STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. KEN-25-53

MAINE STATE CHAMBER OF COMMERCE and BATH IRON WORKS CORPORATION

Plaintiffs - Appellants

v.

STATE OF MAINE DEPARTMENT OF LABOR and LAURA A. FORTMAN, in her official capacity as Commissioner of the State of Maine Department of Labor

Defendants - Appellees

On Questions reported by the Kennebec County Superior Court

BRIEF OF APPELLEES

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INTRODUCTION

The Paid Family and Medical Leave Act ("PFML Act" or "Act") created a state program to provide twelve weeks of paid family or medical leave for most employees in Maine beginning in May 2026. 26 M.R.S. §§ 850-A – 850-R (2025). The PFML program is funded by premiums paid by employees and employers beginning January 1, 2025, that are held in trust in the PFML Fund ("Fund"). *Id.* §§ 850-F, 850-E. In accordance with the provision of the Act directing the Maine Department of Labor ("Department") to adopt rules as necessary to implement the PFML program by January 1, 2025, the Rules Governing the Maine Paid Family and Medical Leave Program were finalized on December 4, 2024, and are codified at 12-702 C.M.R. ch. 1 ("Rule").[1] *Id.* § 850-Q; Appendix ("A") at 40.

This case, which arises from a consented-to report from the Superior Court pursuant to M.R. App. P. 24(a), A. 7-9, is a challenge by the Maine State Chamber of Commerce ("the Chamber") and Bath Iron Works Corporation ("BIW") to one aspect of the Rule, which provides that the Department will accept applications for private plan substitution after April 1, 2025. Rule § XIII(A)(2). Hence, the Rule's exemption from the payment of premiums to the Fund for an "employer with an approved private plan," set forth in 26 M.R.S. § 850-F(8), will take effect for the quarter beginning April 1, 2025, at the earliest. Rule § XIII(A)(4). Because the Act

[1] The Rule is in the Appendix at 45-70. The Rule is effective January 1, 2025.

is silent as to the timing and mechanism of the Department's acceptance and approval of private plan substitutions, the Chamber and BIW have not shown that the Rule exceeds the rulemaking authority of the Department, or that it is arbitrary and capricious, or otherwise not in accordance with the law within the meaning of 5 M.R.S. § 8058 (2025).

Furthermore, the Chamber and BIW have not proven that the mere payment of premiums to the Fund for one quarter amounts to an unconstitutional taking of property under the United States or Maine Constitution. The argument of the Chamber and BIW ignores a considerable body of caselaw establishing that a requirement to pay money to the government does not constitute a "taking." Moreover, the Chamber and BIW have not proven that they have a constitutional property right in the timing of the exemption from the requirement to remit premiums for employers with an approved private plan.

The Court should accept the report and hold that the Rule is valid.

STATEMENT OF FACTS

The Paid Family and Medical Leave Act

The Act requires the Department to administer the PFML program. 26 M.R.S. § 850-B. The Act applies broadly to most employers and employees in the State of Maine, including BIW and other members of the Chamber. A. 40, ¶ 5.

The Act allows "covered individuals" to take up to twelve weeks of leave in a benefit year for certain qualifying reasons. 26 M.R.S. §§ 850-B, 850-A(9). As clarified by the Rule, most employees who earn wages in Maine are "covered employees" who are eligible for benefits. *Id*. § 850-A(9); Rule § II(A)(1)(a). The Rule also clarifies that the number of days that an employee has worked for a particular employer does not affect their eligibility for benefits, although job restoration is required only for employees who had been employed by that employer for at least 120 days. 26 M.R.S. § 850-J(1); Rule § IV(B)(3); s*ee also* A. 104.

To finance its benefits, the Act established the Fund. 26 M.R.S. § 850-E. Beginning January 1, 2025, employers are required to submit payroll premiums quarterly into the Fund to finance the payment of PFML benefits.[2] *Id.* §§ 850-E(2)(A), 850-F, 850-P. The Fund accumulates these premiums and will begin to pay benefits to eligible employees on May 1, 2026, unless it delays payment for up to three months to ensure the solvency of the Fund.[3] *Id*. § 850-P.

The Act allows an employer to apply to the Department for approval of a private plan "to meet its obligations" of the PFML Act. *Id.* § 850-H(1). In order to

[2] The premiums are 1% of wages, with 0.5% paid by the employer with 15 or more employees and 0.5% paid by the employee. 26 M.R.S. §§ 850-F(3)-(5). Employers are required to withhold employee premiums beginning with the first pay period in January 2025. Rule § X(2). The employer then submits the premiums and contribution report to the Fund quarterly, a month after the quarter ends. *Id*. § X(1).

[3] The period from January 1, 2025, when premiums are first required to be remitted, and May 1, 2026, when benefits may first be available, is sometimes referred to herein as "the lead-up period."

be approved, such a private plan must confer rights, protections, and benefits substantially equivalent to those provided by the Act, in addition to other requirements, which are set forth in § 850-H of the Act and § XIII of the Rule.

Significantly, the Act provides that an "employer with an approved private plan under section 850-H is not required to remit premiums" but is silent as to the timing or mechanism of such approval by the Department. 26 M.R.S. § 850-F(8).

The Rulemaking

The Act directs the Department to adopt routine technical rules as necessary to implement the Act by January 1, 2025. *Id*. § 850-Q; A. 40, ¶ 6. The Department did as it was directed.

The Department's expertise and judgment in drafting the Rule were informed by robust public input, including informal listening sessions before the formal rulemaking process began. A. 71. The Department also consulted with states that had experience with implementing paid family medical leave programs. A. 40, ¶ 7. The Department sought from other states their experience in allowing employers to submit a "declaration of intent," indicating that the employer planned to obtain a private plan substitution. *Id*. The Department learned that Oregon received roughly 3,100 declarations of intent, but 467 of those employers never obtained a private plan. *Id*. Connecticut reported administrative issues in verifying whether employers eventually obtained a private plan. *Id*. Massachusetts informed the Department that

it experienced employers with a private plan returning to the state plan at the first opportunity, thus avoiding paying premiums during its lead-up period. *Id*.

The Department also communicated with a trade association for the life insurance industry, learning that insurance companies were waiting for the final Rule and the requirements for "substantial equivalence" before writing policies for private plans to be certified to substitute for the state plan. A. 41-42, ¶ 12. In drafting the Rule, it was the Department's understanding that it would take insurance companies three to four months after the final Rule was issued to write plans consistent with the Rule's requirements for "substantial equivalence" and have such plans available on the market. A. 40-41, ¶ 8. It was also the Department's understanding from another state that insurance companies could issue substitute paid family leave policies, and commit employers to buying such policies, a year in advance of the effective date of the policy. A. 40-41, ¶ 8.

On May 20, 2024, the Department issued a draft rule, proposed Chapter 1, Rules Governing the Maine Paid Family and Medical Leave Program ("first proposed rule"). A. 41, ¶ 9. The first proposed rule provided for the Department to start receiving applications for private plan substitutions beginning January 1, 2026,

with exemptions not effective until April 1, 2026. A. 162. The Department received 95 comments with respect to that start date.[4] *Id*.

