STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. PUC-24-310

CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND COMPANY, LLC

Appellant

v.

PUBLIC UTILITIES COMMISSION, et al.

Appellees

ON APPEAL FROM THE PUBLIC UTILITIES COMMISSION

BRIEF OF MAINE ATTORNEY GENERAL

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INTRODUCTION

For decades, it has been established law in Maine that when a valid exercise of the State's police power results in a utility incurring costs related to its relocation of utility poles or lines placed in public ways, the utility has no right to compensation. *See, e.g.*, *Cent. Me. Power Co. v. Waterville Urban Renewal Auth.*, 281 A.2d 233, 239-40 (Me. 1971) (concluding municipal requirement that utility relocate power lines in the public way to underground facilities was not a taking).

Utility companies, such as Appellant Consolidated Communications of Northern New England Company, LLC ("Consolidated"), place or own utility poles in public ways pursuant to a license granted by the State or a local municipality. *See Bangor-Hydro Elec. Co.*, 226 A.2d 371, 377-78 (Me. 1967); *see also* 35-A M.R.S.A. §§ 2502, 2503, 2507 (2024) (requiring permit from licensing authority). That license remains subject to further exercises of the State's police power, including "the conditions and . . . restrictions provided in . . . chapter [23] and chapter 25" of Title 35-A. 35-A M.R.S.A. § 2301 (2024).

Section 2524 is one such condition. It provides, in relevant part, that:

> Notwithstanding any provision of law to the contrary, <u>for the purpose of safeguarding access to infrastructure essential to public health, safety and welfare</u>, an owner of a shared-use pole and each entity attaching to that pole is responsible for that owner's or entity's own expenses for make-ready work to accommodate a

municipality's attaching its facilities to that shared-use pole:

> **A.** For a governmental purpose consistent with the police power of the municipality; or
>
> **B.** For the purpose of providing broadband service to an unserved or underserved area.

35-A M.R.S.A. § 2524(2) (2024) (emphasis added). Section 2524 reflects the "general common-law rule that a utility must bear its own relocation costs when relocation of equipment," be it utility poles or wiring, "is required by public necessity." *See* 12 E. McQuillan, *The Law of Municipal Corporations*, § 34:100 (3d ed. Oct. 2023).

Access to broadband service, like electricity, is essential to modern life. *See, e.g.*, 35-A M.R.S.A. § 9202-A(1) (2024) (setting the State's broadband goals). Nevertheless, some municipalities in Maine still do not have access to broadband service, and they have acted to provide that service to their residents. Section 2524 assists those communities that are underserved or unserved by broadband carriers to access broadband service by allocating one-time, make-ready costs to pole owners and attaching entities. Section 2524(2) thus assists Maine communities with the most need to gain access to essential broadband services. Costs incurred by a utility in relocating its equipment to support this access are not compensable takings under the United States and Maine Constitutions, nor does section 2524(2) violate any other constitutional

provision. The Court should uphold the constitutionality of section 2524(2).

FACTUAL BACKGROUND

The following factual background is taken from the administrative record and the order of the Public Utilities Commission ("Commission") that is at issue. *Off. of the Pub. Advoc. v. Pub. Utils. Comm'n*, 2023 ME 77, ¶ 2, 306 A.3d 633.

Consolidated is the successor in interest to Northern New England Telephone and Telegraph, Inc., which did business as FairPoint Communications–NNE ("FairPoint"). Appendix [hereinafter, "A."] 61. *N. New Eng. Tel. Operations LLC v. Pub. Utils. Comm'n*, 2013 ME 11, ¶ 1, 58 A.3d 1143. Consolidated acquired FairPoint in 2017, thereby becoming the owner of more than of 440,000 utility poles in Maine, including in the Town of Somerville ("Somerville").[1] A. 58, 62. When Consolidated acquired FairPoint, it did so with an awareness that the utility poles it was acquiring were subject to the State's regulatory regime. A. 93-94. Consolidated provides a variety of communications services in Maine over legacy copper and new fiber optic networks, including voice service, VOIP (voice over internet protocol), and broadband service. A. 61-62.

Consolidated provides certain telecommunications services in

[1] Consolidated's utility poles are either wholly owned or jointly owned with an electric utility. A. 62.

Somerville, but it has chosen not to provide broadband service to Somerville's residential customers. A. 66. Consolidated's poles in Somerville are located in the public way, but Consolidated does not pay any rent or other fee to Somerville for the privilege of having its poles in the public right of way. A. 89-90. *See, e.g.*, *Readfield Tel. & Tel. Co. v. Cyr*, 95 Me. 287, 290, 49 A. 1047, 1048 (1901) ("Telephone lines, though affected with a public use, are operated for private gain. Nothing is paid for the valuable privilege of occupying and using the soil of the public roads and highways.").

PROCEDURAL HISTORY

"The following procedural history 'is drawn from the administrative record and the Commission's order.'" *Indus. Energy Consumer Grp. v. Pub. Utils. Comm'n*, 2024 ME 60, ¶ 19, 320 A.3d 437 (quoting *Off. of the Pub. Advoc.*, 2023 ME 77, ¶ 2, 306 A.3d 633).

On February 14, 2023, Somerville filed a complaint against Consolidated with the Commission regarding Somerville's project to construct a municipal broadband network to serve the residents of Somerville ("Project"). A. 7, 37-38. The Project was necessary because Somerville previously was unserved by broadband.[2] A. 8.

[2] According to Somerville, prior to the Project, "internet access available to" Somerville "citizens varie[d], but in nearly all locations in" Somerville internet "connections [we]re either non-existent, slow, unreliable, very expensive, or a frustrating combination of those

In its complaint, Somerville requested that the Commission, through its expedited review process, find that Consolidated had unreasonably refused to comply with section 2524(2) and Commission rules and pay for make-ready costs related to the Project. A. 7-8, 37. *See* 65-407 C.M.R. ch. 880, § 6 (eff. Sep. 25, 2023). Make-ready costs are expenses for "the rearrangement or transfer of existing facilities, replacement of a pole, complete removal of any pole replaced or any other changes required to make space available for an additional attachment to a shared-use pole." 35-A M.R.S.A. § 2524(1)(A). Consolidated's make-ready costs for the Project were approximately $97,000. Blue Br. 7.

