

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ENBRIDGE ENERGY, LIMITED
PARTNERSHIP, ENBRIDGE ENERGY,
INC., AND ENBRIDGE ENERGY
PARTNERS, L.P.,

Court of Appeals No. 351366

Court of Claims No. 19-000090-MZ

Plaintiffs-Appellees,

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-Appellants.

**The appeal involves a ruling
that a provision of the
Constitution, a statute, rule or
regulation, or other State
governmental action is invalid.**

BRIEF OF STATE APPELLANTS

ORAL ARGUMENT REQUESTED

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Dated: January 16, 2020

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STATEMENT OF JURISDICTION

This Court has jurisdiction under MCL 600.308(1) and MCR 7.203(A)(1) of this appeal by right by Defendants-Appellants 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”) from the October 31, 2019 final Opinion and Order of the Court of Claims granting Plaintiffs-Appellees’ Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc. and Enbridge Energy Partners, L.P. (collectively “Enbridge”) request for summary disposition under MCR 2.116(I)(2). State Defendants timely filed their Claim of Appeal from that final order on November 5, 2019.

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STATEMENT OF QUESTIONS PRESENTED

1. Article 4 § 24, the Title-Object Clause of Michigan’s Constitution requires the title of a statute provide fair notice of its content. 2018 PA 359 contains several provisions, including §§ 14d and 14a, that exceed the scope of what is generally expressed in the title and are not germane, auxiliary, or incidental to its stated object of authorizing the Mackinac Bridge Authority to acquire a utility tunnel, creating a Mackinac Straits Corridor Authority, and authorizing either Authority to operate a utility tunnel. Is Act 359 unconstitutional?

Appellants’ answer: Yes.

Appellees’ answer: No.

Trial court’s answer: No.

2. The Title-Object Clause also provides that “no law shall embrace more than one object.” Act 359 amended 1953 PA 214 to encompass multiple distinct and unrelated objects, including the construction and operation of a utility tunnel to transport oil in a pipeline beneath the Straits of Mackinac and the operation of a motor vehicle bridge above the Straits. Is Act 359 unconstitutional?

Appellants’ answer: Yes.

Appellees’ answer: No.

Trial court’s answer: No.

3. In general, an unconstitutional statute is void for any purpose, as if it had never been enacted and a determination of unconstitutionality is normally given full retroactive effect. In December 2018, Act 359 was enacted, and a series of actions were taken by state agencies based upon it. If Act 359 is found unconstitutional, are Act 359 and all state actions based upon it void from their inception?

Appellants’ answer: Yes.

Appellees’ answer: Did not answer.

Trial court’s answer: Did not answer.

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CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Const 1963, art 4, § 24:

No 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.

Title of Chapter 254, Bridges, of the Michigan Compiled Laws, MCL 254.311 *et seq.*, as amended by 2018 PA 359:

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; extending the corporate existence of the authority; authorizing the authority to enjoy and carry out all powers incident to its corporate objects; authorizing the appropriation and use of state funds for the preliminary purposes of the authority; 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; granting the right of condemnation to the authority; granting the use of state land and property to the authority; making provisions for the payment and security of bonds and granting certain rights and remedies to the holders of bonds; authorizing banks and trust companies to perform certain acts in connection with the payment and security of bonds; authorizing the imposition of tolls and charges; 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; authorizing employment of engineers regardless of whether those engineers have been previously employed to make preliminary inspections or reports with respect to the bridge; 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; exempting bonds and the property of the authority from taxation; prohibiting competing traffic facilities; authorizing the operation of ferries by the authority; authorizing the creation of the Mackinac Straits corridor authority; authorizing the operation of a utility tunnel by the authority or the Mackinac Straits corridor authority; providing for the construction and use of certain buildings; and making an appropriation.

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MCL 254.324a (§ 14a of 2018 PA 359):

(1) The Mackinac bridge authority may acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel. The Mackinac bridge authority shall determine the rates charged for the services offered by the utility tunnel. 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 on terms and for consideration determined by the Mackinac bridge authority. This subsection does not authorize the Mackinac bridge authority to incur obligations that would constitute an indebtedness of this state contrary to the state constitution of 1963.

(2) The Mackinac bridge authority may purchase or otherwise acquire at a fair and reasonable price property and property rights in connection with the construction of a utility tunnel, including, but not limited to, roads, structures, rights-of-way, franchises, easements, and other interests in land, including land under water; the riparian rights of any person; and the right to cut off light, air, and access to real property.

