

STATE OF MAINE  
KENNEBEC, SS.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. KENSC-CV-22-54

ANDREW ROBBINS, ET AL.,

*Plaintiffs,*

v.

MAINE COMMISSION ON INDIGENT LEGAL  
SERVICES, ET AL.,

*Defendants.*

**SUPPLEMENTAL JOINT MOTION TO CONDUCT PRELIMINARY REVIEW OF  
AMENDED CLASS ACTION SETTLEMENT, DIRECT NOTICE TO CLASS  
MEMBERS OF AMENDED PROPOSED SETTLEMENT, AND MAKE FURTHER  
ORDERS AS PART OF THE SETTLEMENT APPROVAL PROCESS**

Following this Court’s September 13, 2023 Order denying the Parties’ August 21, 2023 Joint Motion for Preliminary Settlement Review (“September 13 Order”), the Parties returned to settlement negotiations with the assistance of a Judicial Settlement Officer (Billings, J.) and reached agreement on additional commitments in a good-faith effort to address the Court’s concerns. Under M. R. Civ. P. 23(e), the Parties jointly file this supplemental motion requesting this Court to conduct a preliminary review of their amended proposed class settlement (“Amended Proposed Settlement”), direct notice of the Amended Proposed Settlement to Class Members, and set a fairness hearing date for final approval of the Settlement. *See* Amended Proposed Settlement, attached as **Exhibit 1**.<sup>1</sup>

**I. Procedural History.**

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<sup>1</sup> This Motion incorporates by reference the definitions of the capitalized terms in the Amended Settlement Agreement, attached as **Exhibit 1**.

In March 2022, Plaintiffs—five indigent Mainers represented in criminal proceedings by appointed counsel—filed this Action against Defendants Maine Commission on Indigent Legal Services, its Executive Director, and its Commissioners, alleging that Defendants’ failure to appropriately screen, train, evaluate, and support the defense attorneys it is statutorily charged with overseeing resulted in an unconstitutional risk of denial of effective assistance of counsel. The Parties litigated Defendants’ motion to dismiss and Plaintiffs’ motion for class certification and engaged in written and oral discovery, including the depositions of the named Plaintiffs located in Maine and production of tens of thousands of pages of documents. On August 21, 2023, the Parties filed a joint motion seeking the Court’s preliminary approval of the original proposed settlement agreement (“August 21 Joint Motion”), following active settlement negotiations over nine months including four in-person Judicial Settlement Conference sessions. As detailed in the August 21 Joint Motion, the original settlement proposed a series of systemic reforms addressing Plaintiffs’ allegations regarding Defendants’ oversight of indigent defense services in Maine, including: (1) the Defendants’ commitment to promulgate rules governing key aspects of the delivery of indigent legal services, including training, supervision, and performance standards; (2) imposition of measurable, increasingly rigorous enforcement metrics; and (3) joint advocacy for specific current and future legislative action to facilitate additional fully staffed public defender offices across the state.

The Court’s September 13 Order denied the Parties’ Joint Motion and outlined the Court’s areas of concern. On September 29, the Parties jointly requested additional time to negotiate to address the Court’s concerns, with the assistance of a Judicial Settlement Officer. The Court agreed to permit the Parties an additional month to negotiate before the stay of litigation would be lifted. The Parties participated in two in-person settlement conferences under

the supervision of Justice Billings, in addition to direct negotiations. The Parties reached agreement on revised and additional settlement provisions: provisions addressing the concerns raised in the Court’s September 13 Order. On November 27, 2023, the Commission voted to approve the Amended Proposed Settlement, attached hereto as **Exhibit A**.

**II. Amendments to the Proposed Settlement to Address the Court’s Four Key Areas of Concern.**

The Court’s September 13 Order identified four key issues to be addressed before the Court could preliminarily approve the proposed settlement agreement under M. R. Civ. P. 23: (1) clarification of the limitation on future claims during the stay of this Action; (2) creation of a path for unrepresented indigent defendants to seek emergency relief; (3) collection and monitoring of information identifying unrepresented indigent criminal defendants; and (4) detailed timelines and specifics concerning Defendants’ existing and future efforts to open “brick and mortar” public defender offices across the State. The Parties have engaged in extensive negotiations to address each of these four issues,<sup>2</sup> and have reached agreement on the following amended settlement provisions in an effort to address the Court’s concerns.

**1. Clarification of the limitation on future claims during the stay of this Action.**

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<sup>2</sup> The September 13 Order also expressed concerns about the Commission’s new enforceable caseload standards going into effect in January 2023. The Parties did not amend the settlement provisions regarding caseload standards, for two primary reasons. First, Plaintiffs do not believe that further delaying implementation of already long-delayed caseload standards is in the best interests of the Class. Enforceable caseload standards are critical to addressing one of Plaintiffs’ primary concerns that prompted them to bring this Action: many rostered attorneys are so overburdened and under-supported that it creates an unconstitutional risk of ineffective assistance of counsel. Second, MCILS has enacted caseload standards via rulemaking, pursuant to its undisputed statutory authority and independent of the settlement process. 4 M.R.S.A. § 1804(3)(G) (“The Commission shall . . . [e]stablish a method for accurately tracking, monitoring and enforcing case load standards for assigned counsel, contract counsel and public defenders.”).