Consolidated claimed that section 2524(2) was unconstitutional. A. 33. Through its expedited review process, the Commission determined that Somerville had shown that section 2524(2) applied to the Project and Consolidated was therefore required to pay make-ready costs. A. 34. The Commission declined to find that section 2524(2) was unconstitutional. A. 33-34.

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attributes." A. 84. Somerville is "hilly and remote," which "make[s] cellular service very spotty with frequently dropped calls or [failed] text messages" and limited "availability and quality of satellite-based internet service." A. 84. The pandemic exacerbated Somerville's lack of fast, reliable internet. A. 84. Connectivity issues prevented children from participating in online classes; some Somerville residents resorted to using the public WiFi in the school parking lot for usable bandwidth. A. 84. Remote work is not achievable for many Somerville residents because of connectivity issues, which limits their employment and business opportunities. A. 85.

In response, Consolidated requested that the Commission conduct an adjudicatory hearing on the dispute over section 2524(2). A. 9. The Commission opened a formal investigation and preliminarily stayed its prior decision. A. 9. Several parties intervened in the proceeding, including the Attorney General. A. 10. The parties engaged in discovery, filed briefs and testimony, and participated in several procedural and testimonial conferences. A. 2-5.

The Commission issued its decision on June 13, 2024 ("Decision"). A. 7-30. In its Decision, the Commission concluded that all the requirements of section 2524(2) were met, A. 23, and that Somerville was "not liable for make-ready costs associated with the construction of the [its] municipal broadband project." A. 29. Specifically, the Commission found the following: 1) Somerville is a municipality as used in section 2524(2); 2) Somerville intended to provide broadband service within Somerville; and 3) Somerville is an "unserved or underserved area" as used in section 2524(2). A. 22-23. The Commission found that Somerville was unserved or underserved based on a certification from the Maine Connectivity Authority ("MCA"). A. 23. MCA certified that Somerville is an unserved area because "[n]one of the 447 locations within Somerville have access to [broadband] service that meets the definition of served." Docket No. 2-1. *See* 99-639 C.M.R. ch. 101, § 5(B) (eff. Jan. 2, 2022)

(explaining process by which ConnectMaine Authority determines a geographic area is unserved).[3] The Commission also ordered Consolidated to refund to Somerville any payments that Somerville had made to Consolidated for make-ready work for the Project. A. 29. The Commission once again declined to address Consolidated's constitutional arguments. A. 21.

Consolidated then filed this timely appeal. A. 5. *See* 35-A M.R.S.A. § 1320 (2024).

ISSUES PRESENTED

I. Whether Consolidated has established, under the United States or Maine Constitutions, that compensation is required for the relocation of poles or wires placed in public ways when such relocation is required by public necessity.

II. Whether Consolidated has established that section 2524(2) mandates improper disparate treatment of similar parties in contravention of the Equal Protection Clause of the Fourteenth Amendment.

III. Whether Consolidated has established that section 2524(2) is preempted by federal law when Maine has certified that it regulates pole attachments in accordance with 47 U.S.C. § 224(c).

IV. Whether Consolidated has established that the applicable definition of "underserved area" in section 2524(2) was applied to Consolidated, and, if so, whether Consolidated has established that section 2524(2) is unconstitutionally vague or constitutes an excessive delegation of legislative authority.

[3] The complicated relationship between the MCA and the ConnectMaine Authority is detailed in the Commission's June 13, 2024 Order. A. 22-23.

ARGUMENT

This Court will "overturn an order of the Commission only when it abuses the discretion entrusted to it, or fails to follow the mandate of the Legislature, or to be bound by the prohibitions of the constitution." *Conservation L. Found. v. Pub. Utilities Comm'n*, 2017 ME 109, ¶ 17, 163 A.3d 132 (cleaned up); *see also* 35-A M.R.S.A. § 1320. The appellant has the "burden to establish that the Commission has violated one of these standards." *Id.*

When duly-enacted legislation faces a constitutional challenge, it is cloaked in a "strong presumption of constitutionality." *ACE Tire Co., Inc. v. Mun. Off. of City of Waterville*, 302 A.2d 90, 95 (Me. 1973). That presumption reflects the Legislature's status as a co-equal branch, and that "[t]he necessity for the statute and the manner of its enforcement are fundamentally legislative, not judicial, questions." *Id*.

To prevail against the presumption, "the party challenging the statute must demonstrate convincingly that the statute and the Constitution conflict." *Bouchard v. Dep't of Pub. Safety*, 2015 ME 50, ¶ 8, 115 A.3d 92 (cleaned up); *see also Opinion of the Justices*, 623 A.2d 1258, 1262 (Me. 1993) (plaintiff can prevail over presumption "only if there is a clear showing by strong and convincing reasons that [a statute] conflicts with the Constitution" (cleaned up)). In assessing whether this "heavy burden" has been met, "all reasonable

doubts must be resolved in favor of the constitutionality of the enactment." *Jones v. Sec'y of State*, 2020 ME 113, ¶ 18, 238 A.3d 982 (quotation marks omitted).

I. CONSOLIDATED HAS NOT ESTABLISHED THAT COMPENSATION IS REQUIRED FOR THE RELOCATION OF POLES OR WIRES PLACED IN PUBLIC WAYS WHEN SUCH RELOCATION IS REQUIRED BY PUBLIC NECESSITY.

The Fifth Amendment to the United States Constitution provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Maine Constitution provides that "[p]rivate property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Me. Const. art. I, § 21. Consolidated has not argued that the two provisions have different meanings or reach, but rather has treated them as coextensive. Blue Br. 15-25. Moreover, because Consolidated has not claimed there is a lack of a public exigency under the Maine Constitution, *see Portland Co. v. City of Portland*, 2009 ME 98, ¶ 25, 979 A.2d 1279 ("A finding of public exigency involves a determination that the taking was necessary; the property interest was taken only to the extent necessary; and the property is suitable for the particular public use for which it was taken."), the analysis under both constitutional provisions is the same.

