STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

In re APPLICATION OF ENBRIDGE ENERGY TO REPLACE AND RELOCATE LINE 5

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, ENVIRONMENTAL LAW & POLICY CENTER and MICHIGAN CLIMATE ACTION NETWORK,

Appellant,

and

FOR LOVE OF WATER,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MACKINAC STRAITS CORRIDOR AUTHORITY, MICHIGAN PROPANE GAS ASSOCIATION, NATIONAL PROPANE GAS ASSOCIATION, and MICHIGAN LABORERS' ADISTRICT COUNCIL,

Appellees,

and

ENBRIDGE ENERGY LIMITED PARTNERSHIP,

Petitioner-Appellee.

Supreme Court Nos. 168335, 168336, 168337, 168338, 168339, and 168346,

Court of Appeals Nos. 369156, consolidated with Nos. 369157, 369159, 369161, 369162, 369163, and 369165, 369231

MPSC Case No. U-20763

Hon. Christopher S. Saunders

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APPELLEES MICHIGAN PROPANE GAS ASSOCIATION AND NATIONAL PROPANE GAS ASSOCIATIONS' ANSWER IN OPPOSITION TO APPELLANTS' APPLICATIONS FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction under MCR 7.303(B)(1) to consider Appellants Bay Mills Indian Community, Little Traverse Bay, Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law and Policy Center, and Michigan Climate Action Network and For Love of Water's applications for leave to appeal from the Court of Appeals' opinion dated February 19, 2025, affirming the Michigan Public Service Commission's December 1, 2023 Final Order.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Appellants' applications for leave to appeal express disagreement with the Michigan Public Service Commission and Court of Appeals' decisions to confine the scope of the proceedings under Public Act 16 of 1929 to consider only the replacement of the segment of Line 5's crossing of the Straits of Mackinac into a tunnel. Should this Court grant leave to appeal where the issues raised by Appellants do not have significant public interest or involve a legal principle of significance for this state's jurisprudence, and where the published decision below is not clearly erroneous, does not conflict with other decisions of this Court or the Court of Appeals, and will not cause material injustice?

Appellants answer: Yes.

Appellees answer: No.

REASONS TO DENY LEAVE

Appellants Bay Mills Indian Community, Little Traverse Bay, Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, Environmental Law and Policy Center, and Michigan Climate Action Network (the "Joint Appellants") and For Love of Water's ("FLOW") applications do not check any of the boxes for this Court to grant leave. Despite Appellants' repeated attempts to turn this case into something it is not, this case does not concern the continued operation of Line 5's entire 645-mile interstate pipeline.

Rather, the sole question is whether Enbridge Energy, Limited Partnership should be permitted to replace a four-mile segment of the Line 5 pipeline that crosses the Straits of Mackinac in two, 20-inch-diameter pipes at the bottom of the lakebed with a single, 30-inch-diameter pipe, which will be located within a concrete-lined tunnel beneath the lakebed (the "Replacement Project"). The purpose of the Replacement Project is to provide *greater* protection to the aquatic environment by removing the risk of anchor strikes to the existing dual pipelines and virtually eliminating the risk of product reaching the Straits.

Both the Commission and the Court of Appeals correctly recognized Appellants' arguments for what they were—an improper challenge to the continued operation of the entire Line 5 pipeline. Appellants' applications do nothing more than express disagreement with the Commission's and Court of Appeals' decisions to enforce the appropriately limited scope of review under Act 16 and the Michigan Environmental Protection Act ("MEPA"). The narrow questions raised by Appellants do not involve issues of significant public interest or implicate issues of major significance to the state's jurisprudence—particularly since Line 5 will continue to operate with or without the enhanced protections provided by the Replacement Project—nor

do they demonstrate a clear error by the Court of Appeals or a conflict with any binding decisions.

Accordingly, this Court should deny leave to appeal.

