

STATE OF MICHIGAN

DANA NESSEL, ATTORNEY GENERAL

CONSTITUTIONAL LAW:                      Constitutionality of 2018 PA 359.

CONST 1963, ART 4, § 24:

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.

Opinion No. 7309

March 28, 2019

The Honorable Gretchen Whitmer  
Governor  
The Capitol  
Lansing, MI 48909

You have asked several questions regarding the constitutionality of 2018 PA 359 (Act 359), which amended the Mackinac Bridge Authority Law, 1952 PA 214, MCL 254.311 *et seq.*<sup>1</sup> Principally, the amendments authorized the Mackinac Bridge

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<sup>1</sup> This office received comments regarding your request from Andrene Dabaghi and Margrethe Kearney, on behalf of the Environmental Law & Policy Center; Andy Buchsbaum, Benjamin Muth, Oday Salim, Mike Shriberg, Beth Wallace, and Bruce Wallace, on behalf of the National Wildlife Federation; Gary Gordon, on behalf of the Michigan Chamber of Commerce; Scott W. Howard, Ross A. Hammersley, William C. Rastetter, and Rebecca L. Millican, on behalf of the Straits of Mackinac Alliance, the Grand Traverse Band of Ottawa and Chippewa Indians, and the City of Mackinac

Authority (Bridge Authority) to acquire a “utility tunnel”<sup>2</sup> connecting the Upper and Lower Peninsulas of Michigan, created the Mackinac Straits Corridor Authority (Corridor Authority), and authorized the Bridge Authority or the Corridor Authority to operate a utility tunnel. 2018 PA 359.

### **History of 2018 PA 359**

Act 359 was introduced as Senate Bill 1197 on November 8, 2018.<sup>3</sup> As introduced, the Act amended 1952 PA 214 to allow the Bridge Authority to acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel; to purchase or otherwise acquire at a fair and reasonable price property and property rights in connection with the construction of the tunnel; to enter on any land, water, or premises to make a survey, sounding, or examination in connection with the tunnel; to perform any acts necessary to secure consent from any state entity necessary for the construction and operation of the tunnel; to specify that the Authority’s purposes were a public purpose and its performance was an essential government function; to specify that all property owned by the Authority related to

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Island; James Olson and Elizabeth Kirkwood, on behalf of For Love of Water; and law student Blaise Ryan.

<sup>2</sup> Act 359 defines the term “utility tunnel” to mean:

[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, licenses, franchises, easements, and rights-of-way. [2018 PA 359, § 14(e), MCL 254.324(e).]

<sup>3</sup> SB 1197 (as introduced), <http://www.legislature.mi.gov/documents/2017-2018/billintroduced/Senate/pdf/2018-SIB-1197.pdf> (last accessed March 28, 2019).

the tunnel would be exempt from all taxes levied by the State and all of its political subdivisions; and to define the term utility tunnel.<sup>4</sup> The bill accomplished these changes by amending the title to Public Act 214 and adding a new § 14.<sup>5</sup>

Senate Bill 1197 was referred to committee and was reported out as Substitute S-1 on November 29, 2018.<sup>6</sup> 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.<sup>7</sup> Substitute S-1 was referred to committee on December 5, 2018 and was reported out as Substitute S-2 on the same day.<sup>8</sup>

Substitute S-2 made significant changes in that it authorized the creation of the Corridor Authority, headed by the Corridor Authority Board. Upon appointment of members to the Corridor Authority Board, all duties, responsibilities, authorities, and powers of the Bridge Authority related to a “utility tunnel” would transfer to the Corridor Authority Board. Substitute S-2 required

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<sup>4</sup> SFA Analysis, SB 1197, November 27, 2018, <http://www.legislature.mi.gov/documents/2017-2018/billanalysis/Senate/pdf/2017-SFA-1197-G.pdf> (last accessed March 28, 2019).