Consolidated's primary contention is that section 2524(2), by allocating make-ready costs for broadband access to existing pole owners and attaching entities, constitutes a taking without just compensation in violation of the takings clauses of the United States and Maine Constitutions. Blue Br. 15-25. Consolidated misapprehends the nature of the State's authority over utility poles that have been placed in public ways. Over a century of Maine caselaw makes clear that section 2524(2) reflects a permissible exercise of the State's police power that neither constitutes a taking nor requires compensation to Consolidated.

A. This Court has long recognized that utility poles located in public ways, and the wiring attached thereto, may be relocated without compensation.

1. The State and its municipalities control public ways and utility poles located in public ways.

It is "settled law" that Article IV, part 3, section 1 of the Maine Constitution grants the State "'police power' to pass general regulatory laws promoting the public health, welfare, safety, and morality." *In re Weapons Restriction of J.*, 2022 ME 34, ¶ 14, 276 A.3d 510 (cleaned up). That power likewise "embraces regulations designed to promote the public convenience or the general prosperity." *Chi. Burlington, & Quincy Ry. Co. v. Ill.*, 200 U.S. 561, 592 (1906).

Where the State's police powers are used to regulate constitutional rights, that use must, at a minimum, be reasonable, i.e., bear "a rational relationship to intended goals." *Weapons Restriction of J.*, 2022 ME 34, ¶ 14 (cleaned up). "Proper regulation under the police power does not amount to a taking of property which could require the payment of just compensation by the State." *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n*, 320 A.2d 247, 254 (Me. 1974).

The State and its municipalities, through the exercise of the State's police power, control public ways within the State. *See, e.g., Central Me. Power Co.*, 281 A.2d at 239 ("It is within the exclusive jurisdiction of the Legislature to lodge control of the roads of the State in the municipalities and to prescribe rules as to the exercise of such control."). The public utility poles to which Somerville has attached or will attach broadband wiring are overwhelmingly—if not entirely—placed in such public ways. A. 89-90.

When utility companies place utility poles in public ways, they do so pursuant to a license granted by the State or a local municipality. *See Bangor-Hydro Elec. Co.*, 226 A.2d at 377-78; *see also* 35-A M.R.S.A. §§ 2502, 2503, 2507 (requiring permit from licensing authority). That license remains subject to further exercises of the State's police power, including "the conditions and . . .

restrictions provided in . . . chapter [23] and chapter 25." 35-A M.R.S.A. § 2301.[4]

Section 2524(2) is one such condition. It reflects the "general common-law rule that a utility must bear its own relocation costs when relocation of equipment," be it utility poles or wiring, "is required by public necessity." *See* 12 E. McQuillan*, The Law of Municipal Corporations*, § 34:100 (3d ed. Oct. 2023); *Ct. Ry. & Lighting Co. v. New Britain Redev. Comm'n*, 161 Conn. 234, 240, 287 A.2d 362, 365 (1971) (describing the "fundamental common-law right applicable to franchises in the streets," namely "that a utility company must relocate its facilities in the public streets when changes are required by public necessity at its own expense"); *accord Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 478, 217 P.3d 424, 428 (Ariz. Ct. App. 2009) ("Th[e] common-law rule of implied duty to pay for relocating property is the general rule in the United States."). Before the Commission, Consolidated acknowledged that the common-law rule applied to its poles and wiring:

> to the extent [a] municipality . . . want[s] to install a sidewalk in the right-of-way where our poles are placed, we are required, <u>at our cost</u>, to move those poles out of the way . . . to produce a sidewalk. That's . . . the rights and burdens that come with being in the municipal right-of-way.

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[4] *Cf.* Proposed Amendments to Chapter 88, Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure (Chapter 880), Docket No. 93-087, 1993 WL 559845, at *11 (Oct. 18, 1993) (identifying CMP's recognition that "pole owners and users do not pay for use of public rights of way" as "part of a bargain" whereby "municipalities typically do not pay for space that they use on poles").

A. 91 (emphasis added).

Access to broadband service, like electricity, is essential to modern life. The Legislature has determined that "[b]roadband service [should] be universally available in this State, including to all residential and business locations and community anchor institutions" and that "[t]here be secure, reliable, competitive and sustainable forward-looking infrastructure that can meet future broadband need." 35-A M.R.S.A. §§ 9202-A(1)(A), (B). *See also Chi. Burlington, & Quincy Ry. Co.*, 200 U.S. at 592 (police power "embraces regulations designed to promote the public convenience or the general prosperity").

Federal broadband policy is in accord. More than 15 years ago, Congress concluded that "[t]he deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans." 47 U.S.C.A. § 1301(1) (Westlaw through Pub. L. No. 118-157). Congress also found that "[c]ontinued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth." *Id*. § 1301(2).

Accordingly, access to broadband is "essential to public health, safety and

welfare" and modern life and in the public interest. 35-A M.R.S.A. § 2524(2); *see also Bos. & Me. R.R. Co. v. Cty. Comm'rs of York County,* 79 Me. 386, 393, 10 A. 113, 114 (explaining that the exercise of the State's police power "must become wider, more varied, and frequent, with the progress of society"). Section 2524, which is intended to assist unserved or underserved communities gain access to broadband service, bears a rational relationship to achieving the State's goals of universal broadband access. *See* 35-A M.R.S.A. § 9202-A(1); *Weapons Restriction of J.*, 2022 ME 34, ¶ 14.

2. Long-standing precedent supports the constitutionality of state and municipal laws that require utilities to bear their own costs of moving facilities located in the public way.

This Court has consistently ruled in support of the common-law rule. For decades, it has been established law in Maine that where a valid exercise of the State's police power results in utilities incurring costs related to the relocation of utility poles placed in public ways, the utilities have no right to compensation.

