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
DOCKET NO. AUGSC-CV-2025-00007

BRIEF OF APPELLANTS

Joshua D. Dunlap, Bar No. 4477
Sara A. Murphy, Bar No. 5423
Katherine E. Cleary, Bar No. 10299
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
(207) 791-1100

Attorneys for Appellants

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Page(s)

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

LEGISLATIVE DOCUMENTS

OTHER AUTHORITIES

INTRODUCTION

In creating a state Paid Family and Medical Leave ("PFML") program, the Maine Legislature made the policy determination that employers should be able to provide PFML benefits through private insurance policies, 26 M.R.S. § 850-H, and that an employer who does so "is not required to remit premiums" into the state plan, *id.* § 850-F(8). The Department of Labor ("DOL"), however, promulgated implementing regulations that embody the opposite policy determination by requiring employers who offer private plans to remit "non-refundable" premium payments into the state plan for at least one quarter. 12-702 C.M.R. ch. 1, § XIII(A)(4)(b); *see id.* XIII(A)(2), (4). Section XIII(A)(4)(b) is contrary to the governing statute and constitutes an unlawful taking.

STATEMENT OF FACTS

I. The Paid Family and Medical Leave Program

In July 2023, the Maine Legislature enacted, and Governor Janet Mills signed, a biennial State budget that created the PFML program. A.40, ¶ 5; A.15, ¶ 24. The PFML program, codified at 26 M.R.S. §§ 850-A to 850-R, will become effective January 2026. *See id.* § 850-B. The program applies to most employers and employees in Maine and allows "covered individual[s]" to take up to twelve weeks of leave in a benefit year for certain qualifying reasons. *Id.* During the employee's leave, the PFML program will pay the covered individual based on a prescribed calculation. *See id.* § 850-C.

These payments will be funded through "The Paid Family and Medical Leave Insurance Fund" (the "Fund"). *Id.* § 850-E(1). The Fund consists of, among other things, "[c]ontributions collected pursuant to section 850-F together with any interest earned thereon." *Id.* § 850-E(2)(A); *see id.* § 850-F(1). The Fund will accumulate contributions, *i.e.*, premiums, for a period, with payment of benefits to "covered individuals" beginning May 1, 2026, unless delayed to ensure solvency. *See id.* § 850-P.

To allow for benefits payments beginning in 2026, the PFML statute provides that premium payments must begin in 2025 and be remitted quarterly. *Id.* § 850-F(2). Until 2028, premiums "may not be more than a combined rate of 1.0% of wages." *Id.* § 850-F(3). Employers "with 15 or more employees may deduct up to 50% of the premium required for an employee" from that employee's wages. *Id.* § 850-F(5)(A).

Importantly, the PFML statute contemplates that employers may choose to provide to their employees a private plan that confers substantially equivalent rights, protections, and benefits as those provided by the PFML. *See id.* § 850-H(1). Employers who offer a private plan need only "reimburse [DOL] for the costs arising out of the private plan." *Id.* § 850-H(7). To accommodate private plans and to ensure that employers and employees will not pay double premiums, the PFML statute specifically provides that "[*a*]*n employer with an approved private plan under section 850-H is* <u>*not*</u> *required to remit premiums under this section to the fund*." *Id.* § 850-F(8) (emphases added).

This exemption is a critical component of the PFML program. The primary sponsor of the PFML, Senator Mattie Daughtry, and co-sponsor Representative Kristen Cloutier, jointly testified in support of PFML and stated, "With a comparable program, the business is exempt from the program. . . . *For a business with existing benefits, there would* *be no need to pay into the state fund under this law*. Businesses can still select private programs. We wanted to keep that flexibility for Maine employers." *An Act to Implement the Recommendations of the Commission to Develop a Paid Family and Medical Leave Benefits Program: Hearing on L.D. 1964 Before the J. Standing Comm. on Lab. & Hous.*, 131st Legis. 6 (May 25, 2023) (testimony of Sen. Daughtry and Rep. Cloutier) (emphases added).

If an employer provides an approved private plan and is exempt from remitting premiums to the Fund, then its employees lose their status as "covered individual[s]" under the PFML. 26 M.R.S. § 850-A(9). Consequently, employees of businesses with approved private plans cannot utilize or benefit from the PFML.

II. The Department of Labor's Implementing Regulations

Pursuant to technical rulemaking authority delegated to DOL, A.40, ¶ 6; *see* 26 M.R.S. § 850-Q, DOL issued final implementing regulations (the "Rules") on or about December 4, 2024. A.41-42, ¶¶ 9-10, 13. The Rules appear at 12-702 C.M.R. ch. 1. *See* A.45-70. Although the Rules acknowledge the PFML's provision exempting employers offering substantially equivalent private plans from remitting premiums to the Fund, *see* 12-702 C.M.R. ch. 1, § X(J), in operation the Rules contravene this exemption by requiring these very same employers to make non-refundable premium payments. They do this through their timing of premium payments and private plan approvals.

The Rules address the timing of DOL's statutorily mandated quarterly collection of premiums. *See* 26 M.R.S. § 850-F(2). Specifically, the Rules provide that "[t]he employer's premium amount and contribution report must be remitted quarterly on or before the last day of the month following the close of the quarter for which premiums have accrued." 12-702 C.M.R. ch. 1, § X(A). The effect of this provision is that the first round of premium payments and reports will be due on April 30, 2025.[1]

Although employers must make the first round of premium payments by April 30, 2025, the Rules make it impossible for employers to complete the agency review process for substitution of private plans in time to avoid liability for this first round of premium payments. First, the Rules prevent employers from applying for substitution of private plans, and therefore obtaining exemption from premiums, until after April 1, 2025. *Id.* § XIII(A)(2); *see also id.* § XIII(A)(4) (requiring employers to pay premiums through and until the date DOL grants their application for substitution). Second, the Rules disallow the premium exemption for the first quarter: "if the application for substitution is submitted less than 30 days prior to the end of a quarter, . . . the exemption is effective on the first day of [the] quarter following when the application for substitution was submitted, assuming it is an approval." *Id.* § XIII(A)(4).

Most problematically, and at the heart of this case, the Rules include a non-refundability provision: "premiums owed prior to the effective date of the exemption must be remitted and are *non-refundable*." *Id.* § XIII(A)(4)(b) (emphasis added); *see also* A.43, ¶ 19. Section XIII(A)(4)(b), when read together with the foregoing provisions, forces employers and employees into paying *at least* one quarter's worth of premiums

[1] Failure to timely remit premiums (in whole or in part) results in "a penalty of 1.0 percent of the employer's total payroll for the quarter," *i.e.*, a 100% penalty. 12-702 C.M.R. ch. 1, § XI(A).

into the Fund, notwithstanding 26 M.R.S. § 850-F(8) and the fact that employees covered by a substantially equivalent private plan will never benefit from the PFML program, *see* 26 M.R.S. § 850-A(9)—with no potential for a refund.

III. Maine State Chamber of Commerce and Bath Iron Works Corporation

The Maine State Chamber of Commerce ("MSCC") is a statewide non-profit organization that has supported Maine's business community since 1889. A.39, ¶ 1; A.12, ¶ 9. MSCC serves more than 5,000 members, including Bath Iron Works Corporation ("BIW") and other employers of all sizes and sectors in Maine, and is dedicated to empowering the business community by collaboratively advancing an agenda for economic growth and prosperity in Maine. A.39, ¶¶ 1-2; A.12, ¶¶ 9-10. It does so by working with the Legislature and agencies to advocate for its members. A.13, ¶ 11. MSCC engaged in the legislative and rulemaking process related to the PFML program with the goal of helping develop a benefits program that supports employees while minimizing unintended consequences for employers. A.41, ¶ 11; A.13, ¶ 13.[2]

BIW, a Maine company and MSCC member, is the largest manufacturer and one of the largest private-sector employers in Maine. A.39, ¶ 2; A.13-14, ¶ 17. BIW employs more than 6,700 employees and pays them roughly $499 million in wages, as that term is defined in the PFML. A.14, ¶¶ 18, 20. BIW's mission is to design, build, and support naval warships for the U.S. Navy. A.13, ¶ 16. Valuing its employees and community

[2] MSCC specifically opposed requiring employers who offer private plans to remit premiums into the Fund as contrary to statute and the Legislature's intent. *See* A.41, ¶ 11; A.199-200; *see also* 201-242.

generally, BIW offers a generous benefits package to its employees and has partnered with its local YMCA to expand childcare for area families. A.14, ¶¶ 19, 21-22.