<sup>5</sup> SB 1197 (as introduced), <http://www.legislature.mi.gov/documents/2017-2018/billintroduced/Senate/pdf/2018-SIB-1197.pdf> (last accessed March 28, 2019).

<sup>6</sup> SB 1197, Substitute S-1, [http://www.legislature.mi.gov/\(S\(444g3owbfsb5t43re4gf1umt\)\)/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-16398.PDF](http://www.legislature.mi.gov/(S(444g3owbfsb5t43re4gf1umt))/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-16398.PDF) (last accessed March 28, 2019).

<sup>7</sup> SFA Analysis, December 3, 2018, <http://www.legislature.mi.gov/documents/2017-2018/billanalysis/Senate/pdf/2017-SFA-1197-F.pdf> (last accessed March 28, 2019).

<sup>8</sup> SB 1197, Substitute S-2, [http://www.legislature.mi.gov/\(S\(444g3owbfsb5t43re4gf1umt\)\)/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-17081.PDF](http://www.legislature.mi.gov/(S(444g3owbfsb5t43re4gf1umt))/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-17081.PDF) (last accessed March 28, 2019).

the Corridor Authority to enter into an agreement or series of agreements for the construction, maintenance, operation, and decommissioning of a utility tunnel if the Corridor Authority made certain findings regarding the proposed agreements. If a proposed tunnel agreement were supplied by the governor to the Corridor Authority before December 21, the Corridor Authority was required to enter into the agreement(s) by December 31, 2018. If the governor did not supply a proposed tunnel agreement by that date, the Corridor Authority would have to act on a proposed agreement within 45 days after one was presented.

Substitute S-2 also created the Straits Protection Fund, which could accept money or assets from any source, and the Corridor Authority Board could use the fund for oversight of the proposed utility tunnel. Substitute S-2 also added a provision to require 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 declined to represent either body in a matter related to the utility tunnel.<sup>9</sup> Substitute S-2 accomplished these changes by amending the title to Public Act 214, amending §§ 1 and 5, and adding new §§ 14, 14a, 14b, 14c, 14d, and 14e.<sup>10</sup>

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<sup>9</sup> House Fiscal Analysis, December 10, 2018, <http://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/htm/2017-HLA-1197-92ECOB0A.htm> (last accessed March 28, 2019).

<sup>10</sup> SB 1197, Substitute S-2, [http://www.legislature.mi.gov/\(S\(444g3owbfsb5t43re4gflumt\)\)/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-17081.PDF](http://www.legislature.mi.gov/(S(444g3owbfsb5t43re4gflumt))/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-17081.PDF) (last accessed March 28, 2019).

The same day it was reported out of committee, Substitute S-2 was approved by the Senate by a vote of 25 to 13, and sent to the House of Representatives.<sup>11</sup>

On December 11, 2018, Senate Bill 1197, as substituted, was reported from committee as House Substitute H-2, but H-2 was not adopted.<sup>12</sup> House Substitute H-1 was then adopted.<sup>13</sup> 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 by a vote of 74 to 34.<sup>14</sup> Senate Bill 1197, as substituted by H-1, was then returned to the Senate the same day and the Senate concurred in Substitute H-1, passed the bill on a 25 to 12 vote, and gave it immediate effect.<sup>15</sup>

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<sup>11</sup> Senate Journal No. 75, pp 1975-1978, [http://www.legislature.mi.gov/\(S\(444g3owbfsb5t43re4gf1umt\)\)/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-05-075.pdf](http://www.legislature.mi.gov/(S(444g3owbfsb5t43re4gf1umt))/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-05-075.pdf) (last accessed March 28, 2019).