The September 13 Order expressed concern about the breadth and lack of clarity of the limitations on future claims during the stay of this Action, as set forth in Section II of the original proposed settlement. *See* Order, 17-20.

The Parties intended the limitations on future claims to apply only to claims asserted against the Defendants expressly named in this case—MCILS, its Executive Director, and its Commissioners.<sup>3</sup> However, the September 13 Order expressed concerns that the language in Section II.D and II.F could bar Class Members from asserting future claims not only against MCILS, but against any subdivision of the State of Maine. *Id.* at 18. The Court referenced statements made in the context of discussions regarding 5 M.R.S.A. §191(3)<sup>4</sup> that the “party in interest” in this litigation is the State of Maine. In addition, the September 13 Order expressed concerns that the language limiting future claims alleging “systemic failures” was so broad as to touch upon virtually any claim for Sixth Amendment violations. *Id.* at 19. The Order required that the language in II.F “at a minimum, needs to be clarified so that a Class Member could understand what they would be up against if they brought a separate claim in a different Court alleging non-representation or any other grounds for emergency relief.” *Id.*

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<sup>3</sup> The original proposed settlement agreement provided, “Plaintiffs . . . will not reassert or revive the Remaining Claims or substantially similar claims for systemic relief against Defendants,” Original Settlement Agreement, §II.D., defining “Defendants” as “the named Defendants in . . . *Robbins, et al. v. Maine Commission on Indigent Legal Services, et al.* (‘MCILS’), originally filed in March 2022 in Kennebec County Superior Court, Dkt. No. KENSC-CV-22-54.” *Id.* at §§ I.A. and I.D.

<sup>4</sup> “The Attorney General or a deputy, assistant or staff attorney shall appear for the State, the head of any state department, the head of any state institution and agencies of the State *in all civil actions and proceedings in which the State is a party or interested, or in which the official acts and doings of the officers are called into question*, in all the courts of the State and in those actions and proceedings before any other tribunal when requested by the Governor or by the Legislature or either House of the Legislature. All such actions and proceedings must be prosecuted or defended by the Attorney General or under the Attorney General's direction.” 5 M.R.S.A. §191(3) (emphasis added).

To address the Court’s concerns, the Parties substantially revised Section I.D. (defining “Defendants”) and Sections II.D and II.F (describing the scope of limitation on future claims), to clarify and narrow the limitation on future claims during the stay of this Action. **First**, the definition in Section I.D clarifies that the term “Defendants” as used in the Agreement means *only* the MCILS defendants expressly named in this Action, and does not include “the State of Maine” or any other government actors or entities:

Defendants are the expressly named Defendants in this Action: the Maine Commission on Indigent Legal Services, the Commissioners of the Maine Commission on Indigent Legal Services, in their official capacities, and the Executive Director of the Maine Commission on Indigent Legal Services, in his/her official capacity. “Defendants” includes the successors in office of the commissioners and Executive Director. “Defendants” as used in this Agreement does not include the State of Maine or any governmental entity or officeholder other than those expressly named as Defendants in this Action.

**Second**, Section II.D eliminates the broad language limiting future claims related to “systemic” deficiencies and instead defines the scope of any limitation on future claims specifically and narrowly:

Except as provided in Section II.E and II.F below, Plaintiffs will not reassert or revive the Remaining Claims (i.e., Plaintiffs’ claims of constructive denial of counsel against State officials tasked with identifying, training, supervising, and evaluating counsel available for appointment by the District or Superior Court pursuant to 15 M.R.S.A. §810 and M. R. U. Crim. P. 44) against Defendants for four (4) years after the Effective Date.

**Third**, the original language in Section II.F, including the reference to “systemic failures,” has been deleted entirely. Instead, to provide clarity for Class Members, Section II.F now provides examples of claims Class Members retain the right to assert, including claims based on non-representation:

Nothing in this Agreement prevents Settlement Class Members from asserting claims other than those expressly included within the limitations of Section II.D above. By way of example, as long as the claims are supported by the law and the facts, Settlement Class Members retain the right to assert claims including but not limited to the following:

1. Claims against any entities or individuals other than the Defendants expressly named in this Action, including claims against the State of Maine or against any government agencies or officeholders other than the Defendants expressly named as Defendants in this Action (see “Definitions” above);
2. Claims regarding ineffective assistance of counsel in connection with Settlement Class Members’ individual cases, including claims for habeas relief;
3. Claims regarding actual denial of counsel or non-representation (*e.g.*, failure to appoint counsel for an indigent criminal defendant), whether those claims seek individual or class-based relief.

The Amended Proposed Settlement makes clear that it does nothing to close the courthouse doors to Class Members seeking to pursue claims other than the specific claims Plaintiffs asserted in this lawsuit against the Defendants expressly named in this lawsuit. The unaffected claims include claims for emergency relief based on actual denial of counsel. Indeed, a habeas petition for emergency relief on behalf of several Class Members not appointed counsel is currently pending before a single Justice of the Law Court. An evidentiary hearing was held on November 14, 2023 and a decision is forthcoming. *Peterson v. Johnson et al.*, SJC-23-2.