(3) The Mackinac bridge authority may enter on any public land, water, or premises to make a survey, sounding, or examination in connection with the construction of a utility tunnel. The Mackinac bridge authority has the right to use and full easements and rights-of-way through, across, under, and over any lands or property owned by this state or in which this state has any right, title, or interest, without consideration, that may be necessary or convenient to the construction and efficient operation of the utility tunnel.

(4) The Mackinac bridge authority may perform all acts necessary to 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 and the charging of fees for its use, and to secure the approval of any department, agency, instrumentality, or officer of the United States government or this state required by law to approve the plans, specifications, and location of the utility tunnel or the fees to be charged for the use of the utility tunnel.

(5) The carrying out of the Mackinac bridge authority's purposes, including a utility tunnel, are for the benefit of the people of this state and constitute a public purpose, and the Mackinac bridge authority is

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performing an essential government function in the exercise of the powers conferred upon it by this act. All property owned by the Mackinac bridge authority related to a utility tunnel is exempt from all taxes levied by this state and all of its political subdivisions and taxing districts, and the Mackinac bridge authority is not required to pay taxes or assessments upon its activities or upon any of its revenues. If a tax of any nature is legally imposed on any property or obligation of the Mackinac bridge authority in connection with a utility tunnel, and that tax is determined to be valid and effective, the tax shall be paid from the revenues of the Mackinac bridge authority as an expense of maintaining and operating the utility tunnel. Real property or personal property owned or used by an entity leasing or otherwise using the utility tunnel is not exempt from taxation.

MCL 254.324d (§ 14d of 2018 PA 359):

(1) 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.

(2) The corridor authority board shall provide a report to the Mackinac bridge authority and the director of the state transportation department at least 1 time per year regarding aspects of the utility tunnel that could affect the Mackinac bridge authority, including, but not limited to, the progress of construction and utility leasing.

(3) The operation of a utility tunnel, including, but not limited to, the leasing of space in the utility tunnel to a utility, is not competition with the bridge.

(4) 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:

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(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.

(b) That the proposed tunnel agreement allows for the use of the utility tunnel by multiple utilities, provides an option to better connect the Upper and Lower Peninsulas of this state, and provides a route to allow utilities to be laid without future disturbance to the bottomlands of the Straits of Mackinac.

(c) That the proposed tunnel agreement requires gathering of geotechnical information before construction to ensure that construction of a utility tunnel is feasible.

(d) That the proposed tunnel agreement provides the Mackinac Straits corridor authority with a mechanism to ensure that a utility tunnel is built to sufficient technical specifications and maintained properly to ensure a long asset life and secondary containment for any leak or pollution from utilities using the tunnel.

(e) That the proposed tunnel agreement does not require any obligation of funds that is inconsistent with this act, and that the proposed tunnel agreement provides 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, its predecessor, or a successor. This subdivision does not prevent the expenditure of money from the straits protection fund for the cost of independent oversight of the utility tunnel or the leasing of space in the utility tunnel to publicly-owned entities.

(f) That the proposed tunnel agreement does not require the use of the power of eminent domain.

(g) That the proposed tunnel agreement does not exempt any entity that constructs or uses the utility tunnel from

the obligation to obtain any required governmental permits or approvals for the construction or use of the utility tunnel.

(h) That the proposed tunnel agreement does not exempt an entity using the utility tunnel from the payment of a tax or similar obligation.

(i) That the proposed tunnel agreement does not require the Mackinac Straits corridor authority to bring or defend a legal claim for which the attorney general is not required to provide counsel.

(j) That the proposed tunnel agreement requires that for any leasing of space for facilities for the transmission of data and telecommunications that the Mackinac bridge authority shall be reimbursed for any and all loss of net profit from the leasing of space for facilities for the transmission of data and telecommunications.

(k) That the proposed tunnel agreement requires the development of a plan on how to engage this state's labor pool in the project, including the means and methods for recruitment, training, and utilization.

(5) If the attorney general declines to represent the Mackinac bridge authority or the Mackinac Straits corridor authority in a matter related to the utility tunnel, the attorney general shall provide for the costs of representation by an attorney licensed to practice in this state chosen by the Mackinac bridge authority or the Mackinac Straits corridor authority, as applicable. As used in this subsection, "matter related to the utility tunnel" includes, but is not limited to, 1 or more of the following:

(a) A claim seeking a judicial determination that the tunnel agreement is legally invalid.