This Court first addressed the issue of uncompensated exercise of the State's police power in 1887 in *Boston & Maine Railroad Company v. County Commissioners of York County*, 79 Me. 386, 10 A. 113. In that case, York County had established a new county road that crossed railroad tracks. 79 Me. at 391, 10 A. at 113. A Maine statute required that the railroad build and maintain the portion of the road that fell upon the railroad's land without compensation to

the railroad. *Id*. This Court concluded that the statute was constitutional, ruling that it was a "moderate and ordinary exercise of a constitutional power." 79 Me. at 395, 10 A. at 115.[5] In so doing, the Court affirmed the "power of the legislature," by virtue of the State's police power, "to impose uncompensated duties, and even burdens, upon individuals and corporations, for the general safety." 79 Me. at 393, 10 A. at 114.

The Supreme Court of the United States reached a similar conclusion eighteen years later in *New Orleans Gaslight Company v. Drainage Commission of New Orleans*, 197 U.S. 453 (1905). In that case, the city, to clear room for a drainage system, required a gas utility to move pipes and conduits that the utility had placed underground in public ways without compensation to the utility. *Id*. at 454. The Court concluded that it was constitutional to do so. It reasoned that a "user of [public streets] may be required to adapt themselves to regulations made in the exercise of the police power," such that "whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare." *Id*. at 461. In short, "uncompensated obedience to a regulation enacted for the public safety under the police power

[5] This Court had also previously ruled that the railroad, in this context, was not due compensation for the taking of its land. *See Bos. & Me. R.R. Co.*, 79 Me. 386, 391, 10 A. 113, 113 (citing *Portland & R. R. Co. v. Deering*, 8 Me. 61, 2 A. 670 (1885)).

of the state was not taking property without due compensation," but rather was "*damnum absque injuria*," i.e., damage without invasion of a legal right. *Id*. at 462.

This Court continued to follow suit. In *First National Bank of Boston v. Maine Turnpike Authority*, 153 Me. 131, 136 A.2d 699 (Me. 1957), the Court considered whether the Maine Turnpike Authority could require utility companies to "relocate or replace some of their pipes, wire lines and other facilities which had been installed in many portions of extant public ways" that would be traversed by a planned extension of the turnpike. 153 Me. at 132-33, 136 A.2d at 700. The Court answered in the affirmative, ruling that "the defendant utilities when submitting to the police power had no right to reimbursement for relocation of their facilities installed in the public ways or for abandonment of them." 153 Me. at 159-60, 136 A.2d at 715; *see also* 153 Me. at 151, 136 A.2d at 711 ("Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient . . . to the paramount police power[,] and relocation of utility facilities in public streets or ways are at utility expense . . . ."). In so doing, and citing *New Orleans Gaslight*, the Court described the general rule:

> When to accomplish a legitimate, public, protective purpose by a reasonable and not arbitrary regulation, not violative of any constitutional limitation the state invokes the police power

> obliging utilities to relocate their facilities installed in a public street or way, without compensation, there is no taking of private property but damnum absque injuria, damage without the invasion of legal right.

153 Me. at 152, 136 A.2d at 711.

Just a few months later, in *Brunswick & Topsham Water District v. W.H. Hinman Co.*, 153 Me. 173, 136 A.2d 722 (1957), the Court applied the same rule in a case involving the State Highway Commission, which without compensation required the movement of utility poles from public ways to make room for water lines. 153 Me. at 174-75, 136 A.2d at 723. Consistent with *First National Bank*, and once again using the Supreme Court's language in *New Orleans Gaslight Company*, this Court ruled that a utility's rights to usage of the public ways are "subservient to validly exercised police power," such that the costs incurred were "damnum absque injuria." 153 Me. at 178, 136 A.2d at 725. Accordingly, there had therefore been no unconstitutional taking.

More recently, in *Central Maine Power Company v. Waterville Urban Renewal Authority*, 281 A.2d 233 (Me. 1971), this Court considered whether Waterville could require Central Maine Power (CMP) to bear the "excess cost" of moving its overhead electric system underground to make room for an urban renewal project. *Id*. at 235, 239. The Court unambiguously confirmed that Waterville could do so. It reasoned that "[e]lectric companies . . . occupy and

use the soil of our public roads and highways by permission of the municipal officers under legislative enabling acts," such that "[t]he location of their posts, cables, wires and suitable accessory appliances has been left . . . to the wise discretion of the municipal authorities to be exercised with a view to existing and probable future conditions." *Id*. at 239. Waterville's "request[] [that] the plaintiff utility . . . relocate its facilities underground in the urban renewal area" was accordingly a permissible exercise of the State's police power, not a "taking or invasion of a legal right, property or interest therein." *Id*. at 239-40.[6]

The throughline of these cases is plain. It is constitutional to require a utility or other entity to absorb the costs of relocating poles or wiring set in the public way when that relocation is pursuant to a valid exercise of the State's police power. That is precisely what section 2524(2) contemplates, in that it allocates make-ready expenses to pole owners and attaching entities when necessary to "safeguard[] access to infrastructure essential to public health, safety and welfare." 35-A M.R.S.A. § 2524(2).

Consistent with section 2524(2), Somerville's broadband Project addresses an undisputed lack of fast and reliable internet access in that

[6] The Court also rejected CMP's argument that Waterville's "failure to obtain approval of the [Commission] in the matter of underground relocation justifie[d] compensation for the excess cost." *Cent. Me. Power Co.*, 281 A.2d at 239-40. To the extent the costs to CMP were "potentially disastrous," it could seek relief from the Commission. *Id.* at 241.

community—access that is essential to modern life. *See* 35-A M.R.S.A. § 9202-A(1). Section 2524(2) accordingly does not violate the takings clauses of the United States or Maine Constitutions.

B. Section 2524(2), by its very nature, does not effectuate a taking.

Beyond the common-law framework discussed above, there are two other reasons why section 2524(2) does not effectuate a taking at all.

