

# UNIVERSAL CHAOS

*The Truth Behind Question 1*



THE  
MAINE HERITAGE  
POLICY CENTER

*We the people of Maine*

**OCTOBER 2018**

**JACOB POSIK  
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## **ABOUT THE MAINE HERITAGE POLICY CENTER**

The Maine Heritage Policy Center (MHPC) is a nonprofit organization dedicated to freeing people from dependency, creating prosperity, and redefining the role of government. Founded in Portland in 2003 by a handful of passionate citizens concerned about the direction the state was headed, MHPC has become the leading conservative public policy voice in Maine.

Governed by an independent Board of Directors, The Maine Heritage Policy Center is a nonpartisan, tax-exempt organization. MHPC relies on the generous support from individuals, corporations, and foundations, and does not accept government funds or perform contract work. With six full-time staff members and hundreds of individual supporters, we conduct detailed and timely research and develop public policy solutions that improve the lives of Maine citizens. We educate the public, engage legislators, and employ the media to shift public opinion and establish enduring legislative change in our state.

Over the past fifteen years, we have testified hundreds of times before the Maine Legislature. Some of our most notable victories include the largest tax cut in state history, historic welfare reforms that led to higher rates of employment, public-sector pension reform that saved taxpayers more than \$1 billion, financial transparency, including “sunshine” on the pay and perks of government employees, and pro-market insurance reforms that are actively driving down healthcare premiums for many Mainers by more than 50 percent. These positive changes are the direct result of MHPC’s work.

## EXECUTIVE SUMMARY

Question 1, also known as the Universal Home Care initiative, would be devastating to Maine’s economy and jeopardize services for Maine’s truly needy.

The initiative establishes three new tax revenue sources to be dedicated to the Universal Home Care Trust Fund, including a 1.9 percent payroll tax on employers for wages paid out over \$128,400, a 1.9 percent wage income tax on employees for wages earned over \$128,400, and a 3.8 percent income tax on Maine adjusted gross incomes over \$128,400.

Enactment of Question 1 would raise Maine’s top marginal income tax rate to 10.95 percent, a 53 percent increase. Maine would have the third-highest top marginal income tax rate in the country behind only California and Hawaii, and would surpass Vermont to implement the highest income tax rate in New England. Question 1’s passage would also introduce the highest income tax rate in the country at the \$128,400 income level.

According to Maine Revenue Services and Maine’s Department of Administrative and Financial Affairs, Question 1 imposes a marriage penalty on joint filers who earn above the \$128,400 income level. As a result, 108,000 Mainers representing 58,355 resident tax returns, or nine percent of all filings, will be affected by Question 1.

### Profile of Mainers Experiencing Tax Increases Under Question 1

Number of affected Mainers	Number of affected Maine returns	Number of affected Maine married and filing joint returns	Affected joint returns as a share of total affected Maine returns
108,000	58,355	49,000	84 %

Source: Maine Department of Administrative and Financial Affairs

Using data collected from the U.S. Census Bureau, we estimate that approximately 22,900 Mainers will be eligible for services under the Universal Home Care program. The estimated cost of delivering services to these individuals varies between \$268 million and \$375 million, depending on the care model under which services are delivered. As Maine’s population continues to age, the price tag of the Universal Home Care program will grow.

### UHC Program Eligibility and Cost Estimates

Estimated eligible population	Annual cost per enrollee (agency model)	Annual cost per enrollee (individual provider model)	Total UHC program costs (agency-based provider model)	Total UHC program costs (individual provider model)
22,900	\$16,380	\$11,700	\$375 million	\$268 million

Source: US Census Bureau 2012 ACS 5-year PUMS data.

Within the initiative is a program to provide a stipend to family caregivers in Maine that, by design, appears ripe for abuse. Family caregivers in Maine currently offer approximately \$2 billion in unpaid care each year. It is clear, given the estimated costs of the Universal Home Care program and the unpaid care that currently exists in Maine, that the \$310 million in anticipated revenues will not be enough to cover all eligible persons or provide stipend to all eligible family caregivers.

Therefore, the program is not truly “universal,” and it is likely that rationing of services or further tax increases will be necessary to serve the full eligible population.

Question 1 includes a mandate that requires providers participating in covered programs to devote 77 percent of reimbursements received from the Universal Home Care Trust Fund on “direct service worker costs.” However, this term is left undefined in the initiative, leaving uncertainty over how providers must expend 77 percent of the funds they receive from the program.

Data show that current wages for home care workers in Maine reflect between 63 and 67 percent of the reimbursement to provider agencies. The 77 percent mandate within Question 1 could cause a measurable disparity between the wages of home care workers serving clients under the Universal Home Care program versus clients in existing Medicaid and state-funded programs. In addition, the 77 percent mandate could leave provider agencies without adequate compensation to make up for the costs associated with employment.

The undemocratic design of the Universal Home Care Trust Fund Board abandons our traditions of representative government. The Board’s autonomy over the program and use of the Universal Home Care Trust Fund leaves many remaining questions for which we cannot answer.

However, implementing the Universal Home Care program in coordination with existing programs will prove chaotic for any Board tasked with doing so. Enacting a program that is to supplement, not supplant, existing programs is difficult when the program being enacted has less stringent eligibility requirements and is not obligated to abide by federal rules imposed through Medicaid.

# INTRODUCTION

On November 6, 2018, Maine voters will consider a ballot initiative—Question 1—to impose new taxes on the amount of wages and combined family incomes that exceed the threshold subject to Social Security employment taxes (\$128,400 in 2018) to support the Universal Home Care program (UHC program).<sup>[1]</sup>

If approved by Maine voters, the program would provide home care services to seniors and people with disabilities living in Maine, regardless of income, who need assistance with one or more activities of daily living (ADLs). ADLs are defined as “tasks routinely performed by a person to maintain bodily functions, including bed mobility, transfers, locomotion, dressing, eating, toileting, bathing and personal hygiene.”<sup>[2]</sup> Disability under Question 1 is someone with a physical or mental disability as defined in Title 5, Section 4553-A of the Maine Human Rights Act, or as defined in 42 United States Code, Section 12102 of the Americans with Disabilities Act.

## Question 1:

*“Do you want to create the Universal Home Care Program to provide home-based assistance to people with disabilities and senior citizens, regardless of income, funded by a new 3.8% tax on individuals and families with Maine wage and adjusted gross income above the amount subject to Social Security Taxes, which is \$128,400 in 2018?”*

Supporters of the initiative claim its enactment would bolster the home care workforce in Maine and “guarantee that every Maine senior and person with a disability can access the care they need to stay in their home.”<sup>[3]</sup> A deeper look at the proposal, however, reveals that it would be destructive to Maine’s economy and raise taxes on Maine families to unprecedented levels.

As outlined in the language of the initiative, Question 1 establishes three new tax revenue sources to be dedicated to the “Universal Home Care Trust Fund” (the Fund), including:

- 1.9 percent excise payroll tax on employers for wages paid out over \$128,400;
- 1.9 percent wage income tax on employees for wages earned over \$128,400; and
- 3.8 percent income tax on Maine adjusted gross incomes (MAGI) for individuals and families earning more than \$128,400, reduced by a credit equal to the amount of wage and payroll taxes (from Question 1) paid by the employee and the employer.