After reviewing and considering public comments, on August 28, 2024, the Department issued a second version of the draft rule ("second proposed rule"), setting forth substantial changes to many sections of the draft rule and inviting another round of comments, in accordance with 5 M.R.S. § 8052(5)(B). A. 41, ¶ 10.

The second proposed rule provided for applications for private plan substitutions to begin after April 1, 2025. A. 163-164. The Department explained the reason for the change to this start date in its Summary and Responses to Comments, filed with the Secretary of State pursuant to 5 M.R.S. § 8052(5)(B) as follows:

> The changes were in response to the multiple comments listed above. The Department finds that the changes balance the interest of employers and the interest of establishing a fiscally sound Paid Family and Medical Leave Fund. The Department also considered the experiences of other states that have recently established a paid family and medical leave program. The timing is also based upon administrative feasibility.

A. 163.

The Department held another rulemaking hearing on September 17, 2024, and received additional public comments until September 30, 2024. A. 41, ¶ 10. In response to the start date in the second proposed rule, the Department received public comments requesting that the Department allow employers an earlier date to opt out

[4] Overall, the Department carefully considered more than 1,600 comments on the Rule submitted by approximately 500 commenters during both comment periods. A.71.

of the public plan, while other commenters suggested that the date for applying for private plan substitutions should remain April 1, 2025. A. 163.

Some commenters suggested that the Department should refund premiums that an employer had previously remitted to the Fund if the Department approved its application for a approved private plan substitution. A. 166. The Department declined to make that change.[5] *Id*.

The final Rule provides that applications for private plan substitutions may be made after April 1, 2025. Rule § XIII(A)(2). The employer is responsible for paying premiums until the effective date of the exemption. *Id.* § XIII(A)(4)(b).[6]

The Process for Approval of Private Plan Substitutions

After the Rule was finalized, insurance companies could submit proposed private plans to the Bureau of Insurance ("BOI") to be certified as substantially equivalent plans in accordance with a checklist prepared by the Department and BOI. A. 42 ¶ 14. Employers could then apply for a private plan substitution by showing that they had "entered a contractual obligation with a certified fully-insured

[5] The Department noted that its reasons for not providing refunds was because the "substitution application process was developed balancing the interest of employers and the interest of establishing a fiscally sound Paid Family and Medical Leave Fund." The Department also explained that it considered the experiences of other states and administrative feasibility. *Id*.
[6] If the application is submitted during the first two months of the quarter, the exemption is effective from the first day of the quarter (assuming the application is approved). If the application for substitution is submitted less than 30 days before the close of a quarter, "the exemption is effective on the first day of quarter following when the application for substitution was submitted, assuming it is an approval." Rule § XIII(A)(4).

plan," but with coverage under the certified private plan allowed to begin by May 1, 2026. Rule § XIII (A)(4)(c). The Department reviews these applications to ensure that all requirements of the Act and the Rule are met, including that the employer has a contractual obligation with a certified fully insured plan that covers all of its employers for a period of three years. 26 M.R.S. §§ 850-H(1), (2); Rule § XIII(A). The Rule results in all employers and employees paying premiums for at least sixteen months before being eligible for benefits, except that an employer with an approved private plan substitution, and its employees, must pay premiums to the Fund for only as little as three months, and are not required to pay premiums to their private insurer during the remainder of the lead-up period.

ARGUMENT

I. The Rule is valid under 5 M.R.S. § 8058, as it does not conflict with the plain language of the Paid Family and Medical Leave Act.

In this substantive challenge to § XIII(A)(4)(b) of the Rule under 5 M.R.S. § 8058, the Chamber and BIW have the burden of proof to demonstrate that the provision requiring employers to pay non-refundable premiums into the Fund until their application for a private plan substitution is approved exceeded the Department's authority, is arbitrary and capricious, or is otherwise not in accordance with the Act. *Bocko v. Univ. of Me. Sys.*, 2024 ME 8, ¶ 27, 308 A.3d 203; *Conservation L. Found., Inc. v. Dep't of Envtl. Prot.,* 2003 ME 62, ¶¶ 38-39, 823 A.2d 551. The Chamber and BIW did not meet this burden.

The Act creates a requirement of all covered employees and employers to contribute premiums beginning January 1, 2025, and nothing in the Act authorizes, much less requires, that the Department refund premiums paid by employers who are later approved to substitute a private plan. The plain language of the Act, read as an entire statutory framework, provides no support for the Chamber and BIW's position that the Act requires an exemption from the payment of premiums as of January 1, 2025. The Rule is valid and should be upheld.

A. The plain language of the Paid Family and Medical Leave Act requires all employers and employees to contribute beginning January 1, 2025, and does not require refunding these contributions.

In establishing the PFML program, the Legislature laid out a path for the development and implementation of the entire program and the initial funding of the Fund over the course of approximately thirty-one months. The Legislature also expressly delegated the implementation of the program to the Department to be accomplished through rulemaking. 26 M.R.S. § 850-Q. This path included deliberately staggered dates for adoption of the Department's Rule, the beginning of premium contributions, and the payment of benefits. *Id.* §§ 850-Q, 850-F(2), 850-P. After a thorough rulemaking process, the Department issued a Rule that complied with the Legislature's instructions and appropriately implemented the Act.

The Chamber and BIW challenge only § XIII(A)(4)(b) of the Rule, asserting that this provision conflicts with the Act and is "arbitrary, capricious, an abuse of

discretion or otherwise not in accordance with law," pursuant to 5 M.R.S. § 8058(1). (Blue Brief at 22-35). The Court should reject the challengers' arguments because they are inconsistent with fundamental principles of statutory interpretation.

In matters of statutory interpretation, the Court "seek[s] to discern from the plain language the real purpose of the legislation, avoiding results that are absurd, inconsistent, unreasonable, or illogical." *Botting v. Dep't of Behav. & Developmental Servs.*, 2003 ME 152, ¶ 20, 838 A.2d 1168 (internal quotations omitted). Further, the Court "consider[s] the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Town of Eagle Lake v. Comm'r, Dep't of Educ.*, 2003 ME 37, ¶ 7, 818 A.2d 1034 (internal quotations omitted).

The plain language is determinative, and "only if the statute is ambiguous will [the Court] look to extrinsic indicia of legislative intent such as relevant legislative history." *Jones v. Cost Mgmt., Inc.*, 2014 ME 41, ¶ 12, 88 A.3d 147. "Stated succinctly, when the language chosen by the Legislature is clear and without ambiguity, it is not the role of the court to look behind those clear words in order to ascertain what the court may conclude was the Legislature's intent." *Kimball v. Land Use Regul. Comm'n*, 2000 ME 20, ¶ 18, 745 A.2d 387.