BIW's support for its employees will be directly impacted by the Rules. BIW—like other MSCC members—will offer substantially equivalent PFML benefits to its employees via a private plan. A.42, ¶ 16; A.13-14, 16, ¶¶ 14, 23, 32. BIW and other MSCC members will be able to make these benefits available to employees through insurance plans that have been approved in advance by DOL. A.42, ¶¶ 14-15.[3] Nevertheless, under the Rules, BIW and other MSCC members must remit premiums into the Fund until their applications are processed by DOL. A.43, ¶¶ 19-23. For BIW, this means that it must pay about $1,240,000 in non-refundable premiums (half remitted by the company and half, as allowed by statute, remitted by employees) into the Fund, *see* A.43, ¶¶ 20-21, even though (1) its employees will never benefit from the Fund because BIW will offer a private plan, A.42, ¶ 16, and (2) the governing statute exempts employers like BIW from premium payments, 26 M.R.S. § 850-F(8).

IV. Procedural Background

Promptly after DOL promulgated the Rules, MSCC and BIW (collectively, "Plaintiffs") filed a Verified Complaint challenging the validity of section XIII(A)(4)(b)

[3] As of March 11, 2025, DOL and the Maine Bureau of Insurance had already approved eighteen substantially equivalent private plans that employers can utilize in applying for substitution. *See* DOL, *Approved Insurance Carriers and Plans Certified as Substantially Equivalent*, https://www.maine.gov/paidleave/docs/2025/employerresources/ListofApprovedandCertifiedInsuredPlans.pdf; M.R. Evid. 201(b)(2) (allowing judicial notice of a fact that "[c]an be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). However, the Rules require employers to wait until after the first quarter even to apply for permission to use them.

of the Rules. A.4, 10-29. Specifically, Plaintiffs assert that section XIII(A)(4)(b) is invalid because it (1) conflicts with 26 M.R.S. § 850-F(8), and (2) constitutes an unlawful taking under both the Maine and U.S. Constitutions. Following Plaintiffs' consented-to motion to report pursuant to M.R. App. P. 24(a), the Superior Court (Kennebec County, *Mitchell, J.*) reported three questions to this Court, set forth below. A.7-9.

STATEMENT OF ISSUES

I. Have Plaintiffs proven, on the stipulated record, pursuant to 5 M.R.S. § 8058 that 12-702 C.M.R. ch. I, § XIII(A)(4)(b) conflicts with the Paid Family and Medical Leave Act, 26 M.R.S. §§ 850-A to 850-R (2024), or that 12-702 C.M.R. ch. 1, § XIII(A)(4)(b) is arbitrary and capricious or otherwise not in accordance with law?

II. Have Plaintiffs proven, on the stipulated record, that 12-702 C.M.R ch. 1, § XIII(A)(4)(b) constitutes a cognizable claim of taking of private property for public use, without just compensation, in violation of article I, section 21 of the Maine Constitution?

III. Have Plaintiffs proven, on the stipulated record, that 12-702 C.M.R. ch. 1, § XIII(A)(4)(b) constitutes a cognizable claim of taking of private property for public use, without just compensation, in violation of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment?

SUMMARY OF ARGUMENT

Section XIII(A)(4)(b) of the Rules is invalid pursuant to 5 M.R.S. § 8058(1) because it requires employers who offer private plans that are the substantial equivalent of the state plan to pay non-refundable premiums into the Fund. First, section XIII(A)(4)(b) contradicts the plain language of the governing statute, which states that "[a]n employer with an approved private plan . . . is not required to remit premiums . . . to the fund." 26 M.R.S. § 850-F(8). The structure of the PFML statute, which only authorizes DOL to charge employers offering substitute private plans fees to cover the cost of administering those private plans, confirms the unambiguous meaning of this language. Second, even if the statute were ambiguous, DOL's interpretation should be rejected. This Court owes no deference to DOL's interpretation because it is unreasonable; legislative history demonstrates the Legislature's intent to exempt employers offering substitute private plans from payments; and requiring premium payments would lead to the absurd result of *employees* paying into a state program for which they do not qualify. Finally, Maine's separation of powers doctrine and the Maine Administrative Procedures Act ("MAPA") prohibit this Court from deferring—rather than just giving due weight—to DOL's interpretation of a statute. Agencies cannot assume this Court's exclusive responsibility to interpret the governing statute.

Section XIII(A)(4)(b) is also invalid because it effects a taking of private property without just compensation. The Takings Clause prohibits DOL from confiscating more money than is lawfully owed. The Takings Clause also bars DOL from imposing user fees (such as the premiums at issue here) that are disproportionate to the cost of the benefits supplied. DOL has acted unconstitutionally by assessing more fees than statutorily authorized and by assessing fees on persons who receive no PFML benefits.

For these reasons, the answer to each reported question is "yes."

ARGUMENT

I. This Court should accept the report pursuant to M.R. App. P. 24(a).

This matter is appropriate for report. A.7-9. The parties agree to the report and further agree upon the facts material to resolution of the appeal. Moreover, the issues in this case raise important questions of law, the resolution of which, in at least one alternative, will finally dispose of the action. M.R. App. P. 24(a)(1)-(3).

Review is consistent with this Court's basic appellate function. *Me. Senate v. Sec'y of State*, 2018 ME 52, ¶ 14, 183 A.3d 749. The issues presented are "of sufficient importance and doubt to outweigh the policy against piecemeal litigation," *York Reg. of Prob. v. York Cnty. Prob. Ct.*, 2004 ME 58, ¶ 11, 847 A.2d 395 (quotation marks omitted), because they concern the validity of a portion of the Rules affecting not only employers and employees state-wide, but also the State budget. The longer the parties, and Maine employers and employees generally, must navigate the uncertain implementation of the PFML, the greater the upheaval to Maine citizens. *See State v. Placzek*, 380 A.2d 1010, 1014 & n.9 (Me. 1977). There are no preliminary factual determinations that would prevent the Court from reaching these issues. *See Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC*, 2013 ME 89, ¶ 12, 81 A.3d 348. Finally, the Court's answer to the questions presented would effectively end the case—either because Plaintiffs' claims fail, or because DOL cannot lawfully collect non-refundable premiums from employers offering private plans. *See Swanson v. Roman Cath. Bishop*, 1997 ME 63, ¶ 6, 692 A.2d 441.

II. The Rules contradict the governing statute by requiring employers who provide a substitute private plan to pay non-refundable premiums and therefore must be invalidated in part pursuant to 5 M.R.S. § 8058(1).

The central question presented in this case is whether the Rules, by requiring employers who offer paid family and medical leave benefits via a private plan to pay non-refundable premiums into the Fund for the state plan, violate the Legislature's mandate that "[a]n employer with an approved private plan . . . is not required to remit premiums . . . to the fund." 26 M.R.S. § 850-F(8). The answer is "yes."

"State agencies may exercise only that power which is conferred upon them by law." *Calnan v. Hurley*, 2024 ME 30, ¶ 9, 314 A.3d 267 (quotation marks omitted). "An agency's authority is determined by its enabling statute and is subject to the provisions of [MAPA]." *Id.* Section 8058(1) of MAPA establishes a multi-part test for determining the validity of a rule promulgated by an agency. As relevant here, if a rule promulgated by an agency "exceeds the rule-making authority of the agency, it is invalid." *Calnan*, 2024 ME 30, ¶ 9, 314 A.3d 267 (quotation marks omitted); *see* 5 M.R.S. § 8058(1). Relatedly, a rule is invalid if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Calnan*, 2024 ME 30, ¶ 9, 314 A.3d 267 (quotation marks omitted); *see* 5 M.R.S. § 8058(1). Under these standards, a rule is invalid if it contradicts the relevant statutory scheme. *Bocko v. Univ. of Me. Sys.*, 2024 ME 8, ¶¶ 26-27, 308 A.3d 203; *see, e.g.*, *Lydon v. Sprinkler Servs.*, 2004 ME 16, ¶ 15, 841 A.2d 793; *Beaulieu v. Me. Med. Ctr.*, 675 A.2d 110, 111 (Me. 1996). Here, section XIII(A)(4)(b) of the Rules conflicts with the governing statute and therefore must be invalidated.