**2. Creation of a path for unrepresented indigent defendants to seek emergency relief.**

The September 13 Order expressed concerns about the absence of “any path within [the Proposed Settlement Agreement’s] terms” for unrepresented indigent defendants to seek emergency relief. *See* Order, 14. The September 13 Order asserted that Maine’s indigent defense system has deteriorated since commencement of this suit, and that delays in appointment of counsel “significantly disadvantage indigent defendants.” *Id.* at 16. The September 13 Order further stated that the Court would not approve the settlement unless it provided “a clear path permitting individual Class Members during a stay—of any length—to seek emergency relief if evidence supports the claim.” *Id.* at 20.

In an effort to address this concern, the Parties agreed to a new Section III of the Amended Proposed Settlement Agreement outlining four provisions to facilitate a clear path for Class Members to seek meaningful emergency relief in the courts. First, consistent with advocacy by MCILS Executive Director Billings, the Unified Criminal Docket issued a Standing Order, effective November 3, on Initial Assignment of Counsel to the Unified Criminal Docket (“Standing Order”), establishing the procedure to bring all unrepresented indigent criminal defendants before the Court presiding over their criminal matters. Amended Proposed Settlement Agreement, § III.A & Exhibit A. Second, under the Amended Proposed Settlement Agreement, Defendants will authorize compensation for Counsel to attend the court appearances established by the Standing Order on behalf of the unrepresented indigent defendants. Amended Proposed Settlement Agreement, § III.B. Third, Defendants will issue substantive guidance “addressing expectations that Counsel representing Settlement Class Members at the court appearances identified in the Standing Order assert all reasonable claims for emergency relief for denial of counsel on behalf of Class Members, including but not limited to: motions for bail review; habeas corpus relief; 4 M.R.S.A. §7; and/or dismissal of charges.” *Id.* at § III.C. Defendants will “support and monitor Counsel to facilitate their compliance with the Guidance.” *Id.* at § III.C. And fourth, Defendants will initiate rulemaking to guide the performance of Counsel appearing on behalf of unrepresented defendants at the court appearances established by the Standing Order. *Id.* at § III.D.

To enable the Parties to monitor the newly created procedure for unrepresented defendants and gauge whether it is serving as a meaningful path for relief, the Amended Proposed Settlement requires Defendants to collect, review, and share data on the outcomes of these appearances (as made available by the Judicial Branch), including the outcomes of those

appearances (*i.e.* bail modifications, release, dismissal of charges, etc.). *Id.* at §§ X.A.2 and XIII.B.3.b.

Key features of Maine’s indigent defense system are within the control of actors who are not party to this suit. The Parties in this case do not have the authority to create new public defender offices and hire additional public defenders: that authority is constitutionally vested in the legislature. The Parties do not have authority over the initiation of criminal prosecutions against indigent defendants: that authority is constitutionally vested in prosecutors. The Parties do not have the authority, in settlement or otherwise, to mandate judicial action in criminal prosecutions: that authority is constitutionally vested in individual judges. The Defendants in this case are responsible for screening, evaluating, training, supervising, and supporting rostered and employed defense attorneys. This Amended Proposed Settlement represents commitments within the Parties’ authority and responsibility: as civil plaintiffs pursuing claims asserted in their Complaint and as a statutorily created body with oversight of rostered and employed defense attorneys. The Amended Proposed Settlement facilitates the judicially created process for unrepresented criminal defendants to appear before the court—assisted by Counsel overseen, supported, and paid by the Commission—and assert claims for emergency relief, including but not limited to motions for bail review, habeas corpus relief, or dismissal of charges. And the Amended Proposed Settlement does not close the courthouse doors to indigent criminal defendants seeking emergency relief for actual denial of counsel.

**3. Improved collection and monitoring of information identifying unrepresented indigent criminal defendants.**

The September 13 Order expressed concern that neither Class Counsel nor the Court “know with any certainty how many Class Members are currently without counsel, and for how long.” *See* September 13 Order, 20. This lack of “monitoring” concerning “ongoing instability”



left both counsel and the Court unable to respond in changes in the status of Maine’s indigent defense system *See Id.* at 15-16 (“[N]o one in this case really knows how bad the problem is.”).

Over the past two months, the collection and sharing of information about unrepresented indigent defendants has improved substantially. On or about October 13, 2023, the Judicial Branch began publishing data from courts across the State identifying indigent criminal defendants awaiting appointment of counsel and sharing those reports with MCILS three times per week. The Parties have added provisions to the Amended Proposed Settlement’s Data Collection and Reporting obligations to ensure that MCILS will provide these reports from the Judicial Branch to Plaintiffs:

B. In order to permit Plaintiffs to assess compliance with the provisions of this Agreement, Defendants will:

1. To the extent available from the Judicial Branch, Defendants will provide reports to Plaintiffs regarding Settlement Class Members awaiting appointment of counsel, including: the name of each affected Class Member, the docket number, the charges pending, the court in which charges are pending, whether the Class Member is in custody, where they are in custody, their last court date, and their next court date.

