it unclear which portions of the prior acts PA 281 was reenacting, and hid the fact that PA 281 added "wolf" to the list of game species. We find this argument to be without merit.

Const 1963, art 4, § 25 provides:

> dare to again pass it, especially when they knew that each passage could and would be suspended by another referendum.

In the instant case, although the Legislature did not know that voters would reject 2012 PA 520 and 2013 PA 21, two laws upon which 2014 PA 281 was based, when it adopted the initiated legislation, it did know that wolf hunts had the potential to become a "legislative football," with people repealing act after act that authorized wolf hunting. See *Reynolds*, 240 Mich App at 110, quoting *McBride*, 32 Ariz at 530. Even though the addition of an appropriations provision to 2014 PA 281 rendered it referendum-proof, Const 1963, art 2, § 9, we cannot presume that the Legislature would have adopted the act without the inclusion of a benefit to veterans to explain its taking a potentially unpopular position on wolf hunting.

[11] To invoke the initiative requires petitions signed by at least eight percent of the "the total vote case for all candidates for governor at the last preceding general election at which a governor was elected." Const 1963, art 2, § 9.

[12] We consider abandoned plaintiff's argument that the act violates MCL 168.482(3) because plaintiff only supports this assertion by claiming that the violation occurs for the same reason the act violates article 4, § 25. A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for the claim. *Petersen Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

> No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

Michigan's Supreme Court has explained that the constitutional provision "is worded to prevent the revising, altering or amending of an act by merely referring to the title of the act and printing the amendatory language then under consideration." *In re Requests of Governor & Senate on Constitutionality of Act No. 294 of Public Acts of 1972*, 389 Mich 441, 470; 208 NW2d 469 (1973). The purpose of the requirement is to ensure that the people and the Legislature were not deceived or misled as to the effect of the law. *Mok v Detroit Bldg and Savings Ass'n No 4*, 30 Mich 511, 516 (1875).

In this case, the initiative petition stated that PA 281 accomplished its objectives by amending certain sections of the NREPA, including § 40103, as amended by PA 520 and PA 21. Section 40103, as amended by PA 520 and PA 21, which, because of these amendments, included "wolf" on the game list, was reenacted in Enacting § 1, and republished in its entirety on the back of the petition, with the amendments made by PA 281 printed in bold typeface. This same procedure was followed for the other four sections of the NREPA amended by PA 281. PA 281 did not purport to amend any laws outside its four corners, and it made its amendatory effects clear by reenacting and republishing in their entirety the sections of the NREPA being amended. Thus, the petition complied with the reenactment and republication requirement of Const 1963, art 4, § 25.

Next, plaintiff contends that, although no constitutional provision requires amended language to be printed in bold typeface or otherwise indicated, the drafters of the initiative petition assumed this requirement by stating on the petition in capital letters that language added to the NREPA was shown in capital letters, while deleted language was struck out with a line. Thus, according to plaintiff, those portions of PA 281 derived from PA 520 and PA 21 should have appeared in capital letters because PA 520 and PA 21 were ineffective, pending the result of the referenda votes. We note, however, that the Board of State Canvassers did not certify the referendum petition for PA 21 until after the proponent of the initiative petition submitted its signatures to the Board for certification. Consequently, PA 21 was effective while the initiative petition was circulating. Thus, the initiative's proponents did not violate their assertion that changes to the NREPA would be highlighted.

C. CONCLUSION

Plaintiff's description regarding how PA 281 came into being conjures up images of a Trojan Horse, within which the ability to hunt wolves was cleverly hidden. Plaintiff claims that the initiating petition was strategically drafted in such a way as to appeal to potential signers by touting that it would ensure that only sound scientific principles would govern the taking of fish and game, rather than allowing the selection of game to become the subject of legislative footballs, that it would support our active-military members by letting them hunt and fish for free, and that it would provide money to combat the spread of Asian carp—all of which have excellent "curb appeal"—while surreptitiously slipping inside the body of the act a reenacting provision to ensure that regardless of the referenda votes on PA 520 and PA 21, wolves would be on the game species list, as would associated wolf hunting provisions, and that the appropriations

provisions made the whole package referenda-proof. However accurate the plaintiff may be in its assessment of why PA 281 came into being, our analysis is not about policy. Rather, our decision must be based on an analysis of the dictates of Michigan's constitution. See *PA 227 I*, 396 Mich at 133. Because PA 281, as drafted, violates the Title-Object Clause of the Michigan Constitution, the act is constitutionally infirm. Consequently, we reverse the order granting summary judgment for defendants and remand the matter for entry of an order granting summary judgment for plaintiff, in accord with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering