Dykema Gossett PLLC
Capitol View
201 Townsend Street, Suite 900
Lansing, MI 48933
Tel: (517) 374-9100
Fax: (517) 374-9191
www.dykema.com

MEMORANDUM

TO: Michigan Attorney General Dana Nessel

FROM: Gary P. Gordon

RE: Comments on Governor Whitmer's January 1, 2019 Opinion Request Regarding Public Act 359 of 2018 - Submitted on behalf of the Michigan Chamber of Commerce

DATE: February 4, 2019

On January 1, 2019, Governor Whitmer sought an opinion from the Attorney General on six questions relating to Public Act 359 of 2018 ("2018 PA 359" or "Act 359"), which provided for the creation and operation of a utility tunnel in the Straits of Mackinac, as well as the creation of the Mackinac Straits Corridor Authority (the "Corridor Authority"). Attorney General Nessel responded that she would review the questions and also invited comments on the issues presented by the Governor's letter. The Michigan Chamber of Commerce (the "Chamber") respectfully submits for the Attorney General's consideration these comments on the six questions asked by the Governor.

Before addressing each of the six questions asked by the Governor, the Chamber first wants to express its support of Act 359, along with the agreements that were entered into between the Corridor Authority, the State of Michigan ("State"), and Enbridge to achieve a replacement to the Line 5 Dual Pipelines' crossing of the Straits of Mackinac ("Straits"). The continued operation of Line 5 through the State of Michigan serves important public needs by providing substantial volumes of propane to Michigan citizens, particularly during cold winters like that which we all are now enduring. Line 5 also transports essential products, including Michigan-produced oil to refineries, thereby supporting not only our State's energy needs, but also our businesses and economy.

The agreements entered into by the Corridor Authority, the State, and Enbridge recognize the paramount public interest in the continued operation of the existing Line 5 Dual Pipelines under new and expansive safety monitoring conditions provided in those agreements, while fostering the replacement of the Dual Pipelines in a tunnel beneath the Straits as expeditiously as possible. The construction of a utility tunnel connecting the upper and lower peninsulas of

Michigan, and the placement in that tunnel of a new replacement pipeline, is in the interest of the State's residents, as it substantially reduces any risk of adverse impacts from a potential oil spill reaching the Straits. The agreements also establish a procedure, under the Corridor Authority's oversight, to ensure that a tunnel is constructed at Enbridge's sole expense in a safe and reliable manner, which can then be utilized by multiple utilities that provide communications and other utility services to Michiganders. Further, once the tunnel is constructed and the replacement pipeline is operational, the agreements require Enbridge to deactivate the Dual Pipelines, thereby permanently removing them from use.

For the reasons set forth below, the Chamber submits that the Attorney General should conclude that Act 359 is constitutional and that the Corridor Authority and its Board of Directors may take actions to implement the statute consistent with their duties and powers under it. The agreements between the Corridor Authority and Enbridge providing for the Authority to acquire the tunnel that Enbridge will construct, and to operate that utility tunnel across the Straits in furtherance of the public interest in the safe and continued transportation of energy products and utility services, should not be undermined. Nor should the special safeguards to which Enbridge has agreed with the State in connection with the operation of the existing Line 5 during the period until the tunnel is constructed be sacrificed.

DISCUSSION

Several of the issues raised in the Governor's letter relate to the constitutionality of Act 359. As the Attorney General is aware, under Michigan law, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003). Indeed, Michigan courts have held that:

> 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 a court will refuse to sustain its validity.

Cady v Detroit, 289 Mich 499, 505; 286 NW2d 805 (1939). Thus, 2018 PA 359 is presumed to be constitutional, and this principle guides the following analysis addressing each of the Governor's questions.

I. Does Act 359 violate the Title-Object Clause (Const 1963, art 4, § 24) because it embraces more than one object, the object embraced is not stated in the law's title, or because SB 1197 was altered or amended on its passage through the legislature so as to change its original purpose?

No, the Legislature did not violate the Title-Object Clause of the Michigan Constitution when it passed Act 359.

Article 4, § 24 of the Michigan Constitution provides:

> 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. Const 1963, art 4, § 24.

A statute that is challenged as a violation of the Title-Object Clause is presumed to be constitutional. *Pohutski v Allen Park*, 465 Mich 675, 690; 641 NW2d 219 (2002). Such a statute will not be declared unconstitutional as a title-object violation "unless clearly so, or so beyond a reasonable doubt." *Hildebrand v Revco Discount Drug Ctrs*, 137 Mich App 1, 6; 357 NW2d 778 (1984) (quoting *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 342; 22 NW2d 433 (1946)).

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; 658 NW2d 804 (2002); *Phinney v Perlmutter*, 222 Mich App 513, 552; 564 NW2d 532 (1997); see also *People v Bosca*, 310 Mich App 1, 82; 871 NW2d 307, 356 (2015); *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 388; 803 NW2d 698 (2010). Through 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 not generally aware of their intention and effect . . . which was little less than a fraud upon the public." *People v Kevorkian*, 447 Mich 436, 454-455; 527 NW2d 714 (1994) (quoting *People ex rel Drake v Mahaney*, 13 Mich 481, 494-495 (1865)). Generally speaking, the "goal of the clause is notice, not restriction of legislation." *Pohutski*, 465 Mich at 691. Because the purpose is to prevent members of the Legislature and the public from being deceived by those who would slip an unknown and unrelated provision into a bill for passage—but not to unnecessarily restrict or invalidate legislation that was passed with full transparency—"[t]he constitutional requirement should be construed reasonably and [should] permit[] a bill enacted into law to include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object." *Gen Motors Corp*, 290 Mich App at 388. This purpose underlying the Title-Object Clause should also inform and shape the contours of any title-object analysis.

The Governor asked Attorney General Nessel to analyze each of the following three potential challenges available under article 4, § 24: (1) a title-body challenge; (2) a multiple-object challenge; and (3) a change of purpose challenge. See *Kevorkian*, 447 Mich at 453.[1] Under each potential challenge, the answer is clear—the Legislature did not violate article 4, § 24 when it passed Act 359. Here, the legislators – both those in favor of Act 359 and those opposed – were not misled into believing that Act 359 was anything other than an enactment

[1] See also *People v Cynar*, 252 Mich App 82, 84; 651 NW2d 136 (2002) (holding that the Revised Judicature Act's title was broad enough to include the proscribed conduct); *Wayne Co Bd*, 253 Mich App at 185 (holding that bonding provisions were appropriately placed in legislation related to operation and management of airports); *HJ Tucker & Assocs, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 556; 595 NW2d 176 (1999) (holding that the Revised Judicature Act properly included provisions for attorney fees, court costs and treble damages); *Ray Twp v B&BS Gun Club*, 226 Mich App 724, 728; 575 NW2d 63 (1997) (holding that inclusion of a provision related to local ordinances in a statute regarding shooting ranges did not violate art 4, § 24).

designed to support the development of a utility tunnel under the Straits that would house (among other utilities) a replacement Line 5. The broad and singular purpose of the statute to promote the operation of a tunnel connecting the two Michigan peninsulas is clearly stated in its title.

A. There is no title-body violation.

With respect to a title-body challenge, there is no violation. This challenge requires that the "title of an act must express the general purpose or object of the act." *Wayne Co Bd*, 253 Mich App at 185; *Cynar*, 252 Mich App at 84; *HJ Tucker*, 234 Mich App at 559. However, an act's title does not need to serve as an index to all of the provisions within the act. See *Cynar*, 252 Mich App at 84; *HJ Tucker*, 234 Mich App at 559; *Ray Twp*, 226 Mich App at 728. Courts must therefore ask whether the title provides the Legislature and the public with fair notice of the provision being challenged. *Cynar*, 252 Mich App at 84-85; *HJ Tucker*, 234 Mich App at 559; *Ray Twp*, 226 Mich App at 728. Courts find that the notice provision has been violated only when "the subjects are so diverse in nature that they have no necessary connection." *Cynar*, 252 Mich App at 85 (quoting *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 559; 492 NW2d 246 (1992)).

The title of Public Act 359 of 2018 included a purpose "to acquire a bridge and a utility tunnel connecting the Upper and Lower Peninsulas of Michigan," as well as "authorizing the operation of a utility tunnel by the authority or the Mackinac Straits corridor authority."[2] Although this title does not specifically address every amendment related to the authority and utility tunnels (nor need it do so under the Title-Object Clause), it does generally inform the Legislature and the public that the act provides for the acquisition of a utility tunnel by the Bridge Authority as well as the operation of a utility tunnel by the Bridge Authority or the Corridor Authority. Any specific duties or powers granted by the act are covered by the stated general purpose and object of the act. The title certainly gives fair notice of the provisions in 2018 PA 359, which is sufficient to pass constitutional muster.

B. There is no multiple-object violation.

With respect to a multiple-object challenge, again, there is no violation. A multiple-object challenge asserts that the body of the subject legislation embraces more than one object. *Gillette Commercial Operations N Am & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 439; 878 NW2d 891 (2015). Yet "[t]he 'one object' provision must be construed reasonably, not in so narrow or technical a manner that the legislative intent is frustrated." *Pohutski*, 465 Mich at 691 (citing *Kuhn v Dep't of Treasury*, 384 Mich 378, 387-388; 183 NW2d 796 (1971)). A court should not invalidate an act simply because it contains more than one means of achieving its primary purpose. *Id.*; *Mayor of Detroit v Arms Tech, Inc*, 258 Mich App 48, 68; 669 NW2d 845 (2003); *Kevorkian*, 447 Mich at 455. An act can therefore address all issues related to its

[2] A title authorizing the "operation" of a tunnel includes all things incidental to that operation; since the Authority cannot "operate" a tunnel that does not exist, the acquisition and/or construction of the tunnel by the Authority are plainly contemplated by the Act's title as well. See also *Midland Township v State Boundary Commission,* 401 Mich 641, 654; 259 NW2d 326 (1977) ("Whether a provision is germane depends on its relationship to the object of the act, not who is charged with implementing the provision."), discussed below.

object as well as those matters that directly relate to, implement, and/or are necessary to carry out its general purpose, even if incidental. See *Pohutski*, 465 Mich at 691-692. Accordingly, "[l]egislation, 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 454-455. A multiple-object violation will therefore be found only if the provisions of an act are so diverse that there is no necessary connection among them. See *Pohutski*, 465 Mich at 691.

Here, the object of 2018 PA 359—its general purpose or aim as embraced in the body of the act—was to provide for the acquisition and operation of a utility tunnel connecting the Upper and Lower Peninsulas of Michigan at the Straits of Mackinac. *Kevorkian*, 477 Mich 459 ("[On]e looks to the body of the act, not the title, to determine whether it has a single object: While the object must be expressed in the title, the body of the law must be examined to determine whether it embraces more than one object."). The provisions of Act 359 all directly relate to this general purpose. For example, (1) Section 14a authorizes the Mackinac Bridge Authority ("Bridge Authority") to "acquire, construct, operate, maintain, improve, repair, and manage a utility tunnel" and gives it additional incidental authority, such as authority to acquire property in connection with building a utility tunnel; (2) Section 14b creates the Mackinac Straits Corridor Authority within the Department of Transportation; (3) Section 14c establishes the Straits Protection Fund; and (4) Section 14d transfers all responsibilities and authority given to the Mackinac Bridge Authority and all funds in the Straits Protection Fund to the Mackinac Straits Corridor Authority "upon the appointment of the members of the Corridor Authority Board . . . ." 2018 PA 359, §14d(1).

Although Act 359 creates the Corridor Authority as a state entity separate from the Bridge Authority, the functions served by the two authorities are not directed toward multiple objects. Rather, Act 359 empowers both authorities to work toward the same goal: constructing, managing, and operating the utility tunnel in the Straits of Mackinac. The Bridge Authority was to exercise utility tunnel authority until the Corridor Authority had an established board that was able to take over those responsibilities. The two authorities are necessarily connected because they are both tied to authorizing and operating infrastructure connecting the two peninsulas across the Straits of Mackinac.

Michigan case law shows that separate provisions that are equally incidental to achieving an act's object are not violations of article 4, § 24. For example, in *Kevorkian*, the Michigan Supreme Court held that a statute that both created a commission to study death and dying and amended the Penal Code to create the crime of assisted suicide "clearly . . . embrace[d] only one object": to address assisted suicide. 447 Mich at 456. The Court of Appeals recently held that a provision appropriating $1 million to respond to the threat of invasive species did not introduce a second object when the general purpose of the statute was to ensure that decisions affecting the management of fish, wildlife, and their habitats are governed by sound scientific principles. *Keep Mich Wolves Protected v State*, unpublished per curiam opinion of the Court of Appeals, issued November 22, 2016 (Docket No. 328604), pp 14-15. In the same case, however, the court found that a provision providing free hunting, trapping, and fishing licenses to qualified active members of the military introduced a second object that had no necessary connection to the scientific management of fish, wildlife, and their habitats. *Id.* As another example, the Court of Appeals also held that an act that created public airport authorities and authorized the issuance of

bonds to raise revenue did not violate the multiple object principle because both provisions directly related to the statute's principle object: providing for the acquisition, development, and operation of airports. *Wayne Co Bd*, 253 Mich App at 190-191. See also *Gillette*, 312 Mich App at 442-443 (holding that repeal of a statutory interstate tax agreement and amendment of a separate tax statute were sufficiently related because both carried out the principle object of clarifying the appropriate method of income apportionment for business taxes).

In each of these cases, the reason that the diverse provisions contained in a single act did not violate the multiple-object principle was that the provisions directly related to, carried out, or implemented the single, principal object of the act. The same is true of Act 359. Although Act 359 amended the Bridge Authority's powers and established a new Corridor Authority, the single object furthered by both is the creation and operation of a utility tunnel across the Straits. (The Title-Object Clause is applied to the Act itself, and not with respect to how an existing statute may be changed).

Any assertion that Title-Object Clause prohibits the Legislature from providing for a utility tunnel through an amendment to 1952 PA 214, which addressed the building of the Mackinac Bridge, places a greater onus on the Legislature than the Title-Object Clause requires. As the Michigan Court of Appeals has explained:

> There is . . . no constitutional requirement that the legislature do a tidy job in legislating. It is perfectly free to enact bits and pieces of legislation in separate acts or to tack them on to existing statutes even though some persons might think that the bits and pieces belong in a particular general statute covering the matter. The constitutional requirement is satisfied if the bits and pieces so enacted are embraced in the object expressed in the title of the amendatory act and the act being amended.

Gillette, 312 Mich App at 441 (citations and internal quotation marks omitted). Here, the Legislature reasonably determined that creation of the Corridor Authority for the purpose of constructing and operating a utility tunnel under the Straits of Mackinac is, like the bridge, germane to Act 359's stated objective of "providing an option to better connect the Upper and Lower Peninsulas of this state."

Nor should it matter that the utility tunnel is subject largely to the powers of the new Corridor Authority rather than the original Bridge Authority. In *Midland Township v State Boundary Commission*, the Michigan Supreme Court held that "[w]hether a provision is germane depends on its relationship to the object of the act, not who is charged with implementing the provision." 401 Mich at 654. Thus, whether Act 359 charges the Bridge Authority or the Corridor Authority with carrying out its provisions relating to the construction and operation of a utility tunnel should be of no consequence to the one-object requirement.

Additionally, it is important to note that neither the Legislature nor the public was deceived as to the intent or effect of Act 359 when it was proposed and enacted. Each legislative analysis by the House Fiscal Agency and Senate Fiscal Agency clearly stated that the purpose of

the bill was to establish a utility tunnel under the Straits of Mackinac connecting the Upper and Lower Peninsulas.[3] Media reports, too, captured the purpose of the bill.[4] Act 359 was not "legislation of the vicious character referred to" by Justice Cooley that "was little less than a fraud upon the public" because "the proposed measure [stood] upon its own merits, and . . . the legislature [was] fairly notified of its design when required to pass upon it." *Kevorkian*, 447 Mich at 454-455 (quoting *People ex rel Drake v Mahaney*, 13 Mich 481, 494-495 (1865)). The purpose of the Title-Object Clause—preventing fraud, deceit, and subterfuge—would not be fulfilled, therefore, if Act 359 was found to violate it. Act 359 does not present a violation of the multiple-object principle, or any other title-object principle.

C. There is no change-of-purpose violation.

Finally, with respect to the third and final potential challenge, article 4, § 24 is not offended if a substitute bill or amendment is for the same purpose as the original bill or if the substitute or amendment is in harmony with the objects and purposes of the original bill and germane thereto. *United States Gypsum Co v Dep't of Revenue*, 363 Mich 548; 110 NW2d 698 (1961), *Moeller v Wayne Co Bd of Supervisors*, 279 Mich 505; 272 NW 886 (1937). This question thus requires consideration of whether "the subject matter of the amendment or substitute is *germane* to [the bill's] original purpose." *Kevorkian*, 447 Mich at 461 (emphasis added). Courts will ask whether the provisions are so diverse in nature that they do not appropriately belong in the same bill. See *Kevorkian*, 447 Mich at 454, 461; *Cynar*, 252 Mich App at 85, 86.

SB 1197 was introduced on November 8, 2018, with the stated purpose of authorizing the acquisition, construction, operation, maintenance, improvement, repair, and management of a utility tunnel between the Straits of Mackinac. The initial bill gave all of the powers and authority for the utility tunnel to the Bridge Authority. Shortly after the initial bill was introduced, the Senate adopted Substitute S-2, which introduced several new provisions, including: (1) the creation of the Corridor Authority and definitions of its rights, powers, and duties (see Act 359, §§ 14b and 14d); and (2) the creation of the straits protection fund (Act 359, § 14c). SB 1197, including Substitute S-2, passed the Senate on December 5, 2018, and was introduced in the House of Representatives that same day. The House of Representatives passed SB 1197 six days later on December 11, 2018, and the bill was ultimately approved by the Governor (and given immediate effect) on December 13, 2018.

Similar to the analysis described above with respect to the multiple-object challenge, SB 1197's purpose did not materially change in violation of article 4, § 24 as it passed through the

[3] House Fiscal Agency and Senate Fiscal Agency analyses of Senate Bill 1197 (2018), which became Act 359, can be found here: http://legislature.mi.gov/(S(zs5hg1m2oswumw40g305mtft))/mileg.aspx?page=getObject&objectName=2018-SB-1197.

[4] The Detroit News, *State aims to finalize Line 5 tunnel agreement in under 3 weeks* (Published Dec. 10, 2018 at 4:26 pm), https://www.detroitnews.com/story/news/politics/michigan/2018/12/10/michigan-line-5-agreement-under-3-weeks/2270013002/

Detroit Free Press, *New 'straits corridor authority' to oversee proposed Line 5 tunnel*, (Published Dec. 5, 2018 at 1:24 pm) https://www.freep.com/story/news/local/michigan/2018/12/05/new-authority-enbridge-line-5-tunnel/2215113002/

Legislature. The addition of the Corridor Authority and the delineation of its powers, rights, and duties were certainly germane to SB 1197's original purpose—to acquire and operate a utility tunnel under the Straits of Mackinac. The fact that the original bill had all powers and authority related to the utility tunnel vested in the Bridge Authority and that the substitute bill transferred many of those duties, powers, and responsibilities to the Corridor Authority are immaterial. As the Michigan Supreme Court held in *Midland Township*, "[w]hether a provision is germane depends on its relationship to the object of the act, not who is charged with implementing the provision." 401 Mich at 654. That same analysis applies here. Moreover, a similar conclusion may be drawn with respect to the newly-created straits protection fund, which is intended to further the bill's original purpose by providing a fund from which money can be used to cover the "cost of independent oversight of the utility tunnel or the leasing of space in the utility tunnel to publicly-owned utilities." 2018 PA 359 § 14d(4)(e). See *Kuhn v Dep't of Treasury*, 384 Mich 378, 388; 183 NW 2d 796 (1971) ("The appropriation in the Act was utterly germane to that object."). In short, there was no material change to SB 1197 as it passed through the Legislature and there certainly was no violation of article 4, § 24. Indeed, Substitute S-2 furthered the general purpose of SB 1197, as introduced, to construct and operate a utility tunnel under the Straits of Mackinac.

II. Does the requirement that members of the board of the Corridor Authority serve for six years or more violate the constitutional mandate under section 3 of article 5 of the Michigan Constitution of 1963 that the terms of office of any board or commission created or enlarged after January 1, 1964 must not exceed four years?

Section 14b(2) likely violates article 5, § 3 of the Michigan Constitution, but it may be severed from the remainder of the act, which may be given effect. The Michigan Constitution prohibits terms of office for any board or commission created after January 1, 1964 from exceeding four years. Thus, the first four years of a board member's term are consistent with this constitutional restriction. To the extent that 2018 PA 359 provides for an additional two years and is inconsistent with article 5, § 3, that portion of the statute may be severed and should not affect the remainder of 2018 PA 359.

> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

MCL 8.5.

The test for severability used by Michigan courts is whether it can be presumed that the Legislature "would have passed the one [provision] without the other." *People v McMurchy*, 249 Mich 147, 158; 228 NW 723 (1930). Stated another way, "[t]o determine whether severance is appropriate, [the courts] must consider whether the portion of [the statute] remaining after its last

sentence has been severed is capable of functioning alone." *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 96; 803 NW2d 674 (2011).

With respect to 2018 PA 359, the Legislature's intent was clear—to provide for the creation of a utility tunnel under the Straits of Mackinac that could be operated by the Corridor Authority. In creating the Corridor Authority, the Legislature also provided for the appointment of the Corridor Authority's board members, their respective duties, and filling board vacancies. Each of these provisions can function alone and be given effect without regard to the length of the board member's term of office.

Although severing the length of term provision would leave 2018 PA 359 silent with respect to how long board members are to serve, the Michigan Supreme Court has recognized that such a gap may be filled by other constitutional or statutory provisions. See *Midland Cogeneration*, 489 Mich at 96. In *Midland Cogeneration*, for example, the Michigan Supreme Court struck a provision of the General Property Tax Act as unconstitutional, which left the act silent with respect to a plaintiff's right to appeal an adverse classification decision. The court held that the Constitution, under article 6, § 28, provided for direct judicial review of quasi-judicial decision affecting private rights. 489 Mich at 96-97. Because the Michigan Revised Judicature Act ("RJA") specifically allowed for appeals of decisions by state agencies when judicial review was not otherwise provided by law, the Legislature had already filled the gap created by striking the unconstitutional provision—the RJA provision applied and a plaintiff could appeal the subject decision under the RJA. *Id.* at 97.[5]

Indeed, in an Opinion nearly directly on point, the Attorney General used similar logic when examining Const 1963, art 5, § 3 and the constitutionality of a public act that enlarged the Michigan Historical Commission. OAG, 2005, No. 7178 (Aug 2, 2005). In that opinion, the Attorney General found that although the Legislature exceeded its authority by granting six-year terms to some members of the then-newly enlarged commission, article 5, § 3 only invalidated "those provisions of [the act] that specify a term of office in excess of four years and does not affect the remaining provisions."

The Attorney General explained that the four-year limit established in article 5, § 3 operated "by its own force to set the terms of the gubernatorial appointees" until such time as the Legislature decided "to revisit the issue." In fact, as recently as December 28, 2018 the Attorney General stated that this provision of 2018 PA 359 is severable and does not affect the remainder of the Act. *A Felon's Crusade for Equality, Honesty and Truth v Mackinac Straits Corridor Authority, et al,* Court of Claims No. 18-000269-MM.

> The first four years of each Board member's term on the Board is consistent with the four-year limitation in Const 1963, art V, section 3, and the

[5] See also *Hunt v Buhrer*, 133 Mich 107; 94 NW 589 (1903), which held that an act that purported to extend the term of the then-current Wayne County Treasurer by six months was impermissible. Despite so finding, the Supreme Court held that it did not render the whole act unconstitutional. The Court found that extending the existing treasurer's term was an "incidental feature" of the act when the legislative intent behind the whole was to change the treasurer's term of office. *Id.* at 115. The court held that a vacancy between the terms created by striking the impermissible language could be filled by the county's board supervisors under a separate statute. *Id.* at 115-116.

> manifest intent of the Legislature in enacting 2018 PA 359. To the extent that Section 14(b)(2) of 2018 PA 359 provides for a fifth and sixth year of a Board member's term, pursuant to MCL 8.5 that portion of the statute and its application to the Defendant Board members is severable from and does not affect the validity of the remainder of 2018 PA 359.

(Attorney General's Answer for Defendants, ¶32).

The same analysis applies to 2018 PA 359. Although the Legislature exceeded its authority in providing for six-year terms for Corridor Authority board members, the Legislature's intent in enacting 2018 PA 349—to provide a means for a utility tunnel to connect the two peninsulas under the Straits of Mackinac and allow board members to have a term of at least four years permitted by the Constitution—would not be furthered by declaring the entire act void. Instead, since article 5, § 3 expressly limits the board members to terms not to exceed four years,[6] and future appointments are made by the governor, it would be appropriate and consistent with the Legislature's intent to simply recognize the limitation that the Michigan Constitution automatically places on the length of the board members' terms unless or until the Legislature decides to revisit the issue.

III. Does Act 359 revise, alter, or amend other sections of law, including any restrictions on the construction or operation of a tunnel included in section 18 of Public Act 214 of 1952, in a manner that violates section 25 of article 4 of the Michigan Constitution of 1963?

No, the Legislature did not violate Const 1963, art 4, § 25 when it passed Act 359. Article 4, § 25 provides that:

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

Const 1963, art 4, § 25. "Amend" is defined in Black's Law Dictionary as "to change the wording of, to formally alter by striking out, inserting, or substituting words." An alteration is "an act done to an instrument whereby its meaning or language is changed[.]" A revision is a "reexamination or careful analysis for correction or improvement . . . [a]n altered version of a work." Black's Law Dictionary (9th ed). As explained by this Court, this provision prevents "the revising, altering or amending of an act by merely referring to the title of the act and printing the amendatory language then under consideration." *In re Constitutionality of 1972 PA 294,* 389 Mich 441, 470; 208 NW2d 469 (1973). In short, the Legislature may not *revise, alter or amend*

[6] Under MCL 10.61, "the term of office of officers and commissioners appointed by the governor, in cases not otherwise provided, or where no term is specified in the act creating such office or commission, shall expire 2 years from the first day of January of the year when the appointment is made, unless the appointment shall be by the commission limited to a shorter term, in which case it shall cease as limited, or unless the appointment be to fill a vacancy, in which case it shall continue for the remainder of the term: Provided, That in cases where by law the office does not expire with the term, such officers shall hold the office and continue to act until their successors are appointed and have qualified."

a law by reference to its title only without republishing the affected section(s). *That is the full extent of the constitutional prohibition.*[7]

2018 PA 359's enactment did not revise, alter, or amend any section of the original statute that was not republished. And 2018 PA 359 certainly did not amend, alter, or revise section 18 of 1952 PA 214, as implied by the Governor's letter. Section 18 of 1952 PA 214 states, in relevant part:

> The state of Michigan further covenants and agrees with the holders of the bonds **that it will not construct or operate any tunnel, bridge or ferry service <u>which will be competitive with the bridge herein authorized</u>**, and so far as legally possible it will prohibit the **construction or operation of any other tunnel, bridge or ferry service <u>which will afford facilities for vehicular traffic to cross the straits of Mackinac</u>**: Provided, That nothing herein contained shall be construed to prevent the operation of ferries by the state highway department between the upper and lower peninsulas until such time as the bridge shall have been placed in operation.

MCL 254.328 (emphasis added).

This provision—which is structured as a covenant with bondholders as opposed to a statutory restriction[8]—states that the State will not construct a tunnel that will either be competitive with the authorized bridge or which will allow vehicular traffic to cross the Straits of Mackinac. The construction and operation of a utility tunnel is not prohibited under this section. 1952 PA 214 does not define what it means to "compete" with the bridge, but from both the context of section 18 and the Act's title (which refers only to "prohibiting competing traffic facilities" and not to prohibiting utility tunnels), interpreting section 18's non-competition restriction to actual *vehicular* traffic is a reasonable construction that should be applied in furtherance of the requirement that statutes are presumed constitutional, as noted above. Indeed, the utility tunnel falls under neither of the prohibited categories. Section 18 did not need to be amended or republished under the requirements of article 4, § 25.

The Governor's question is not limited to only section 18, as it also asks whether there has been a revision, alteration or amendment of "other sections of law" in a manner that violates article 4, § 25. The only other law that would appear to be potentially implicated by the enactment of Act 359 is 1950 PA 21, which created the Mackinac Bridge Authority and governed feasibility studies. But Act 359 did not revise, alter, or amend any part of 1950 PA 21, or even attempt to revise, alter, or amend 1950 PA 21.

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[7] Although Article 4, § 25 prohibits amendments "by reference to its title only," the Michigan Supreme Court in *Alan v County of Wayne*, 388 Mich 210, 281; 200 NW2d 628 (1972), overturned *Burton v Lindsay*, 184 Mich 250; 151 NW 48 (1915), which had held that a violation of article 4, § 25 could not occur without a specific reference to *an* amendment of another act because such a holding led to an "absurd" rule. *Alan*, 388 Mich at 281-82.

[8] As we understand, there are no current bondholders with standing or interest to enforce this obligation.

MCL 254.302, which is section 2 of 1950 PA 21, states:

> The Mackinac bridge authority is created within the department of transportation as a nonsalaried entity, a public benefit corporation, and an agency and instrumentality of the state of Michigan. . . . *In addition to the powers expressly granted to it under Michigan law*, the authority shall have all powers necessary or convenient to carry out the things authorized and to effect the purposes of this act. [(Emphasis added.)]

This provision of 1950 PA 21 contemplates that the Mackinac Bridge Authority may be granted powers under separately enacted statutes. Act 21 does not, therefore, restrict the Bridge Authority's powers to those granted in that act, and the Legislature did not need to amend Act 21 when it granted the Bridge Authority power to acquire a utility tunnel through Act 359.

The Michigan Court of Appeals recently considered a similar challenge under article 4, § 25 to a statutory FOIA exemption that was enacted as part of a law separate from the Freedom of Information Act. See *Coal Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, 317 Mich App 1; 894 NW2d 758 (2016). In that case, plaintiffs challenged MCL 500.134, a provision of the Insurance Code, which specifically describes and exempts the Michigan Catastrophic Claims Association's ("MCCA") records from FOIA disclosure. *Id.* at 6-8. The plaintiffs claimed that the provision "violated Const 1963, art 4, § 25, because the statute amended FOIA by exempting the MCCA from FOIA without reenacting and republishing FOIA." *Id.* at 6. However, section 13(1)(d) of FOIA "provides in pertinent part that '[a] public body may exempt from disclosure as a public record under this act . . . [r]ecords or information specifically described and exempted from disclosure by statute.'" *Id.* at 32. The Court of Appeals held that the challenged provision exempting MCCA records from FOIA did not violate article 4, § 25 because: (1) "FOIA was drafted in a manner that permits other statutes to exempt public bodies from FOIA's disclosure requirements"; and (2) "the Legislature did not 'dispense with' or 'change' any provision of FOIA when it revised the Insurance Code and enacted MCL 500.134(4)." *Id.*

Here, too, Act 21 was drafted in a manner that permits other statutes to grant powers to the Michigan Bridge Authority. See MCL 254.302. And, the Legislature did not dispense with or change any provision of Act 21 when it enacted Act 359 and granted the Bridge Authority power over the acquisition of a utility tunnel. See *Coal Protecting Auto No-Fault*, 317 Mich App at 32. When an act, such as Act 359, is an "act complete in itself" such that it does not purport to amend an act or section that was only referred to but not republished, then the act does not violate article 4, § 25. See *People ex rel Drake v Mahaney*, 13 Mich. 481, 497 (1865) ("But an act complete in itself is not within the mischief designed to be remedied by [article 4, § 25], and cannot be held to be prohibited by it without violating its plain intent."); *Coal Protecting Auto No-Fault*, 317 Mich App at 26. Cf *Nalbandian v Progressive Michigan Ins Co*, 267 Mich App 7, 15-16; 703 NW2d 474 (2005) ("[The amendment] is a piecemeal amendment to an existing comprehensive statutory scheme . . . . [The amendment] attempt[ed] to amend the old law by intermingling new and different provisions with the old ones found in the Insurance

Code. Thus, [the amending statute] was not an act complete in itself, and Const. 1963, art. 4, § 25 applied to its enactment.").

Because Act 359 did not alter, amend, change, or dispense with any provisions of Act 21, and because Act 21 contemplates that other statutes will grant additional powers to the Bridge Authority, Act 359 was complete in itself and the Legislature was not required to reenact and republish Act 21 under Const 1963, art 4 § 25. *Coal Protecting Auto No-Fault*, 317 Mich App at 33. Act 359 only amended 1952 PA 214, and all amended sections were reenacted and republished in full. And, Act 359 does not conflict with or amend section 18 of 1952 PA 214, so any statutory provision that was amended, revised, or altered by Act 359 was properly republished and there is not a violation of article 4, § 25.

IV. In contrast to general acts providing for the creation of authorities (see, for example, the Regional Transit Authority Act of 2012, the Regional Convention Facility Authority Act, and Chapter 6A of the Aeronautics Code of the State of Michigan), is Act 359 a special or local act prohibited by the Michigan Constitution of 1963 because a general act could have been made applicable instead?

No, Act 359 is not a special or local act prohibited under the Michigan Constitution. Const 1963 art 4, § 29 provides:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

The Michigan Supreme Court has recounted the "history and rationale" behind this constitutional provision:

> Considering the history of legislation under the Constitution of 1850, it is apparent that there had grown up a pernicious practice on the part of the legislature in passing local acts. The practice was bad in two very important particulars. In the first place, much of the legislation thus enacted constituted a direct and unwarranted interference in purely local affairs and an invasion of the principles of local self-government. In the second place, such legislation affecting as it did certain limited localities in the State, the senators and representatives from unaffected districts were usually complaisant, and agreed to its enactment without the exercise of that intelligence and judgment which all legislation is entitled to receive from all the members of the legislature. This course led to

> many abuses (principally in amendments to city charters), some of which found their way into the courts, and were there redressed so far as the Constitution then in force would permit.

In re Advisory Opinion Re Constitutionality of 1975 PA 301, 400 Mich 270, 286; 254 NW2d 528 (1977) (quoting *Attorney General ex rel Dingeman v Lacy*, 180 Mich 329, 337-338; 146 NW 871 (1914)). Const 1963, art 4, § 29 thus prohibits the Legislature from passing local or special acts that "constitute[] a direct and unwarranted interference in purely local affairs and an invasion of the principles of local self-government" or that affect only "limited localities in the State." *Id.* The Michigan Supreme Court has further clarified that Article 4, Section 29 "properly has application only to legislative action which is limited to some geographical area." *Id.* at 287.

Not all acts that affect only a limited geographical area or only a few people are local or special acts, however. Michigan courts have held:

> The mere fact that a law only applies . . . to a limited number does not make it special instead of general. It may be general within the constitutional sense and yet, in its application, only affect one person or one place. If a law is general and uniform in its operation upon all persons in like circumstances, it is general in the constitutional sense.

GMC v Dep't of Treasury, 290 Mich App 355, 378-379; 803 NW2d 698 (2010) (quoting *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 349; 22 NW2d 433 (1946)) (internal quotation marks and citations omitted). Although Act 359 is geographically local in that it provides for a utility tunnel in the Straits of Mackinac and creates the Corridor Authority to carry out the tunnel's creation in that location, the problems that the utility tunnel seeks to address are state- and region-wide concerns: First, the utility tunnel will provide an improved energy infrastructure connection between the Upper and Lower Peninsulas, which will benefit all Michigan citizens. Second, the utility tunnel seeks to protect the Great Lakes and Michigan's natural resources by insulating Enbridge's Line 5 pipeline. Thus, although the tunnel will be physically located in the Straits, Act 359 was enacted to benefit Michigan generally and is "general in the constitutional sense." *Id.*

The Michigan Supreme Court's decision in *W A Foote Memorial Hospital, Inc v City of Jackson Hospital Authority* reinforces this idea. Analyzing a constitutional challenge under article 4, § 29, the Court stated:

> We must consider the purposes sought to be accomplished by the law. If we find [that] those purposes are public purposes, if the work of the entity is a public work[,] then we should find [the statute] to be a constitutional exercise of legislative power insofar as art 4, § 29 applies.

390 Mich 193, 212; 211 NW2d 649 (1973) (quoting *Advisory Opinion re Constitutionality of PA 1966, No 346*, 380 Mich 554, 571; 158 NW2d 416 (1968)) (internal quotation marks and

citations omitted). In addition to finding that the statute's purposes were public purposes and that the work of the entity was a public work, the Court found that the statute was "designed to meet and remedy a statewide problem" and that it "[did] not speak to the problem dealt with by art 4, § 29." *Id.*

Const 1963 art 4 § 29 is not implicated, therefore, when an act provides for a public works project in a particular locality if the act has a public purpose, the entity's work is a public work, and the project addresses a statewide concern. For instance, in *Attorney General ex rel Eaves v State Bridge Commission*, 277 Mich 373; 269 NW 388 (1936), the Michigan Supreme Court upheld the constitutionality of an act creating a "state bridge commission" and authorizing it to "acquire, improve, construct, operate, and maintain" the Blue Water Bridge, which connects Michigan and Canada across the Saint Clair River in Port Huron. *Id.* at 376. The Court reasoned that "[s]o far as the state of Michigan is concerned, practically all of its citizens are affected directly or indirectly by the means of ingress and egress at Port Huron," which belied any characterization of the bridge as "local or special." *Id.* at 378-379.

Similarly, the utility tunnel authorized in Act 359 has a public purpose, the work of the Bridge Authority and Corridor Authority is a public work, both authorities are state agencies, and the tunnel was designed to meet and remedy a statewide problem. Act 359 is not, therefore, a local or special act in the constitutional sense, but a general act. See also *Advisory Opinion Re Constitutionality of Pa 1966, No 346*, 380 Mich 554, 570; 158 NW2d 416 (1967) ("It is said that the conferring of corporate powers by the legislature upon agencies of the State, appointed to perform some public work, in the course of the administration of civil government, the more efficiently to perform the duties imposed, is not such an act as is prohibited by the Constitution.").

V. Does the Corridor Authority possess any power not constitutionally and explicitly granted to it by Act 359?

The Corridor Authority is a creature of statute and therefore possesses only those powers granted by the constitution or by statute. Indeed, 2018 PA 359 explicitly states as much.

> The Mackinac Straits corridor authority does not possess any powers not explicitly granted to it under this act, including, but not limited to, the power of eminent domain.

MCL 254.324b(11).

Because the Corridor Authority is a creature of statute, "it possesses only that authority granted by the Legislature." See, e.g., *Consumers Power Co v Mich Pub Serv Comm*, 460 Mich 148, 155; 596 NW2d 126 (1999). Indeed, "the power and authority of an agency must be conferred by clear and unmistakable statutory language. And if a statute does explicitly grant an agency a power, that power is subject to 'strict interpretation.'" *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 583; 810 NW2d 110 (2011). In short, Michigan courts have held that statutorily created entities are not imbued with any inherent power. Rather, any authority possessed by such an entity must be plainly granted by the Legislature or by the Constitution.

Citizens for Protection of Marriage v Bd of State Canvassers, 263 Mich App 487, 492; 688 NW2d 538 (2004); see also *In re Procedure and Format for Filing Tariffs under the Mich Telecom Act*, 210 Mich App 533, 539; 534 NW2d 194 (1995); *Sebewaing Indus, Inc v Sebewaing*, 337 Mich 530; 60 NW2d 444 (1953); *Advisory Opinion Re Constitutionality of 1966 PA 346*, 380 Mich 554; 158 NW2d 416 (1967); *Continental Cas Co v Mich Catastrophic Claims Ass'n*, 874 F Supp 2d 678 (ED Mich, 2012).

VI. If the Corridor Authority was not created in a manner that conforms with the Michigan Constitution of 1963, is the Authority, its board, and action taken by the board void?

To begin, as set forth above, the Chamber believes that there is no valid argument that 2018 PA 359 should be struck in its entirety as unconstitutional under the questions posed by the Governor's letter. The only potentially plausible argument against any provision of 2018 PA 359 raised in the Governor's letter is that section 14b(2) should be severed to the extent it conflicts with article 5, § 3, consistent with the Attorney General's stated position regarding this provision. See footnote 4 above. And as discussed above, Act 359's apparent violation of Const 1963, art 5, § 3's limitation on the length of the Corridor Authority board members' terms does not impact the validity of the entire act.

With respect to the other questions raised about 2018 PA 359, none of the constitutional challenges overcome the strong presumption of the act's constitutionality, let alone provide the requisite "clearly apparent" reasons. *Cady v Detroit*, 289 Mich 499, 505; 286 NW2d 805 (1939). If, however, Act 359 is fatally flawed and, as the question presupposes, the creation of the Corridor Authority was unconstitutional (which as discussed above is not the case), then the Corridor Authority, its board, and actions already taken by the board would almost certainly be void.

"As a general rule, an unconstitutional statute is void *ab initio*; it is void for any purpose and is as ineffective as if it had never been enacted. Pursuant to this rule, decisions declaring statutes unconstitutional have been given full retroactive application." *Johnson v White*, 261 Mich App 332, 336; 682 NW2d 505 (2004) (citations omitted); see also *Norton v Shelby Co*, 118 US 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."). Nevertheless, the Michigan Supreme Court has recognized that, under certain extraordinary factual circumstances, fairness and/or "the necessities of governmental administration" may counsel against retroactive application of a decision holding a legislative act unconstitutional. See *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 147; 253 NW2d 114 (1977).

CONCLUSION

For the reasons set forth above, Act 359 is not unconstitutional: the record makes clear that there is no serious question that the Legislature understood exactly what it was doing and, consistent with the Title-Object Clause, more than adequately described in the Act's title its goal to establish a utility tunnel connecting the upper and lower peninsulas. In addition, the

Legislature did not unconstitutionally amend or revise any other statute that was not republished, and Act 359 is far from a special or local act given its broad purpose to ensure that the State's energy needs are met in as safe a manner as possible. Further, the Corridor Authority possesses only those powers vested in it by Act 359, and to the extent that the members of that Authority's Board were given terms longer than 4 years the portion of the Act providing for longer terms can readily be severed without voiding the rest of the law, as the Attorney General's office itself has recognized in its response to a pending lawsuit challenging Act 359 on these very grounds.

The Chamber therefore respectfully submits that the Attorney General should conclude that Act 359 is constitutional and that the Corridor Authority and its Board of Directors have taken, and may continue to take, actions to implement the statute consistent with their duties and powers under it.