A. In determining the Rules' validity, this Court must give effect to the Legislature's intent as expressed in the governing statute.

Whether a rule is contrary to statute is an issue of statutory interpretation. *Calnan*, 2024 ME 30, ¶ 10, 314 A.3d 267. The Court's "main objective in statutory interpretation is to give effect to the Legislature's intent." *Town of Eagle Lake v. Comm'r, Dep't of Educ.*, 2003 ME 37, ¶ 7, 818 A.2d 1034. In determining legislative intent, the Court "look[s] first to the statute's plain meaning," *id.* (quotation marks omitted), "interpret[ing] the statute to mean exactly what it says," *Kimball v. Land Use Regul. Comm'n*, 2000 ME 20, ¶ 18, 745 A.2d 387 (quotation marks omitted). A "statute is not reviewed in isolation but in the context of the statutory and regulatory scheme." *Calnan*, 2024 ME 30, ¶ 11, 314 A.3d 267 (quotation marks omitted). The Court considers the "whole statutory scheme . . . so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Town of Eagle Lake*, 2003 ME 37, ¶ 7, 818 A.2d 1034 (quotation marks omitted). The Court goes further only if the statute is ambiguous, *i.e.*, "reasonably susceptible to different interpretations." *State v. Marquis*, 2023 ME 16, ¶ 14, 290 A.3d 96 (quotation marks omitted). To resolve an ambiguity, the Court may consider legislative history. *Town of Eagle Lake*, 2003 ME 37, ¶ 7, 818 A.2d 1034.

Further, this Court has applied "a two-part analysis in reviewing an agency's interpretation of a statute it administers. If the statute is unambiguous, [the Court] give[s] effect to the plain meaning of the statute. If it is ambiguous, [the Court] determine[s] whether the agency's interpretation was reasonable." *Calnan*, 2024 ME 30,

¶ 11, 314 A.3d 267 (citations omitted).[4] Under this framework, the Court will not defer to an agency interpretation where the statute's plain language compels a contrary result. *See Urrutia v. Interstate Brands Int'l*, 2018 ME 24, ¶¶ 12-13, 179 A.3d 312; *Lippitt v. Bd. of Certification for Geologists & Soil Scientists*, 2014 ME 42, ¶ 17, 88 A.3d 154. If, however, the statute is both ambiguous "and . . . within the agency's expertise," the Court will review only to determine if the agency interpretation is unreasonable or unlawful. *Botting v. Dep't of Behav. & Developmental Servs.*, 2003 ME 152, ¶ 9, 838 A.2d 1168.

Deference applies to an agency interpretation only if the statute is "genuinely ambiguous"—a conclusion that follows only "after a court has resorted to all the standard tools of interpretation." *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019); *see Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001) (no deference to agency unless "the canons of statutory interpretation and resort to other interpretative aids (like legislative history) do not resolve the issue"). Further, even if a statute is genuinely ambiguous, the Court will reject an agency interpretation if it is "'unreasonable'" or if "'the statutory scheme as a whole and its underlying policy' compel[] a different construction." *Lippitt*, 2014 ME 42, ¶ 17, 88 A.3d 154 (quoting *Fuhrmann v. Staples the Off. Superstore E., Inc.*, 2012 ME 135, ¶¶ 29, 35, 58 A.3d 1083).

[4] Plaintiffs contend that this framework conflicts with the Maine Constitution and MAPA. *See infra* Part II.C.2. The Rules, however, fail even if this deference analysis applies. *See id.* Parts II.B, II.C.1.

B. Title 26, section 850-F unambiguously exempts employers who provide a substitute plan from paying non-refundable premiums.

1. Section XIII(A)(4)(b) contradicts the plain language of title 26, section 850-F.

Section XIII(A)(4)(b) of the Rules should be invalidated because it thwarts the Legislature's intent as clearly set forth in the plain language of 26 M.R.S. § 850-F(8). *See Lydon*, 2004 ME 16, ¶ 15, 841 A.2d 793; *Beaulieu*, 675 A.2d at 111. Section XIII(A)(4)(b) directly conflicts with the unambiguous language of section 850-F.

The Legislature expressly exempted employers with an approved private plan from remitting premiums into the Fund. As provided in section 850-F, "[a]n *employer with an approved private plan* under section 850-H *is not required to remit premiums* under this section to the fund." 26 M.R.S. § 850-F(8) (emphasis added). In turn, section 850-H provides that a plan qualifies as an "approved" plan if it "confer[s] rights, protections and benefits substantially equivalent to those provided to employees" through the state plan. *Id.* § 850-H(1). Read together, this language is not reasonably susceptible to multiple interpretations: it clearly states that an employer that offers paid family and medical leave benefits to its employees via a private plan that is the substantial equivalent of the state plan need not remit premiums to the Fund.

The Rules, by contrast, establish a structure whereby employers who offer an approved private plan must pay *non-refundable* premiums into the Fund. The Rules require premium payments to be "remitted quarterly on or before the last day of the month following the close of the quarter for which premiums have accrued." 12-702

C.M.R. ch. 1, § X(A). Because premiums are required for the quarter beginning January 1, 2025, *see* 26 M.R.S. §§ 850-F(2), 850-P, the effect of this provision is that the first round of premium payments is due on April 30, 2025. The Rules, however, prevent employers from applying for substitution of a private plan until after April 1, 2025. 12-702 C.M.R. ch. 1, § XIII(A)(2).[5] Additionally, the Rules delay the effective date of any exemption for employers offering a substantially equivalent private plan, providing that, if the application for substitution is "submitted less than 30 days prior to the end of a quarter, . . . the exemption is effective on the first day of [the] quarter following when the application for substitution was submitted." *Id.* § XIII(A)(4). Finally, the Rules require employers to remit premiums through the date DOL grants their applications for substitution and further provide that "premiums owed prior to the effective date of exemption . . . are *non-refundable*." *Id.* § XIII(A)(4)(b) (emphasis added).

In operation, therefore, the Rules require precisely the opposite outcome contemplated by 26 M.R.S. § 850-F(8). Because the Rules forbid employers from applying to be exempt until April 1, 2025, it is impossible for employers to apply at least thirty days prior to the end of the first quarter; accordingly, employers offering approved private plans will necessarily be required to remit (at least) one quarter's worth

[5] Because no plan needs to be in place until 2026, *see* 26 M.R.S. § 850-B, it is possible that applications may be submitted throughout 2025. The Rules are silent on how long DOL can take to review applications, and they do not establish any deadline by which DOL must take action on an application. The Rules thus allow an indefinite period for DOL to process an employer's application for exemption from premiums and expose employers to the possibility of paying more than one quarter's premiums.

of premiums into the Fund. The Rules then bar these employers from obtaining a refund of these premiums—even though the Legislature exempted them from the requirement to pay premiums into the Fund because their employees will not benefit from the Fund.[6]

Accordingly, by requiring non-refundable premium payments into the Fund prior to the effective date of the private-plan exemption, section XIII(A)(4)(b) directly conflicts with the Legislature's clear mandate that an employer who offers an approved private plan "is not required to remit premiums under this section to the fund." 26 M.R.S. § 850-F(8). The Rules require employers to remit premiums even though they timely offer a plan that is the substantial equivalent of the state plan, and even though the statute exempts employers that offer substantially equivalent plans from having to remit premiums. The Rules do not simply create a safety mechanism to ensure payment in the event the employer ultimately fails to offer a substantially equivalent plan; rather, by providing that the premiums are non-refundable, *see* 12-702 C.M.R. ch. 1, § XIII(A)(4)(b), DOL has expressly mandated that employers must pay premiums *regardless* of the employers' timely compliance.[7] The Rules handcuff private-plan

---

[6] Thus, although the Rules give lip-service to the governing statute by providing that "[a]n employer that has been approved for a private plan substitution is exempt from the requirements to remit premiums as specified in Section XIII of this rule," 12-702 C.M.R. ch. 1, § X(J), the Rules do *not* exempt employers offering an approved private plan from remitting premiums.