ARGUMENT

I. The issues do not have significant public interest.

The Joint Appellants allege that this "*case* . . . involves matters of significant public interest." (Joint Appl 5 (emphasis added).) FLOW likewise states, "Not only does this *case* lie against two state agencies, but it concerns a matter of paramount public importance." (FLOW Appl 4 (emphasis added).) While the *case* itself may have generated significant public interest, the *issues* raised by Appellants do not.

Under MCR 7.305(B)(2), this Court may grant leave where "the *issue* has significant public interest and the *case* is one by or against the state or one of its agencies or subdivisions" (emphases added). "[T]he use of different words generally indicates that the words have different meanings." *In re Guardianship of AMMB,* __ Mich App __, __; __ NW3d __ (2024), slip op at 4, citing *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 14; 795 NW2d 101 (2009).[1] And, under the "distributive phrasing" canon, the *issue* must have significant public interest, while the *case* must be against the state agency. See *Encino Motorcars, LLC v Navarro*, 584 US 79 (2018), citing A. Scalia & B. Garner, Reading Law 214 (2012) ("Distributive phrasing applies each expression to its appropriate referent.")

[1] When called upon to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation. *Grievance Administrator v Underwood*, 462 Mich.188, 193; 612 NW2d 116 (2000).

The *issues*, as identified by Appellants, are (1) whether the Court of Appeals applied the correct standard of review (Joint Appl 2), whether the Court of Appeals correctly affirmed the Commission's MEPA determination (*id.*), and whether the Court of Appeals correctly concluded the public trust doctrine was not implicated (FLOW Appl v). These issues have not garnered significant public interest, and they merely involve alleged error correction. See *People v Anderson*, 513 Mich 1023, 1027; 2 NW3d 912 (2024) (Zahra, J., dissenting) ("Our role is not to nitpick debatable fact questions, but to focus on legal issues of statewide significance.") This is far cry from matters that invoke legal issues of significant public interest. See, e.g., *T & V Associates, Inc v Director of DHHS* and *Baker v Watervliet Pub Schools*, 12 NW 3d 592, 593, 597 (2024) (Viviano, J dissenting) (describing legal issues of significant public interest concerning "the authority of the director of the Department of Health and Human Services (DHHS) to restrict gatherings in and operation of food service establishments" and "whether . . . school districts had the authority to issue mask mandates."); see also *League of Women Voters of Michigan v Independent Citizens Redistricting Commission*, 509 Mich 885; 971 NW2d 595, 596-597 (2022) (Welch, J dissenting) (stating that a challenge to whether an adopted restricting plan for the Michigan House of Representatives complied with the Michigan Constitution which was an issue of first impression that had significant public interest.)

As a practical matter, this Court could not take every *case* with significant public interest, and it regularly denies leave in high-profile cases with significant public interest. See, e.g. *People v Schurr*, 13 NW 3d 633 (2024) (denying leaving in a high-profile case concerning a trial for a former police officer for murder in a traffic stop killing); *LaBrant v Secretary of State*, 998 NW2d 216 (2023) (denying leave in a challenge to President Donald Trump's eligibility to appear on Michigan's presidential primary ballot); *Wade v University of Michigan*, 12 NW3d 6

(2024) (denying leave in a case concerning a high-profile gun ban by the University of Michigan). As the Court explained in *People v Tyrer*, "If a bi-level appellate system is to work, it is necessary for the Supreme Court to resist the temptation, always present among men trained in the law, to become involved in the fascinating work of the trial and intermediate appellate courts. This is such a case. A murder trial is to the lawyer what opening night is to the thespian or brain surgery is to the medical profession." 385 Mich 484, 486; 189 NW2d 226 (1971) (denying leave in a high-profile criminal case). This, too, is such a case.