(b) A claim seeking to enjoin performance under the tunnel agreement.

(c) A claim challenging the validity of any governmental approval or permit granted based upon an application submitted singly or jointly by the Mackinac Straits corridor authority.

(d) A claim challenging a governmental entity's denial of a governmental approval or permit submitted singly or jointly by the Mackinac Straits utility tunnel authority.

(e) A claim challenging the right to use any land of this state for which the Mackinac bridge authority or the Mackinac Straits corridor authority was granted the right to use.

(f) A claim alleging a failure to perform under the tunnel agreement that limits 1 of the following:

(i) The use of the utility tunnel.

(ii) The ability to operate the utility infrastructure within the utility tunnel, if the utility is in full compliance with the terms of a lease granted by the Mackinac Straits corridor authority.

(g) A claim challenging the validity of or seeking to enjoin the issuance of any approval regarding the utility tunnel.

(6) Any administrative functions of the Mackinac Straits corridor authority shall be performed under the direction and supervision of the state transportation department.

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INTRODUCTION

Haste makes waste. In the waning days of the Governor Rick Snyder's Administration, the governor, Enbridge, and their legislative allies quickly moved to enshrine in Michigan law a specific policy outcome: the perpetuation of 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.

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 sought to graft onto the Mackinac Bridge Authority, which under long-established law 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.

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 providing fair notice of 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," in two ways. First, the Act's title does not provide

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fair notice of, and actually directly contradicts, key provisions of its body. Second, Act 359 contains multiple objects in violation of the Constitution. 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.

The contrary conclusion reached by the Court of Claims rests on multiple errors. To begin, seizing upon a straw man advanced by Enbridge, the Court of Claims misunderstands State Defendants' argument below as somehow insisting that the Title-Object Clause required the title to include all of the details contained in the body. On the contrary, State Defendants acknowledged that the title need not serve as an exhaustive index of the body of the act nor directly mention provisions of the body of the act that are germane, incidental or auxiliary to the purpose identified in the title. But, as explained below, key provisions of Act 359 were not, under those standards, fairly noticed in the title and in some cases, actually contradicted its terms.

Moreover, the Court of Claims mistakenly invented a "single object" of the Act—providing "infrastructure" connecting Michigan's Upper and Lower Peninsulas—that is at odds with the text, structure, and history of Act 359. And the Court of Claims compounded that error by looking beyond the statutory text, relying in part upon assertions that the public was otherwise aware of the content of the legislation, in concluding that Act 359 passed constitutional muster.

For these reasons, and as more fully set forth below, this Court should reverse the decision of the Court of Claims.

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STATEMENT OF FACTS AND PROCEEDINGS

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, ¶ 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, ¶ 22.) Line 5 currently transports approximately 540,000 barrels, or 22,680,000 gallons, of petroleum products per day. (Complaint, ¶ 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, ¶ 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, ¶ 45.) The Second

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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 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 of its inhabitants.” MCL 254.302. As stated in its title, the principal purpose of Act 21 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 in 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

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

Act 21, Act 214 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.

Development and Enactment of Act 359

Act 359 was introduced as Senate Bill 1197 on November 8, 2018, just days after the statewide election that elected Governor Snyder’s successor and a new Attorney General.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

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

³ [http://www.legislature.mi.gov/\(S\(pkxvk20044om3oo4d4tumeffa\)\)/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-16398.PDF](http://www.legislature.mi.gov/(S(pkxvk20044om3oo4d4tumeffa))/documents/2017-2018/billcurrentversion/Senate/PDF/2018-SCVBS-1197-16398.PDF).

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

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 effort: creating an entirely new entity—the Mackinac Straits Corridor Authority—whose Board members would be immediately 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.

But Substitute S-2 made very extensive changes to the body of the Act.

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 than 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

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

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

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.

In contrast to these extensive substantive revisions of the statute contained in Substitute S-2, the bill 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.”

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

⁷ [http://www.legislature.mi.gov/\(S\(zq1f5qcbmvw0xlf3tskp2zr\)\)/mileg.aspx?page=getobject&objectname=2018-SJ-12-05-075](http://www.legislature.mi.gov/(S(zq1f5qcbmvw0xlf3tskp2zr))/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](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](http://www.legislature.mi.gov/(S(ea342fyo2djzxnpcu4hf33u3))/mileg.aspx?page=getobject&objectname=2018-HJ-12-11-078).