[7] The most critical problem with the Rules is that premiums will *never be refunded* even after the agency has verified that the employer offers an approved private plan. Even if DOL could have adopted Rules that required initial premium payments pending administrative review of private plan applications, at the very least section 850-F(8) mandates that DOL must refund those payments.

employers into paying for a program that their employees will never use despite the PFML statute's plain language exempting those employers from premium payments.

2. Section XIII(A)(4)(b) contradicts the structure of the PFML statute viewed as a whole.

DOL cannot establish that section 850-F is ambiguous; any interpretation different from the one proffered above would be inconsistent with the PFML statute as a whole. Plaintiffs anticipate DOL will argue that the Rules are valid because the PFML statute exempts only employers with "approved plan[s]," 26 M.R.S. § 850-F(8), and no employer will have an approved plan until DOL actually processes the employer's application and issues an administrative determination that the private plan is the substantial equivalent of the state plan. This reading, however, fails in light of the PFML's overall statutory scheme. *See Fuhrmann,* 2012 ME 135, ¶¶ 31-35, 58 A.3d 1083.

DOL's interpretation is contradicted by section 850-H, which, as noted above, provides that a plan qualifies as an "approved" plan if it "confer[s] rights, protections and benefits substantially equivalent to those provided to employees" through the PFML. 26 M.R.S. § 850-H(1). A straightforward reading of this language confirms that, if an employer offers the substantial equivalent of the state plan, it has offered an "approved" plan for the entirety of the period during which the plan is in place. The fact that DOL must review an employer's application and reach an administrative determination that the plan is the substantial equivalent of the state plan does not mean that the plan is not an "approved" plan prior to completion of DOL's review process.

DOL's interpretation would suggest that an employer offering a private plan is not in compliance with the statute until the date that the employer's application is processed, and thus that all employers must utilize the state's plan prior to the date the agency completes its review process. There is no statutory support for this conclusion.[8]

DOL's interpretation is also illogical when viewed in the context of the PFML program's implementation schedule. Under the PFML statute, an employer need not have any plan in place until January 1, 2026. *Id.* § 850-B. The Rules nevertheless impose the cost of premiums on an employer like BIW who applies for a substitute plan in 2025 *even if* (1) DOL processes the application and determines the offered plan is satisfactory before January 1, 2026, and (2) that plan is in place on the first day the PFML program becomes effective. The PFML statutory scheme provides no basis to conclude that DOL has the authority to require premium payments by employers who clear all necessary administrative hurdles and implement an approved private plan *before* the PFML program ever becomes effective.

The overall PFML scheme also demonstrates that the Legislature did not intend for employers offering substantially equivalent plans to pay anything other than the cost

---

[8] Indeed, such a conclusion would sit uneasily with DOL's actual review process. Insurance companies may submit proposed private plans to the Bureau of Insurance for certification that the plans are the substantial equivalent of the state plan. A.42, ¶ 14. Many have already received certification. *Supra* n.3. Accordingly, when BIW and other MSCC members submit applications for private plan substitutions, they will be able to do so utilizing pre-certified private plans. A.42, ¶¶ 15-16. As DOL has acknowledged, the review process for companies offering pre-certified plans will therefore be "streamlined." A.42, ¶ 17. Because the application process is largely a formality, it makes no sense to view completion of administrative review as the moment that an employer offers an "approved" plan.

of administering private plans. It is a well-settled principle of statutory interpretation that the "express mention of one concept implies the exclusion of others not listed." *Riemann v. Toland*, 2022 ME 13, ¶ 31 n.7, 269 A.3d 229 (quotation marks omitted). Section 850-H(7) expressly allows DOL to recover the costs of administering private plans from employers offering substitute plans. It does not allow for collecting other payments (such as premiums) from such employers. By implication, therefore, the Legislature precluded DOL from assessing premiums to employers who offer private plans. *See Violette v. Leo Violette & Sons, Inc.*, 597 A.2d 1356, 1358 (Me. 1991).

Finally, the PFML statute as a whole, and section 850-H specifically, indicates that the Legislature intended to encourage the provision of family and medical leave plans through *either* the state plan *or* an equivalent. Section 850-H specifically allows for private plans, evincing the Legislature's neutrality regarding the means of providing paid family and medical leave benefits. There is no suggestion that the Legislature intended to drive out or penalize private plans, as DOL's interpretation would effectively do—to the contrary, as discussed below, the PFML's sponsors disclaimed this possibility.

C. Even if title 26, section 850-F were ambiguous, controlling deference should not be afforded to DOL's interpretation.

Even if section 850-F contained some ambiguity when read in the context of the PFML statute as a whole, it would not be appropriate to defer to DOL's interpretation of that statute as set forth in the Rules. Fundamentally, no deference is owed because DOL has no expertise in the timing of premium payments. *See, e.g.*, *Pinkham v. Dep't of*

Transp., 2016 ME 74, ¶ 7, 139 A.3d 904. While DOL may have expertise regarding, for example, "continuous," "intermittent" and "reduced schedule" leave, *see* 26 M.R.S. § 850-B(5), 12-702 C.M.R. ch. 1, § III, it has no meaningful expertise on whether an employer who offers a substitute private plan should have to pay premiums. That is a quintessential legislative choice, and thus no deference is owed to the agency's views.

Deference is inappropriate for two other reasons. First, DOL's interpretation, which would deem an employer's plan to be "approved"—thus exempting the employer from premium payments—only after administrative processing of an employer's application for substitution of a private plan, is not reasonable because it would contradict the Legislature's expressed intent and lead to absurd results. Second, deferring to an agency's legal interpretation of a statute simply because it is "reasonable" violates the Maine Constitution and MAPA.

1. Section XIII(A)(4)(b) is not a reasonable interpretation of title 26, section 850-F.

DOL's interpretation of section 850-F as embodied in the Rules is not a reasonable interpretation. DOL would force employers (and employees) to pay premiums while it processes an application for exemption—for an indeterminate period of time, given the lack of any provision, in statute or in rule, requiring DOL to process an application within a particular timeframe. The Legislature, however, did not intend to grant DOL power to collect premiums from employers that provide a substantially equivalent plan to their employees by delaying the application process until premiums have been paid and deeming those payments non-refundable. *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000) (no agency deference if the interpretation is not "consistent with the statutory purpose and legislative history" (quotation marks omitted)). Further, DOL's interpretation would lead to absurd results by causing *employees* to pay a portion of the premium for benefits under a state program for which they do not qualify. *See Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (no agency deference if the interpretation leads to absurd results).

a. Section XIII(A)(4)(b) is contrary to legislative intent.

DOL's interpretation contradicts the Legislature's intent, which was to prevent employers with substantially equivalent private plans from having to pay twice for the benefits offered to its employees. As such, DOL's interpretation is unreasonable.

First, the Legislature did not intend to discourage the provision of paid family and medical leave benefits through private plans—to the contrary, the Legislature was protective of such plans. Representative Cloutier, a co-sponsor of the PFML legislation, stated on the floor of the House of Representatives that "[b]usinesses already offering their employees a substantially equivalent private option for paid family medical leave can keep it." House Jour. 1035 (131st Legis. 2023); *see also* L.D. 1964, Summary (131st Legis. 2023) (stating that the bill "authorizes employers to provide these benefits through a private plan as long as the benefits for family and medical leave . . . are the same as provided in the program"). But imposing a requirement to pay non-refundable premiums on employers offering a substantially equivalent private plan would create an onerous burden by levying massive penalties on such plans.

Second, and more specifically, the Legislature did not intend to make employers with private plans pay twice. In joint testimony to the Joint Standing Committee on Labor and Housing, Senator Daughtry, a primary sponsor of the PFML legislation, and Representative Cloutier directly addressed this point:

> *For businesses that already provide PFML programs, nothing would change for them*. With a comparable program, the business is exempt from the program. For example, we spoke with Louisiana Pacific leaders in Aroostook who described their paternity and maternity program, programs they are using to attract and retain quality workforce. *For a business with existing benefits, there would be no need to pay into the state fund under this law*. Businesses can still select private programs. We wanted to keep that flexibility for Maine employers. . . . Businesses that already offer comparable leave and protections won't have to change what they're doing.