The plain language of the Act, read as a whole, requires all employers to begin contributing premiums on January 1, 2025, and does not require an exemption from

the requirement to pay premiums until the Department approves a private plan substitution. Nor does the Act require the Department to refund contributions that are made to the Fund before it approves a private plan. The position of the Chamber and BIW is unsupported by the Act's unambiguous plain language.

1. The Act does not specify a date when exemptions must begin.

Section 850-F(8) of the Act sets forth the exemption for employers with approved private plan substitutions, providing in its entirety, "An employer with an approved private plan under section 850-H is not required to remit premiums under this section to the fund." Significantly, the Act does not contain any date for such approvals to begin. Similarly, while § 850-H sets out lengthy criteria and procedures for the review and approval of private plans, nothing in that section requires that applications be accepted, much less approved, by any specific date. The Act's plain language is unambiguous. Had the Legislature intended to require that the exemption in § 850-F(8) be available as of January 1, 2025, it could have done so. It did not.

The Chamber and BIW point to no date in the Act supporting their position. Instead, they rely on the assertion that the Legislature intended "to ensure that employers and employees will not pay double premiums," (Blue Brief at 14), supported only by a single isolated sentence of extrinsic legislative history. Yet,

legislative history is only to be considered by the Court if the plain language does not clearly establish legislative intent, which it does.[7]

Even if the Court considered this conclusory assertion of legislative intent, it would not support the Chamber and BIW's position. Neither the Act nor the Rule require employers to pay double premiums at any time.

While the Rule requires that an employer must "have entered a contractual obligation with a certified fully-insured plan," at the time it applies for a private plan substitution, the employer "may choose to start benefit coverage by May 1, 2026 at the latest." Rule § XIII(A)(4)(c). The Rule does not require the employer to pay premiums to the private insurer in the interim.[8] Thus, the Rule does not require employers to "pay double."[9] Instead, employers with an approved private plan substitution may avoid paying premiums for more than a year, while employers and employees under the state plan are required to pay premiums to the Fund.

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[7] The Chamber and BIW note that the Court may consider legislative history to resolve an ambiguity, yet they argue that the Act is unambiguous, in an apparent attempt to foreclose deference to agency interpretation. (Blue Brief at 23-24). As explained in Part I(C), if the Act is ambiguous, the Court should defer to the agency's expertise in implementing a new statutory framework.

[8] During the rulemaking process, the PFML Authority submitted a comment suggesting such a requirement, proposing "that the Department allow an employer to apply for approval of a private plan no sooner than January 1, 2026, provided the employer continue to make contributions until they have a private plan that has been approved and *has gone live*." A. 162 (emphasis added). However, the Department rejected that proposal, allowing employers to obtain a private plan with an effective date of May 1, 2026, without a requirement that premiums be paid in the interim. *Id*.

[9] Furthermore, no employer could have been required to pay double during the first quarter because no employer could have had an approved substitution during that time period – the only payment required was to the Fund.

The Chamber and BIW assert that the Legislature intended employers to be able to be approved for a private plan substitution the moment premiums were required, on January 1, 2025. (Blue Brief at 28). This assertion has no support in the language of the Act, as it sets forth no date for approval of private plans substitutions, as discussed above.[10] Instead, the Chamber and BIW rely on a statement by the legislation's sponsor, who stated that for employers "*with existing benefits*, there would be no need to pay into the state fund." (Blue Brief at 14). However, BIW has submitted no evidence that it offered existing family and medical leave benefits to its employees; to the contrary, BIW acknowledges its intent to offer those benefits through a private plan, which it had not yet obtained as of the filing of the complaint. A. 42, ¶ 16.

The Act does not state when the Department must begin to accept applications for private plan substitutions. However, § 850-H expressly directed the Department's rules to include "the determination of what constitutes a private plan that may be approved under this section," including what will be considered substantially equivalent, effectively incorporating the existing rulemaking deadline of January 1, 2025. 26 M.R.S. §§ 850-H(8), 850-Q. Reading those sections together, the

[10] The Chamber and BIW essentially ask the Court to invent a date where none exists. However, "just as we are not free to interpret a statute so as to render a provision a surplusage … so too we are not free to substitute a different date for the existing one. Such speculation and legislative redrafting is wholly outside of our role as a court." *Kimball*, 2000 ME 20, ¶ 26, 745 A.2d 387.

Department had until January 1, 2025, to determine what constitutes a substantially equivalent private plan. Practically speaking, no substantially equivalent plan could exist until the Department's rules were finalized – and certainly the Department could not approve a plan as meeting the Rule's and Act's requirements before January 1, 2025. Furthermore, in drafting the Rule, including § XIII(A)(4)(b), the Department relied on information from the insurance industry indicating that private plans could not begin to be written until the substantial equivalence standard was defined in the Rule, and that such private plans would not be available on the market until several months thereafter. A. 40-42, ¶¶ 8, 12.

Reading these statutory requirements together as part of the Act as a whole, employers are required to remit contributions on January 1, 2025 "in the form and manner determined by [the Department]," 26 M.R.S. § 850-F(2), to begin financing the Fund. *Id*. § 850-P. The Act also authorized the Department to approve substitutions of substantially equivalent private plans, after an application and review process. *Id*. § 850-H.

In this context, it is unambiguous that § 850-F(8) created an exemption for the requirement that employers must begin contributing to the Fund, but only for employers with a private plan that had been approved as substantially equivalent – and the Department's determination of what constitutes a substantially equivalent private plan was not required until January 1, 2025. The Legislature's clear intent

was for all employers to begin making contributions on January 1, 2025, with the understanding that some employers, at some later point, could be exempted from the obligation to remit premiums going forward, after the Department defined substantial equivalence, private plans were developed and certified, and applications were submitted by employers, and reviewed and approved by the Department.

2. Exemptions are available only to employers with approved plans, and refunds of contributions are not required by the Act.

The express language of § 850-F(8) provides an exemption only to employers with "an approved private plan." The Chamber and BIW attempt to render this requirement meaningless, asserting that a plan is somehow automatically "approved" if the proposed private plan confers "rights, protections and benefits substantially equivalent to those provided" by the PFML program, *id*. § 850-H(1), without regard to whether the Department has reviewed and approved it. However, the specific language of the Act is that "*in order to be* approved" that requirement must be met. *Id*. (emphasis added). The Chamber and BIW disregard the role of the Department in review and approval of applications for such private plan substitutions to ensure that all requirements are met. *Id*. This interpretation ignores the plain language of the Act.

It is a well-established rule of statutory interpretation that "[a]ll words in a statute are to be given meaning, and no words are to be treated as surplusage if they can be reasonably construed." *Howard v. White*, 2024 ME 9, ¶ 11, 308 A.3d 213

(internal quotations omitted). "Surplusage occurs when a construction of one provision of a statute renders another provision unnecessary or without meaning or force." *Id.* (internal quotations omitted).

The Chamber and BIW's arguments, if accepted, would render large portions of § 850-H surplusage, including the first sentence, which requires an employer to "apply to the department for approval to meet its obligations under this subchapter through a private plan." Their position also ignores § 850-H(2), which establishes additional requirements for approval, including that the private plan apply to all the employer's employees, and § 850-H(3), which establishes the requirements that employers must meet to maintain their approval.[11] To suggest that the Legislature intended these provisions to have no meaning or applicability is contrary to these fundamental tenets of statutory construction.