<sup>12</sup> House Journal No. 78, pp 2527, 2535, [http://www.legislature.mi.gov/\(S\(444g3owbfsb5t43re4gf1umt\)\)/documents/2017-2018/Journal/House/pdf/2018-HJ-12-11-078.pdf](http://www.legislature.mi.gov/(S(444g3owbfsb5t43re4gf1umt))/documents/2017-2018/Journal/House/pdf/2018-HJ-12-11-078.pdf). (last accessed March 28, 2019). See also House Fiscal Analysis, December 11, 2018, <http://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-1197-0E74E78E.pdf> (last accessed March 28, 2019).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, pp 2536-2537. SB 1197 was also given immediate effect.

<sup>15</sup> Senate Journal No. 77, pp 2118-2119, [http://www.legislature.mi.gov/\(S\(444g3owbfsb5t43re4gf1umt\)\)/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-11-077.pdf](http://www.legislature.mi.gov/(S(444g3owbfsb5t43re4gf1umt))/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-11-077.pdf) (last accessed March 28, 2019).

Senate Bill 1197 was presented to former Governor Rick Snyder on December 11, 2018 and he signed it the same day. It was filed with the Secretary of State on December 12, 2018 and became immediately effective<sup>16</sup> as Public Act 359 of 2018.<sup>17</sup>

In the days that followed, Governor Snyder appointed members to the Corridor Authority Board, who held a public meeting on December 19, 2018, and approved a tunnel agreement.<sup>18</sup>

### Legal principles

When addressing a constitutional challenge to a statute, the 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). Indeed, 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).

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<sup>16</sup> See

[http://www.legislature.mi.gov/\(S\(444g3owbfsb5t43re4gf1umt\)\)/mileg.aspx?page=getObject&objectName=2018-SB-1197](http://www.legislature.mi.gov/(S(444g3owbfsb5t43re4gf1umt))/mileg.aspx?page=getObject&objectName=2018-SB-1197) (last accessed March 28, 2019).

<sup>17</sup> 2018 PA 359, <http://www.legislature.mi.gov/documents/2017-2018/publicact/pdf/2018-PA-0359.pdf>, (last accessed March 28, 2019).

<sup>18</sup> The tunnel agreement between the Mackinac Straits Corridor Authority and Enbridge Energy, as well as other related documents, may be found at <https://mipetroleumpipelines.com/document/mackinac-straits-utility-corridor> (last accessed March 28, 2019).

## **Title-Object Clause**

You ask whether Act 359 violates article 4, § 24 of the Michigan Constitution, often referred to as the Title-Object Clause. Const 1963, art 4, § 24.

### **A. Title-Object Clause Framework**

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.

Not long after its initial adoption, Justice Cooley described the purpose of the Title-Object Clause:

The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which would succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through deleterious management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not

generally aware of their intention and effect. [*People ex rel. Drake v Mahaney*, 13 Mich 481, 494–495 (1865).]<sup>19</sup>

Justice Cooley clarified, however, that the intent of the clause was not to unnecessarily hinder the passage of legislation:

There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it. [*Id.*]

Generally, three types of challenges may be brought under the Title-Object Clause: (1) a title-body challenge, (2) a multiple-object challenge, and (3) a change-of-purpose challenge. *People v Kevorkian*, 447 Mich 436, 453 (1994). Your request raises all three with respect to the enactment of Public Act 359. But because the title-body challenge is dispositive, it is unnecessary to address the multiple-object and change-of-purpose challenges.

### **1. Title-body review**

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

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<sup>19</sup> The Supreme Court has continued to rely on this passage when considering Title-Object Clause challenges. See *People v Kevorkian*, 447 Mich 436, 454–455 (1994).



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 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).