An Act to Implement the Recommendations of the Commission to Develop a Paid Family and Medical Leave Benefits Program: Hearing on L.D. 1964 Before the J. Standing Comm. on Lab. & Hous., 131st Legis. 6-7 (May 25, 2023) (testimony of Sen. Daughtry and Rep. Cloutier) (emphasis added). By stating that businesses with existing benefits would have "no need to pay into the state fund under this law," *id.* at 6, the sponsors of the PFML expressly disclaimed the very position that DOL has now adopted by regulation.[9]

[9] Senator Daughtry's statement reflects her intent to find a "collaborative" solution for a PFML program. *An Act to Implement the Recommendations of the Commission to Develop a Paid Family and Medical Leave Benefits Program: Hearing on L.D. 1964 Before the J. Standing Comm. on Lab. & Hous.*, 131st Legis. 9 (May 25, 2023) (testimony of Sen. Daughtry and Rep. Cloutier) ("Our goal has been to make sure we pass . . . a bill that takes into consideration the concerns and ideas of over 300 businesses, including members of the State Chamber" and other stakeholder groups). MSCC has consistently taken the position that employers offering private plans should not have to pay into the Fund. *See* A.199 (noting

As this legislative history establishes, the Legislature meant just what it said when it adopted language specifying that "[a]n *employer with an approved private plan* under section 850-H *is not required to remit premiums* under this section to the fund." 26 M.R.S. § 850-F(8) (emphasis added). The Rules violate the Legislature's intent by forcing businesses offering benefits to their employees via private plans to pay into the Fund when the PFML's sponsors specifically stated that they intended to foreclose that possibility.

b. Section XIII(A)(4)(b) would lead to absurd results.

Further, DOL's interpretation is unreasonable because it would lead to absurd results. It would cause the same employees that the PFML program was designed to protect to pay a portion of the premium through wage withholdings without obtaining any additional benefits. The law permits employers to deduct up to 50% of the required premium payments from employee wages. *See* 26 M.R.S. § 850-F(5)(A) ("An employer with 15 or more employees may deduct up to 50% of the premium required for an employee by subsection 3 from that employee's wages."). DOL's interpretation would mean that these employees' wages can be reduced by these deductions even though the employees would obtain no additional benefits because they are excluded from the PFML. *See id.* § 850-A(9) (providing that employees whose employer provides an approved plan do not qualify as a "covered individual"). It is difficult to imagine that

---

that MSCC's members did not expect to pay premiums if they provided private plans "given the legislative discussions, the process in other states, and based on the basic logic that this program would not be punitively funded by those very employers and employees who have developed their own paid family and medical leave program"); A.202, 222-223.

the Legislature intended to place on employees an additional financial burden with no corresponding benefit when the purpose of the PFML program is to provide benefits to employees while they are away from work because of medical or family events.

DOL may seek to escape this absurd outcome by arguing that employers, not employees, must cover the entire premium for the period prior to processing of the application. The Rules require employers to refund to employees any withholdings "to the effective date of the exemption within 30 days from the approval of the substitution." 12-702 C.M.R. ch. 1, § XIII(A)(4)(a). Although this language is not entirely clear,[10] it appears that DOL may take the position that employers who offer a private plan must refund withholdings and thereby pay a larger portion of the premium than employers who utilize the state plan. But such an interpretation would create an arbitrary class of individuals—employers who offer a private plan—and impose the full cost of financing the Fund on those and only those employers, while simultaneously allowing another group of employers to share that burden with employees.

Not only is this an unnatural reading, but it would violate the Equal Protection Clauses of the Maine and U.S. Constitutions, *see* U.S. Const. amend XIV, § 1; Me. Const. art. I, § 6-A, and unconstitutional interpretations must be avoided if possible, *see* *DaimlerChrysler Corp. v. Exec. Dir., Me. Revenue Servs.*, 2007 ME 62, ¶ 19, 922 A.2d 465.

[10] It is unclear from the Rules' language whether the refund covers the entire period that premiums were paid—*i.e.*, the date on which the employer receives approval all the way back to January 1, 2025—or whether it is just for the relevant quarter—*i.e.*, the withholdings the employer has set aside from the employee's pay for a specific quarter that have not yet been remitted to the Fund.

Equal protection "requires, generally, that persons similarly situated be treated alike." *Anderson v. Town of Durham*, 2006 ME 39, ¶ 28, 895 A.2d 944. Although a government action that creates a distinction not involving a suspect classification is subject to rational basis review, *see id.* ¶ 29, that standard is not toothless, *see McNicholas v. York Beach Vill. Corp.*, 394 A.2d 264, 269-70 (Me. 1978); *Ace Tire Co. v. Mun. Officers of Waterville*, 302 A.2d 90, 100-01 (Me. 1973). Where the State draws an "arbitrary and unreasonable" distinction that "bears no genuine relation to the obvious purpose to be achieved," it violates equal protection. *Ace Tire Co.*, 302 A.2d at 100.

DOL would do just that to the extent it imposes the full cost of premiums on employers who choose a private plan, but only half the cost of premiums on employers who utilize the state plan. A select group of employers would arbitrarily be forced to pay higher costs, even though they are not meaningfully distinguishable from those who are permitted to split the cost of premiums—both sets of employers are necessarily providing "substantially equivalent" benefits to their employees. *See* 26 M.R.S. § 850-H. Further, given the equal provision of benefits by all employers, there is no rational justification for DOL to penalize employers who provide a private plan by forcing them to refund employee contributions even while refusing to return the premium payments to the employers. DOL's fee structure would have no rational relationship to the ends sought under the PFML. *See McNicholas*, 394 A.2d at 270 (no rational basis for imposing fees for park use to divers but not other park users); *Ace Tire Co.*, 302 A.2d at 100 (imposing greater fee on junkyards within 100 feet of the highway "bears no actual relation to the end purpose of the Act," namely, protecting the safety of travelers). Thus, to the extent that DOL seeks to impose the full cost of premiums on employers who provide a private plan, that interpretation violates both Equal Protection Clauses.

Consistent with section 850-F(5)(A), therefore, the PFML statute and implementing Rules must be read to allow cost-sharing between employers and employees. So construed, DOL's decision to mandate the payment of non-refundable premiums will lead to the absurd result of penalizing the very employees the PFML program was designed to protect. As such, DOL's interpretation of the PFML as reflected in the Rule is unreasonable and should be rejected.

2. Article III, section 2 of the Maine Constitution and MAPA bar the Court from deferring, rather than simply giving due weight, to an agency's interpretation of law.

Even if DOL's interpretation of the statute were reasonable, this Court should not simply defer to that interpretation. The Court has granted deference to agency interpretations of statutes, adopting the two-step analysis set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), without considering its constitutionality or consistency with MAPA. *See Cobb v. Bd. of Counseling Pro. Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271; *Guilford Transp. Indus. v. Pub. Utils. Comm'n*, 2000 ME 31, ¶¶ 9-11, 746 A.2d 910.[11] Now that *Chevron* has been overruled, *see Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411-12 (2024), this Court should consider the validity of

---

[11] The absence of any constitutional analysis is particularly striking given the Court's adherence to the primacy doctrine. *See Dupuis v. Roman Cath. Bishop of Portland*, 2025 ME 6, ¶ 11 & n.8, ---A.3d ---.

Chevron deference, reject its application under Maine law, and give the relevant statute the best reading available.

Under the Maine Constitution, "[n]o person or persons, belonging to one of [the legislative, executive, or judicial] departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Me. Const. art. III, § 2. Separation of powers serves a crucial purpose—"[t]here can be no liberty where the legislative and executive powers are united" or where "the power of judging [is] not separated from the legislative and executive powers." The Federalist No. 47, at 325 (James Madison) (J. Cooke ed. 1961) (quotation marks omitted). "[T]he more that the 'independence of each department, within its constitutional limits, can be preserved, the nearer the system will approach the perfection of civil government, and the security of civil liberty.'" *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 24, 237 A.3d 882 (quoting *Lewis v. Webb*, 3 Me. 326, 329 (1825)); *see TWISM Enters., LLC v. State Bd. of Registration for Pro. & Surveyors*, 223 N.E.3d 371, 379-80 (Ohio 2022); *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 41-42 (Wis. 2018) (Kelly, J., lead op.).