Thus, although the Department anticipates that its review and approval of private plan substitutions that involve a private plan that it has already certified to be fairly streamlined, A. 42, ¶ 17, such approval is not automatic. Furthermore, the Act's requirement that employers continue to meet their non-premium obligations, including submitting wage reports and ensuring that benefits are paid consistent with the Act, or risk having the Department withdraw its approval, indicates that approval

[11] For instance, the Department may withdraw its approval (also referred to as revocation) if the employer's private plan does not "pay family leave benefits or medical leave benefits timely and in a manner consistent with" the Act. 26 M.R.S. § 850-H(3)(B).

is conditional. *Id*. § 850-H(3). The Chamber and BIW minimize the Department's review and approval process as "largely a formality" (Blue Brief at 29 n.8), but the Act makes clear that the Department's review and oversight is a critical component of the administration of private plan substitutions.

Indeed, the Department's initial approval process and continuing oversight explain why the Legislature authorized the Department to collect "costs arising out of the administration of private plans," separate and apart from premiums. *Id*. § 850-H(7). These costs are to cover Department review of the application and its ongoing oversight of approved private plan substitutions, Rule § XIII(A)(2), and they have no bearing whatsoever on any premiums required prior to such approval, contrary to the Chamber and BIW's arguments. (Blue Brief at 29-30). Two different costs chargeable to employers under two different sets of circumstances are not in conflict.

Furthermore, the Chamber and BIW set forth no statutory basis for their argument that premiums must be refundable once the Department has approved an employer's application for a private plan substitution. Indeed, the word "refund" is never used in the entirety of the Act. *See DaimlerChrysler Servs. N. Am., LLC v. State Tax Assessor*, 2003 ME 27, ¶ 8, 817 A.2d 862 ("If the Legislature had intended to provide for a refund instead of a credit or in addition to a credit, it knew how to do so"); *Larochelle v. Crest Shoe Co.*, 655 A.2d 1245, 1247 (Me. 1995) ("If the Legislature intended to enable employers to recoup overpayments made during the

pendency of a motion for findings of fact, it could have easily drafted the statute to say so.").

3. The assertion that BIW's employees will never benefit from the PFML program is based upon flawed and inaccurate presumptions and is not relevant.

The Chamber and BIW repeatedly assert that because BIW intends to substitute a private plan, BIW and its employees will never benefit from the PFML Act. (Blue Brief at 28, 45, 49). Their assertion has not been proven.[12] First, the use of an approved private plan does not, as the Chamber and BIW suggest, operate as an opt out of the entire PFML program. Instead, it is expressly an alternative means for an employer to "meet its obligations" to the program, subject to review, oversight, and administration by the Department. 26 M.R.S. § 850-H(1).

Furthermore, a private plan substitution is not a one-time, permanent option. Instead, substitutions are approved for a three-year period, which may be renewed. Rule §§ XIII(A)(3), (9). An employer may also cancel its private plan substitution upon demonstration of "significant direct negative business impact." *Id.* § XIII(A)(5). If an employer cancels or does not renew its substitution or its substitution is revoked by the Department, then the employer must return to the

[12] In any event, this argument not relevant. The PFML program was designed to provide a safety net to workers under defined circumstances, essentially, the serious health conditions of themselves or certain family members. Only some workers will eventually need or utilize PFML benefits. In other words, it is an insurance-like program, not a pay for services program.

PFML program, and it must remit premiums to the Fund again. *Id.* §§ XIII(A)(8), (9). Yet, an employer in that scenario is *not* required to repay premiums for the lead-up period between April 1, 2025, and May 1, 2026, which the employer had not been required to pay due to the employer's approved private plan substitution.

Indeed, in drafting the Rule, the Department was mindful that at least one other state with a PFML program had an issue with employers with a private plan returning to the state plan at the first opportunity, thus avoiding paying premiums during the lead-up period. A. 40, ¶ 7. The payment of premiums for one quarter by all employers, among other things, minimizes the fiscal impact of this scenario.

Finally, while BIW's employees will not receive paid leave benefits from the Fund while they are employed by BIW and covered by an approved private plan, to suggest that they will *never* benefit is based upon an inaccurate assumption, unsupported by this record, that employees of BIW will never leave the company. Rather, it is reasonable to anticipate that some BIW employees may quit or be terminated while BIW has an approved private plan substitution, and then work for a different employer without an exemption. Such employees will benefit from the PFML program, despite having paid only one quarter of premiums while other workers in Maine paid sixteen months of premiums during the lead-up period.[13]

[13] Employees also benefit from having the oversight by the Department to ensure that the employer's private plan provides substantially equivalent rights, protections, and benefits to employees. 26 M.R.S. §§ 850-H(3)(A), 850-H(3)(B), 850-H(3)(F). Contrary to the Chamber and

Thus, given that employees working for employers who have a private plan substitution for a three-year period may eventually receive benefits from the PFML program, and also receive some benefit during the private plan substitution period, the requirement that all employers and their employees pay premiums for approximately one-sixth of the lead-up period is reasonable and is not grounds for invalidating the Rule under 5 M.R.S. § 8058.

4. The Rule is a reasonable interpretation of the Act and is not arbitrary and capricious.

The Chamber and BIW contend that the Rule is invalid because it is arbitrary and capricious. (Blue Brief at 22-29). To establish arbitrariness, the Chamber and BIW must show that the Rule "is unreasonable, lacks a factual basis, or lacks support in an evidentiary record." *Conservation L. Found.*, 2003 ME 62, ¶ 38, 823 A.2d 551. However, the Rule has a substantial and well-documented factual basis, supported by the evidentiary record, and is reasonable.

The Department considered dozens of comments on Section XIII of the Rule, including comments by the Chamber and BIW. A.162-62. As discussed above, the Department based its decision to adopt § XIII(A)(4)(b) on a "reasonable balance of

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BIW's assertion that the requirement for employees to contribute premiums for one quarter is absurd unless the employees actually directly receive benefits, this requirement is entirely reasonable in the context of the Act as a whole and its function in creating a broadly applicable social benefit program. See *Kimball v. Land Use Regul. Comm'n*, 2000 ME 20, ¶ 23, 745 A.2d 387 ("An absurdity may occur when the enactment is so contrary to the plain understanding of legislative intent and the entire statutory scheme within which the amendment falls that enforcement of the plain language would be wholly unreasonable.").

the interests of employers with the interest of establishing a fiscally sound Paid Family and Medical Leave Fund," as well as "the experiences of other states that have recently established" PFML programs and "administrative feasibility." A. 162-64. The Department also considered the information that it learned from the insurance industry. A. 40-42, ¶¶ 8, 12. Based on the Department's understanding and consistent with the Act's requirement of quarterly remittance of contributions and wage reports, the Department's decision to draft a Rule where it would begin accepting applications for private plan substitutions after April 1, 2025, was well-supported and reasonable.

Moreover, the Maine Administrative Procedure Act ("MAPA"), 5 M.R.S. §§ 8001-11008 (2025), expressly supports the consideration and application of the "professional judgment" of the Department in making such determinations. *Id.* §§ 8057-A(4), 8063-B. The Chamber and BIW's position suggests that the Department should have ignored the information that it learned during its rule development and notice and comment process in favor of a strained, factually inaccurate interpretation of isolated comments from legislative history that finds no support in the Act's plain language. Their assertion that the Rule is unreasonable should be rejected.

The Chamber and BIW also contend that the Rule is unreasonable in that there is no deadline for the Department to process applications, suggesting that the Department could simply sit on applications indefinitely and collect the employer's

premiums. (Blue Brief at 31). Any plausible reading of the Rule does not support this contention.

The Rule provides that, for applications made during the first two-thirds of a given quarter, "[t]he exemption from the obligation of premiums begins on the first day of the quarter in which the substitution is approved." Rule § XIII(A)(4). A commonsense reading of this provision is that the Department anticipates that it will approve or deny private plan substitutions within thirty days, so that employers are afforded the exemption within the quarter that they submit their application. For applications received during the last thirty days of the quarter, "the exemption is effective on the first day of quarter following when the application for substitution was submitted, assuming it is an approval." *Id.* This provision incentivizes employers to apply earlier in the quarter so that the exemption will likely take effect for that quarter, rather than the following quarter. Contrary to the Chamber's and BIW's assertion, these two provisions can reasonably be read in harmony.

Similarly, the Chamber and BIW's argument that the Rule could create an Equal Protection violation is groundless.[14] The Chamber and BIW suggest that the Rule is unreasonable if it provides for refunds of premiums paid prior to the approval of a private plan substitution *by employees* but not by employers. (Blue Brief at 36).

[14] As an initial matter, the Court should not consider this Equal Protection argument because it is not among the set of legal issues agreed to by the parties and reported to the Court under Rule 24(a). In any event, their Equal Protection argument fails.

To establish a violation of the Equal Protection clause, "where, as here, the challenging party is not a member of a suspect class, a party challenging a statute must show (1) 'that similarly situated persons are not treated equally under the law,' and (2) that the statute is not 'rationally related to a legitimate state interest.'" *MacImage of Maine, LLC v. Androscoggin Cnty.*, 2012 ME 44, ¶ 33, 40 A.3d 975 (quoting *Town of Frye Island v. State*, 2008 ME 27, ¶ 14, 940 A.2d 1065). The Chamber and BIW fail at the first hurdle, however, as the Rule does not authorize refunds in the manner that they describe, and therefore, there is no unequal treatment under the Rule.

The Rule requires that employers that are approved for a private plan substitution must "refund the withholdings [from their employees] to the effective date of the exemption within 30 days from the approval of the substitution." Rule § XIII(A)(4)(a). The Chamber and BIW profess confusion about whether this provision applies to all contributions withheld since January 1, 2025, or only to those contributions withheld between the beginning of the quarter and the approval of the substitution. The Department, however, answered this question expressly in its Responses to Comments:

> **Round 2 comment summary:** Commenters 060, 105, 124, 166, 168 and 311 asked for clarification to the Department on whether a private plan submitted by an employer on April 1, 2025, and approved by the State on May 1, 2025, means that all employee premiums withheld from employees' pay for the month of April 2025 are required to be refunded to the employee.
> **Round 2 response to comment:** Yes.

A. 165. The Department thus made clear that employees' withholdings must be refunded because the employer cannot keep the employees' contributions that they withheld but are not obligated to remit to the Fund. Neither the employer nor the employee is required to contribute for that time period, so both the employee and employer are treated equally by the operation of this Rule section. Thus, the Rule can easily – and accurately – be interpreted to avoid unconstitutional results.[15]

B. If the Act is ambiguous, the Department's Rule is entitled to great deference.

Even if the Court rules that the Act is ambiguous, the Court "does not 'second-guess' an agency on issues within its area of expertise; rather, [it] review[s] only to ascertain whether its conclusions are 'unreasonable, unjust, or unlawful.'" *Town of Eagle Lake*, 2003 ME 37, ¶ 8, 818 A.2d 1034 (quoting *Wood v. Superintendent of Ins.*, 638 A.2d 67, 71 (Me. 1994)). "Statutory language is considered ambiguous if it is reasonably susceptible to different interpretations." *Scamman v. Shaw's Supermarkets, Inc.*, 2017 ME 41, ¶ 14, 157 A.3d 223, *as corrected* (Mar. 23, 2017) (internal citations omitted).

[15] Should the Court rule that there *is* unequal treatment, however, the Rule bears a rational relationship to a legitimate state interest – the creation of a program to allow Maine workers to benefit from access to paid leave to care for themselves and their family members. "Because the legislation does not treat similarly situated parties differently and bears a rational relationship to a legitimate state interest, it does not violate the Equal Protection Clause." *MacImage of Me., LLC*, 2012 ME 44, ¶ 35, 40 A.3d 975.

Contrary to the argument of the Chamber and BIW that the Court should not defer to the Department because the Department lacks expertise in the "timing of premium payments," (Blue Brief at 30), the Department was acting within its expertise in drafting the Rule provision at issue, informed by the rulemaking process. *See* A. 40-42, ¶¶ 7, 8, 12; A. 163-64, 166. Indeed, MAPA directs the agency to "consider all relevant information available to it . . . before adopting any rule," 5 M.R.S. § 8052(4), including "the goals and objectives for which the rule is being proposed, possible alternatives to achieve the goals and objectives and the estimated impact of the rule," *Id.* § 8057-A(1). MAPA further directs that "the agency shall strive to obtain and evaluate relevant information from the public and other information reasonably available to the agency." *Id*. § 8057-A(3). MAPA anticipates that the "[p]rofessional judgment of the agency may be one of its primary sources of information in adopting a rule." *Id*. § 8057-A(4).

Significantly, in determining whether an agency is acting within its expertise, this Court is

> guided by the authority conferred on the particular agency by the Legislature. When an agency . . . is given the authority to implement a new statutory scheme at that time, we will defer to that agency's reasonable interpretation of an ambiguous statute.

Me. Ass'n of Health Plans v. Superintendent of Ins., 2007 ME 69, ¶ 42, 923 A.2d 918; *see also Ga. Pac. Corp. v. State Tax Assessor*, 562 A.2d 672, 674 (Me. 1989)

(explaining that an agency's interpretation is especially persuasive when the interpretation is "contemporaneous with the statute").

"Further, when the Legislature has expressly imposed upon an agency the duty to make a statute operative, the agency's construction of the statute is entitled to great deference." *Me. Ass'n of Health Plans*, 2007 ME 69, ¶ 42, 923 A.2d 918 (citing *Kelley v. Halperin*, 390 A.2d 1078, 1080 (Me. 1978)). Here, the Legislature expressly directed the Department to make a new statute operative in its entirety, 26 M.R.S. § 850-Q, and thus the Court should defer to the Department's expertise and professional judgment.