Amended Proposed Settlement Agreement, § XIII.B.1.

This newly available information, along with the additional data Defendants will compile and share under the Amended Proposed Settlement (*id.* at § XIII.B), will be subject to ongoing analysis by a data consultant to facilitate identifying and addressing systemic issues system-wide on a sound evidentiary basis (*id.* at § XIII.A). Thorough, accurate data collection and analysis regarding Maine’s indigent defense system will be a novel and continuing benefit of the Amended Proposed Settlement.

**4. Detailed timelines and specifics concerning Defendants’ existing and future efforts to open “brick and mortar” public defender offices across the State.**

Finally, the September 13 Order expressed concerns that the original proposed settlement lacked specific recitations of Defendants’ current and future efforts to open regional public

defenders' offices across the State. The September 13 Order expressed concern that, while "the Agreement talks about one 'brick and mortar' public defender office opening somewhere sometime in the next four years," it did not set out a timeline for the opening of that office. *See* September 13 Order, 16. The September 13 Order further expressed concern that although the agreement "refers to the goal of obtaining approval and financing to open other [public defender offices]" in future legislative sessions, it lacked specifics. *Id.*

The Amended Proposed Settlement Agreement supplies updated information about Defendants' progress and its future efforts to open regional brick-and-mortar public defenders' offices across the State. The Capital Region Public Defenders' Office, primarily serving Kennebec County, is open: office space in Augusta has been secured; the District Defender and two line-defenders have been hired; and hiring is underway for the three additional line-defender positions. Amended Proposed Settlement Agreement § V.A.

Defendants' efforts to open regional public defenders' offices across the State have also progressed significantly. As detailed in the Amended Proposed Settlement Agreement, Defendants voted on October 11, 2023 to submit a Supplemental Budget Request in fall 2023 seeking \$3.2 million in supplemental funding in FY '24 to create two (2) new public defender offices (Aroostook and Penobscot/Piscataquis Counties); hire a paralegal and an investigator for the Rural Defender Unit; hire an investigator for the Kennebec Public Defender Office; and create positions for 4 new public defender offices (Washington/Hancock, Androscoggin/Franklin/Oxford, Midcoast, and Cumberland/York) to be staffed in FY' 25. *Id.* at

§ V.B.<sup>5</sup> The Parties have agreed to jointly use their best efforts to advocate for these appropriations. *Id.* at §§ IV.C and VI.A.

**III. The Court should direct notice to the Class because the Court will likely be able to approve the Settlement as fair, reasonable, and adequate.**

The changes outlined above to the Amended Proposed Settlement Agreement are each in direct response to the concerns the Court identified as preventing preliminary approval in the October 13 Order. The Court should direct notice to the Class based on a finding that it will likely be able to approve the settlement as fair, reasonable, and adequate. *Pike Indus., Inc. v. City of Westbrook*, 2012 ME 78, ¶ 25; *see also* Fed. R. Civ. P. 23(e)(2); *Miller v. Carrington Mortg. Servs., LLC*, 2020 WL 2898837 (D. Me. Jun. 3, 2020).

The Amended Proposed Settlement is not a panacea. Important aspects of Maine’s indigent defense system are within the control of actors who are not party to this suit, as detailed above. Because the Defendants in this Action are MCILS and its Director and Commissioners, the Amended Proposed Settlement Agreement continues to focus on meaningful reforms to aspects of Maine’s indigent defense system that Defendants have the authority and responsibility to address: (1) promulgating and enforcing rules governing the caseloads, qualifications, training, and evaluation of Counsel; (2) facilitating a meaningful path by which unrepresented indigent defendants—assisted by Counsel overseen, supported, and paid by the Commission—can appear before the court and assert all reasonable claims for emergency relief (including motions for bail review, habeas corpus relief, and dismissal of charges); (3) advocating for legislative reform and budget appropriations; and (4) engaging in comprehensive data collection and monitoring of the

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<sup>5</sup> For additional details on the staff-recommended Supplemental Budget request, which was approved by the Commission on October 11, see Executive Director Billings’ Memorandum to the Commission, at pp. 88-91, [https://www.maine.gov/mcils/sites/maine.gov/mcils/files/inline-files/commission\\_packet.20231011.pdf](https://www.maine.gov/mcils/sites/maine.gov/mcils/files/inline-files/commission_packet.20231011.pdf).

system as a whole. In addition, the Amended Proposed Settlement Agreement expressly leaves the door open to Class Members to assert a range of potential Sixth Amendment claims, represented by Class Counsel or by other counsel.