To this end, article III, section 2 establishes a "strict separation of powers between the three branches of government." *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985). Separation of powers under the Maine Constitution is "much more rigorous" than under the U.S. Constitution. *Dupuis*, 2025 ME 6, ¶ 22, --- A.3d --- (quotation marks omitted); *see State v. Hunter*, 447 A.2d 797, 799 (Me. 1982). "[S]eparation of powers issues must be dealt with in a formal rather than functional manner." *Bossie*, 488 A.2d at 480. Under Maine law, the question is: "'[H]as the power in issue been explicitly granted to one branch of state government, and to no other branch? If so, article III, section 2 forbids another branch to exercise that power.'" *Id.* (quoting *Hunter*, 447 A.2d at 800). Thus, the Maine Constitution does not merely prohibit one branch from going *too far* in impairing another branch's powers; rather, *any* exercise of another branch's power is forbidden. *Hunter*, 447 A.2d at 799-800.

Under the Constitution, "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Portland Pipe Line Corp. v. Env't Improvement Comm'n*, 307 A.2d 1, 8 (Me. 1973) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

> It is . . . a fundamental duty of the court *and within its exclusive province* to construe both the statutes and the Constitution and to ascertain . . . what the real intention of the lawmaking power was and how the expressed intention should be interpreted. This principle is too familiar to require the citation of authority.

Moulton v. Scully, 111 Me. 428, 89 A. 944, 953 (1914) (emphasis added); *see TWISM Enters.*, 223 N.E.3d at 380-81; *Tetra Tech EC, Inc.*, 914 N.W.2d at 43, 45 (Kelly, J., lead op.). The Framers "envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Loper Bright Enters.*, 603 U.S. at 385 (quoting The Federalist No. 37, at 236 (James Madison) (J. Cooke ed. 1961)). Vesting the power to say what the law is in the judiciary ensures the "'steady, upright and impartial administration of the laws.'" *Id.* (quoting The Federalist No. 78, at 522 (Alexander Hamilton) (J. Cooke ed. 1961)). Thus, if a court's legal judgment differs from the executive's, the court is "'not at liberty to surrender, or to waive it.'" *Id.* at 386-87 (quoting *United States v. Dickson*, 40 U.S. 141, 162 (1841)).[12]

Simply deferring to agency interpretations wrests the judicial power from the courts and places it in the hands of the executive. The judiciary is well equipped to determine the meaning of ambiguous statutes—this is, indeed, its bread-and-butter. *See Loper Bright Enters.*, 603 U.S. at 400. Under *Chevron*'s construct, however, agencies assume this judicial prerogative and tie the hands of courts, even when the agency has been inconsistent over time. *Id.* at 399. By requiring courts to give "great deference" to agency interpretations unless the statute "compels" a contrary result, *Competitive Energy Servs. LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039 (quotation marks omitted), it "relieve[s] the court of the real work of judicial review," *Tetra Tech EC, Inc.*, 914 N.W.2d at 46 (Kelly, J., lead op.); *see TWISM Enters.*, 223 N.E.3d at 380. To make matters worse, it mandates deference to the executive *in a case where the executive is a party*—violating the fundamental principle that "[n]o man is allowed to be a judge in his own cause." *TWISM Enters.*, 223 N.E.3d at 380 (quoting The Federalist No. 78, at 404 (Alexander Hamilton) (Gideon Ed. 2001)); *see Tetra Tech EC, Inc.*, 914 N.W.2d at 49-50 (Kelly, J., lead op.). *Chevron* deference thus stands as "an impediment, rather than an

---

[12] Consistent with this conclusion, this Court has, prior to *Chevron*, exercised its own judgment in interpreting a statute, even when confronted by the interpretation of another branch of government. *See Me. Tpk. Auth. v. Brennan*, 342 A.2d 719, 729 (Me. 1975) ("It is for the courts and not government agencies to exercise ultimate responsibility to construe the language used by the legislature."); *Sproul v. Randell*, 107 Me. 274, 78 A. 450, 452 (1910) (regardless of Legislature's interpretation, "the court must declare its own judgment as to the real scope of the statute").

aid, to accomplishing the basic judicial task of 'say[ing] what the law is,'" *Loper Bright Enters.*, 603 U.S. at 410 (quoting *Marbury*, 5 U.S. at 177), by "prevent[ing] [judges] from judging," *id.* at 404.[13]

For the same reasons, *Chevron* deference also conflicts with MAPA, which recognizes Maine's separation of powers structure. MAPA provides that an agency action should be reversed if "[i]n violation of constitutional or statutory provisions." 5 M.R.S. § 11007(4)(C)(1). Notably, MAPA does not provide for deference to agency interpretations of the law—in distinct contrast to the language relating to factual determinations. In allowing for reversal of agency actions "[u]nsupported by substantial evidence," *id.* § 11007(4)(C)(5), MAPA expressly states that "[t]he court may not substitute its judgment for that of the agency," *id.* § 11007(3).[14] In light of this text, the omission of language prescribing a deferential standard for courts in reviewing legal determinations "is telling." *Loper Bright Enters.*, 603 U.S. at 392.[15] MAPA, fairly read, "codifies for agency cases the unremarkable, yet elemental proposition . . . that courts decide legal questions by applying their own judgment" and reflects the constitutional

---

[13] A growing number of states have rejected *Chevron*, citing constitutional concerns. *See, e.g.*, *TWISM Enters.*, 223 N.E.3d at 379-82; *Myers v. Yamato Kogyo Co.*, 597 S.W.3d 613, 617 (Ark. 2020); *Tetra Tech EC, Inc.*, 914 N.W.2d at 40-45, 49-50 (Kelly, J., lead op.); *King v. Miss. Mil. Dep't*, 245 So.3d 404, 407-08 (Miss. 2018); *In re Complaint of Rovas Against SBC Mich.*, 754 N.W.2d 259, 264-71 (Mich. 2008).

[14] It has long been recognized that making factual findings does not encroach upon the judicial function. *See Loper Bright Enters.*, 603 U.S. at 387; *Portland Pipe Line Corp.*, 307 A.2d at 30.

[15] MAPA does not contain the language, contained in the federal APA, expressly stating that courts decide "'all relevant questions of law.'" *Loper Bright Enters.*, 603 U.S. at 392 (quoting 5 U.S.C. § 706). But that same point is made by the Legislature's express directive regarding deference to factual determinations and silence regarding any deference to legal determinations.

requirement that it "remains the responsibility of the court to decide whether the law means what the agency says," *id.* at 391-92 (quotation marks omitted).

Thus, courts should defer to an agency interpretation only to the extent it has the power to persuade. The judiciary can accord due respect to agency interpretations of federal statutes. *Id.* at 385-86. But this deference is limited; "'interpretations and opinions'" of an agency "'made in pursuance of official duty' and 'based upon . . . specialized experience'" should be considered by courts and accorded weight "'depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Id.* at 388 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see TWISM Enters.*, 223 N.E.3d at 382.

In light of Maine's "more rigorous" separation of powers doctrine, this Court should join the growing number of state courts that have rejected *Chevron*'s flawed construct. *See Buffington v. McDonough*, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting) (citing cases); *TWISM Enters.*, 223 N.E.3d at 382-83 (citing cases); Luke Phillips, Chevron *in the States? Not So Much*, 89 Miss. L.J. 313, 364 (2020) (observing that most States have declined to follow *Chevron*).[16] Where the basis for a rule has "fallen into

[16] In addition to those states that have recently departed from *Chevron*, *see supra* n. 13, others, such as California, Maryland, and Delaware, have historically declined to apply *Chevron* deference. *See, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Dep't of Indus. Rels.*, 2025 WL 261942, at *8 & n.5 (Cal. Ct. App. Jan. 22, 2025); *Md. Dep't of the Env't v. Assateague Coastal Tr.*, 299 A.3d 619, 650 (Md. 2023); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del. 1999).

jurisprudential disrepute and is disapproved," the rule should be set aside. *Dyer v. Me. Drilling & Blasting, Inc.*, 2009 ME 126, ¶ 28, 984 A.2d 210 (quotation marks omitted).[17]

Accordingly, if the Court concludes that DOL's interpretation is "reasonable," the Court should reject *Chevron* deference and grant DOL's interpretation only the weight due its persuasive power. As set forth above, DOL's interpretation as embodied in section XIII(A)(4)(b) does not provide a persuasive reading of the PFML statute.