As discussed in Part I(A), above, the Rule is reasonable, is not arbitrary and capricious and does not conflict with the Act. If the Court concludes that the Act is ambiguous, then the Court should follow its longstanding precedent of deferring to the Department's expertise under these circumstances.

C. Neither MAPA nor the Maine Constitution prohibits the Court from deferring to the agency's reasonable interpretation.

The Chamber and BIW assert that this Court is precluded from applying its long-established and well-supported precedent of affording great deference to the Department's reasonable interpretation of a statute that it is charged with administering, relying in large part on *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which overruled *Chevron, U.S.A., Inc. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837 (1984)).[16] As shown below, contrary to the Chamber's and BIW's contention, this Court's deference to agency interpretation under Maine law remains undisturbed by the holding in *Loper Bright*, which involved judicial deference to federal agencies under the federal APA. *Loper Bright* is not binding on Maine courts reviewing state agency actions. Indeed, since *Loper Bright* was decided, this Court has continued to give deference to state agencies. *E.g., Eastern Me. Conserv. Initiative v. Bd. of Envtl. Prot*., 2025 ME 35, ¶ 22. There is no basis in the Maine Constitution or in this Court's precedents for departing from this longstanding precedent.

1. Deference to agency expertise is a precedent of this Court that pre-dates *Chevron*.

The precedent of this Court deferring to the decisions, interpretations, and expertise of State agencies existed before the federal recognition of the *Chevron* doctrine in 1984. *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 153 Me. 228, 230, 136 A.2d 726, 729 (1957); *In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 741 (Me. 1973); *Mechanic Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080, 1091 (Me. 1978); *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 405 A.2d 153, 182 (Me. 1979); *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272, 279 (Me. 1982).

[16] The Court should not consider this argument because it is not among the set of legal issues agreed to by the parties and reported to the Court under Rule 24(a). In addition, given the expedited nature of the briefing, this case would not be a suitable vehicle to decide whether the Court should overrule more than fifty years of its precedent upholding judicial deference to agency interpretation and expertise.

This Court's deference stems from the even older "principle that reviewing courts should presume, in the absence of clear evidence to the contrary, that administrative agencies have properly discharged their official duties." *State v. Boyajian*, 344 A.2d 410, 414 (Me. 1975); *In re General Marine Constr. Co.*, 272 A.2d 353 (Me. 1971); *New England Tel. & Tel. Co.*, 448 A.2d 272, 279 (Me. 1982) (citing *United States v. Chemical Found.*, 272 U. S. 1 (1926)).

Although the Court has noted that the standard for exercising deference in Maine precedent is "similar" to that of *Chevron*, its precedent predates that federal doctrine and, crucially, does not rest upon it. *Guilford Transp. Indus. v. Public Utilities Com'n*, 2000 ME 31, ¶ 11, 746 A.2d 910. Maine courts' deference is based primarily on the recognition that state agencies have "greater expertise" in the areas and programs that they administer and "greater experience administering and interpreting those particular statutes." *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 2005 ME 27, ¶ 5, 868 A.2d 210, *aff'd on other grounds sub nom. S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006). Indeed, this Court has recognized that the fact that the Legislature has delegated rulemaking or other administrative authority to an agency is a strong indicator of legislative intent. *Guilford Transp. Indus.*, 2000 ME 31, ¶ 12, 746 A.2d 910. The mere fact that a federal precedent that shares similarities to Maine precedent was overruled is not grounds for overturning well-reasoned Maine law.

This is particularly true when that federal precedent is based on federal law that differs in meaningful ways from Maine law. MAPA differs from its federal counterpart. For instance, under MAPA, when the Legislature authorizes rulemaking, it may exercise its discretion in designating that rulemaking as either major substantive, which requires an additional layer of legislative review, or routine technical; the federal APA, by contrast, only has one form of rulemaking, which does not involve legislative review. 5 M.R.S. § 8071; 5 U.S.C. § 553.[17] Additionally, *Loper Bright* was premised heavily on language in the federal APA that has no counterpart in MAPA. 603 U.S. at 398-399; 5 U.S.C. § 706.

The Chamber and BIW have not shown why the Court should change its decades-long deference to an agency's interpretation of a statute that it has been charged by the Legislature with administering.

2. Courts may exercise deference to other branches without offending separation of powers.

The Chamber and BIW assert that the Maine Constitution prohibits this Court from deferring to the Department's reasonable interpretation of a statute that it is charged with administering, but in fact, the separation of powers doctrine supports the application of this long-standing precedent.[18] (Blue Brief at 37-43). This Court

[17] In addition, as explained in detail in I(A)(4) above, MAPA supports the use of an agency's professional judgment in developing a rule.

[18] Only Justice Thomas in *Loper Bright* concluded that *Chevron* deference violates federal separation of powers. *Loper Bright Enters.*, 603 U.S. at 413 (Thomas, J., concurring).

has expressly based its deference on separation of powers, noting that "[r]especting our constitutional separation of powers, Me. Const. art. III, and statutes governing administrative appeals, our review of state agency decision-making is deferential and limited." *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128. Indeed, where the Legislature intended the agency to have responsibility for implementing or enforcing a statute, it is an expression of separation of powers for the Court to defer, absent a compelling reason not to.

> [W]hile the amount of discretion the Legislature can bestow upon a state agency is not boundless, latitude must be given in areas where the statutory enactment of detailed specific standards is unworkable.

Doane v. Dep't of Health & Hum. Servs., 2021 ME 28, ¶ 27, 250 A.3d 1101.

Here, the Legislature expressly imposed a duty on the Department to make the PFML Act operative through rulemaking. This Court should defer to the Department's reasonable Rule.

3. *Stare decisis* supports maintaining this precedent.

Contrary to the contention of the Chamber and BIW, principles of *stare decisis* support maintaining longstanding precedent, as discussed above, with respect to judicial deference to agency interpretation of a statute that the agency is charged with administering.[19]

[19] The Chamber and BIW are incorrect, relying on a case from Georgia, that this Court's caselaw on deference to agencies "lacks an articulated basis." (Blue Brief at 43 n. 17). This Court has frequently considered the issue of separation of powers under the Maine Constitution in connection

> The doctrine of stare decisis "embodies the important social policy of continuity in the law by providing for consistency and uniformity of decisions." According to this doctrine, Maine courts are bound by our "'deliberate or solemn decision . . . after argument on a question of law fairly arising in the case, the disposition of which is necessary to the determination of the case.'" Unless the prevailing precedent "'lacks vitality and the capacity to serve the interests of justice,'" we will not disturb that settled precedent.

John T. Cyr & Sons, Inc. v. State Tax Assessor, 2009 ME 52, ¶ 22, 970 A. 2d 299 (quoting *Bourgeois v. Great N. Nekoosa Corp.,* 1999 ME 10, ¶ 5, 722 A. 2d 369 (internal citations omitted)). Given the number of cases in which Maine courts are called upon to defer to agency interpretations, the Court's precedent can hardly be described as lacking vitality.