First, Consolidated's property interest in wholly or jointly owned poles placed in public ways is itself limited by Title 35-A, including section 2524(2). As a general matter, property rights are defined and created by state law. *See Cortes-Reyes v. Salas-Quintana*, 608 F.3d 41, 52 (1st Cir. 2020); *see also Rochon v. La. State Penitentiary Inmate Account*, 880 F.2d 845, 846 (5th Cir. 1989). In Maine, with respect to utility poles, "[n]o enjoyment by any person for any length of time of the privilege of having or maintaining its facilities in the public way[] may give a legal right to the continued use of the enjoyment or raise any presumption of a grant of a legal right." 35-A M.R.S.A. § 2504 (2024). Rather, utilities receive a license to place utility poles in public rights of way, a privilege they voluntarily sought, and that license subjects the pole owner to a series of conditions and restrictions. 35-A M.R.S.A. § 2301. Those conditions include limitations on interference with trees and road use, 35-A M.R.S.A. § 2514

(2024); accommodations for street lights, 35-A M.R.S.A. § 2523 (2024); and other permitting requirements, *see, e.g.,* 35-A M.R.S.A. §§ 2503, 2507.

Section 2524(2) is therefore not a peripheral limitation on an otherwise-existing property right. Rather, it is a facet of the property right itself. As applied here, Consolidated's property interest in the utility poles at issue, given they are placed in public ways pursuant to a license, extends only so far as Title 35-A—including section 2524(2)—permits. *First Nat. Bank*, 153 Me. at 151, 136 A.2d at 711 ("permits affording the use of public ways to utility locations are subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense"). Therefore, section 2524(2)'s requirement that pole owners and other attaching entities foot the bill for facilitating attachments by communities seeking to expand broadband access does not constitute a taking.

Second, section 2524(2) does not itself mandate a physical taking, but allocates responsibility for make-ready costs. The requirement that utility pole owners accommodate municipal attachments, i.e., that they permit their poles to be physically occupied, is set forth in other portions of Title 35-A. *See, e.g.*, 35-A M.R.S.A. §§ 711, 2518 (2024).

Further, insofar as the actual physical occupation of Consolidated's poles

is concerned, it *will* receive compensation in the form of a rental fee. *See* 35-A M.R.S.A. § 2518. Consolidated has not contended that the rental fee is insufficient, but rather argues that it does not cover make-ready costs, Blue Br. 19—which, once again, begs the question whether the one-time payment of make-ready costs constitutes a taking of property. *See Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) ("[T]he mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment.").

In sum, pursuant to the wealth of cases and statutes cited above, section 2524(2) does not effectuate a taking without just compensation. It is constitutional, both facially and as applied to Consolidated, under the United States and Maine Constitutions.

C. Consolidated's takings arguments are unavailing.

First, Consolidated incorrectly argues that the "plain language of [s]ection 2524(2) *entitles* a municipality to permanently physically occupy Consolidated's private property for public use." Blue Br. 18. Consolidated misreads section 2524(2) and distorts the plain language analysis.

This Court has explained that a plain language analysis is not "a literal interpretation," but must "tak[e] into account the subject matter and purposes of the statute, and the consequences of a particular interpretation." *Dickau v.*

Vermont Mut. Ins. Co., 2014 ME 158, ¶¶ 20-21, 107 A.3d 621. Section 2524(2) provides, in pertinent part, that "an owner of a shared-use pole and each entity attaching to that pole is responsible for that owner's or entity's own expenses for make-ready work to accommodate a municipality's attaching its facilities to that shared-use pole." 35-A M.R.S.A. § 2524(2). The first part of the provision identifies who is being regulated, i.e., "an owner of shared use pole" and "each entity attaching to that pole." *Id*. It then goes on to identify what each regulated party is responsible for doing, i.e., being "responsible for that owner's or entity's own expenses for make-ready work to accommodate a municipality's attaching its facilities to that shared-use pole." *Id*. Section 2524(2) does not, as Consolidated contends, authorize the physical occupation of its poles.

Instead, other statutes that have not been challenged in this proceeding govern Somerville's attachment to (or physical occupation of) Consolidated's poles. As noted, section 711 of Title 35-A requires utility pole owners to accommodate municipal attachments for broadband purposes, i.e., to permit their poles to be physically occupied. *See* 35-A M.R.S.A. § 711. And, as Consolidated concedes, Blue Br. 19, Consolidated will receive compensation from Somerville in the form of a rental fees for the occupation of Consolidated's poles. *See* 35-A M.R.S.A. § 2518.

Second, neither of the two principal federal cases that Consolidated cites

involves a state exercise of police power or state statutes and therefore does not change the analysis here. Blue Br. 15-23.

In *Gulf Power Company v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit considered the constitutionality of a federal statute that required utilities to provide telecommunications carriers with nondiscriminatory access to their poles. *Id*. at 1326-27. The statute at issue in that case is meaningfully different than section 2524(2) in at least four critical ways. The federal statute at issue in *Gulf Power* (1) authorizes a physical taking of personal property, unlike section 2524(2), which allocates responsibility for one-time make-ready costs; (2) was passed by Congress, but extends beyond public ways owned by the federal government; (3) placed a new limitation on the property rights of utility pole owners, rather than articulated a condition already built into those rights by virtue of a state's police power and/or state law; and (4) applies to "duct[s], conduit[s], [and] right[s]-of-way," thereby reaching beyond the utility poles on public ways at issue in this case. *Id*. at 1326.[7]

Even if *Gulf Power* were a meaningful precedent, it is not controlling in

[7] Notably, the Eleventh Circuit ultimately did deem the statute in that case constitutional. It concluded that while it effectuated a taking, it also provided for just compensation through application of the FCC's pole attachment formula and an associated appeals process. 187 F.3d at 1327-28, 1337. Here, too, as noted, Consolidated will receive compensation for the physical occupation of its poles.

the First Circuit or in this Court. It accordingly offers no reason to depart from this Court's established precedent that govern the specific factual scenario at issue in this case.

Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 426 (1982), is even farther afield. The complainant in that case was not a utility company, but a landlord who was required to permit cable television facilities to be installed on his building. *Id*. at 421.[8] Unlike Consolidated, the complainant had not placed his property on a public way pursuant to a state license, nor obtained it subject to an extensive state regulatory regime. Accordingly, the *Loretto* Court's pronouncements about permanent physical occupations of land, and the importance—or lack thereof—of the public interest involved, have no import here.

Third, Consolidated's claim that it has "no ability" to recover the make-ready costs through its provision of regulated service, Blue Br. 23-25, ignores the fact that it could cover any make-ready costs that it incurs through revenue from its sale of other services—just like any other cost of doing business. Consolidated's other, non-regulated services are not subject to regulation or price caps by the Commission, and thus Consolidated sets its own prices for

[8] For the same reason, namely that the case involves a public taking of privately owned land, and not a utility pole placed in a public way, *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), has no relevance here. Blue Br. 16.

those services. A. 62. Consolidated may have business reasons for not doing so, but they are not legal impediments. In other words, Consolidated is free to set its prices for those services as it sees fit in order to cover its costs of doing business, including make-ready costs.

II. CONSOLIDATED HAS NOT ESTABLISHED THAT SECTION 2524(2) MANDATES IMPROPER DISPARATE TREATMENT OF SIMILAR PARTIES AND THEREFORE HAS FAILED TO SHOW THAT IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Equal Protection Clause of the Fourteenth Amendment, at its core, concerns improper disparate treatment of like parties.[9] *See MSAD 6 Bd. of Dirs. v. Town of Frye Island*, 2020 ME 45, ¶ 41, 229 A.3d 513 ("The Fourteenth Amendment's Equal Protection Clause prohibits any state from denying to any person within its jurisdiction the equal protection of the laws, and requires, generally, that persons similarly situated be treated alike." (quotation marks omitted)). It is "implicated only when action by the state results in treatment of that person different than that given similarly situated individuals." *Wellman v. Dep't of Human Servs.*, 574 A.2d 879, 883 (Me. 1990). Therefore, when a plaintiff asserts a violation of the Equal Protection Clause, no matter whether

[9] The Equal Protection clauses under the Maine Constitution and U.S. Constitution are coextensive, such that the analysis is the same under both clauses. *See Adoption of Riahleigh M.*, 2019 ME 24, ¶ 28, 202 A.3d 1174; *Town of Frye Island v. State*, 2008 ME 27, ¶ 14, 940 A.2d 1069.

the alleged violation is based on a suspect classification, irrationality, or the infringement of a fundamental right, that plaintiff must always demonstrate that "compared with others similarly situated, it was selectively treated." *Barrington Cove Ltd. P'Ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 7 (1st Cir. 2001) (cleaned up); *see also Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) ("Plaintiffs claiming an equal protection violation must first identify and relate specific instances where persons situated similarly in all relevant respects were treated differently . . . ." (cleaned up)). But, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quotation marks omitted).

As an initial matter, although Consolidated asserts that "[t]he right to be free from a governmental taking of one's property without just compensation" is a "fundamental right," Blue Br. 26, it does not cite a single case with that holding. *See Scott v. City of Sioux City, Iowa*, 736 F.2d 1207, 1216 (8th Cir. 1984) (rejecting appellants' contention that ordinances "infringed on their fundamental right to receive just compensation for a taking" and explaining a "taking claim should stand or fall on its own merit, rather than serve as a back door for other constitutional challenges"). Precedent from this Court supports separate analyses for takings claims and equal protection claims, rather than

Consolidated's attempted constitutional bootstrapping. *See City of Auburn v. Tri-State Rubbish, Inc.*, 630 A.2d 227, 232 (Me. 1993) (analyzing takings and equal protection claims according to different standards); *Shapiro Bros. Shoe Co.*, 320 A.2d at 254-56 (same).

The applicable analysis under the Equal Protection Clause is well-trod. Not "all discrimination based on classification results in a denial of equal protection." *Me. State Emps. Ass'n v. Univ. of Maine*, 395 A.2d 829, 832 (Me. 1978). Consolidated's claim that section 2524(2) violates the Equal Protection Clause rests on two flawed assumptions. First, Consolidated assumes that it is being treated differently than electric transmission and distribution ("T & D") utilities. But section 2524(2) applies equally to all owners of and entities attaching to shared use poles, who must all must bear their own make-ready costs to make room for municipal attachments. Further, as discussed above, Consolidated <u>can</u> recover the make-ready costs that it incurs through its sale of other, non-regulated services.

Second, Consolidated incorrectly assumes that it is similarly situated to T & D utilities. Blue Br. 27. T & D facilities are "regulated public utilities that fall within the ambit of the Commission's regulatory authority." *Cent. Maine Power Co. v. Pub. Utilities Comm'n*, 1999 ME 119, ¶ 25, 734 A.2d 1120. Consolidated, on the other hand, is almost entirely unregulated by the

Commission; with the exception of provider of last resort service, the Commission does not control the pricing of Consolidated's services in Maine. Blue Br. 9.

This Court has rejected similar attempts to equate T &D utilities (and the requirements imposed on T &D utilities) with utilities that are not regulated by the Commission. At issue in *Central Maine Power Company v. Public Utilities Commission*, 1999 ME 119, 734 A.2d 1120, was a Commission regulation that required CMP and any other T & D utility to educate consumers about electricity deregulation. *Id.* ¶ 4. CMP argued that because "competitive electricity generation providers and nonelectric utilities, unlike T & D facilities, [we]re permitted to disseminate educational materials regarding deregulation without prior submission to the Commission and without fear of correction or forced inclusion of Commission materials," that alleged disparate treatment "violate[d] equal protection guarantees." *Id.* ¶ 24. CMP had argued that these entities competed with CMP, yet were free to say what they wished to consumers about electricity market restructuring.[10]

This Court summarily rejected the claim that CMP was similarly situated to those other entities. *See id.* ¶ 25. "Competitive providers of electricity

[10] Brief for Appellant at 32-34, *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 1999 ME 119, 734 A.2d 1120 (No. PUC-98-290), *available at* 1998 WL 35076166.

generation services" were not similarly situated to CMP because they were no longer "directly regulated as public utilities." *Id.* Despite competing with CMP, non-electric utilities were not similarly situated to CMP because they were not directly affected "by the deregulation of the electricity generation industry." *Id.* In other words, despite alleged surface similarities between entities, the Court looked to the broader statutory framework and determined the entities were not similarly situated.