If this case is not resolved now, the Parties continue to believe that the costs, risks, and delays of proceeding with litigation are considerable. The Parties share the Court's desire to litigate this case as efficiently as possible, but bringing this state-wide class action through discovery, motion-practice, and trial cannot happen in two months. Moreover, the high likelihood of an appeal will mean additional delays before any final outcome. Plaintiffs have prevailed on the motion to dismiss their constructive denial of counsel claim and obtained class certification. But there is significant litigation ahead if the case cannot be resolved. Absent settlement, the Parties will resume time-intensive discovery, including a possible amended complaint, additional written discovery and likely motions to compel concerning document production and assertions of privilege; over a dozen depositions; and the designation and depositions of experts. At the close of discovery, recognizing the absence of Maine precedent on the availability and evidentiary burden applicable to a constructive denial of counsel claim, one or both Parties may seek summary judgment, requiring substantial time from the Parties and the Court. Given the complexity of issues and the number of potential witnesses, trial of this matter would likely take at least three weeks. There will almost certainly be an appeal of any final decision—raising the likelihood of additional delay. Continued litigation will impose significant burdens on MCILS, a small office with limited staff, and those burdens will consume time and resources that could otherwise be devoted to fulfilling MCILS's core roles of overseeing and supporting defense counsel and setting up new public defender offices across the state.

Moreover, both Parties recognize risks and uncertainty on their legal claims and defenses going forward, particularly given the lack of clarity surrounding the applicable legal standards. Almost all systemic legal challenges to indigent defense systems across the country have been resolved by settlement. There is no clear body of law on the standard for civil enforcement of the Sixth Amendment for prospective injunctive relief. Each Party believes they could prevail under either standard, but the lack of direction from the Law Court imposes substantial risks and uncertainty. Even if Plaintiffs prevail at trial, Maine’s “much more rigorous” separation of powers jurisprudence renders the scope of attainable relief highly uncertain. *See Bates v. Dep’t of Behavioral & Developmental Servs.*, 2004 ME 154, ¶ 84. Moreover, even if Plaintiffs ultimately prevail, the Court will be limited in imposing remedies against the Defendants before it.

Based on its terms and with the benefit of this context, the Court should conclude under Rule 23 that it will likely be able to approve the Amended Proposed Settlement as fair, reasonable, and adequate.

With respect to Class Notice, for the reasons detailed in the August 21 Joint Motion, the Court should approve the proposed Notice to the Class because it is reasonably calculated to inform Class Members of the Amended Proposed Settlement Agreement and their opportunity to object. The Parties have prepared an amended Notice, which is in plain language understandable to the Class and provides: (i) the case name and case number; (ii) a description of the case and the legal claims; (iii) the class definition approved by the Court; (iv) a summary of the terms of Settlement; (v) a clear description of the options available to Class Members such as the manner of filing objections and the 60-day deadline applicable to objections; (vi) information about Plaintiffs’ counsel; (viii) the time and location of the Fairness Hearing to consider final approval of the Settlement, and; (ix) an explanation of how to make inquiries and obtain further

information about the Settlement, including a website providing a copy of the complete Amended Proposed Settlement Agreement. *See* Amended Proposed Notice, attached as **Exhibit**

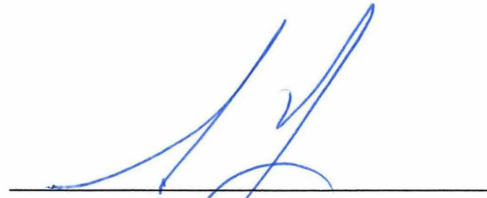
**2.**

**IV. Conclusion.**

For all these reasons, the Parties respectfully ask the Court to grant their Supplemental Joint Motion, direct Notice of the Amended Proposed Settlement to the Class, schedule a Final Fairness Hearing for 90 days from the date of the order directing notice to the Class Members or as soon as practicable after that date, and grant all such other and further relief as this Court deems just.

November 28, 2023

MAINE COMMISSION ON INDIGENT  
LEGAL SERVICES, et. al.



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November 28, 2023

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# EXHIBIT 1

## SETTLEMENT AGREEMENT

### I. Definitions

- A. “The Action” is *Robbins, et al. v. Maine Commission on Indigent Legal Services, et al.* (“MCILS”), originally filed in March 2022 in Kennebec County Superior Court, Dkt. No. KENSC-CV-22-54.
- B. “Effective Date” is the date upon which the Court issues final approval of this Settlement Agreement.
- C. “Plaintiffs,” “Settlement Class,” “Class,” or “Class members” means the Named Plaintiffs and all members of certified class as defined in the Court’s July 15, 2022 Order granting certification.
- D. “Defendants” are the expressly named Defendants in this Action: the Maine Commission on Indigent Legal Services, the Commissioners of the Maine Commission on Indigent Legal Services, in their official capacities, and the Executive Director of the Maine Commission on Indigent Legal Services, in his/her official capacity. “Defendants” includes the successors in office of the commissioners and Executive Director. “Defendants” as used in this Agreement does not include the State of Maine or any governmental entity or officeholder other than those expressly named as Defendants in this Action.
- E. “Parties” are all Plaintiffs and Defendants in the Action.
- F. “Class Counsel” are the attorneys representing the Plaintiffs and the Settlement Class in this Action.
- G. “Defendants’ Counsel” are the attorneys representing the Defendants in this Action.
- H. “Remaining Claims” are the Plaintiffs’ claims in Count I of the Complaint in this Action, which remain pending following the Court’s June 2, 2022 Order on Defendants’ Motion to Dismiss.
- I. “Counsel” refers to all rostered private counsel handling MCILS cases and all employed public defenders handling MCILS cases.
- J. “Execution Date” is the date on which this Agreement is signed by the Parties or their designated representatives.