According to Maine’s Department of Administrative and Financial Services (DAFS), Question 1 would apply to all Maine families filing taxes, whether individually or jointly. As a result, the enactment of Question 1 would establish a “marriage penalty” on dual income households filing

<sup>[1]</sup> The full language of Question 1 can be found at the Maine Department of the Secretary of State’s website: <https://www.maine.gov/sos/cec/elec/citizens/uhcleg.pdf>

<sup>[2]</sup> <http://legislature.maine.gov/statutes/22/title22sec7852.html>

<sup>[3]</sup> <http://mainebeam.com/universal-home-care-campaign-buoyed-by-small-dollar-grassroots-donations/>

married joint returns, meaning the 3.8 percent tax on MAGI could affect married earners whose individual incomes are less than \$128,400 threshold but whose combined income exceeds it. For example, a married nurse and construction contractor, each earning \$70,000 per year, would be subject to the new 3.8 percent tax on MAGI (because their combined income would total \$140,000), but they each would fall below the threshold and would not be subject to the tax if they were not married and filed taxes individually.

In analyzing Question 1's impact on Maine's workforce, economy, and health care sector, this report focuses on two important aspects of the proposal: increasing taxes on Maine residents with incomes greater than \$128,400 and increasing state funding for home care and community support services under the design of Question 1. This report outlines the likely effects of a substantial income tax hike on Maine's economic future, as well as the impacts on Maine's home care industry. This report specifically considers the challenges of implementing the UHC program in coordination with existing programs.



## RAISING THE INCOME TAX

The passage of Question 1 would, in effect, increase Maine’s top marginal tax rate from 7.15 percent to 10.95 percent, a 53 percent increase. As a result, Maine would have the third-highest top marginal income tax rate in the country behind only California and Hawaii, and would surpass Vermont (8.95 percent) to implement the highest income tax rate in New England. In addition, the passage of Question 1 would introduce the highest income tax rate in the country at the \$128,400 income level; California’s top marginal income tax rate of 13.3 percent applies only to income beyond \$1 million and Hawaii’s top rate of 11 percent applies only to income beyond \$200,000. Figure 1 illustrates where Maine’s tax burden would stand in relation to other relevant states if Question 1 is passed by voters.

**Figure 1: State Individual Income Tax Rate Comparisons Under UHC**

State	Top Tax Rate on Income	Top Tax Rate Threshold
California	13.3%	\$1,000,000
Hawaii	11%	\$200,000
Maine	10.95%	\$128,400
New Hampshire	5% (only on dividends and interest income)	\$0
Florida	0%	\$0

Source: The Tax Foundation, Tax Year 2018

Maine’s top marginal income tax rate is currently 7.15 and, despite recent reductions, still ranks 11<sup>th</sup> highest nationally among states levying an individual income tax.<sup>[4]</sup> Overall, state and local tax collections per capita were \$1,153 in 2015—the 19<sup>th</sup> highest in the nation.<sup>[5]</sup> If enacted, Question 1 would effectively raise Maine’s individual income tax to the highest levels in state history. Similarly, the \$310 million in anticipated revenues<sup>[6]</sup> constitutes one of the largest single tax increases in state history. It is also important to note that the taxes contained within Question 1 will be assessed on gross income rather than taxable income, a method that DAFS describes as a “drastic departure from the form of taxation familiar to Maine taxpayers.”<sup>[7]</sup>

Because the new tax would apply to gross income, it would generate greater revenues than if, like most other income taxes, it was applied to taxable income. Question 1 would create a new 3.8 percent tax on gross income over \$128,400, meaning that if a Maine employee earned gross wages above \$128,400, both the employee and his or her employer would pay a 1.9 percent tax (for a combined 3.8 percent) on excess wages before other taxes or deductions were taken into account.

The self-employed and small business owners that file as pass-through entities would be subject to the 3.8 percent tax on MAGI, which includes nonwage income sources such as business earnings

<sup>[4]</sup> <https://taxfoundation.org/state-individual-income-tax-rates-brackets-2018/>

<sup>[5]</sup> <https://taxfoundation.org/state-local-income-tax-collections-per-capita-2018/>

<sup>[6]</sup> The taxes contained within Question 1 would generate \$310 million in revenue according to Maine’s nonpartisan Office of Fiscal and Program Review.

<sup>[7]</sup> <https://www.maine.gov/dafs/news/question1-public-comment>

from an S corporation, partnership, or sole proprietorship. The built-in credit from Question 1 would not apply to these individuals because their earnings do not come in the form of wage income. In the case of an S corporation, the business owner would only receive this credit if they paid themselves wages in excess of \$128,400. Similarly, joint filers with family income greater than \$128,400 would not receive the credit unless one member of the couple earned wages in excess of \$128,400. Any other nonwage source of income, such as dividends, rental income, capital gains, or the sale of a small business, is also subject to the 3.8 percent tax on MAGI.

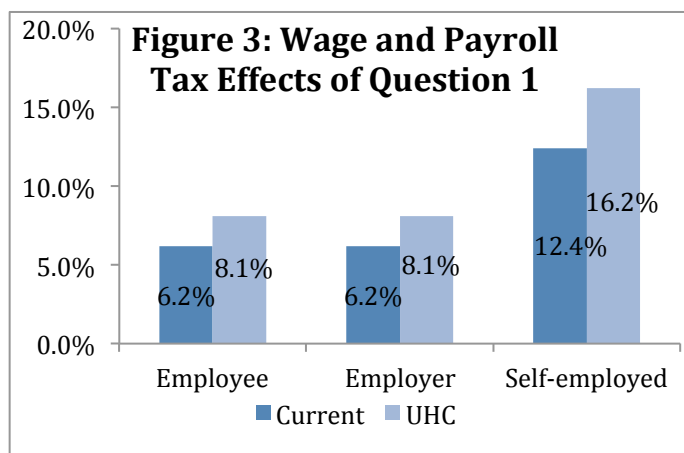
Because Maine phases out both itemized and standard deductions, Mainers who earn over the \$128,400 threshold and make sizeable charitable contributions or have high medical expenses will pay a substantially higher tax rate than a California resident, for example, with the same deductions. In addition, given new federal tax changes that cap state and local tax (SALT) deductions at \$10,000, some Mainers impacted by the taxes imposed under Question 1 will not be able to deduct these taxes from their federal income taxes. Figure 2 below shows how the proposed initiative would alter Maine’s individual income tax structure.

**Figure 2: Maine Income Tax Rate Schedule with Question 1 Taxes**

Rate	Single/Married – Separate Return	Head of Household	Married – Joint Return
5.8%	Less than 21,050	Less than \$32,150	Less than \$42,900
6.75%	\$21,050 but less than \$50,750	\$32,150 but less than \$76,150	\$42,900 but less than \$101,550
7.15%	\$50,750 but less than \$128,400	\$76,150 but less than \$128,400	\$101,550 but less than \$128,400
10.95%	\$128,400 or more	\$128,400 or more	\$128,400 or more

Source: Maine Department of Administrative and Financial Services

Due to the design of the taxes imposed under Question 1, self-employed workers who earn over the threshold will face a steeper tax increase than individuals with equivalent wage earnings but who are not self-employed. Because the 1.9 percent wage and payroll taxes contained within Question 1 are structured to be paid by both an employer and the employee, self-employed Mainers earning more than \$128,400 would be responsible for both portions of the tax (for a combined 3.8 percent) in addition to existing payroll taxes.



## ECONOMIC IMPACT OF TAX INCREASE

The Maine State Economist has analyzed the potential economic impacts of Question 1 over the next five years relative to current projections and has found that Question 1 would adversely affect Maine’s economy to a significant degree. Figure 4 below outlines the results of the State Economist’s analysis. In 2019 alone, Maine’s population, labor force, and private non-farm employment would see significant reductions relative to baseline forecasts. Through 2023, cumulative losses in real GDP and total personal income would push upwards of \$1 billion and \$2 billion, respectively. As outlined in the State Economist’s report, the estimated reductions in these demographic and economic metrics are caused by a combination of enhanced out-migration and reduced in-migration, and production cost increases for businesses due to the payroll tax included in Question 1.<sup>[8]</sup> The findings in Figure 4 represent the differences in each metric relative to baseline forecasts; they do not represent year-over-year changes.