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 The same day Senate Bill 1197 was voted out of the House, December 11, 2018, it was presented to and signed by former Governor Snyder. It was filed with the Secretary of State on December 12, 2018 and became immediately effective¹² as 2018 PA 359.¹³

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, 2018¹⁵ and was confirmed by the Senate in the early morning of December 19, 2018.¹⁶

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](http://www.legislature.mi.gov/(S(h0pbf4rubkoeacrdix4rwzka))/mileg.aspx?page=getobject&objectname=2018-SJ-12-11-077).

¹² [http://www.legislature.mi.gov/\(S\(eaknxz0mchnleq1mvtsscift\)\)/mileg.aspx?page=getobject&objectname=2018-SJ-12-13-079](http://www.legislature.mi.gov/(S(eaknxz0mchnleq1mvtsscift))/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](http://www.legislature.mi.gov/(S(2mx3eyqv3n52e3yvloe3q5vw))/mileg.aspx?page=getobject&objectname=2018-SJ-12-13-079).

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](http://www.legislature.mi.gov/(S(h4hvuictwkpjwv4b5ozrvd20))/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-19-081.pdf)

On December 19, 2018, just seven 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 Agreement¹⁸ and related documents, including the Assignment of MDNR Easement 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

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>.

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>.

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:

- 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

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

Transportation, the Governor, the Department of Natural Resources, and the Department of Environmental Quality²² 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.

Enbridge Complaint

Enbridge sued the State Defendants in the Court of Claims on June 6, 2019. Its complaint asserted that, contrary to the conclusions reached in the Attorney General opinion, Act 359 does not violate article 4, § 24 of the Michigan Constitution. It sought 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 sought a declaration that the Third Agreement is valid and enforceable, as well as an order enjoining State Defendants from taking any action inconsistent with the Tunnel agreement, Third Agreement, MDNR Easement, and Assignment of MDNR Easement Rights.

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.

Summary Disposition Proceedings in the Court of Claims

On June 27, 2019, State Defendants moved for summary disposition and dismissal of the complaint under MCR 2.116(C)(8) for failure to state a claim upon which relief could be granted. State Defendants' motion and supporting brief argued that, as concluded in the Attorney General Opinion, Sections 14d(1), 14d(4) and 14d(5) of Act 359 violated the Title-Object Clause of article 4, § 24 of the Michigan Constitution because those provisions exceed the scope of what was fairly noticed in the title of the Act.

State Defendants also argued that Sections 14a(1) and 14a(4) are unconstitutional because they likewise exceed the scope of what was fairly noticed in the title. Moreover, State Defendants argued that Sections 14a(1), 14a(4), 14d(1), and 14d(4), cannot be severed from the remainder of Act 359 and accordingly the entire Act is unconstitutional. State Defendants further argued that 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.

State Defendants' motion requested a declaratory judgment that (a) Act 359 violates the Title-Object Clause and is in its entirety, unconstitutional; (b) Act 359 was void from its inception on December 12, 2018; and (c) all actions taken by the Department of Natural Resources and the Mackinaw 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. In addition, because Enbridge's complaint initially sought a broad declaration that the Third Agreement is valid and enforceable, State Defendants also requested a

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declaratory judgement that the Third Agreement (1) is void because by its terms it was linked to the effectiveness of the void Tunnel Agreement, and (2) is without binding legal effect to the extent it purported to determine that continued operation of the existing Straits pipelines is in accordance with protection of the public trust.

In its response in opposition to State Defendants' motion, Enbridge argued that Act 359 does not, for several reasons, violate the Title-Object Clause. It requested summary disposition in its favor under MCR 2.116(I)(2), limited to a declaratory judgment that Act 359 is constitutional and that the December 2018 Agreements, including the Third Agreement, are not invalid due to any constitutional defect in Act 359.

Court of Claims Decision

After the submission of extensive briefs by the parties as well as several amici curiae,²³ the Court of Claims elected not to hear oral argument and issued its Opinion and Order on October 31, 2019. (Appendix, pp 1–22.) The court concluded that Act 359 did not violate the Title-Object Clause in any respect. It granted Enbridge's request for summary disposition under MCR 2.116(I)(2).²⁴

²³ Amicus curiae briefs were submitted by the Michigan House of Representatives and Senate in support of the Plaintiffs, the Michigan Chamber of Commerce in support of the Plaintiffs, the City of Mackinac Island in support of the State Defendants, and a nonprofit organization called For Love of Water (FLOW) in support of the State Defendants.