### II. Term, Effect, and Dispute Resolution

- A. The Parties stipulate to the dismissal of the Remaining Claims without prejudice four (4) years from the Effective Date.
- B. This settlement will be binding upon the Settlement Class.
- C. In consideration of the reforms implemented by Defendants and in order to allow the continued progress of reforms to the operations of MCILS, the Parties consent to a stay in this litigation for a period of four (4) years from the Effective Date.

- D.** Except as provided in Section II.E and II.F below, Plaintiffs will not reassert or revive the Remaining Claims (*i.e.*, Plaintiffs' claims of constructive denial of counsel against State officials tasked with identifying, training, supervising, and evaluating counsel available for appointment by the District or Superior Court pursuant to 15 M.R.S.A. §810 and M. R. U. Crim. P. 44) against Defendants for four (4) years after the Effective Date.
- E.** If the Court determines that there has been a material and unremedied breach of this Agreement as set forth in Section II.I below, Plaintiffs may resume litigation of the Remaining Claims against only the breaching Defendants.
- F.** Nothing in this Agreement prevents Settlement Class Members from asserting claims other than those expressly included within the limitations of Section II.D above. By way of example, as long as the claims are supported by the law and the facts, Settlement Class Members retain the right to assert claims including but not limited to the following:
1. Claims against any entities or individuals other than the Defendants expressly named in this Action, including claims against the State of Maine or against any government agencies or officeholders other than the Defendants expressly named as Defendants in this Action (see "Definitions" above);
  2. Claims regarding ineffective assistance of counsel in connection with Settlement Class Members' individual cases, including claims for habeas relief;
  3. Claims regarding actual denial of counsel or non-representation (*e.g.*, failure to appoint counsel for an indigent criminal defendant), whether those claims seek individual or class-based relief.
- G.** Plaintiffs will not appeal the Court's June 2, 2022 Order dismissing Count II of their Complaint, except that Plaintiffs retain their appeal rights in the event the stay of this litigation is lifted due to a material and unremedied breach of the Agreement and the Parties resume litigation to a final judgment in the Superior Court, as set forth in Section II.I below.
- H.** Dispute Resolution. If a dispute arises regarding either Party's compliance with any provision of the Agreement, then the Party asserting noncompliance shall first send written notice to the other Party specifying the concern and requesting an opportunity to meet and confer. The Parties shall schedule a mutually convenient time, place, and manner to confer, within 14 business days, to seek resolution of the dispute. This informal dispute resolution procedure is a condition precedent to seeking judicial intervention with respect to a dispute regarding compliance with this Agreement. To facilitate open discussion, the Parties' communications and all

information exchanged during this informal dispute resolution process shall be deemed to be part of confidential settlement negotiations pursuant to M. R. Evid. 408 and shall not be disclosed or used by one Party against the other unless mutually agreed, in writing, between the Parties. Any agreement generated by this informal dispute resolution process to resolve a dispute shall be reduced to writing.

- I. Lifting of Stay. If the Parties have not resolved an allegation of non-compliance raised as provided in Section II.H within thirty (30) days after Defendants' receipt of the notice of alleged non-compliance, Plaintiffs may seek leave from the Court to resume litigation in the Action based on a material and unremediated breach of §§VI – XII of this Agreement ("Performance Metrics"). Within twenty-one (21) days of Plaintiffs' request to the Court for leave, Defendants may file an objection to Plaintiffs' request. The Parties will seek and/or consent to the Court's prompt consideration of the request. The Parties agree that, absent consent from Defendants to Plaintiffs' request for leave to lift the stay, the standard determining whether the stay approved by the Court should be lifted, in consideration of the breach, is whether the Court, upon consideration of the Parties' written submissions and with the taking of testimony and other evidence as determined necessary by the Court, the Court finds, by a preponderance of the evidence, that Defendants have materially breached the Performance Metrics and failed to remediate that breach.

**III. Path for Class Members to Seek Emergency Relief.** The Parties agree to the following:

- A. Effective November 3, 2023, the Court issued a Standing Order on Initial Assignment of Counsel to the Unified Criminal Docket ("Standing Order"). *See Attachment A*. Under the Standing Order, "the court shall determine the status of a criminal defendant's constitutionally protected right to counsel by bringing before the court (A) any defendant who is entitled to an assigned attorney and remains in custody awaiting assignment, or (B) any defendant who expressed an intent to retain counsel or seek an indigency determination," on the following schedule:
  1. In-custody defendants shall be brought before the court no later than 7 days after the initial appearance.
  2. Out of custody defendants shall be brought before the court no later than 30 days before the dispositional conference, if the defendant has neither (a) filed a financial affidavit for indigency determination nor (b) retained counsel and filed counsel's entry of appearance.
- B. Defendants will authorize compensation for Counsel serving as Lawyer of the Day to attend the court appearances identified in the Standing Order.
- C. Defendants will issue non-rulemaking guidance applicable to all Counsel serving as Lawyer-of-the-Day addressing expectations that Counsel representing Settlement Class Members at the court appearances identified in the Standing Order assert all reasonable claims for emergency relief for denial of counsel on

behalf of Class Members, including but not limited to: motions for bail review; habeas corpus relief; 4 M.R.S.A. §7; and/or dismissal of charges. Defendants will support and monitor Counsel to facilitate their compliance with the Guidance.