The Michigan Supreme Court applied these principles in holding a statute unconstitutional in *Rohan v Detroit Racing Ass’n*, and that decision is instructive here. 314 Mich 326 (1946). In *Rohan*, the Court addressed a title-body challenge to 1933 PA 199: “The precise question is whether [ ] the provision of section 9 of Act No. 199 authorizing the leasing of State-owned land for ‘the conduct of horse racing,’ embraces an object no[t] express[e]d in the title of the act. In other words, is this leasing provision germane, auxiliary or incidental to the general object of the act as expressed in its title[.]” 314 Mich at 354. The title to Public Act 199 provided:

“An Act to provide, regulate and license the conducting of racing meets in the state of Michigan; to create the office of Michigan racing commissioner, to prescribe his powers and duties and to provide for [ ]his salary and expenses; to legalize and permit auction pools, the pari-mutuel or certificate method of wagering on the result of races at licensed race meetings in the state of Michigan; to appropriate the funds derived therefrom; to render inapplicable all acts or parts of acts in conflict therewith, and to provide penalties for the violation thereof.” [*Rohan*, 314 Mich at 354, quoting 1933 PA 199, title (emphasis added).]

Section 9 of Public Act 199 authorized the state department of agriculture “to lease on behalf of the state, *for the conduct of horseracing* and other lawful purposes, any lands subject to the control of the said department of agriculture, said lease to be subject to the approval of the state administrative board.” 1933 PA 199, § 9 (emphasis added).

After noting these provisions and existing precedents, the Court restated the question as whether “the title of the act g[ave] the legislature and the public, fair notice that the act contain[ed] a provision delegating to the department of agriculture authority to lease State-owned land, such as the Detroit fair grounds, for ‘the conduct of horse racing[.]’” *Id.* at 356. The Court concluded it did not:

We are convinced that the wording of the title of the act does not give notice of, or call attention to, or in any way express or indicate, the object or purpose of delegating authority to the department of agriculture to lease State-owned land for the conduct of horse racing. [*Id.* at 356-357 (citations omitted).]

The Court further stated that the provision in § 9 “authorizing the department of agriculture to lease State-owned land under its control [was] not germane, auxiliary or incidental to the general object and purpose of the act as expressed in its title, which was to regulate horse-racing meets and betting on horse races.” *Id.* at 357 (citations omitted). In other words, the language in the title regarding the provision, regulation, and conduct of horse-racing meets did not adequately reflect the leasing provision in the body of the act. Accordingly, the Court held § 9 of Public Act 199 unconstitutional. *Id.*

Similarly, in *Maki v East Tawas*, the Supreme Court noted that § 24 “was not a hollow formality” and 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. 385 Mich 151, 156–159 (1971) (superseded by subsequent statutory amendment to cure the Title-Object Clause violation). See also *Alan v Wayne County*, 388 Mich 210, 269, 364–381 (1972) (Black J., concurring specially); *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).

Turning to Act 359, an amendatory act, the question is whether the title to 1952 PA 214, as amended by Act 359, adequately expresses the content of the law. See *Knott*, 363 Mich at 495 (“As a general proposition the title of an act must be sufficiently broad so that one reading it may reasonably expect to find in the body of the act provisions of the character that the legislature has seen fit to insert, either in the original enactment or by amendment.”); *Black v Powell*, 248 Mich 150, 151 (1929) (observing that amended sections of the act were within the title as amended). See also Sutherland Statutory Construction, § 22:8, pp 272–273 (“Amendatory provisions that are not germane to the subject expressed in the title of the original act are unconstitutional, unless the title of the original act can be and is amended without violating the rule against dual subject matter.”).

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<sup>[20]</sup>; [20] and making an appropriation. [2018 PA 359, title (Emphasis added; bracketed numbering added.)]

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<sup>20</sup> 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.

The italicized language represents the most relevant amendments to the title. 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.

## **2. 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. Because the analysis of § 14d is ultimately dispositive, it is unnecessary to address in this Opinion the legality of the other sections.

### **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 to the Corridor Authority Board. This transfer comes without fair notice and is a surprise since clause 1 of the amended title "authori[z]es 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 at some point the Corridor Authority may operate a utility tunnel. But, of course, the body of Act 359 reveals 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 automatically transferred from the Bridge

Authority to the Corridor Authority upon the appointment of its Board members. The Bridge Authority retains no duties or oversight of the utility tunnel.