The same is true here. T & D utilities are highly regulated public utilities, but Consolidated is not. Unlike Consolidated, T & D utilities are subject to minimum services standards through Commission rules governing service quality and performance metrics for the services it provides.[11] *See* 65-407 C.M.R. ch. 320, §§ 4, 11 (eff. Aug. 27, 2022). Further, T & D utilities rates' are set through Commission ratemaking, which includes rate recovery for a variety of costs, *see* 35-A M.R.S.A. § 3209-A (2024), not just costs incurred for make-ready work that is subject to section 2524.[12] Consolidated simply is not similarly situated to T & D utilities. *See Cent. Me. Power Co.*, 1999 ME 119, ¶¶ 24-25, 734 A.2d 1120; *Shapiro Bros. Shoe Co.*, 320 A.2d at 255 ("The Legislature may in its wide discretion promulgate legislation which treats some classes differently

[11] Investor-owned T & D utilities are subject to additional requirements. *See, e.g.* 65-407 C.M.R. ch. 320, §§ 5-8.

[12] Any recovery of these costs is not provided for explicitly in state statute.

from others so long as the dissimilar treatment is not arbitrary and is rationally related to the objectives of the statute.").

Consolidated's Equal Protection arguments regarding statutory cost recovery mechanisms are also inconsistent with its acknowledgement that it must move poles and wiring in the public right-of-way at its own cost when, for example, such relocation is required for the placement of a sidewalk. A. 91. State law does not provide a "mechanism for Consolidated to recover" such costs either, Blue Br. 21, which costs it must recover through revenue from its sale of non-regulated services. Consolidated does not explain why costs incurred to accommodate a sidewalk are, as it admits, non-compensable, but costs incurred to accommodate the Project should be compensable as a taking. In short, the lack of an express, statutorily-mandated cost recovery mechanism tied to section 2524 is of no constitutional moment.

III. CONSOLIDATED HAS NOT ESTABLISHED THAT FEDERAL LAW PREEMPTS SECTION 2524(2).

When a party claims conflict preemption, the "ultimate touchstone" of the judicial inquiry is congressional intent. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation marks omitted). In analyzing congressional intent, courts must presume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress." *Arizona v. United*

States, 567 U.S. 387, 400 (2012) (quotation marks omitted). This presumption against preemption and the "clear and manifest" requirement reflect the fact that "the States are independent sovereigns in our federal system," as well as "the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (cleaned up).

Here, although Consolidated claims that section 2524(2) conflicts with federal law and is thereby preempted, Blue Br. 31-34, the clear and manifest purpose of Congress is *not* to preempt section 2524(2). Since 1978, the Communications Act of 1934 has contained a so-called "reverse-preemption"[13] provision "that deprives the FCC of jurisdiction in certain situations." *BellSouth Telecomms., LLC v. Louisville/Jefferson Cty. Metro Gov't*, 275 F. Supp. 3d 833, 840 (W.D. Ky. 2017). Specifically, and as Consolidated seems to recognize, *see* Blue Br. 32, 47 U.S.C. § 224 provides, in relevant part:

> (1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.
>
> (2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

[13] Reverse preemption refers to an instance where state law preempts federal law by Congress's consent. *See, e.g., Ruthardt v. United States*, 303 F.3d 375, 380 (1st Cir. 2022). Here, Congress has provided that state certification preempts the efficacy of FCC regulations in the certifying state.

> (A) it regulates such rates, terms, and conditions; and
>
> (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

47 U.S.C. § 224(c) (Westlaw through Pub. L. No. 118-157).

Accordingly, the FCC has no jurisdiction over pole attachments in states that provide the requisite certification. *See In re Implementation of Section 224 of the Act*, 26 FCC Red. 5240, 5243, ¶ 7 (Apr. 7, 2011); *see also MCI Telecomms. Corp. v. N.Y. Tel. Co.*, 134 F. Supp. 2d 490, 503–04 (N.D.N.Y. 2001) (holding that FCC rulings and regulations are non-binding when a state has certified pursuant to Section 224(c) that it regulates pole attachments); *Heritage Cablevision Assocs. of Dallas, L.P.*, 6 FCC Rec. 7099, 7101 n.14 (Nov. 29, 1991) ("Any state regulation of the rates, terms and conditions for pole attachments governs over federal regulation of pole attachments in that state . . . . [T]he [FCC]'s mandate is to fill the regulatory vacuum created when individual states do not regulate pole attachments."). In other words, where a state invokes the reverse-preemption provision by virtue of certification pursuant to 47 U.S.C. § 224(c), federal law and associated FCC regulations governing pole attachments have no preemptive effect. *BellSouth*, 275 F. Supp. 3d at 841. Maine is one such certifying state. *See States That Have Certified That They*

Regulate Pole Attachments, 35 FCC Rec. 2784, 2785 (Mar. 19, 2020).

Consolidated ignores this fact and the implications of the reverse-preemption provision in the Communications Act of 1934. Blue Br. 31-32. Instead, Consolidated claims that because Maine currently uses the FCC's rates, *see* 65-407 C.M.R. ch. 880, § 4, and because the Commission adopted regulations consistent with those of the FCC, federal law is preemptive.

Consolidated cites no cases that support this argument. Federal law frequently inspires state law, whether implicitly and expressly, but the mere fact of consistency and/or cross-reference does not render federal law preemptive.[14] The Maine Legislature and the Commission can, pursuant to section 224(c), change the relevant laws at any time and as they see fit. Certainly, nowhere in section 224(c) has Congress suggested that a state's certification is ineffectual if its own regulations are similar to those of the federal government. Rather, the reverse-preemption provision's import is clear: "the [FCC] retains jurisdiction over pole attachments only in states that do not so certify." *In re Implementation of Section 224 of the Act*, 26 FCC Red. at 5243 ¶ 7 (emphasis added).