- D. Through the regulatory rulemaking process, Defendants will issue Practice Standards to guide the performance of all Counsel serving as Lawyer-of-the-Day at the court appearances required by the Standing Order.

**IV. Advocacy Regarding Funding.** Defendants have undertaken a good-faith effort to advocate for the advancement of appropriate legislation, including the legislative approval of funding for, the commitments as described in Section IV.A. Defendants will undertake a good-faith effort to advocate for the advancement of appropriate legislation, including the legislative approval of funding for, the commitments described in IV.B and IV.C below:

A. Upcoming Legislative Sessions (Summary).

MCILS will be asking for headcount for an Aroostook office and use existing funding to pay for it, beginning as soon as the budget is approved. For fiscal year 2025, MCILS will seek funding to create one office covering Penobscot and Piscataquis counties to begin July 1, 2024; create one office covering Androscoggin, Franklin and Oxford counties to begin September 1, 2024; create one office covering Hancock and Washington counties to begin January 1, 2025; and create one office covering Sagadahoc, Lincoln, Knox, and Waldo counties to begin April 1, 2025. The Executive Director will prepare the biennial budget request for funding in fiscal year 2026 to include a final office covering York and Cumberland counties.

B. Upcoming Legislative Sessions (FY '24 Supplemental Budget Request).

To maintain and improve access to indigent defense services, the Commission voted on October 11, 2023 to submit a Supplemental Budget Request in fall 2023 seeking \$3.2 million in supplemental funding in FY '24 for:

1. The creation of 2 new public defender offices (Aroostook and Penobscot/Piscataquis Counties).
2. The hiring of 1 paralegal and 1 investigator for the Rural Defender Unit and 1 investigator for the Kennebec Public Defender Office.
3. The creation of positions for 4 new public defender offices (Washington/Hancock, Androscoggin/Franklin/Oxford, Midcoast, and Cumberland/York), who will be hired in FY25.
4. Additional central office staff for administrative support for the Audit and Training & Supervision Divisions, and the creation of a Director of Systems/Data Infrastructure position.
5. The increased personal services costs to fund a salary reclassification for RDU attorney to be in line with their state counterparts (has been authorized by BHR).

- C. Future Legislative Sessions (FY '25 onward). To continue to improve access to indigent defense services, Defendants intend to advocate for the following:
1. In FY '25, \$5.7 million in additional funding to fund positions in four additional new public defender offices (in Washington/Hancock, Androscoggin/Franklin/Oxford, Midcoast, and Cumberland/York).
  2. In FY '25 and future sessions, creation of additional fully staffed trial-level public defenders' offices as appropriate; and
  3. In FY '25 and future sessions, creation of new Post-Conviction Review and Appellate public defender units as appropriate.
- D. Prior Legislative Session (FY '24). In spring 2023, Defendants successfully advocated for the following legislative reforms to improve the structure and funding of Maine's indigent defense system, located in Comm. Amend. A to LD 258, "An Act Making Unified Appropriations and Allocations from the General Fund and Other Funds," at p. 188 – 189.<sup>1</sup> MCILS has hired a District Defender to oversee the Capital Region Public Defender's Office, former deputy district attorney Frayla Tarpinian. Attorney Tarpinian started in the position on November 6, 2023. The two Assistant Defender I positions have been filled by Andrew Dawson and Hillary Knight. Hiring is underway for the additional three (3) Assistant Defender II positions. The Bureau of Human Resources has not yet approved the FJAs submitted in late August for the two paralegals and office manager: those positions cannot be posted yet. The Public Defender Office will temporarily be housed in MCILS office space on State Street until it can move into permanent space in early February on Sewall Street in Augusta. Legislative funding and authorization for that office, staff, and associated costs are in addition to:
1. Continued funding of the Rural Defender Unit, established in 2022, consisting of a District Defender, 5 trial-level public defenders and funding for associated costs;
  2. Creation of a new Deputy Executive Director position at MCILS, focused on training and supervision of Counsel; and
  3. \$150/hour for all appointed counsel.

- V. Advocacy Regarding Statutory Initiatives.** The Parties have successfully undertaken good-faith efforts to advocate for the enactment of additional statutory initiatives to facilitate the effective provision of indigent legal services, as reflected in LD 565, "An Act to Improve Maine's System for Protecting Sixth Amendment Rights," signed into law by Governor Janet Mills on June 28, 2023. In sum, LD 565:
- A. Requires all jails to provide bi-weekly reports to the Commission regarding their pretrial detention populations to assist the Commission in facilitating prompt assignment of counsel in all pending cases;
  - B. Requires Defendants to enact rules on topics including caseloads, eligibility standards, and attorney evaluation: a judicially enforceable requirement; and

- C. Confirms that MCILS rules apply to public defenders as well as contract and assigned counsel.

