SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

No. KEN-24-132

ANDREW ROBBINS, *et al.*

Plaintiffs-Appellees,

v.

MAINE COMMISSION ON
INDIGENT LEGAL SERVICES, *et al.*

Defendants-Appellants.

On Appeal from an Interlocutory Order of the
Superior Court, Kennebec County
Superior Court No. KENSC-CV-22-54

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS THE APPEAL

Defendants spend much of their opposition attacking the Superior Court's decision on the merits. But they fail to overcome the threshold problem: they are seeking improper interlocutory review. Defendants admit (Opp. 6) that they are asking for an "exception to the final judgment rule." But they have not shown that any exception applies here.

Even if Defendants could overcome that hurdle, another stands in the way: there is no live dispute for this Court to resolve. The proposed settlement agreement has already lapsed by its own terms. And regardless, the agreement will be stale by the time of any remand. Defendants resist those conclusions, but they fail to grapple with the actual text of the proposed agreement or the quickly changing facts on the ground.

For these reasons, the Court should dismiss the appeal. At the very least, the Court should let the Superior Court proceed with "Phase 1" proceedings to address the rapidly unfolding—and rapidly worsening—crisis of non-representation. Defendants present no just reason for delay.

ARGUMENT

I. Defendants seek improper interlocutory review.

"With few exceptions," this Court "decline[s] to hear interlocutory appeals," and Defendants fall well short of showing this is the rare exception. *See Maples v. Compass Harbor Vill. Condo. Ass'n*, 2022 ME 26, ¶ 15. Dismissal of this appeal will directly serve each of the final judgment rule's "compelling rationale[s]": it "prevents piecemeal litigation, and helps curtail interruption, delay, duplication and harassment; it minimizes interference with the trial process; it serves the goal of judicial

economy; and it saves the appellate court from deciding issues which may ultimately be mooted . . . ." *Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶12 (cleaned up).

First, Defendants mistakenly rely on federal decisions permitting interlocutory review of orders that refuse to approve consent decrees providing injunctive relief. But this federal case law is based on the federal statute that *permits* appeals of orders granting or denying preliminary injunctive relief. *See Carson v. American Brands., Inc.*, 450 U.S. 79, 84 (1981) (relying on 28 U.S.C. §1292(a)(1)). That statute has no corollary in Maine law; instead, this Court has held that preliminary injunction orders are *not* appealable judgments, unless a specific exception to the final judgment rule applies. *Sanborn v. Sanborn*, 2005 ME 95, ¶8.

Even if this federal case law were applicable in Maine courts, it would not apply in this case. The parties' most recent proposed settlement did not propose any kind of consent decree and did not provide for injunctive relief. Instead, as noted in the court's February 27 Order ("Combined Order"), the last proposal provided for dismissal upon final settlement approval and contemplated ordinary contract remedies in the event of a breach. Combined Order 3, n.3 ; Pls.' Mot., Ex. B (Proposed

Settlement Agreement), Section II.A, II.F. Moreover, unlike in the federal cases, the Combined Order did not "foreclose" any further settlement negotiations. *See Carson*, 450 U.S. at 87, n.12; Opp. 12 (citing cases). Instead, the Combined Order expressly encourages further settlement negotiations. Combined Order 16 ("The parties are urged to consider settling the Phase 2 issues apart from, and without prejudice to, either side's right to adjudicate claims and defenses in the Phase 1 trial"). Plaintiffs are willing to discuss settlement of Phase 1 and Phase 2 issues in this case at any time, and hope Defendants are as well.

Second, Defendants fall well short of showing this is "the rare case" that warrants interlocutory review under the "judicial economy" exception. *Cutting v. Down E. Orthopedic Associates, P.A.*, 2021 ME 1, ¶19.[1] The judicial economy exception applies only when two distinct requirements have been met: (1) "resolution of the appeal can establish a final, or practically final, disposition of the entire litigation," and (2) "the interests of justice require that an immediate review be undertaken." *Trump*

[1] Defendants also allude to supposed "separation of powers" concerns, but have not demonstrated the kind of "extraordinary circumstances" required to justify interlocutory appeal. *Almy v. U.S. Suzuki Motor Corp.*, 600 A.2d 400, 402 (Me. 1991).

v. Sec'y of State, 2024 ME 5, ¶ 18, 307 A.3d 1089, 1097 (cleaned up). Defendants do not even acknowledge these strict requirements, let alone show that their appeal meets either one.[2] Instead, Defendants immediately dive into the merits of their challenge to the court's denial of preliminary settlement approval, devoting ten pages to claimed legal errors in the court's Combined Order. Opp. 14-24. This lengthy discussion only underscores why this Court should not hear an interlocutory appeal of the court's preliminary order in this complex class-action case. The complexity of the legal challenges asserted by Defendants weigh heavily against the Court addressing the merits of this interlocutory appeal. *Cutting*, 2021 ME 1, ¶ 17, 19.[3]

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[2] This appeal meets neither prong of the judicial economy exception. As to the first requirement, which this Court construes "narrowly," *Forest Ecology*, 2012 ME 36, ¶18, appellate review of the Combined Order cannot possibly establish a final disposition of this case. "Especially when several possible outcomes of the present appeal would not finally resolve the matter, we cannot conclude that our review has the potential to establish a final disposition of the entire litigation." *Trump v. Sec'y of State*, 2024 ME 5, ¶ 19. The Combined Order denied preliminary settlement approval and established a scheduling order. If this Court affirms the Order, then litigation will proceed. Even if this Court reverses the Order, it will not end the case. The parties will need to return to the negotiating table to address portions of the agreement that have become obsolete, and even then any revised agreement will have to proceed to preliminary approval, class notice, a final fairness hearing, and a decision on final settlement approval. *See* M.R. Civ. P. 23(e). To the extent Plaintiffs' claims for non-representation remain unresolved, the parties will likewise need to return to litigation to address those claims.

[3] Plaintiffs-Appellees do not address Defendants' challenges to the Combined Order on the merits, as the sole question before the Court is whether it should hear this interlocutory appeal. It should not.

Third, Defendants urge this Court to review the portion of the Combined Order bifurcating the case into two phases and issuing a scheduling order for Phase 1 discovery and trial this summer. Opp. 19-24. It is hard to imagine an order less suitable for interlocutory review than a scheduling order. At bottom, Defendants argue that the current trial schedule is too fast and adhering to it will be burdensome for the State. Opp. 19-24. But the court scheduling a trial to address the widespread denial of counsel is not a violation of due process: it is the judicial process working as it should. Defendants are free to assert their arguments about the scheduling to the Superior Court; they have not yet done so.

Defendants make repeated references to "irreparable harm," but requiring the State to proceed to trial hardly inflicts the kind of "irreparable harm" that justifies an exception to the final judgment rule. "The only injury that the appellant asserts is that it will have to present its defense at trial, but that sort of injury follows in every denial of a motion to dismiss a complaint and does not justify an exception to the final-judgment rule." *United States of Am., Dept. of Agric., Rural Hous. Serv. v. Carter*, 2002 ME 103, ¶ 10, 799 A.2d 1232, 1235 (cleaned up).

Moreover, Defendants' claims of irreparable harm rest on the incorrect assertion that the Phase 1 trial relates to "previously unasserted" claims of which they had no notice. As the Combined Order explained, "[w]hile there have been new factual developments since the filing of this case, non-representation and actual denial of counsel were theories asserted in the Complaint." Combined Order 13, n.7 (citing Pls' Compl. ¶¶79-80). Moreover, since at least fall 2023 (if not earlier), Defendants have been on notice of the declining numbers of available counsel and the escalating crisis of non-representation.

II. This appeal is already moot.

This Court also lacks jurisdiction over Defendants' appeal because it asks the Court to resolve a purely academic question: whether the Superior Court should have approved a proposed settlement agreement that, by its own terms, is no longer in effect. While Defendants block-quote the relevant portion of the agreement (*see* Opp. 24), they fail to grapple with its text.

Section XIV(C) of the proposed agreement states: "In the event that the Court"—*i.e.*, the Superior Court—"does not approve the Settlement Agreement, then the Parties will meet and confer for a period of 30 days."