²⁴ The Court of Claims discussed arguments raised by the parties and amici related to the public trust doctrine. (Opinion and Order, pp 20–22.) The court noted that State Defendants did not allege in this case that the 1953 Easement or the Third Agreement violated the public trust doctrine, but rather argued that those agreements do not preclude the state from making contrary determinations in the future. (*Id.*, pp 21–22.) Having determined that there was no controversy before it

STANDARD OF REVIEW

The interpretation and constitutionality of a statute present issues of law that are reviewed de novo on appeal. *Hunter v Hunter*, 484 Mich 247, 257 (2009). The legal conclusions reached by the Court of Claims regarding the constitutionality of Act 359 are subject to de novo review by this Court.

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).

regarding whether the 1953 Easement or the Third Agreement violate the public trust doctrine, the Court declined to rule on the issue. (*Id.*)

ARGUMENT

I. Act 359 violates the Title-Object Clause, article 4, § 24 of the Michigan Constitution, because its title does not provide fair notice of its content.

A. The Title-Object Clause requires that the title of a statute provide fair notice of its content.

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.” Dating back to 1850, two of Michigan’s 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).

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Generally, three types of challenges may be brought against statutes under the Title-Object Clause: (1) a title-body challenge, (2) a multiple-object challenge, and (3) a change-of-purpose challenge. *Kevorkian*, 447 Mich at 453.

As noted above, OAG 7309 focused on a title-body review of certain provisions of Act 359, as did Enbridge’s complaint.²⁵ 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 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 and quotation marks 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

²⁵ A multiple-object challenge not addressed in the OAG is discussed separately in Section II, below.

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).

- 1. The title to Act 359 reflects the general purpose of authorizing the Mackinac Bridge Authority to acquire a utility tunnel, creating a new Mackinac Straits Corridor Authority, and authorizing the operation of a utility tunnel by the Bridge Authority or the Corridor Authority.**

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]²⁶; and making an

²⁶ 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.

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 and quotation marks 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.* (quotation marks omitted).

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.

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2. Three provisions of Section 14d of Act 359 fail 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

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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 the general purpose. *Anderson v Oakland Cty Clerk*, 419 Mich 313, 328 (1984). Again, the title of Act 359 reflects that its main

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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 simply not an extension of the main purpose reflected in the title. Rather, it *directly conflicts with* the first clause of the title which authorizes the Bridge Authority alone to acquire such a tunnel and discloses no such provision for the Corridor Authority.

Moreover, 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 general purpose of the amended title. See *Rohan*, 314 Mich at 356–357.

In rejecting State Defendants’ argument on this point, the Court of Claims relied upon *Midland Twp v State Boundary Comm’n*, 401 Mich 641, 654 (1977), for the proposition that “it is not consequential for purposes of title-object review who implements a provision of an act as long as that which is to be accomplished is germane to the object of the act as expressed in the title.” (Opinion, p 11.) But

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Midland Twp is neither controlling nor persuasive here. In *Midland Twp*, the issue was whether an amendment to the home rule cities act providing annexation procedures for cities by the State Boundary Commission was germane to the purposes of that act. Because that act's title had been held to have as its object anything germane to the functioning of a city, the court held that the amendment did not violate the Title-Object Clause. *Id.* at 654. Here, the issue is not the failure of a broadly worded title to specify the identity of the entity implementing a statutory provision, but rather the fact that the body of Act 359 directly contradicts the object as specifically stated in the title, i.e. that the Bridge Authority alone would acquire a utility tunnel.

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

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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,²⁷ it is apparent that the body of Act 359 contemplated a tunnel agreement

²⁷ See 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,

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.²⁸

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.

To be clear, contrary to the suggestions in the Court of Claims opinion (pp 9–10), State Defendants did not argue below, and certainly do not argue here “that the specific tunnel agreement, with all of its precise parameters” had to be “spelled out in painstaking detail in the Act’s title.” But to achieve the purpose of the Title-Object Clause, providing fair notice of the object of the legislation, the title had to reflect, at least in a general way, the central, substantive feature of Act 359—the mandate for an imminent tunnel agreement with a private party. Because none of

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”).