* * * *

Under 5 M.R.S. § 8058(1), this Court should invalidate section XIII(A)(4)(b) because it requires employers offering substantially equivalent private plans to make non-refundable premium payments despite contrary language in and the overall structure of the governing statute; despite the expressed legislative intent of the PFML program's sponsors; and despite the absurd results that such a requirement entails.

III. The Rules effect a taking of private property without just compensation under the Maine Constitution and the U.S. Constitution.

The Maine and U.S. Constitutions both prohibit the taking of private property—whether tangible or intangible—for public use without just compensation. Me. Const. art. I, § 21; U.S. Const. amend. V, XIV; *see MacImage of Me., LLC v. Androscoggin Cnty.*,

[17] As noted above, Maine courts have never considered the constitutionality of *Chevron* deference. *Stare decisis* is at its weakest when a judicial rule lacks an articulated basis. *See, e.g.*, *State v. Turnquest*, 827 S.E.2d 865, 877-78 (Ga. 2019). Moreover, as the Supreme Court has explained, *Chevron* has "proved to be fundamentally misguided" given its inconsistency with the APA and separation of powers principles; "is unworkable" given the indeterminate ambiguity analysis; has been subject to frequent modification; and, rather than "safeguarding reliance interests," in fact "affirmatively destroys them" by mandating deference to changing agency interpretations. *Loper Bright Enters.*, 603 U.S. at 406-12.

2012 ME 44, ¶ 36, 40 A.3d 975. "[S]tate and federal [takings] claims require the same analysis." *MC Assocs. v. Town of Cape Elizabeth*, 2001 ME 89, ¶¶ 10-11, 773 A.2d 439; *see Dupuis*, 2025 ME 6, ¶ 12, --- A.3d --- (noting that a primacy analysis is not needed if this Court's "precedent has already addressed the issue presented"). Section XIII(A)(4)(b) of the Rules does not pass constitutional muster.

A. The Rules effect a taking of private property by requiring employers who provide a substitute private plan to pay non-refundable premiums that exceed the amount allowed by statute.

Although the government may generally collect funds from citizens via taxes or fees without effecting a taking of private property, *see infra* Part III.B, the principle that the government is prohibited from taking more than what a citizen lawfully owes is deeply rooted in the common law. Indeed, this principle's origins can be traced back to 1215 and was recently affirmed by the Supreme Court in *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631, 639-641 (2023). Section XIII(A)(4)(b) violates this principle.

In *Tyler*, the Supreme Court held that the plaintiff stated a takings claim based on the county's retention of surplus proceeds after a tax lien foreclosure sale. *Id.* at 635, 647-48. In that case, the county sold the plaintiff's property for $40,000 to satisfy a $15,000 tax bill. *Id.* at 635. Instead of returning the excess $25,000 to the plaintiff, the county kept the funds for itself. *Id.* In finding this action unconstitutional, the Supreme Court explained that the county "could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a 'classic taking in which the government directly appropriates private property for its own use.'" *Id.* at 639 (quoting

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 324 (2002)). This is because the "Takings Clause '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 647 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Requiring the plaintiff to contribute $25,000 more than what she owed to the public fisc violated this basic tenet of constitutional law. *Id.*

The underlying circumstances here are no different from those in *Tyler*. Even assuming DOL can lawfully collect premiums from employers until its administrative determination that such employers are exempt, section XIII(A)(4)(b) of the Rules is unconstitutional under *Tyler*. Like the county in *Tyler*, DOL is collecting funds from BIW and other members of MSCC. But instead of returning the excess funds paid by these employers following DOL's administrative determination that the employer is offering an approved private plan, DOL is retaining the funds for itself, contrary to section 850-F(8)'s clear language that an employer "with an approved private plan under section 850-H is not required to remit premiums . . . to the fund." *See supra* Part II. Put simply, once DOL completes its administrative process, such employers owe, and have owed, nothing to the public fisc by virtue of offering a private plan, and DOL has no authority to retain the funds. DOL, however, is unconstitutionally placing the burden of initially financing the PFML program on employers providing private plans, in direct violation of *Tyler* (and despite the fact that those companies' employees will never utilize the Fund). Section XIII(A)(4)(b) thus constitutes a taking without just compensation.

B. The Rules effect a taking of private property because the premiums paid by employers who provide a substitute private plan are unreasonable user fees imposed in the absence of any benefit.

The Takings Clauses of the Maine and U.S. Constitutions prohibit confiscatory regulation. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-64 (1980); *Bell v. Town of Wells*, 557 A.2d 168, 178 (Me. 1989). Notwithstanding the presumption of legitimacy typically applicable in the realm of economic regulation, Supreme Court precedent establishes the constitutional mandate that the government must pay just compensation when appropriating private property, including money, unless such appropriations are defensible as lawfully imposed taxes or fees. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013); *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989); *Massachusetts v. United States*, 435 U.S. 444, 462 (1978). Although the government has broad discretion to impose taxes, any fees imposed must be proportional to the cost of the government benefits supplied. *Sperry Corp.*, 493 U.S. at 60-63. Under this precedent, section XIII(A)(4)(b) fails because, rather than imposing taxes or legitimate fees reasonably related to government benefits, it simply confiscates money from employers and employees who derive no benefit from the PFML program.

1. The premiums paid under the Rules are user fees, not taxes.

"A tax is universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service." *City of Lewiston v. Gladu*, 2012 ME 42, ¶ 12, 40 A.3d 964 (quotation marks omitted). "Because both a fee and a tax raise monies for governmental use, the distinction between the two is one of purpose and of degree of particularity." *State v. Biddeford Internet Corp.*, 2017 ME 204, ¶ 20, 171 A.3d 603 (quoting *Butler v. Supreme Jud. Ct.*, 611 A.2d 987, 990 (Me. 1992)). Fundamentally, the Legislature is the only branch of government with the power to tax. Me. Const. art. IX, § 9 ("The Legislature shall never, in any manner, suspend or surrender the power of taxation."); *see id.* art. I, § 22 ("No tax or duty shall be imposed without the consent of the people or of their representatives in the Legislature."); *see also id.* art. III, § 2 (no branch of government may "exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted"). The Supreme Court has "repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax." *Koontz*, 570 U.S. at 615.

As an initial matter, the premium payments at issue here are fees (not a tax) because they were not imposed by the Legislature. The PFML statute does not impose premiums on employers who provide substantially equivalent benefits through a private plan. *See* 26 M.R.S. § 850-F(8). The Legislature specifically contemplated that an employer opting out of the state program by offering paid family and medical leave benefits to its employees via a private plan would *not* have to pay premiums. *See supra* Part II. Regardless of the authority delegated to DOL to administer the PFML program, it is indisputable that DOL does not have independent constitutional authority to tax employers through the date employers' applications for substitution of a private plan are administratively processed. *See* Me. Const. art. IX, § 9.