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 such that it need not have been mentioned in the amended title. *Id.*

An amendment or a substitute is germane if it falls within the general purpose of a bill or is an extension of the 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—authorizing the Corridor Authority to almost immediately enter into a specific type of agreement with a private party to

acquire and operate a utility tunnel. 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 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 for the construction of a tunnel if an agreement was presented by a specific date and contained 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).]

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).

Requiring the Corridor Authority to enter into a tunnel agreement, as provided by the Governor and by a certain date, to construct and operate a tunnel so long as it meets statutory criteria is a 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 of a utility tunnel, nor is § 14d(4) 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. PA 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.

It is my opinion, therefore, that subsections 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.

## **B. Severability of unconstitutional provisions**

Having concluded that §§ 14d(1), (4) and (5) of Act 359 violate article 4, § 24, it is necessary to determine whether the offending provisions may be severed, leaving the remainder of Act 359 intact and operative, or whether the invalidation of these sections is fatal to the Act as a whole.

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. The question then is whether the remainder of Act 359 can operate without §§ 14d(1), (4), and (5). Arguably, § 14d(5), concerning legal representation by the

Attorney General, could be severed from the Act, leaving the remainder of the Act operable. The answer is less clear regarding §§ 14d(1) and (4). Severing these provisions would essentially leave the Bridge Authority with the power to acquire a utility tunnel under § 14a, but without any of the parameters imposed under § 14d(4), and leave the Corridor Authority in existence under § 14b, but without any of the powers or duties transferred under § 14d(1). Various other provisions would have to be construed in light of the severing of §§ 14d(1) and (4).

Even if it is technically possible to sever §§ 14d(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 almost immediately enter into a specific type of agreement to acquire and operate a utility tunnel. Without §§ 14d(1) and 14d(4), the remaining provisions of Act 359 could not achieve that objective. 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) cannot be severed from the remainder of Act 359, it must be concluded that the entire Act is unconstitutional.

It is my opinion, therefore, that 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 the Act 359 because doing so would be inconsistent with the intent of the Legislature. Because 2018 PA 359 is unconstitutional under article 4, § 24, it is unnecessary to address your additional questions regarding the validity of the statute.<sup>21</sup>

#### **Effect of unconstitutional statute**

Finally, you ask whether, “[i]f the Corridor Authority was not created in a manner that conforms with the [Constitution], is the Authority, its board, and action by the board void.” As noted above, after Act 359 took effect on December 12, 2018, former Governor Snyder appointed members to the Corridor Authority Board, and the Board met on December 19, 2018, and approved a tunnel agreement.

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<sup>21</sup> With respect to your second question, regarding whether the six-year terms of office provided for members of the Corridor Authority Board violate article 5, § 3 of the Constitution, that question was recently answered in a March 8, 2019 decision by Court of Claims Judge Stephen Borello 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 violated Const 1963, art 5, § 3’s four-year limit of the terms for state board members. Nevertheless, he found the provision to be severable from the balance of Act 359 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).

As discussed above, this Opinion concludes that certain sections of Act 359 violate article 4, § 24 of the Constitution, that the offending sections cannot be severed, and that, as a result, 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 of this opinion 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<sup>22</sup>, the validity of both the legislation and the proposed agreement was subject to intense public and legal scrutiny, foreshadowing likely legal challenges.<sup>23</sup> And on January 1, 2019, your 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. Under these circumstances, any reliance upon assumed validity of the statute was inherently very limited in time and occurred with the understanding that any action 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.

It is my opinion, therefore, that any court determination that Act 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.



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<sup>22</sup> See e.g., <https://www.mlive.com/news/grand-rapids/2018/12/gov-snyder-gives-public-five-days-to-comment-on-draft-line-5-tunnel-agreements.html> (last accessed March 28, 2019).

<sup>23</sup> See e.g., <http://flowforwater.org/wp-content/uploads/2018/12/FLOW-Public-Comment-12-18-18.pdf> (last accessed March 28, 2019).