²⁸ Tunnel Agreement dated December 19, 2019, Sections 3.2 and 13.1;

<https://mipetroleumpipelines.com/document/tunnel-agreement-between-msca-and-enbridge-energy>.

the clauses in the amended title generally reflect this purpose or can be construed to reflect this purpose, Act 359 falls short of the constitutional standard.

Contrary to Enbridge’s argument below and the conclusion of the Court of Claims, the highly prescriptive provisions of Section 14d(4) are not “germane, auxiliary, or incidental” (Opinion, p 10) to the purposes disclosed in the title. In fact, these provisions actually *conflict* with the purposes stated in the title. As noted above, the title indicates that the Bridge Authority, not the Corridor Authority, will acquire the proposed utility tunnel. But the body contradicts this by mandating that the *Corridor Authority* enter into an agreement or agreements proposed by former Governor Snyder to have a private party construct the tunnel for it. Moreover, while the title expresses the purpose of authorizing the “operation of a utility tunnel by . . . the Mackinac Straits Corridor authority,” the body of the act in subsection 14d(4) contradicts this by mandating a tunnel agreement under which a private party, not the Authority, would operate the utility tunnel.

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,

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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, contrary to Enbridge’s argument below and the Court of Claims’ suggestion (Opinion, p 12) is it incidental or auxiliary to that main purpose. The Court of Claims observed that “it is hardly unusual for litigation concerning [a large scale, controversial construction project] to arise” and that “in this sense, litigation and representation during that litigation is pertinent to the underlying construction project.” While it is true that construction projects often give rise to litigation, there is no necessary connection between the general objective of constructing and operating a tunnel and the extraordinary and highly specific provisions of section 14d(5) by which the Legislature seeks to commandeer the decision-making of a duly-elected constitutional officer of the executive branch. Accordingly, those provisions cannot be considered “germane or incidental” to the purpose expressed in Act 359’s title.

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

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

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

While not addressed in OAG No. 7309, as State Defendants argued below, 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

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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, the body of the Act authorizes all of these actions with respect to a bridge, but 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

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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

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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.

Contrary to the Court of Claims’ suggestion (Opinion, pp 12–13), the issue is not that “the title contains a level of imprecision.” The problem is, in part, that the title is actually quite precise about the powers of the *Bridge Authority* with respect to the *bridge* but utterly devoid of any notice that parallel powers would be conferred upon either the Bridge Authority or the Corridor Authority with respect to a *tunnel* in sections 14a(1) and 14a(4). The plain and specific language of the title is thus inconsistent with the Court of Claims’ conclusion that the provisions of

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those sections are fairly noticed in the title on the theory the activities in question are “impliedly necessary, and germane tasks.” (*Id.* at 13.)

B. 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. Here, the question then is whether the remainder of Act 359 can operate without §§ 14d(1), (4), and (5), and 14a(1) and (4).

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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 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 also be unconstitutional because it 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

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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,

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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. 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,

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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) (Appendix, pp 34–45).

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).

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).

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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.²⁹

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

²⁹ 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.

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.

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 v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2016 (Docket No. 328604) (Appendix, pp 34–45).

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

In rejecting State Defendants' argument on this issue, the Court of Claims mistakenly adopted Enbridge's argument that the general purpose or aim of Act 359 "relates to the provision of infrastructure connecting the state's Upper and Lower Peninsulas." (Opinion, p 17.) Moving beyond the plain and unambiguous language chosen by the Legislature, the Court of Claims effectively invented a new statement of the purpose of the Act: "creating *infrastructure* connecting the Upper and Lower Peninsulas of Michigan." In doing so, they improperly disregarded the obvious textual distinctions drawn by the Legislature between a "bridge" and "a utility tunnel," between "acquire" and "operat[e]," and between the "Mackinac bridge authority" and the "Mackinac Straits corridor authority." The Court of Claims

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substituted a term—“infrastructure”—not used by the Legislature in the title.³⁰

Where, as here, the text of the statute is plain and unambiguous, neither litigants or a reviewing court may re-write or construe it as they see fit. *Hesse v Ashland Oil, Inc*, 466 Mich 21, 30–31 (2002).

- 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 214. 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

³⁰ The word “infrastructure” is used in Act 359, but only as part of the phrase “utility infrastructure” contained in the definition of “utility tunnel” in Section 14(e). The Legislature could have, but chose not to, employ that term in the title. This further undermines Enbridge’s claim that the Legislature’s purpose in enacting Act 359 was to lump together “bridge” and “utility tunnel” under the category of “infrastructure.”