**Figure 4: Simulated Impact of Question 1 Relative to Baseline Forecast**

	2019	2020	2021	2022	2023
<b>Population</b>	-1200 to -1700	-1300 to -1900	-1500 to -2200	-1600 to -2300	-1500 to -2100
<b>Labor Force</b>	-1300 to -1800	-1100 to -1500	-1100 to -1500	-1000 to -1500	-900 to -1300
<b>Private Non-farm Employment</b>	-2600 to - 3800	-600 to -900	-700 to -1000	-400 to -600	+100 to +200
<b>Personal Income (current dollars)</b>	-\$300 million to -\$500 million	-\$300 million to -\$400 million	-\$300 million to -\$400 million	-\$300 million to -\$400 million	-\$200 million to -\$300 million
<b>Real GDP (fixed 2009 dollars)</b>	-\$200 million to -\$300 million	-\$100 million to -\$200 million	-\$100 million to -\$200 million	-\$100 million to -\$200 million	-\$100 million

Source: Maine State Economist, Department of Administrative and Financial Services

The State Economist’s report is consistent with new economic evidence indicating that highly skilled professionals are sensitive to state income tax rates when choosing where to live in work. A recent study found that state taxes have a significant impact on the geographical location of elite scientists, and possibly other highly-skilled workers. The study found that cuts to personal income and corporate tax rates correspond with a 0.42 percent increase per year in the stock of scientists for as long as the tax advantages remain in place relative to other states.<sup>[9]</sup>

A recent paper from Stanford University concluded that, based on an analysis of 45 million tax records stretching from 1999 to 2011, “there is an observable pattern of elite migration from high-income-tax to low-income-tax states.”<sup>[10]</sup> The authors estimate that “a 10 percent increase in the top tax rate leads to a 1 percent loss of the millionaire population” of a state.

<sup>[8]</sup> <https://www.maine.gov/dafs/reports/state-economist-home-care-referendum>

<sup>[9]</sup> <https://www.frbsf.org/economic-research/files/wp2015-06.pdf>

<sup>[10]</sup> <https://web.stanford.edu/~cy10/public/Jun16ASRFeature.pdf>

Applying this estimate to Maine, the results are striking. Maine’s current top income tax rate is 7.15 percent. As previously noted, adding a 3.8 percent surtax on top of the existing rate equates to a 53 percent increase. Maine would therefore see a roughly 5.3 percent decline in its millionaire population under Question 1—which translates to the departure of 50 of Maine’s wealthiest residents.

While this figure may seem small, the contribution these individuals make to Maine’s economy—in managing businesses, creating jobs, paying taxes, and giving to charity—is substantial. In total, Maine’s millionaires reported a combined \$1.7 billion in adjusted gross income to the IRS in 2015. Figure 5 below estimates the tax losses from millionaire out-migration as a result of the income tax increase under Question 1.

**Figure 5: Tax Losses from Millionaire Out-Migration Under Question 1**

<b>Category</b>	<b>Annual Tax Loss from Millionaire Out-Migration</b>
Property Taxes	\$1,882,536
Income Taxes	\$7,750,000
Sales Taxes	\$1,674,724
<b>Total</b>	<b>\$11.3 million</b>

Note: These figures do not include Mainers who earn more than \$128,400 but less than \$1 million per year and would also face new incentive to relocate to another state under Question 1.

Simply put, Question 1—by discouraging work, saving, and entrepreneurship—would further weaken Maine’s economic competitiveness by making it even less attractive for businesses and highly-skilled individuals to live here.

## WHO WOULD BE IMPACTED?

Some of Question 1’s supporters have repeatedly claimed, without explaining their calculation, that the proposed taxes would only affect “the wealthiest 1.6 percent” of Mainers.<sup>[11]</sup> This unsourced assertion is untrue. Based on an analysis conducted by Maine Revenue Services, DAFS estimates that 108,000 Mainers will face a tax increase under Question 1. The 108,000 impacted Mainers account for roughly 58,355 resident tax returns, or approximately nine percent of all filings.<sup>[12]</sup> According to DAFS, more than 49,000 of the affected resident tax filings represent married joint returns; they account for roughly 84 percent of all affected Maine returns.

**Figure 6: Profile of Mainers Experiencing Tax Increases Under Question 1**

<b>Number of affected Mainers</b>	<b>Number of affected Maine returns</b>	<b>Number of affected Maine married and filing joint returns</b>	<b>Affected joint returns as a share of total affected Maine returns</b>
108,000	58,355	49,000	84 %

Source: Maine Department of Administrative and Financial Affairs

The Maine State Economist’s report estimates that the taxes contained within Question 1 would generate \$315 million in new revenues in the first year of enactment.<sup>[13]</sup> Of that \$315 million, \$285.5 million is generated from full-year residents and \$29.5 million derives from out-of-state taxpayers’ business income. Of the \$285.5 million generated from resident taxpayers, \$173.6 million comes in the form of wage taxes, \$50.8 million comes from taxes on self-employment and business income, and the remaining \$61.1 million consists of tax increases on other forms of nonwage income, such as dividends, rents, and capital gains.

The taxes imposed under Question 1 will impact Maine earners who work in some of the state’s most critical industries and occupations, making it harder for Maine to attract and retain workers to fill key positions. Figures 7 and 8 estimate which industries and occupations, and the corresponding number of workers, will be most impacted by the taxes imposed under Question 1. It is important to note the findings in Figures 7 and 8 are based on total personal earnings, not household income. Therefore, Figures 7 and 8 capture only individuals who personally earn at or above the income threshold outlined in Question 1, without regard for their spouse’s income.

**Figure 7: Top 10 Affected Industries from Question 1 Taxes**

<b>Industry</b>	<b>Number of affected workers</b>
Medical – Hospitals	3,253
Manufacturing (all manufacturers)	2,316

<sup>[11]</sup> <https://www.pressherald.com/2018/05/02/business-and-legal-experts-push-back-on-universal-home-care-ballot-initiative/>

<sup>[12]</sup> <http://bangordailynews.com/2018/09/17/politics/following-the-money-on-maines-home-care-ballot-question/>

<sup>[13]</sup> This total is \$5 million more than the analysis conducted by the Office of Fiscal and Program Review due to variance in the accounting of behavioral responses from the taxes contained within Question 1.

Finance – Insurance Carriers & Related Services	1,411
Construction	1,203
Management, Scientific, & Technical Consulting Services	911
Education – Colleges, Universities, Professional Schools	839
Medical – Physician Office	731
Finance – Securities, Commodities, Funds, Trusts & Other Investments	730
Agriculture – Fishing, Hunting, Trapping	727
Computer Systems Design & Related Services	724

Source: US Census Bureau 2013 ACS 5-year PUMS data

**Figure 8: Top 10 Affected Occupations from Question 1 Taxes**

<b>Occupation</b>	<b>Number of affected workers</b>
Physicians & Surgeons	2,710
Miscellaneous Managers	2,003
Chief Executives & Legislators	1,934
Wholesale and Manufacturing Sales Representatives	1,011
Supervisors of Non-retail Sales Workers	964
Pharmacists	795
Lawyers, Judges, Magistrates & other Judicial workers	764
General and Operations Managers	763
Fishing & Hunting Workers	631
Supervisors of Retail Sales Workers	577

Source: US Census Bureau 2013 ACS 5-year PUMS data

## CURRENT LANDSCAPE OF HOME CARE IN MAINE

While advocates of the proposal claim that a new government program is needed to provide Maine's seniors and disabled residents the home care they need, the fact is that, while far from perfect, Maine already devotes a considerable amount of resources to the State's home care infrastructure. MaineCare, Maine's Medicaid program, spent \$465 million on "home health and personal care" in 2016.<sup>[14]</sup>

Maine currently offers in-home and community support services to seniors and the disabled through Medicaid and state-funded long-term services and support (LTSS) programs that serve both Medicaid eligible and non-Medicaid eligible Mainers.<sup>[15]</sup>

These services are offered under two service models; the agency-based service model and the individual provider service model (also known as the consumer- or self-directed model). Under the agency-based model of care, a provider agency employs trained professionals who are dispatched to a client's home when services are needed. Under the individual provider care model, the client being served is responsible for selecting and managing their own caregiver.