Consolidated's claim that section 2524(2) conflicts with 47 U.S.C.

[14] In fact, the FCC draws lessons from certifying states in establishing its own pole attachment rules. *In re Implementation of Section 224 of the Act*, 26 FCC Red. at 5243 ¶ 7.

§ 224(d)(1) and associated FCC regulations is therefore meritless. Blue Br. 31-34. Because Maine has certified that it regulates pole attachments independently, consistent with Congress's express design, federal law governing pole attachments does not and *cannot* conflict with section 2524(2).

IV. CONSOLIDATED HAS NOT ESTABLISHED THAT SECTION 2524(2) IS UNCONSTITUTIONALLY VAGUE OR CONSTITUTES AN EXCESSIVE DELEGATION OF LEGISLATIVE AUTHORITY BASED ON THE DEFINITION OF "UNDERSERVED AREA."

Consolidated argues that because section 2524(2) empowers an administrative agency to define "underserved area," it is void for vagueness and an excessive delegation of legislative authority. Blue Br. 35-36.[15] The Court should reject this argument.

Consolidated's "argument invokes two constitutional doctrines—that a statute is void if it is too vague or if it delegates too much authority to the administering body. While these concepts overlap, they have different sources of authority and emphases." *Doane v. Dep't of Health & Hum. Servs.*, 2021 ME 28, ¶ 16, 250 A.3d 1101 (citation omitted). The

> goal of both doctrines is to avoid arbitrary decision-making. A "void for vagueness" claim is based on the due process protections set forth in the United States and Maine Constitutions and focuses

[15] It is questionable as to whether Consolidated preserved this issue for appellate review, when, to the Commission, Consolidated merely adopted the vagueness arguments of other parties, and only in its reply brief. *See* Docket No. 53 at 17. Moreover, Consolidated never raised the unlawful delegation argument to the Commission at all. *See generally* Docket Nos. 47 & 53.

> on the need for adequate notice. An "excessive delegation" claim is based on the separation of powers clause of the Maine Constitution, which precludes a statutory delegation to a regulator so broad or amorphous that it amounts to a surrender of legislative authority to the executive branch.

Id. ¶ 17 (citations omitted). Neither doctrine applies here.

First, although Consolidated attacks MCA's definition of "underserved area," it has not shown or argued how that definition was applied by the Commission in this matter to affect Consolidated's rights. Instead, the evidence before the Commission was that Somerville was an "unserved area." A. 8 (emphasis added). The MCA certified that, prior to the Project, Somerville was an unserved area because "[n]one of the 447 locations within Somerville have access to [broadband] service that meets the definition of served." Docket No. 2-1; *see also* Blue Br. 2 (noting that the MCA determined Somerville is an "unserved" area). Consolidated presents no arguments challenging MCA's certification or the Commission's decision to rely on the certification. Accordingly, Consolidated's arguments about the definition of "underserved area" are irrelevant.

Regardless, Consolidated's attacks on the definition of "undeserved area" as unconstitutionally vague are meritless. The definition of an "underserved area," which was adopted through a duly-promulgated rule of the ConnectMaine Authority, is abundantly clear. An "underserved area" "means any geographic

area where broadband service exists, but where the Authority has determined that the service is inadequate pursuant to criteria set forth in section 5(C) of this Chapter." 99-639 C.M.R. ch. 101, § 1(M). Service is inadequate under 5(C) when that area has "service available at greater than 50mbps download and 10mbps upload, but less than 100mbps download and 100mbps upload." *See* 99-639 C.M.R. ch. 101, § 5(C). There is thus no need to "guess" at the meaning of this well-defined term, which neither "authorizes [n]or encourages arbitrary and discriminatory enforcement." *Town of Baldwin v. Carter*, 2002 ME 52, ¶ 10, 794 A.2d 62; *accord Uliano v. Bd. of Env't Prot.*, 2009 ME 89, ¶ 15, 977 A.2d 400.

Consolidated's claim that the Legislature made an excessive delegation of authority to MCA to establish the definition of underserved areas is equally meritless. Blue Br. 35-36. As an initial matter, the definition of "underserved area" in the rule attacked is a regulation adopted by the ConnectMaine Authority, not the MCA. *See* 35-A M.R.S.A. §§ 9203, 9204-A(1) (2024).

Further, the Legislature created a clear legal framework to guide the ConnectMaine Authority in its work, including authorizing rulemaking. *See Doane*, 2021 ME 28, ¶ 24, 250 A.3d 1101 ("[A] legislative delegation is not excessive when 'the legislation clearly reveals the purpose to be served by the regulations, explicitly defines what can be regulated for that purpose, and suggests the appropriate degree of regulation.'" (quoting *Lewis v. Dep't of Hum.*

Servs., 433 A.2d 743, 748 (Me. 1981)). The Legislature established three goals for broadband service in Maine:

- accelerate universal broadband coverage throughout the State;
- assure there is "secure, reliable, competitive, and sustainable forward-looking infrastructure that can meet future broadband needs"; and
- "All Maine residents, businesses and institutions should be able to take full advantage of economic opportunities available through broadband service."

35-A M.R.S.A. § 9202-A(1). The Legislature also established guiding policies, including maximizing federal and private resources to support the deployment of broadband infrastructure in unserved and underserved areas of the State. 35-A M.R.S.A. § 9202(A)(2). Finally, the Legislature expressly instructed that when establishing criteria to define "unserved and underserved areas" by rule, the ConnectMaine Authority "must include the percentage of households with access to broadband service within the municipality or other appropriate geographic area." 35-A M.R.S.A. § 9204-A(1). These statutes provide sufficiently clear instruction to the ConnectMaine Authority and are not an unlawful delegation of the Legislature's authority. *Lewis*, 433 A.2d at 748.

CONCLUSION

For the reasons stated above, the Attorney General respectfully requests that the Court conclude section 2524 is constitutional under the United States

and Maine Constitutions.

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Respectfully submitted,

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