Furthermore, the Chamber and BIW have articulated no compelling basis to conclude that the Court's precedent of deference to a reasonable agency interpretation "has become obsolete or has come to undermine the interests of justice in such a way that principles of stare decisis must cede to a new interpretation." *John T. Cyr & Sons, Inc.*, 2009 ME 52, ¶ 23, 970 A.2d 299. The Court should reject their

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with agency authority. *Me. Tpk. Auth. v. Brennan*, 342 A.2d 719, 729 (Me. 1975) (Court exercised its judgment consistent with separation of powers, declining to substitute its judgment for that of the Legislature); *Lewis v. State Dep't of Hum. Servs.*, 433 A.2d 743, 747-48 (Me. 1981) (the Legislature did not unconstitutionally delegate its authority by granting rulemaking authority to a state agency where the legislation provided sufficient standards to guide administrative actions.); *Kosalka v. Town of Georgetown*, 2000 ME 106, ¶ 17, 752 A.2d 183 (law that is "totally lacking in cognizable, quantitative standards" constitutes an unconstitutional delegation of legislative authority); *Me. Ass'n of Health Plans*, 2007 ME 69, ¶ 75, 923 A.2d 918 (Alexander, J., dissenting) (the Legislature cannot constitutionally delegate authority to the Executive Branch "unlimited by any objective standards by which the Executive Branch's observance of its delegated authority from the Legislature may be judged.").

argument and defer to the Department's reasonable interpretation of the PFML Act, should the Court conclude that the Act is ambiguous.

Moreover, while purporting to rely on the primacy approach, the Chamber and BIW's position would upend that doctrine by elevating federal caselaw regarding a federal statute and other states' precedents over well-established Maine precedent.

> Under our "primacy" approach, we first examine our own precedent; our own common law; our own statutes and values; and our own sociological and economic context. Only after that examination do we look to precedent from elsewhere to the extent that we find that precedent persuasive, weighing federal reasoning no more heavily than the reasoning applied in other state courts' decisions.

Dupuis v. Roman Cath. Bishop of Portland, 2025 ME 6, ¶ 11 n.8. The primacy approach requires that this Court be guided by its own precedents, which, as discussed above, have consistently supported deference.

II. BIW has not shown that it has a cognizable claim of taking of private property, without just compensation, under the Maine or the United States Constitution.

BIW alleged in Counts II and IV of the complaint that the Rule effects a taking under the United States and Maine Constitutions.[20] BIW's takings claims fail.

A. BIW has not overcome the strong presumption of constitutionality.

All legislative enactments are presumed constitutional, and the party challenging the constitutionality of a statute bears a heavy burden of proof of

[20] Only BIW asserted takings claims in the complaint.

overcoming this presumption. *Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 20, 191 A.3d 341; *State v. Cropley*, 544 A.2d 302, 304 (Me. 1988); *Union Mutual Life Ins. Co. v. Emerson*, 345 A.2d 504, 507 (Me. 1975). This burden also applies to regulations. *Davis v. Sec'y of State*, 577 A.2d 338, 341 (Me. 1990); *Ouellette v. Saco River Corridor Comm'n*, 2022 ME 42, ¶ 15, 278 A.3d 1183. In addition, "this Court is bound to avoid an unconstitutional interpretation of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements." *Bossie v. State,* 488 A. 2d 477, 479 (Me. 1985). As explained below, BIW falls far short of meeting its heavy burden that the Rule is unconstitutional, as it fails to show that the requirement that all employers and employees pay premiums to the Fund for one quarter before the Department considers applications for private plan substitutions constitutes a taking.

B. The payment of premiums to the Fund, which is the mere payment of money, does not constitute a taking.

As a threshold matter, as this Court has held, "an appropriation of money does not constitute a *per se* taking, as would a physical occupation of property or a denial of all its beneficial use." *Me. Beer & Wine Wholesalers Ass'n v. State*, 619 A.2d 94, 97 (Me. 1993). "Although both tangible and intangible property may be the subject of an impermissible taking, there is no property right to potential or future profits." *MacImage of Me., LLC,* 2012 ME 44, ¶ 36, 40 A.3d 975.

The Federal Circuit has similarly explained that "the mere imposition of an

obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001). The Federal Circuit's conclusion is based upon the Supreme Court's opinion in *Eastern Enterprises v. Apfel*, 524 U. S. 498 (1998), in which five Justices[21] rejected the theory that an obligation to pay money constitutes a taking. *Commonwealth Edison*, 271 F.3d at 1339. The Eleventh Circuit also held that its "independent evaluation of the case law" led it to agree with Justice Kennedy's concurrence in *Eastern Enterprises* "that the takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money." *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008).

Thus, pursuant to the holding of this Court in *Maine Beer & Wine Wholesalers* and *MacImage of Maine*, consistent with controlling decisions by the federal courts, the requirement to pay premiums to the Fund, regardless of whether they are characterized as taxes or fees, does not constitute a taking as a matter of law.

Similarly, the timing of the statutory exemption for employers with an approved private plan substitution does not give rise to a constitutional right. All employees and employers of a certain size are required to pay premiums into the

[21] The concurrence of Justice Kennedy and the four Justices joining the dissent determined that the payment of benefits does not constitute an unconstitutional taking.

Fund for sixteen months beginning January 1, 2025, after which employees may qualify for benefits beginning May 1, 2026. The statutory exemption from the obligation to pay premiums for employers and their employees after being approved for a private plan substitution is triggered by the employers' voluntary choice to seek such a substitution. By analogy, the First Circuit in *Franklin Memorial Hospital v. Harvey*, 575 F.3d 121, 130 (1st Cir. 2009), held that Maine's free care law was not an unconstitutional taking because it was triggered by the hospital's *voluntary* participation in MaineCare. Using that reasoning, an employer's voluntary choice to avail themselves of the private plan exemption does not trigger a takings issue based on the timing of the private plan substitution.

BIW has not shown that it has a protected property right to choose to pay premiums to a private insurance company rather than to the Fund, sufficient to create a takings claim.

C. BIW is not required to pay more than it "owes" to the Fund.

BIW relies upon a case involving a delinquent property tax bill to contend that the requirement that all covered employers and employees pay one quarter of premiums is more than they "lawfully owe." (Blue Brief at 44-45). This contention, and its reliance on *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631, 639-41 (2023), are misplaced. *Tyler* involved a specific debt by a taxpayer, namely, a property tax bill in the specific amount of $15,000. The Supreme Court held that the

county could not retain the excess $25,000 after Tyler's real property was sold for $40,000 at a tax foreclosure sale. *Id*. at 635. *Tyler* involved a homeowner's right to real property and the equity in that property. *Id.* at 638. That case did not involve a statutory obligation to pay money, and thus nothing in *Tyler* changes the analysis set forth in Part II(B) above that no taking is implicated here.