Within Maine's Medicaid State plan, eligible populations are served through the *Consumer Directed Attendant Services* and *Private Duty Nursing and Personal Care Services* programs. Maine also has a Medicaid §1915 waiver (Section 19 in the MaineCare Benefits Manual)<sup>[16]</sup> that serves populations who are eligible for nursing facility services but wish to receive care at home. Individuals may receive services under Section 19 provided that care in this setting can be obtained at a lower cost than in a nursing facility.

Maine also maintains non-Medicaid LTSS programs for which the State does not receive federal matching dollars. These programs include *In-home and Community Support Services for Elderly and Other Adults*, *Office of Elder Services Homemaker Program*, and *Consumer Directed Personal Assistance Services*, or Sections 11, 63, and 69 within the Office of Aging and Disability Services (OADS) Policy Manual.<sup>[17]</sup>

The benefits and services offered under these programs include, but are not limited to, personal assistance with ADLs, assistive technologies, chore and handyman services, respite care, non-medical transportation, and therapies, among others. According to a recent analysis by the

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<sup>[14]</sup> <https://www.kff.org/statedata/custom-state-report/?view=3&i=32622~32347~32348~32625~32626~32621&g=me>

<sup>[15]</sup> Existing LTSS include care in nursing and intermediate care facilities, as well as adult family care and residential care. For the purpose of this report, we focus exclusively on LTSS programs for which the UHC program could provide similar services. Those who reside in a hospital, nursing facility, intermediate care facility for individuals with intellectual disabilities, adult family care home or residential care facility are not eligible for services under the UHC program.

<sup>[16]</sup> <https://www.maine.gov/sos/cec/rules/10/ch101.htm>

<sup>[17]</sup> <https://www.maine.gov/sos/cec/rules/10/chaps10.htm>

University of Southern Maine’s Muskie School of Public Service, 5,622 Mainers currently utilize services within Maine’s existing LTSS programs.<sup>[18]</sup>

In 2017, the federal Bureau of Labor Statistics reported there were 2,530 home health aides and 14,360 personal care aides employed in Maine.<sup>[19]</sup> Home health aides “provide routine individualized healthcare such as changing bandages and dressing wounds, and applying topical medications to the elderly, convalescents, or persons with disabilities at the patient's home or in a care facility.”<sup>[20]</sup> Personal care aides “assist the elderly, convalescents, or persons with disabilities with daily living activities at the person's home or in a care facility.”<sup>[21]</sup>

These figures do not include individual providers, who are employed directly by client consumers. We estimate that an additional 9,651 independent home and personal care aides are self-employed in Maine, accounting for more than one-third of the total personal care services workforce.<sup>[22]</sup>

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<sup>[18]</sup> Snow KI, et al. Adults Using Long Term Services and Supports: Population and Service Use Trends in Maine, SFY 2016. Portland, ME: University of Southern Maine, Muskie School of Public Service;2018.

<sup>[19]</sup> <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm#tab-7>

<sup>[20]</sup> <https://www.bls.gov/oes/current/oes311011.htm#st>

<sup>[21]</sup> <https://www.bls.gov/oes/current/oes399021.htm#st>

<sup>[22]</sup> <https://phinational.org/wp-content/uploads/legacy/phi-home-care-workers-key-facts.pdf>



# UNIVERSAL HOME CARE ELIGIBILITY STANDARDS VS. EXISTING PROGRAMS

Eligibility for Medicaid and state-funded programs is means-tested, ensuring only those without the medical and financial capacity to support themselves receive services.

MaineCare does, however, offer a “Medically Needy” exception within some programs for recipients with income exceeding income eligibility limits but who have high and recurring medical costs. Eligibility requirements under the UHC program are lax compared to existing LTSS programs, both in and outside of Medicaid.

Under Question 1, program eligibility extends to all seniors and all persons with a disability living in Maine, provided they need assistance with at least one ADL. As acknowledged by the initiative’s supporters, most existing home care programs in Maine require that an individual need assistance with at least two ADLs. The average adult user of LTSS in Maine among programs for which the UHC program could provide similar services requires assistance with at least 2.2 ADLs.<sup>[23]</sup>

The UHC program effectively cuts self-care eligibility requirements in half relative to similar existing LTSS programs, greatly broadening the eligible population.

In addition, income cannot be a factor of eligibility under the Universal Home Care program, which is a sharp divergence from the eligibility standards imposed under existing programs. While exemptions exist for the blind, elderly and disabled, general eligibility within Medicaid—even for the program’s mandatory eligibility groups—is means-tested.

In addition, Maine’s state-funded home based care program imposes liquid asset tests of \$50,000 and \$75,000 for individuals and couples, respectively. In short, existing programs are targeted to the neediest Mainers and explicitly exclude individuals capable of procuring home care themselves.

Figure 9 outlines the stark differences between the eligibility requirements imposed under the UHC program and those currently in place within existing LTSS programs.

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<sup>[23]</sup> <https://digitalcommons.usm.maine.edu/cgi/viewcontent.cgi?article=1112&context=aging>

**Figure 9: UHC Program Rules vs. Existing LTSS Programs<sup>[24]</sup>**

	Medicaid Waiver	Medicaid State Plan	State-Funded Home-Based Care programs	UHC Program
<b>Age</b>	18 and up	18 and up	18 and up	65 and up Under 65 with a disability
<b>Activity of Daily Living (ADL) Need</b>	Minimum of 2	Minimum of 2	Minimum of 1 plus a combination of additional nursing and (Instrumental Activity of Daily Living (IADL) needs	Minimum of 1
<b>Nursing Need</b>	Always required	Depends on benefit level and number of ADL and IADL needs	Depends on benefit level and number of ADL and IADL needs	Permitted if Board decides to offer nursing services
<b>Income Limit</b>	222% of federal poverty level	100% of federal poverty level	None	Prohibited
<b>Asset Limit (individuals/ couples)</b>	\$8,000/\$12,000	\$8,000/\$12,000	\$50,000/\$75,000	Silent
<b>Cost Sharing</b>	Permitted	Copay (services not contingent on copay)	Permitted	Prohibited

Source: “An Analysis of the Universal Home Care Program: Considerations for Implementation with the Context of Maine’s Existing LTSS Programs,” University of Southern Maine, Muskie School of Public Service. 2018. Accessed September 28, 2018. Available at: <https://digitalcommons.usm.maine.edu/aging/112/>

It’s also important to note that there is no explicit residency requirement to receive services within the proposed initiative. The absence of a residency requirement allows elderly and disabled populations needing assistance with one ADL to move to Maine and immediately become eligible for services under the UHC program.

Similarly, individuals who do not reside in Maine but spend a portion of the year here could also qualify for services under the UHC program. If the measure is passed by voters, an influx of new Mainers seeking services under the program would enlarge the eligibility pool—likely without a commensurate increase in revenues for the program—and would further inflate long-term cost projections, add to any waiting list created by the UHC program, and could potentially crowd out Maine residents from receiving services.

<sup>[24]</sup> “An Analysis of the Universal Home Care Program: Considerations for Implementation with the Context of Maine’s Existing LTSS programs” was performed by researchers at the Muskie School of Public Service under contract with the Service Employees International Union, a major funder of Mainers for Homecare, the ballot question committee established by the Maine People’s Alliance to support Question 1.

Given the loose eligibility standards in the UHC program, it is unlikely the new program will be able to provide care for the entirety of its eligible population. In fact, in multiple sections of the proposed law it is noted that, despite being “universal,” the program is not required to cover all possible services for all eligible persons, and may curtail services and create waiting lists if the demand for services exceeds available funds.

## ESTIMATED PROGRAM COSTS

Mike Tipping, the communications director for the Maine People’s Alliance (the primary supporters of Question 1) has claimed that enactment would “[save] our state a lot of money.” He has offered no evidence to support this stunning assertion, perhaps because all evidence points to the contrary.

Each year, the U.S. Census Bureau’s American Community Survey (ACS) collects data on thousands of Mainers, asking questions related to income, demographics, employment, housing, and disability. A series of questions are used to evaluate disability status. Two categories in particular are relevant here: ambulatory difficulty (serious difficulty walking or climbing stairs) and self-care difficulty (difficulty bathing or dressing). Anyone answering affirmatively to either question is considered disabled and could meet the ADL need as defined under Question 1. Based on 2012 ACS data, there are 69,080 Mainers who have an ambulatory difficulty but not a self-care difficulty, 6,638 Mainers who have a self-care difficulty but not an ambulatory difficulty, and 33,791 Mainers who have both ambulatory and self-care difficulties. According to the U.S. Census Bureau’s 2010 Americans With Disabilities report, about 12.3 million of the 56.7 million Americans with disabilities needed assistance with one or more ADLs, or approximately 22 percent of Americans with disabilities.<sup>[25]</sup> Therefore, we estimate there are 22,900 Mainers who could be eligible for services under the UHC program.<sup>[26]</sup>

It should be noted, however, that the definitions of self-care difficulty and ambulatory difficulty do not align exactly with the eligibility criteria of the UHC program. Disabilities are self-reported in the ACS, whereas under existing LTSS programs in Maine, functional eligibility is determined through an assessment.

Using Maine-specific studies of home health care costs, we estimate that providing home care services to each eligible individual under the agency-based care model would cost, on average, approximately \$16,380 annually.<sup>[27]</sup> This annual cost estimate per enrollee is smaller than figures reported in MetLife<sup>[28]</sup> and Genworth<sup>[29]</sup> surveys. If the individual provider model is assumed for the entirety of the eligible population, the annual cost per program enrollee would be \$11,700.<sup>[30]</sup>

Therefore, we predict that to provide services to all eligible Mainers, program costs would range between \$268 million and \$375 million, depending on the care model(s) under which eligible persons are served. It is most likely that the UHC program would provide care using a combination

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<sup>[25]</sup> <https://www2.census.gov/library/publications/2012/demo/p70-131.pdf>

<sup>[26]</sup> This eligibility estimate excludes Mainers under the age of five and the 5,622 Mainers who currently utilize services within existing LTSS programs.

<sup>[27]</sup> For each UHC program enrollee, this figure reflects 15 hours of home care services per week at an hourly rate of \$21.

<sup>[28]</sup> [https://www.metlife.com/content/dam/metlifecom/us/homepage/ltc/resources/LTC\\_Resources.pdf](https://www.metlife.com/content/dam/metlifecom/us/homepage/ltc/resources/LTC_Resources.pdf)

<sup>[29]</sup> [https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/131168\\_081417.pdf](https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/131168_081417.pdf)

<sup>[30]</sup> For each UHC program enrollee, this figure reflects 15 hours of home care services per week at an hourly reimbursement rate of \$15. This rate assumes all UHC program services are delivered under an independent provider model.

of both the agency-based and individual provider models. Without knowing what care model(s) the Board will adopt to administer services, it is difficult to obtain a definitive cost estimate.

**Figure 10: UHC Program Eligibility and Cost Estimates**

<b>Estimated eligible population</b>	<b>Annual cost per enrollee (agency-based provider model)</b>	<b>Annual cost per enrollee (individual provider model)</b>	<b>Total UHC program costs (agency-based provider model)</b>	<b>Total UHC program costs (individual provider model)</b>
22,900	\$16,380	\$11,700	\$375 million	\$268 million

Source: US Census Bureau 2012 ACS 5-year PUMS data.

To serve the full population of eligible Mainers, program costs can only be expected to grow as Maine’s population continues to age. According to results of the 2017 American Community Survey, Maine’s median age is 44.6—the highest in the nation—and the share of Mainers aged 65 and older grew by 55,000 between 2016 and 2017. Seniors now comprise about one-fifth of Maine’s population.<sup>[31]</sup>

A 2014 study prepared by the Muskie School of Public Service at the University of Southern Maine estimates that by 2030, 28 percent of Maine’s population will be age 65 or over.<sup>[32]</sup> The study also notes that adults over the age of 65 have a 70 percent chance of requiring long term care services, showing that as Maine ages, the need for services is likely to grow to unsustainable levels—potentially tens of millions of dollars in services over what could be provided under the current design of the UHC program.

In addition, the only way future needs could be met under the UHC program design is by rationing services or imposing additional tax increases on Maine people. If Maine’s first-in-the-nation UHC program becomes a magnet for eligible people to move to the state in order to receive services, the costs and associated tax increases would be even higher.

To the extent the Board provides stipends for family caregivers (as outlined in the initiative) below the rate at which provider agencies and independent providers are reimbursed to provide care to the 22,900 eligible Mainers, our cost estimate could shrink significantly. To the extent the Board provides stipend to family caregivers who serve persons currently enrolled in existing LTSS programs, our cost estimates could grow significantly.

Testimony submitted to the Maine Legislature by AARP Maine in 2018 suggests that there are 178,000 family caregivers in Maine who provide an estimated 165 million hours of unpaid care each year, valued at more than \$2 billion.<sup>[33]</sup> This indicates that a large number of family caregivers could receive stipends under the program. Without knowing the value of the stipend the Board

<sup>[31]</sup> <https://www.pressherald.com/2018/09/13/maine-still-nations-oldest-state/>

<sup>[32]</sup> <http://muskie.usm.maine.edu/Publications/DA/Long-Term-Services-Supports-Use-Trends-Chartbook-SFY2014.pdf>

<sup>[33]</sup> <https://assets.aarp.org/rgcenter/ppi/ltc/fs229-ltc.pdf>

would disburse to family caregivers throughout the state, we cannot determine by what factor our cost estimates would grow or shrink.

The disparity between projected revenues and program costs validates the observation that, while efforts to raise taxes may begin by targeting the so-called “wealthy,” there is usually an attempt to lower the threshold and impose the higher rates on an ever-increasing number of taxpayers.

In 2016, progressive groups supported Question 2, a law (later repealed by the Maine Legislature) that substantially increased income taxes on households earning more than \$200,000 per year. Advocates assured voters that this income level had been carefully selected to only target Mainers who were supposedly failing to “pay their fair share.”<sup>[34]</sup>

Now, a mere two years later, many of the same supporters of Question 2 in 2016 have radically reduced the taxable income threshold under Question 1 to just \$128,400. Given the lessons of the recent past, it would be naive to think that the law’s supporters would be satisfied with this income threshold for long.

In addition, because the full costs of the program (\$375 million) outweigh the expected revenues generated by the payroll, wage and income taxes contained within Question 1 (\$310 million), the program is not truly “universal.” While eligibility may extend to tens of thousands of Mainers, the UHC program cannot realistically provide services to everyone who would be eligible (particularly as Maine’s population continues to age) nor can it adequately compensate all family caregivers in Maine who provide millions of hours of unpaid care annually.