Further, even if the premium payments were imposed by the Legislature, they are still properly considered fees rather than taxes. This Court "will respect the Legislature's characterization of an assessment, unless that characterization is inconsistent with the law." *Biddeford Internet Corp.*, 2017 ME 204, ¶ 20, 171 A.3d 603. The legislative history shows that the premiums are fees and not a tax. As Senator Daughtry and Representative Cloutier testified, the PFML program "does not create a new wage tax"; rather, "this statewide benefit is a fee-based service, also called a payroll premium." *An Act to Implement the Recommendations of the Commission to Develop a Paid Family and Medical Leave Benefits Program: Hearing on L.D. 1964 Before the J. Standing Comm. on Lab. & Hous.*, 131st Legis. 5 (May 25, 2023) (testimony of Sen. Daughtry and Rep. Cloutier). Other states are in accord. *See, e.g.*, *Chronos Builders, LLC v. Dep't of Lab. & Emp.*, 512 P.3d 101, 102 (Colo. 2022) ("[T]he premium collected pursuant to the [Paid Family and Medical Leave Insurance Act] is a fee used to fund specific services, rather than a tax or comparable surcharge collected to defray general government expenses.").[18]

[18] Though this Court should accept the Legislature's characterization and need not reach the factors it normally considers in determining whether a *legislative* assessment is a fee or a tax, these factors support a conclusion that the premium payments are fees. This Court generally considers:

> (1) whether the primary purpose is to raise revenue or to further regulatory goals, (2) whether the assessment is paid in exchange for benefits not received by the general public, (3) whether the assessment is voluntary, and (4) whether the assessment is a fair approximation of the cost to the government and of the benefit to the party.

Biddeford Internet Corp., 2017 ME 204, ¶ 20, 171 A.3d 603. Premiums are used to implement the PFML program, 26 M.R.S. § 850-F(1); are paid for benefits that are restricted to program participants, *id.* § 850-A(9); may (but for section XIII(A)(4)(b)) be avoided by offering a private plan, *id.* 850-F(8); and are (at least for plan participants) set at a rate to cover the cost of benefits, *id.* § 850-F(3)(B). Further, the premiums are segregated and not made part of the State's general fund. *Id.* § 850-E(1).

Thus, the premium payments at issue here are user fees. Regardless of the "constitutional propriety of a tax that would have raised exactly the same revenue," *Koontz*, 570 U.S. at 616, therefore, DOL's imposition of fees must pass muster as a fee. Because DOL is confiscating employers' and employees' monies without any corresponding benefit, as explained below, the premiums cannot survive scrutiny.

2. The non-refundable premiums imposed pursuant to section XIII(A)(4)(b) are not reasonable user fees because they have no relationship to benefits provided by the PFML program.

Unlike taxation, fees are incurred incident to a voluntary act, *e.g.*, a request that an agency permit an applicant to practice law or medicine or construct a home. The agency performing those services normally may exact a fee for a grant which bestows a benefit on the applicant, not shared by other members of society. *See Biddeford Internet Corp.*, 2017 ME 204, ¶ 20, 171 A.3d 603. Section XIII(A)(4)(b) is not such a permissible fee, however, because Plaintiffs are required to remit non-refundable premiums into the Fund *even though they have opted out of the PFML program* and thus will never utilize or benefit from the program. A.42-43, ¶¶ 16, 20-21.

Although the Supreme Court has held that "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services," *Sperry Corp.*, 493 U.S. at 63, the fee imposed must be a "fair approximation of the cost of benefits supplied" to clear constitutional hurdles, *Massachusetts*, 435 U.S. at 463 n.19; *see Biddeford Internet Corp.*, 2017 ME 204, ¶ 20, 171 A.3d 603. In contrast, in situations where government appropriations are "so clearly excessive as to belie their purported character as user fees," or where the government "has appropriated all, or most, of the award to itself and labeled the booty as a user fee," *Sperry Corp.*, 493 U.S. at 62, just compensation is required, *Webb's,* 449 U.S. at 164.

A comparison of the decisions in *Sperry* and *Webb's* is illustrative. In *Sperry*, an international tribunal created to hear claims brought by Americans against Iran deducted 1.5% of an award that Sperry had won "as reimbursement to the United States Government for expenses incurred in connection with the arbitration of [Sperry's] claims." 493 U.S. at 55-56, 58 (quotation marks omitted). Sperry argued that the fee was a taking because the government had not shown that the fee "approximates the cost of the Tribunal to the United States or bears any relationship to Sperry's use of the Tribunal or the value of the Tribunal's services to Sperry." *Id.* at 60. Noting that a user fee need only be a "fair approximation of the cost of benefits supplied," rather than "precisely calibrated to the use that a party makes of Government services," the Supreme Court held that the fee was "not so clearly excessive as to belie [its] purported character as [a] user fee[ ]." *Id.* at 60-62 (quotation marks omitted). Central to the Supreme Court's holding was the fact that Sperry "did benefit directly from the existence and functions of the Tribunal." *Id.* at 63.

In *Webb's*, in contrast, a county in Florida charged a fee for services rendered by the clerk's office for "receiving money into the registry of court" and took all the interest that accrued on an interpleader fund as "income of the office of the clerk of the circuit court." 449 U.S. at 159-60 (quotation marks omitted). The Supreme Court ruled that it was "obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial [separate] fee charged . . . as a fee 'for services' by the clerk's office." *Id.* at 162. Thus, the state statute that deemed the interest from the interpleader fund as income of the clerk's office did not at all connect that interest to "services rendered" by the court. *Id.* Because appropriating that interest amounted to a "forced contribution to general governmental revenues, and it [was] not reasonably related to the costs of using the courts," the Supreme Court held it was an unconstitutional taking. *Id.* at 163–65; *accord Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (concluding that a state supreme court's seizure of interest on client funds held in escrow was an unconstitutional taking)).

The facts of this case are distinct from the circumstances in *Sperry* and akin to those in *Webb's*. Unlike *Sperry*, where the fee was connected to Sperry's successful use of the arbitration tribunal, section XIII(A)(4)(b) obligates Plaintiffs to remit non-refundable premiums to a Fund they will not use or benefit from. A.42-43, ¶¶ 16, 20-21. Thus, contrary to being a "fair approximation of the costs of benefits supplied," *Sperry*, 498 U.S. at 60 (quotation marks omitted), there is *no* relationship between the remitted non-refundable premiums paid by Plaintiffs and any PFML benefits for the simple reason that Plaintiffs and their employees *will not benefit from the Fund.*

As in *Webb's,* section XIII(A)(4)(b)'s confiscatory mandate is an illusory fee for services. Like the separate "fee for court services" in *Webb's*, here, the PFML statute provides a distinct mechanism for the Administrator of the PFML to annually determine the amount expended on administering private plans under the program, 26 M.R.S. § 850-A(1), and requires employers offering private plans to reimburse the Administrator for such costs, which are ultimately transferred by the Administrator to the Fund, *id.* § 850-H(7). Those costs are intended to fairly approximate the costs of administering benefits received by employers offering private plans, including Plaintiffs. In contrast, section XIII(A)(4)(b) is nothing more than "a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using [the Program]." *Webb's*, 449 U.S. at 164. Where, as here, DOL has "appropriated all, or most, of the award to itself and labeled the booty as a user fee," *Sperry Corp.*, 493 U.S. at 62, just compensation is required, *Webb's,* 449 U.S. at 164.

Although DOL "has an obvious interest in making those who specifically benefit from its services pay the cost," *Massachusetts*, 435 U.S. at 462, the "means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'" *Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). Section XIII(A)(4)(b) obligates Plaintiffs to remit non-refundable premiums to a Fund that they and their employees will not use or benefit from, resulting in a taking under the Maine and U.S. Constitutions.

CONCLUSION

Because section XIII(A)(4)(b) contradicts state law and effects an unlawful taking without just compensation, it must be invalidated.

DATED: March 26, 2025

/s/ Joshua D. Dunlap
Joshua D. Dunlap, Bar No. 4477
Sara A. Murphy, Bar No. 5423
Katherine E. Cleary, Bar No. 10299
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100
jdunlap@pierceatwood.com
smurphy@pierceatwood.com
kcleary@pierceatwood.com

Attorneys for Plaintiffs-Appellants
Maine State Chamber of Commerce and
Bath Iron Works Corporation

CERTIFICATE OF SERVICE

I, Joshua D. Dunlap, 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).

Nancy Macirowski, AAG
Anne Macri, AAG
Office of Maine Attorney General
6 State House Station
Augusta, ME 04333-0006
anne.macri@maine.gov
nancy.macirowski@maine.gov

Dated: March 26, 2025

/s/ Joshua D. Dunlap
Joshua D. Dunlap, Bar No. 4477
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100
jdunlap@pierceatwood.com

Attorney for Appellants