D. BIW has not proven that the requirement to pay one quarter of premiums to the Fund is an unconstitutional taking on the theory that it requires the payment of a disproportionate user fee.

In arguing that the premiums paid to the Fund are a disproportionate "user fee," BIW ignores that the Supreme Court has held that both "taxes *and user fees* are not takings." *Koontz v. St. Johns River Water Mgmt. Dist.,* 570 U.S. 595, 615 (2013) (emphasis added). The Supreme Court further explained:

> We said as much in *County of Mobile v. Kimball,* 102 U.S. 691, 703, 26 L. Ed. 238 (1881), and our cases have been clear on that point ever since. *United States v. Sperry Corp*.,[22] 493 U.S. 52, 62, n.9, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989); see *A. Magnano Co. v. Hamilton,* 292 U.S. 40, 44, 54 S. Ct. 599, 78 L. Ed. 1109 (1934); *Dane v. Jackson*, 256 U.S. 589, 599, 41 S. Ct. 566, 65 L. Ed. 1107 (1921); *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 614–615, 19 S. Ct. 553, 43 L. Ed. 823 (1899).

Id. at 615.[23]

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[22] BIW's reliance on *Sperry* is misplaced, Blue Brief at 46, 49-52, emphasizing only the Supreme Court's analysis that the user fee in that case was reasonable and therefore did not qualify as a taking, 493 U.S. at 62, while ignoring the Court's further analysis, which countless courts have cited, that "money is fungible" and therefore not a physical occupation of private property that triggers a taking, *Id*. at 62 n.9.

[23] BIW's argument that the premiums are not a tax because they allegedly were not imposed by the Legislature (Blue Brief at 47) ignores the fact that, under the Act, all employers are required to

Koontz involved a land use fee on a particular parcel of property to be used for improvements to a nearby parcel. In declining to extend the five-Justice conclusion in *Eastern Enterprises*, 524 U.S. at 541, 554, to *Koontz*, the Supreme Court reiterated its conclusion from *Eastern Enterprises* that payment of a monetary obligation on its own does not constitute a taking. 570 U.S. at 613.[24] Furthermore, the cases cited in Part II(B) above support a ruling that the obligation to *pay money* does not implicate a taking, regardless of whether it is characterized as a "tax," "premium," or "user fee."[25]

BIW's reliance on *Webb's Fabulous Pharmacies, Inc. v. Beckwith* is similar misplaced, as the set-aside funds were the property of Webb's creditors, and the use of such funds for "general governmental revenue" was held to be an unconstitutional taking. 449 U.S. 155, 161, 163 (1980). The Court in Webb's reiterated the premise

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remit premiums, 26 M.R.S. § 850-F, except for employers with an approved private plan substitution, as explained in Part I above. In short, the premiums were imposed by the Legislature.

[24] Indeed, BIW misstated the holding in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 239-40 (2003), Blue Brief at 51, where the Supreme Court held that the state's seizure of interest on client funds was *not* an unconstitutional taking.

[25] In any event, this Court could rule that the payment of premiums is a tax. While the Act characterizes the payment as a "premium" rather than a "tax," months after the enactment of the Act, the IRS issued a Revenue Ruling determining that premiums paid by both employers and employees are a tax. Rev. Rul. 2025-4 at 26-27. Specifically, the employer contributions are considered the payment of a state excise tax, which are deductible as taxes incurred in carrying on a business or trade in the taxable year. *Id*. at 27. According to the IRS, the contributions to the Fund from employees are considered the payment of state income tax. *Id*. at 26. Thus, the payment of PFML premiums may be treated like the excise tax required to be paid under the Social Security Act's unemployment provisions, which the Supreme Court held not to violate the Fifth Amendment, ruling that the government "may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto." *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937).

that "[t]he Fifth Amendment's guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id*. at 163 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Here, most employers and employees are paying for the PFML program, and it is BIW who is seeking to be exempt from a requirement that is in fact borne by the public as a whole.

Indeed, BIW's argument that the requirement that it pay premiums to the Fund for one quarter is a "disproportionate user fee" is based upon its premise that, if it obtains approval from the Department in 2025 for a private plan substitution, BIW and its employees will never benefit from the PFML program. As explained in Part I(A)(3) above, that assertion has not been proven and ignores stipulated facts. *See* A. 40-42, ¶¶ 7, 8, 13, 16. Furthermore, BIW appears to rely on *Massachusetts v. United States*, 435 U.S. 444, 462 (1978), yet the Supreme Court rejected the argument that a perfect user-fee system is constitutionally required. *Id*. at 466.[26]

E. The Maine Constitution does not provide a private right of action.

Finally, the Maine Constitution, by itself, does not provide BIW with a private cause of action, as it alleges in Count IV of the complaint and Section III of the Blue

[26] In any event, that case involved implied immunity of a state government from federal taxation and did not involve a taking.

Brief. *See Andrews v. Dep't of Envtl. Prot.*, 1998 ME 198, ¶¶ 21-23, 716 A.2d 212; *Grenier By & Through Grenier on Behalf of Grenier v. Kennebec Cnty., Me.*, 748 F. Supp. 908, 913 (D. Me. 1990). A plaintiff generally must have a statutory basis for its constitutional claims, which for purported violations of the Maine Constitution is the Maine Civil Rights Act, *see* 5 M.R.S. §§ 4681-4685 (2025); *Andrews*, 1998 ME 198, ¶ 23, 716 A.2d 212, and for purported violations of the United States Constitution is 42 U.S.C. § 1983. Thus, BIW has not established any cognizable claim for relief here under the Maine Constitution.[27]

[27] In the complaint, BIW's federal takings claim (Count III) cites the Fifth Amendment and 42 U.S.C. § 1983. Section 1983 claims against a state agency and a state official named in their official capacity are typically barred due to sovereign immunity and because a state agency is not a "person" under section 1983. *See Alden v. Maine*, 527 U.S. 706, 755-58 (1999); *Kentucky v. Graham*, 473 U.S. 159, 166-69 (1985); *Quern v. Jordan*, 440 U.S. 332, 342-45 (1979) (Congress did not validly abrogate state sovereign immunity when it enacted section 1983); *Scott v. Androscoggin Cnty. Jail*, 2004 ME 143, ¶ 23, 866 A.2d 88 ("State of Maine retains its privilege to assert sovereign immunity in its own courts"); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (a state, a state agency, or a state official sued in their official capacity is not a "person" under section 1983 and thus not subject to section 1983 liability). But some courts have held that the Fifth Amendment of the United States Constitution is self-executing, and hence, the Department, for the sake of avoiding unnecessary issues, defends the federal takings argument on its merits.

CONCLUSION

For the reasons stated above, the Court should accept the report and hold that the Rule is valid.

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CERTIFICATE OF SERVICE

I, Nancy Macirowski, hereby certify that an electronic copy of this Brief of Appellants was served upon counsel at the address set forth below by email on the date of filing and a hard copy will be served by first class mail, postage-prepaid once the clerk has accepted the format pursuant to M.R. App. P. 7(c)(4).

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