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<sup>[34]</sup> <https://bangordailynews.com/2016/11/09/politics/maine-votes-to-hike-tax-on-high-earners-to-boost-school-aid/>

## UHC IMPLEMENTATION CHALLENGES

If Question 1 passes in November, perhaps the biggest challenge facing the Board will be how to implement the UHC program without adversely affecting existing LTSS programs. Specifically, the Board must implement the UHC program without compromising quality of care, exacerbating workforce shortages within the industry, or using taxpayer dollars inefficiently.

To minimize negative impacts, the UHC program must be implemented, to some degree, in coordination with existing LTSS programs administered by the Department of Health and Human Services.

In establishing the UHC program, the Board must take into account current processes for determining eligibility, managing caseloads, coordinating care, assessing qualifications for providers, paying providers, and other administrative functions to ensure program design does not overlap existing programs or cause undue harm to those who currently utilize services.

The language of Question 1 raises questions as it relates to the implementation of the UHC program and the challenges described above, specifically the setting of reimbursement rates and how these rates could exacerbate workforce shortages within the labor market. Workforce shortages within Maine's home health care industry are well documented.

A 2012 entry in the Maine Policy Review cited industry turnover rates between 44 or 64 percent, and found that mean wages for home health aides in Maine remained below 200 percent of the federal poverty level in 2010.<sup>[35]</sup> The *Sun Journal* in 2016 reported that clients served by some of Maine's largest home care providers have more than 1,000 hours of unmet need.<sup>[36]</sup> In 2017, the *Bangor Daily News* reported that Maine would need an additional 2,474 direct care workers by 2026.<sup>[37]</sup>

According to the UHC initiative, the Board "shall ensure improvements in the wages, benefits and working conditions of persons providing in-home and community support services."<sup>[38]</sup> The language of Question 1 mandates that participating agencies devote 77 percent of funding received from the program on "direct service worker costs." Compliance with this mandate is calculated on a

Data show that the hourly wages earned by workers in Maine's home health industry reflect between 63 and 67 percent of reimbursement to agency-based providers.

The mandate that agencies participating in the UHC program devote 77 percent of reimbursements to "direct service worker costs" could create a measurable disparity in the earnings of workers who provide care under the UHC program versus existing LTSS programs and leave provider agencies without adequate funding to cover employment costs.

<sup>[35]</sup> <https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?article=1339&context=mpr>

<sup>[36]</sup> <http://www.sunjournal.com/heartbreaking-home-health-care-shortage-leaving-maine-elderly-without-help/>

<sup>[37]</sup> <http://bangordailynews.com/2017/05/02/mainefocus/maines-3-biggest-bills-to-fill-health-care-worker-shortages/>

<sup>[38]</sup> <https://www.maine.gov/sos/cec/elec/citizens/uhcleg.pdf>

statewide, annual basis for each provider. This arrangement could cause a measurable disparity between the hourly wages of those providing care under existing LTSS programs and the UHC program. In addition, the 77 percent spending mandate on “direct service worker costs” could leave provider agencies without adequate compensation to make up for administrative costs associated with employment.

It is also unclear how or why 77 percent was selected as the spending mandate. As outlined in *An Analysis of the Universal Home Care Proposal: Considerations for Implementation with the Context of Maine's Existing LTSS Programs* by the University of Southern Maine’s Muskie School of Public Service, current reimbursement rates to agency-based providers within existing LTSS programs are either \$18.48 or \$19.60 depending on the program and service provided.

If the UHC program sets equivalent rates, participating agencies receiving payments from the Fund would be required to expend between \$14.23 to \$15.09 on “direct service worker costs” for each full hour of services delivered to meet the 77 percent requirement. According to the Bureau of Labor Statistics, in 2017, home health aides in Maine earned mean hourly wages of \$12.41.<sup>[39]</sup> This suggests that the mean hourly wage of home health aides in Maine currently reflects between 63 and 67 percent of the hourly reimbursement to provider agencies.

However, direct service worker costs are not defined within the proposed initiative, creating uncertainty regarding which spending categories would satisfy the 77 percent requirement. The current reimbursement rate received by providers includes wages, benefits, and other employee-related costs. Broadly, labor costs include wages, benefits, and payroll taxes.

If the Board decides direct service worker costs include only wages, the reimbursement rate for services provided under the UHC program would have to be set to at least \$19.48 for workers to be paid at an hourly rate of \$15.<sup>[40]</sup> This rate is higher than what the state reimburses all independent providers, and higher than what agency-based providers receive for reimbursement for some services offered under Sections 19, 63, and 96 of the MaineCare Benefits Manual.

Because of the Board’s responsibilities to set reimbursement rates and ensure improvements in the wages of persons providing in-home care services—and because workers would have input on the Board that sets final reimbursement rates—it is conceivable that those providing care under the UHC program would receive an hourly rate of pay that exceeds the hourly rate of pay among those who currently provide care within Maine’s existing LTSS programs.

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<sup>[39]</sup> <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm#tab-7>

<sup>[40]</sup> The Maine People’s Alliance and Caring Across Generations have developed implementation strategies that call for all home care workers to be paid at \$15 an hour. Given the provision within Question 1 that allows individual providers to become state employees for the purpose of the State Employees Labor Relations Act, we assume reimbursement to individual providers will be set through collective bargaining and the 77 percent spending mandate will apply only to agency-based providers.



Any measurable disparity in favor of UHC program payments will create new incentive for home care workers to serve patients within the UHC program rather than patients within existing programs, unless the Board develops a strategy for supplementing the wages of workers providing services under existing LTSS programs to an equivalent extent.

Individuals currently served under existing LTSS programs are those who the State of Maine considers truly needy based on existing financial and functional eligibility requirements. As previously noted, the functional eligibility requirements for the UHC program are half of those imposed under existing LTSS programs and income cannot be a factor of eligibility.

If hourly wages for home care workers under the UHC program exceed the hourly wages for workers within existing LTSS programs, there would be new financial incentive for workers to provide care under the UHC program to a population who is less medically and financially needy than those who are currently eligible for services under existing programs.

# FLAWS WITH THE UNIVERSAL HOME CARE TRUST FUND BOARD

The estimated \$310 million in new annual tax revenues to be dedicated to the Fund would be managed and overseen by the Universal Home Care Trust Fund Board. The Board is to be comprised of nine members representing three distinct constituencies; personal care agencies (acting through their owners, directors and managers as they may choose), direct care workers and individual providers, and recipients of home care services.

Each constituency is represented by three members on the Board, and all nine members would be elected by secret ballot among eligible persons in each respective constituency. According to the language of the initiative, only persons belonging to a constituency established under Question 1 may vote in Board elections; neither those paying the taxes mandated by Question 1 nor the public at large would be allowed to vote in Board elections.

Therefore, unless they belong to one of the three constituencies described above, taxpayers subject to the taxes imposed under Question 1 would not be represented on the Board and would have no authority over the use of their tax dollars collected under the program.

As outlined in the language of Question 1, the Board is given broad authority over the Universal Home Care program. According to the legislation, the Board shall, among other activities:

- Ensure improvements in the wages, benefits, and working conditions of persons providing home care services.
- Create within the program a system by which funds may be used to provide a stipend to family caregivers.
- Set standards qualities that do not adversely affect communities of color and low-wage earners.
- Establish systems for determining eligibility and assessing needs.
- Set reimbursement rates for services eligible for reimbursement.
- Adopt its own governance, and develop and approve its own budget without expending more than five percent of funds on program administration.
- Report annually to the Legislature on the status and use of the Fund.