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 1644 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 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

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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.

In concluding that Act 359 did not violate the Title-Object Clause, the Court of Claims erroneously relied in part on the proposition advanced by Enbridge (Pl Br, pp 22–24) that it should look beyond the text of the statute to consider extrinsic evidence that the legislature and public otherwise had adequate notice of the content of the legislation, citing *In re Requests for Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 465 (1973) (Opinion, pp 18–19). Like Enbridge, the Court of Claims emphasized a portion of the Supreme Court’s advisory opinion noting that in that case, which involved an amendment to the Insurance Code for “no-fault” automobile insurance coverage, “[t]he legislature and the public were well aware of the intention and context of this legislation,” and that it had received extraordinary public attention.” *Id.* While the Court of Claims acknowledged that the advisory opinion was not precedentially binding, *id* at 460, n 1, it nevertheless found the quoted discussion “persuasive.” (Opinion, p 19.)

But careful reading of *In re Requests for Advisory Opinion* reveals that the Court based its legal conclusion that the statute “embraces only one object which is *expressed in its title*,” *id.* at 469 (emphasis added), on considerations other than widespread public debate on the subject of the legislation. In particular, the Court emphasized that “the subject matter [the Insurance Code] constitutes a code and that inherently the scope of a code must be broad enough to encompass the various facets necessary to the drafting of a unified law.” *Id.* at 463. It also observed that it

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was reasonable and logical for the Legislature to classify the subject of the legislation as relating to the Insurance Code. *Id.* at 464. In sum, the language quoted by the Court of Claims was, at best, dicta and should not be considered to have even “persuasive” value here.

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

The public act itself and the actions the State took directly based on the Act were invalid from the beginning. As a consequence, the closely related Third Agreement between Governor Snyder and Enbridge is also invalid.

A. Both the Act and the actions taken directly based on it here are void ab initio.

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

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are not blindly followed without concern for principles of justice and fairness.”

Johnson v White, 261 Mich App 332, 336 (2004). As this Court 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.]

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 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*, 261 Mich App at 336 (internal quotations and citations omitted).]

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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,³¹ the validity of both the legislation and the proposed agreement was subject to intense public and legal scrutiny, foreshadowing likely legal challenges.³² 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. 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 based upon it might be subsequently invalidated.

³¹ 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/>.

³² 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>.

Finally, retroactive application of the determination that Act 359 is unconstitutional can have no adverse effect on the administration of justice by Michigan courts. The instant case is the only pending litigation involving Act 359.

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 538 (explaining that a lease from the state department of agriculture to a racing association was void because the portion of the statute authorizing it was unconstitutional). 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 Agreement³³ and the Assignment of MDNR Easement Rights,³⁴ 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

³³ 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 MCL254.324d(1) [Section 14d(1) of Act 359].” <https://mipetroleumpipelines.com/document/tunnel-agreement-between-msca-and-enbridge-energy>.

³⁴ Assignment of Easement Rights for Utility Tunnel, p 1 <https://mipetroleumpipelines.com/document/assignment-easement-rights-msca-enbridge-energy>.

expressly predicated upon Act 359³⁵ and the creation of the grantee, the Corridor Authority, under Act 359 and is therefore also void and unenforceable.

B. The closely related 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, 2018,³⁶ 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 Segment” is put into operation within the tunnel proposed to be constructed pursuant to the Tunnel Agreement.

³⁵ 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>.

³⁶ 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, Inc., and Enbridge Energy Partners, L.P. dated December 19, 2018.

<https://mipetroleumpipelines.com/document/3rd-agreement-between-state-michigan-and-enbridge-energy>.

The Third Agreement is invalid and unenforceable because the Third Agreement and the invalid Tunnel Agreement are inextricably related and expressly “mutually dependent.”

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).]

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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.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, State Defendants-Appellants request that this Court (a) reverse the October 31, 2019 Order of the Court of Claims; (b) declare that 2018 PA 359 violates article 4, § 24 of the Constitution; (c) declare that 2108 PA 359 and the state actions based upon it, including the December 2018 Tunnel Agreement, MDNR Easement, Assignment of MDNR Easement Rights and the Third Agreement are void from their inception; and (d) grant State Defendants-Appellants such other relief as the Court finds appropriate and just.

Respectfully submitted,

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Dated: January 16, 2020

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