II. The issues do not involve a legal principle of major significance to the state's jurisprudence.

Nor do the issues raised involve legal principles of major significance to the state's jurisprudence. Notably, Appellants themselves do not agree on what supposedly significant legal issue is implicated by the Court of Appeals' decision. While the Joint Appellants claim that the issues of major significance involve "the incorrect interpretation of MEPA, and the Court of Appeals' failure to review the Commission's MEPA determinations de novo (Joint Appl 5), FLOW asserts that the Court of Appeals' public trust holding involves a legal principle of major significance (FLOW Appl 4). Appellants' inability to agree on the significance of the issues erodes the supposed significance of their applications.[2]

Regardless, none of the issues implicate questions of major legal significance for the state's jurisprudence. Importantly, they do not raise issues of first impression. See *League of Women Voters of Michigan v Indep Citizens Redistricting Comm*, 509 Mich 885; 971 NW2d 595, 597 (2022) (Welch, J., dissenting) (asserting in dissent that leave should have been granted

[2] While FLOW notes in passing that it "concurs in full" with the issues identified by Joint Appellants, that it focuses its application on an entirely different issue than the Joint Appellants indicates that it has a different opinion as to which issues are supposedly of "major significance."

because "the plaintiffs' challenge raises a question of first impression that checks all the usual boxes to warrant our review"). And while Appellants try to frame the issues as undermining the constitutional and legislative frameworks in Michigan, as explained below, their arguments are not supported by well-established law, nor do Appellants offer any reason why this Court should depart from precedent. Further, the issue raised by the Joint Appellants relating to the Commission's ruling in limine involves a "narrow dispute" of the Commission's application of MEPA to this case that is not jurisprudentially significant. See *Gulf Underwriters Ins Co v McClain Indus, Inc*, 483 Mich 1010; 765 NW2d 16, 17 (2009) (Young, J concurring) ("[The] application for leave to appeal demonstrates only a narrow dispute regarding the interpretation of *its* contact. Accordingly, [the Appellant] has not shown that this case 'has significant public interest' or 'involves legal principles of major significance to the state's jurisprudence.'")

III. The Court of Appeals' decision is not clearly erroneous, will not cause material injustice, and does not conflict with other binding decisions.

Finally, despite Appellants' efforts to undermine the Court of Appeals' reasoned decision, the Court of Appeals applied the correct standard of review, properly affirmed the Commission's MEPA determination, and correctly concluded that the public trust doctrine is inapplicable to this case. Accordingly, the Court of Appeals' decision does not conflict with other decisions, is not clearly erroneous, and will not cause material injustice.

A. The Court of Appeals was not required to apply de novo review to the Commission's MEPA determination.

The Joint Appellants assert that the Court of Appeals erred by not applying de novo review to the Commission's determination that there are no feasible and prudent alternatives to the Replacement Project pursuant to MEPA, and that the Court's decision conflicts with decisions of this Court and the Court of Appeals. Not so.

The Joint Appellants again rely on *West Michigan Environmental Action Council, Inc v Natural Resources Commission* ("*WMEAC*") to support their assertion that a de novo review of the Commission's MEPA determination was required. (Joint Appl 16, citing 405 Mich 741; 275 NW2d 538). But the Court of Appeals properly analyzed and distinguished this case. (See COA Op 23.) *WMEAC* involved an independent MEPA action filed in circuit court. 405 Mich at 754, citing MCL 691.1204(4), as amended by 1994 PA 451 (emphases added). As this Court explained in *WMEAC*, when a MEPA action is filed in circuit court, the trial judge acts as a factfinder, even if the court directs a case to be resolved by an agency first. See *id.* at 752; see also MCL 324.1704; *Ray v Mason County Drain Commissioner*, 393 Mich 294, 307-308; 224 NW2d 883, 889 (1975) ("[T]he very efficacy of the [M]EPA will turn on how well circuit court judges meet their responsibility for giving vitality and meaning to the act through *detailed findings of fact.*" (emphasis added); *Nemeth v Abonmarche Development, Inc.*, 457 Mich 16; 576 NW2d 641 (1998) (referencing that in an independent MEPA action, the "trial judge has a responsibility to independently determine the existence of actual or likely pollution, impairment, or destruction to a natural resource.")

However, as the Court of Appeals recognized, this case does not involve a MEPA action filed in circuit court, but rather, involves a MEPA analysis in the context of an Act 16 proceeding. (COA Op 23.) In other words, the Court of Appeals was not acting as a fact-finder, but was acting as an appellate court reviewing the Commission's MEPA decision. See Cont. 1963, art. 6, § 28; MCL 462.26(8); *Att'y Gen v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999); *In re Consumers Energy Co,* 279 Mich App 180, 188-89; 756 NW2d 253 (2008). As this Court explained in *WMEAC*, "the Legislature specifically addressed the relationship between suits brought under the environmental protection act and administrative

proceedings." *WMEAC*, 405 Mich. at 752. To hold otherwise would disregard this Court's statement that "MCL 691.1204(4) [now MCL 324.1704] specifically indicates that the usual standards for review of administrative actions under the Administrative Procedures Act . . . are inapplicable once an environmental protection act case has been filed *in a circuit court*." *Id.* at 754 (emphasis added).

The cases cited by the Joint Appellants do not create a conflict with the Court of Appeals' conclusion, but rather, support it. All of the binding cases cited by the Joint Appellants involve MEPA actions filed in the circuit court, where the circuit judge was required to act as factfinder and exercise de novo review. See, e.g., *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 485-90; 608 NW2d 531 (2000) (holding that a trial court in a MEPA action filed after the MDEQ approved a permit for an asphalt plant was required to independently determine whether there would be pollution, impairment, or destruction of a natural resource); *Friends of Crystal River v Kuras Props*, 218 Mich App 457, 470-73; 554 NW2d 328 (1996) (finding that the trial court properly reviewed the DNR MEPA determination de novo in an action to block the issuance of a DNR permit); *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 264 Mich App 257, 259-261; 690 NW2d 487 (2004) (noting that the trial court made its ultimate findings under MEPA); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8-9; 596 NW2d 620 (1999) (in an action filed in circuit court under MEPA, noting that the trial court held a hearing to determine whether to order equitable relief under MEPA); *Trout Unlimited, Muskegon-White River Chapter v White Cloud*, 209 Mich App 452, 456; 532 NW2d 192 (1995) (in an action filed in circuit court under MEPA, explaining that trial judge made its own factual findings under MEPA that a natural resource was affected, but not to the level of impairment justifying judicial intervention); *City of Portage v Kalamazoo Co Rd Comm*, 136 Mich App 276, 279; 355 NW2d

913 (1984) (in an action filed in circuit court under MEPA, noting that the trial court held a trial before issuing an opinion and order enjoining the defendant from cutting trees).[3]

Accordingly, the Court of Appeals was not required to apply de novo review and did not clearly err in distinguishing *WMEAC*.

B. The Court of Appeals correctly affirmed the Commission's ruling on Enbridge's motion in limine and its MEPA determination in its final Order.

The Joint Appellants also assert that the Court of Appeals erroneously affirmed the Commission's decision in two ways: (1) by affirming the Commission decision on Enbridge's motion *in limine* limiting the scope of the proceedings to the Replacement Project, and (2) by affirming the Commission's MEPA analysis because, according to the Joint Appellants, the Commission's broad consideration of the impacts of alternatives to the Replacement Project was inconsistent with its decision to limit the scope of the proceedings. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire

[3] The Joint Appellants cite three cases decided before 1990 that do not appear to clearly follow *WMEAC*'s limited holding. (See Joint Appl 21, citing *Thomas Twp v John Sexton Corp of Mich*, 173 Mich App 507, 511; 434 NW2d 644 (1988), *Citizens Disposal, Inc v Dept of Nat. Res*, 172 Mich App 541, 545; 432 NW2d 315 (1988), and *Mich Waste Sys v Dep't of Nat Res*, 147 Mich App 729, 735; 383 NW2d 112 (1985).) These cases are not binding on the Court of Appeals and, thus, the Court committed no clear error in not relying on them. MCR 7.215(J). Further, the Court of Appeals' decision does not conflict with these cases because:

- The Court in *Thomas* ultimately reviewed the MEPA issues under the substantial evidence standard even though it said de novo review applied, 173 Mich App at 517;
- The standard of review analysis in *Citizens Disposal* is mere dicta because the Court affirmed the agency's permit denial based on a different statute, 172 Mich App at 546; and
- The Court in *Michigan Waste Systems* concluded that the MEPA claims were not subject to de novo review because the plaintiff did not allege that the agency's permit denial would damage the environment, 147 Mich App at 735-36.

evidence is left with a definite and firm conviction that a mistake has been made. *Tuttle v Dep't of State Highways*, 397 Mich 44; 243 NW2d 244 (1976).

As the Court of Appeals recognized, the Commission was "following the plain language of [MEPA]" by looking at the "desired 'conduct[;]'" the Replacement Project rather than Line 5 as a whole. (COA Op 24.) A shutdown of Line 5, or oil spills outside of the Replacement Project were simply not pertinent to the proceedings. (See, e.g. *id.* at 20.) And with regard to the Commission's "alternatives analysis," the Court of Appeals also indicated that the Commission could have limited its analysis, but that ultimately its decision was supported by evidence in the record. (*Id.* at 24-25.) Apart from their general disagreement with the Commission and the Court of Appeals, the Joint Appellants do not demonstrate that a clear mistake was made or that injustice will result.

C. The Court of Appeals correctly concluded that the Commission did not have the authority to consider the public trust doctrine.

FLOW asserts that the Court of Appeals erred in determining that the public trust doctrine is inapplicable to this case. As the Court of Appeals recognized, the public trust doctrine arises under the common law, and the Commission does not possess any common law powers. (*Id.* at 22, citing *Glass v Goeckel*, 473 Mich 667, 678; 703 NW2d 58 (2005); *Mich Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988).) The cases cited by FLOW do not contradict this holding. As a result, the Court of Appeals correctly concluded that FLOW's reliance on the public trust doctrine was "misplaced." (*Id.*)[4]

[4] To the extent the State has any public trust obligation with respect to the tunnel, the State made the requisite findings when it entered into the 2018 Agreements and issued the easement to the Mackinac Straits Corridor Authority. See *Enbridge Energy v State*, unpublished opinion of the Court of Claims, issued Oct 31, 2019 (Docket No. 19-000090-MZ), at p 9.

And FLOW has not made clear how public rights, which include "fishing, hunting, and boating for commerce or pleasure," *Glass*, 473 Mich at 679, are implicated by the Replacement Project, which the Commission found "essentially eliminates the risk of adverse impacts that may result from a potential release from Line 5 at the Straits and protects unique ecological and natural resources that are of vital significance to the State and its residents, to tribal governments and their members, to public water supplies, and to the regional economy." (COA Op 14.)

CONCLUSION AND REQUESTED RELIEF

Throughout this case, Appellants have attempted to use Enbridge's request for approval of the Replacement Project as an opportunity to challenge the entirety of Line 5. In their applications, Appellants now seek to leverage their own repeated efforts to broaden scope of this case by highlighting its high-profile nature, despite the limited reach of the question at issue. The Commission and the Court of Appeals methodically considered the statutory requirements to approve the Replacement Project—and only the Replacement Project—and Appellants do not offer any compelling reason for this Court to weigh in to those well-reasoned decisions. Accordingly, Appellees Michigan Propane Gas Association and National Propane Gas Association respectfully request that this Court deny Appellants' application for leave to appeal.

Dated: April 30, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation pursuant to MCR 7.212(B). The Brief contains 3,166 words of Times New Roman 12-point proportional type and 2.0 spacing. The word processing software used to prepare this brief was Microsoft Word 360, Version 2308.

Dated: April 30, 2025

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