In defending the extraordinary, undemocratic, and insular design of the Board, the communications director for the Maine People's Alliance, Mike Tipping, suggested that the Board's composition is not unprecedented and, in fact, mirrors the design of the Maine Potato Board. Specifically, Tipping pointed out that members of the Maine Potato Board are not elected or appointed by the State.<sup>[41]</sup> It is true that the Maine Potato Board's members are elected by potato growers and not the general

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<sup>[41]</sup> <https://www.pressherald.com/2018/05/02/business-and-legal-experts-push-back-on-universal-home-care-ballot-initiative/>

electorate, but it is crucial to distinguish between the powers and responsibilities of the Maine Potato Board and the Board proposed under Question 1.

The Maine Potato Board is funded through an excise tax on potato growers. According to its authorizing statute, the Maine Potato Board's responsibility is to provide a unified organizational structure to promote the economic success of Maine's potato industry.<sup>[42]</sup> In other words, the board is funded by potato growers, controlled by potato growers, and uses its revenue to help potato growers. It's also worth noting that the Maine Potato Board's total spending in 2017 was \$893,000, or 0.28 percent the funds over which the Board established by Question 1 would have control.<sup>[43]</sup>

The Maine Potato Board's structure contrasts sharply with the way the UHC program would operate. The crucial difference is that the Board established to administer the UHC program would not be democratically accountable to those who fund it. Thousands of Mainers whose taxes would be used to fund the Board's activities would not have a voice in its decision-making, since they would take no part in the selection of its members.

Attempts to compare the Maine Potato Board with the Universal Home Care Trust Fund Board ignore the fundamental fact that the Maine Potato Board is accountable to those who fund it. In short, the Board established under Question 1 constitutes taxation without meaningful representation.

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<sup>[42]</sup> <http://www.mainelegislature.org/legis/statutes/36/title36sec4601.html>

<sup>[43]</sup> <http://opencheckbook.maine.gov/>

## THE POTENTIAL FOR WASTE, FRAUD, AND ABUSE

Question 1 contains one of the largest tax increases in the history of Maine, but places few statutory restrictions on how the dedicated tax revenues may be spent. Further, given the broad eligibility of the program, specifically the lack of means testing, its enactment by voters would result in wasted taxpayer financial resources for a portion of the eligible population. While the majority of the eligible population lives in households earning below Maine's median household income, there are some Mainers eligible for services who are fully capable of sharing in the cost of services.

For example, approximately 1,365 individuals eligible for services live in households that earn above the state median household income, nearly 80 of whom live in households earning more than \$200,000 per year.<sup>[44]</sup>

Forcing taxpayers to finance in-home care for individuals capable of doing so themselves could result in a waste of approximately \$22.3 million in taxpayer funds annually (or about six percent of estimated total program costs).<sup>[45]</sup> To put that in perspective, \$22.3 million is roughly equivalent to the entire annual budget of the Maine Housing Authority and would be sufficient to provide every Maine household a \$200 tax cut through the first five years of the program's existence.

Fraud within existing Medicaid programs, particularly those involving services for the elderly and disabled, is well-documented. A 2016 investigative advisory memo by the federal Department of Health and Human Service's Office of Inspector General (OIG) noted that, between 2012 and 2016, the OIG opened more than 200 investigations involving fraud and patient neglect within Medicaid programs across the states.

The OIG investigative memo called fraud within personal care services a 'persistent problem' and highlighted numerous examples of fraud and neglect by caregivers throughout the country.<sup>[46]</sup> The OIG's Medicaid Fraud Control Unit report for the 2017 fiscal year found that "significantly more convictions for fraud involved personal care services attendants and agencies than any other provider type."<sup>[47]</sup>

In addition, fraud is prevalent within personal care services programs largely due to the care environment and the vulnerability of those who utilize these services.

Given that many individuals access personal care services within their own homes, there is minimal public or independent oversight of the daily conduct of caregivers or the quality of care they provide. In addition, the elderly and disabled populations that utilize personal care services often

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<sup>[44]</sup> U.S. Census Bureau 2012 ACS 5-year PUMS data

<sup>[45]</sup> Estimate reflects cost of services under the agency-based care model.

<sup>[46]</sup> <https://oig.hhs.gov/reports-and-publications/portfolio/ia-mpcs2016.pdf>

<sup>[47]</sup> <https://oig.hhs.gov/oei/reports/oei-09-18-00180.pdf>

have difficulties communicating or feel dependent upon the care they receive, making it difficult for them to speak up when they experience neglect or abuse.

As previously noted, the language of Question 1 allows the Board to use UHC program funds to provide a stipend to family caregivers. The terms “family caregiver” and “family member” are both defined in the initiative. “Family caregiver” is defined as a person who provides care to a family member who is permanently or temporarily incapable of fully caring for themselves. “Family member” under Question 1, outside of natural family relationships, includes any individual “related to the eligible person by blood or whose close association with the eligible person is the equivalent of an acknowledged family relationship.”

Apart from the problems mentioned in the OIG investigative memo, the broad definition of “family member” under Question 1, coupled with the broad eligibility standards of the UHC program, raises particular concerns about the effective oversight of a system that provides direct stipends to family caregivers.

To properly implement such a program as envisioned in Question 1, minimum training standards must be set for caregivers and administrative oversight functions must be developed to reduce the potential of fraud, waste, and abuse in the program. While necessary, these actions could result in duplicative administrative costs between the UHC program and existing LTSS programs for which the state would not receive federal matching funds.

## UNIONIZING INDIVIDUAL PROVIDERS

Buried within Question 1 is a troubling provision that requires individual providers of home care services (those hired directly by consumers) to become state employees for the purposes of the State Employees Labor Relations Act, the law that governs the ability of state employees to be represented by labor unions.

The inclusion of this provision within Question 1 could significantly bloat the cost of services delivered under the UHC and existing LTSS programs. If individual providers are represented by a labor union, the reimbursement rate for services under this care model would be determined through collective bargaining.

According to the Bureau of Labor Statistics, in 2017, union workers had median weekly earnings equivalent to 125 percent of those in the private sector workforce.<sup>[48]</sup> In other words, care from an individual provider under the UHC program will likely be more expensive than what care costs today for an individual provider under existing programs.

In addition, if funds from the UHC program are used to assist clients in existing programs, it is possible these programs would be subject to rules imposed under the UHC program, including the requirement that provider agencies expend 77 percent of reimbursements on direct service worker costs, as well as recognizing individual providers as state employees for collective bargaining purposes.

The inclusion of this provision—that individual providers must be considered state employees—raises serious questions about the wide-ranging effects of Question 1.

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<sup>[48]</sup> <https://www.bls.gov/news.release/union2.nr0.htm>

# POTENTIAL CONFLICTS WITH FEDERAL LAW, THE U.S. CONSTITUTION, AND MAINE CONSTITUTION

As previously mentioned, all nine members of the Board established under Question 1 are elected by members of their respective constituencies; personal care agencies, employees of care agencies and individual providers, and recipients of home care services. In addition, the language of the initiative allows for constituency associations—which are defined as “a group of persons within a constituency that is recognized for the purpose of allowing consumers and workers to advocate for their interests before the board, elected officials and the general public,”—to access the contact information of members within their constituency. Specifically, the language of the proposal reads:

*“Upon a showing made to the board by a constituency association that at least 250 individuals of a particular constituency wish to have that association advocate for their interests, the board shall provide that association with the names and most recent contact information of the other constituents of the particular constituency eligible to vote in the next board election for the purpose of inviting those individuals to join their constituency association.”*

Both the arrangement of the Board, and the Board’s disseminating of clients’ confidential health information (confirming that a person is receiving services) to constituency associations, have drawn criticism from Maine legal scholars who believe portions of the initiative conflict with the Maine Constitution, U.S. Constitution, and existing statute.