Pls.' Mot., Ex. B (Proposed Settlement Agreement) §XIV(C). "If the Parties have not entered into a modified agreement within such 30-day period, then the Parties will seek a Court conference for the purpose of establishing a new Scheduling Order." *Id.* The language is clear: if the parties do not reach a new agreement within 30 days, the litigation resumes.

Defendants cite out-of-state cases for the proposition that parties may not "repudiate" or "disclaim" settlement agreements (Opp. 25-26), but Plaintiffs do not seek to *walk away from* the proposed settlement. Rather, they ask Defendants to *abide by its terms*: more than 30 days have passed since the Superior Court issued its order, and so the litigation must resume under Section XIV(C).

III. This appeal will become moot by the time of any remand.

Even if the appeal is not moot already, it will be by the time this Court issues a decision on the merits. The parties entered the proposed settlement agreement in February based on facts as they existed at the time. *See* Pls.' Mot., Ex. B (Proposed Settlement Agreement), at 19. Portions of the agreement call for Defendants to perform certain actions in the current legislative session—*i.e.*, the session that expires in 16 days. *See id.* §IV.B. Even if the Court reaches a decision with record speed (and

agrees with Defendants that the Superior Court erred), it cannot simply rubber-stamp the existing proposed agreement. The parties will need to return to the negotiating table to address portions of the agreement that have become obsolete with the passage of time.

IV. At the very least, this Court should allow the Superior Court to resolve Phase 1 issues while this appeal is pending.

Defendants provide no just reason to prevent the Superior Court from moving forward with "Phase 1"—*i.e.*, litigation over the growing crisis of indigent criminal defendants languishing without appointed representation. *See* M.R. App. P. 3(d). Defendants argue (Opp. at 28) that allowing trial-court proceedings to continue is improper because this appeal "challeng[es] the Superior Court's *sua sponte* identification of new claims and [the] trial schedule on those claims." But the parties just completed briefing in the Superior Court on Plaintiffs' Motion to Amend or Supplement their Complaint. The Court's ruling on that motion will determine the contours of the claims that will proceed to trial—yet another reason that Defendants' appeal is premature. Defendants further argue (Opp. at 26-27) that they are challenging the Superior Court's scheduling of the Phase 1 trial this summer. But as explained above, the court's

scheduling order is not a proper basis for interlocutory appeal. Defendants are free to assert their arguments about scheduling to the Superior Court. *See supra*, at 6.

Defendants also invoke the general principle that "[w]hen an appeal is taken from a trial court action, the trial court's authority over the matter is suspended.'" Opp. 27 (quoting *Doggett v. Town of Gouldsboro*, 2002 ME 175, ¶ 5, 812 A.2d 256, 258). Of course, Maine Rule of Appellate Procedure 3(d) provides an exception to that general principle. Moreover, *Doggett* underscores the impropriety of Defendants' appeal: there, the Court dismissed the appeal because it sought review of an interlocutory order. *Id.* ¶¶ 7-9, 812 A.2d at 258-259. In other words, *Doggett* stands only for the proposition that, when an appellant properly seeks review of a *final* judgment, the trial court is divested of jurisdiction.

CONCLUSION

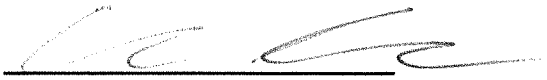
The Court should dismiss Defendants' interlocutory appeal or, in the alternative, permit the trial court to retain jurisdiction over Phase 1 proceedings during the pendency of this appeal.

April 1, 2024

Respectfully submitted.

ANDREW ROBBINS, BRANDY GROVER, RAY MACK, MALCOLM PEIRCE, and LANH DANH HUYNH

By their attorneys:



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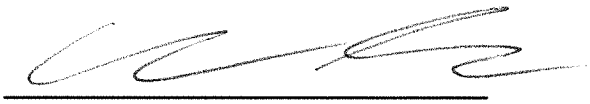
CERTIFICATE OF SERVICE

I certify that on April 1, 2024, I served the foregoing document, Plaintiffs' Reply in Support of Motion to Dismiss Appeal, upon counsel for Defendants by electronically transmitting a copy of the document to Assistant Attorney General Sean D. Magenis at sean.d.magenis@maine.gov.



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