Daniel Wathen, a former Maine Supreme Judicial Court Chief Justice, has called Question 1 “deeply unconstitutional in many respects.”<sup>[49]</sup> The major criticisms of Question 1 from a legal perspective are as follows:

- It delegates to private entities the authority to elect persons to discharge a governmental function, and does so without providing sufficient standards to guide the governing board;
- It authorizes a dues checkoff provision that is preempted by federal law and would subject individual providers to fees for a labor union they did not choose to join;
- It requires the disclosure of protected health information of elderly and disabled Mainers without their express permission.

Opponents of Question 1 reference a 1984 opinion by Maine’s Attorney General to claim that the power to appoint public officers is a sovereign power of the state and cannot be delegated to people who are neither directly or indirectly accountable to Maine voters. Further, even when such power is deemed delegable, the delegating statute must include sufficient standards to guide the exercise of that authority.

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<sup>[49]</sup> <https://www.pressherald.com/2018/05/02/business-and-legal-experts-push-back-on-universal-home-care-ballot-initiative/>

Question 1 may also violate the U.S. Constitution and federal labor law by requiring a mandatory deduction of union fees—or a “dues checkoff” provision—which is expressly regulated at the federal level. The U.S. Supreme Court in 2014 struck down a similar scheme employed in Illinois that declared individual home care providers to be state employees and required them to pay a service fee to a labor union for collective bargaining purposes.<sup>[50]</sup> The court ruled that this arrangement violated the First Amendment because the employees were not full state employees and because the forced fees compelled employees to support union speech with which they may disagree. This process, known as “dues skimming,” continues in 13 states despite the high court’s ruling.<sup>[51]</sup>

In addition, there has been much debate about whether Question 1 violates federal medical privacy laws, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which protects the confidentiality of patients’ “protected health information” (PHI).<sup>[52]</sup> As previously noted, Question 1 allows for the sharing of clients’ contact information to the Board and to constituency associations. However, federal medical privacy laws like HIPAA prohibit the disclosure of PHI without first obtaining permission from the patient. HIPAA does allow for some narrow exceptions, such as disclosures due to judicial order or to report neglect or child abuse, but no such exception exists for the purposes of elections and campaigning.

As outlined in Question 1, the Department of Health and Human Services must give the Board a list of all persons eligible to vote within each constituency, and it is the Board’s responsibility to disseminate these lists among each constituency “for purposes of communicating about the election, candidates and issues relating to the program.” The initiative does require that individuals within each constituency be given the opportunity to opt out of receiving communications related to the UHC program. However, both the initial disclosure to the Board, followed by the Board’s dissemination of constituent lists to each constituency, potentially violate HIPAA for the constituency comprised of individuals receiving home and community support services.

If Question 1 is passed by voters, individuals receiving services under the UHC program should, as provided for in HIPAA, give permission for disclosure at the outset (opt-in permission) rather than opt-out, assuring privacy unless an individual chooses otherwise. The sharing of a UHC client’s contact information is for the purpose of electioneering; opting out of such communications would not affect an individuals’ right to vote to elect UHC Board members, yet their contact information would still be disclosed initially to the Board under Question 1 without an affirmative opt-in.

Much like other recent ballot initiatives, including the expansion of Medicaid in 2017 and the enactment of ranked-choice voting in 2016, the intricacies of this ballot question will likely be settled first in the Maine Legislature and ultimately in state or federal court.

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<sup>[50]</sup> [https://www.supremecourt.gov/opinions/13pdf/11-681\\_j426.pdf](https://www.supremecourt.gov/opinions/13pdf/11-681_j426.pdf)

<sup>[51]</sup> <https://capitalresearch.org/article/dues-skim-part-1/>

<sup>[52]</sup> <https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html?language=es#protected>



## CONCLUSION

The enactment of Question 1 would have a devastating impact on the Maine economy, wreak havoc on existing programs, enrich big government unions, and is destined to fail the elderly and disabled people it intends to help.

The income tax increase contained within Question 1 will likely result in reduced in-migration and increased out-migration, exacerbating Maine's bleak demographic trends by making it more difficult to attract and retain young, talented workers. The wage and payroll taxes contained within Question 1 will raise production costs for businesses and hurt the self-employed and small business owners.

The Board established to administer the UHC program under Question 1 does not replicate any existing board within Maine state government, and its authority to collect and spend the tax revenues of Maine citizens who have no voice in selecting Board members is at odds with our traditions of representative government.

The program itself faces several implementation challenges, particularly as it relates to the setting of reimbursement rates for services eligible for reimbursement, which will prove chaotic if enacted. It is the Board's duty under Question 1 to ensure improvements in the wages of direct care workers, and participating agencies are required to expend 77 percent of the annual funds they receive on "direct service worker costs," a term the initiative leaves undefined. If direct care workers employed by a participating agency receive higher wages while caring for UHC program clients versus those in existing programs, the adoption of Question 1 would create a new financial incentive for workers to serve a less medically- and financially-needy population.

The vagueness of the stipend system for family caregivers under Question 1 also appears ripe for abuse. Extensive rulemaking would be required to implement a stipend system as outlined in the initiative, and the administrative costs to provide adequate training and oversight of the system could be significant. Further, the arrangement of the Board administering the UHC program and the sharing of personal contact information as outlined in the initiative raises concerns about the legality of Question 1 that will likely need to be settled in court. Unfortunately, the lax rules surrounding the ballot initiative process in Maine allow proposals like Question 1—which makes major changes to health care, labor, tax and fiscal policy—to be put forward for statewide vote without being subjected to legislative scrutiny.

The complexities of Question 1 cannot be reduced to or explained in a single-sentence question on a ballot. Circumventing the Maine Legislature to enact major public policy changes, all or most of which have never been considered before, undermines representative democracy and good governance. At the very least, Question 1 should have gone through the legislative hearing and work session process, so that it could be better understood before being sent to Maine voters for their decision.

Ensuring the access and affordability of home care is a laudable goal. However, Question 1—if enacted—would do far more harm than good to Maine's economy and most vulnerable citizens.

*This is a special publication of the The Maine Heritage Policy Center. All information in this report is from sources considered reliable, however may be subject to inaccuracies, omissions, and modifications.*

## **ABOUT THE AUTHORS**



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## **ABOUT THE MAINE HERITAGE POLICY CENTER**

*The Maine Heritage Policy Center (MHPC) is a nonprofit organization dedicated to freeing people from dependency, creating prosperity, and redefining the role of government. Founded in Portland in 2003 by a handful of passionate citizens concerned about the direction the state was headed, MHPC has become the leading conservative public policy voice in Maine.*

*Governed by an independent Board of Directors, The Maine Heritage Policy Center is a nonpartisan, tax-exempt organization. MHPC relies on the generous support from individuals, corporations, and foundations, and does not accept government funds or perform contract work. With six full-time staff members and hundreds of individual supporters, we conduct detailed and timely research and develop public policy solutions that improve the lives of Maine citizens. We educate the public, engage legislators, and employ the media to shift public opinion and establish enduring legislative change in our state.*

*Over the past fifteen years, we have testified hundreds of times before the Maine Legislature. Some of our most notable victories include the largest tax cut in state history, historic welfare reforms that led to higher rates of employment, public-sector pension reform that saved taxpayers more than \$1 billion, financial transparency, including “sunshine” on the pay and perks of government employees, and pro-market insurance reforms that are actively driving down healthcare premiums for many Mainers by more than 50 percent. These positive changes are the direct result of MHPC’s work.*

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