## **VI. Best Efforts on Legislative Measures and Appropriations**

- A. Throughout the period of this Agreement, the Parties will continue to use their best efforts to identify and advocate for the enactment of any additional legislative measures necessary and appropriate to implement the terms of the Settlement, including
  1. Any additional statutory reforms necessary for Defendants to fulfill their obligations or meet any of the metrics under this agreement; and
  2. Any additional budgetary appropriations necessary for Defendants to fulfill their obligations or meet any of the metrics under this agreement, including, but not limited to, funding for employed or contractual positions to implement standards for supervision and regular evaluation of counsel against those performance standards (§X) and training (§XI).

## **VII. Rulemaking Procedure**

- A. Within ten (10) months from the Effective Date, Plaintiffs will provide Defendants with draft rules:
  1. Providing revised minimum qualifications to serve as Counsel; and revised eligibility standards to serve as Counsel for specialized case types. 4 M.R.S. § 1804(2)(B); 1804(3)(E).
  2. Requiring all Counsel to perform conflict checks before representation and standards for adequate representation of clients whose cases present conflicts of interest. See 4 M.R.S. §1804(2)(E).
  3. Regarding handling complaints regarding performance of Counsel.
  4. Regarding initial and regular ongoing training. See 4 M.R.S. §1804(3)(D).
- B. Within eighteen (18) months of the Effective Date, Plaintiffs will provide Defendants with draft rules:
  1. Providing performance standards for all Counsel for each of the following practice areas: juvenile practice; adult criminal practice; child protective practice; involuntary commitment practice; appellate practice; post-conviction practice; Lawyer of the Day practice. See 4 M.R.S. §1804(2)(D), 3(D).
  2. Providing standards for supervision and regular evaluation of Counsel against those performance standards. See 4 M.R.S. §1804(2)(D), 3(D).
  3. Providing caseload standards specific to the Lawyer of the Day (LOD) program.
- C. In order for Plaintiffs to prepare draft rules on the topics identified above, a material component of this Agreement necessary to effectuate a fair, reasonable, and adequate settlement, Plaintiffs require data and information in Defendants' possession, within six (6) months from the Effective Date, Defendants will provide the following data and information to Plaintiffs:

1. The number of rostered attorneys currently accepting new MCILS cases, for each case-type currently delineated by MCILS;
2. The number of attorneys, for the past two years, that have failed to meet MCILS's current Standards for Qualification of Assigned Counsel, 94-649 C.M.R. c. 2, §§1-6, how MCILS learned about the failure, and the consequence (if any) MCILS imposed on the attorney;
3. The number of attorneys, for the past two years, who have waived into the rosters for specialized case types, broken down by type of waiver;
4. Materials used in MCILS's most recent minimum standards trainings
5. The number of attorneys MCILS has evaluated in the past two years, the results of the evaluations and the process of the evaluations.
6. For each attorney suspended or removed from MCILS's roster in the past two years: a description of how MCILS learned the information leading to suspension or removal; how MCILS investigated the allegations resulting in suspension or removal; and whether the attorney was suspended or removed from the MCILS roster.
7. For the past year, the number of times a rostered attorney has withdrawn from representation in an MCILS case and the length of time that passed before a new attorney was appointed to the case, and barriers to prompt reassignment (if any)
8. Twenty applications, selected at random, for inclusion on MCILS rosters within the past two years
9. MCILS's current timekeeping requirements and procedures
10. Number of attorneys currently rostered to serve as Lawyer of the Day, broken down by court.

**D.** MCILS's provision of all documents identified in §§VII.C.1 – 10, above is expressly conditioned upon the following confidentiality provisions:

1. Class Counsel will not use or disclose those documents for any purpose whatsoever other than to prepare draft rules on the topics addressed in §VII.A.
2. Class Counsel shall not disclose or permit the disclosure of any documents to any third person or entity except as set forth in subparagraphs (a) – (d). Subject to these requirements, the following categories of persons may be allowed to review documents provided pursuant to §§VII.C.1 – 10:
  - a. Parties' Counsel. Class Counsel, Defendants' Counsel, and employees of those attorneys who have responsibility for the preparation and trial of the action;
  - b. Contractors. Those persons specifically engaged for the limited purpose of making copies of documents or organizing or processing documents but only after each such person has



completed the certification contained in Attachment B, Acknowledgment of Understanding and Agreement to Be Bound.

- c. Consultants and Experts. Consultants, investigators, or experts (hereinafter referred to collectively as “experts”) employed by the Parties or attorneys for the Parties to assist in the preparation and trial of this action but only after such persons have completed the certification contained in Attachment B, Acknowledgment of Understanding and Agreement to Be Bound; and
  - d. Others by Consent. Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment B, Acknowledgment of Understanding and Agreement to Be Bound.
- E.** Within 6 months of receipt of proposed rules identified in Section VII.B., Defendants will issue notices of rulemaking hearings under 5 M.R.S. § 8053 for rules addressing the subject matter identified in Section VII.A.
- F.** Rules adopted pursuant to this paragraph are intended by the Parties to be judicially enforceable, consistent with LD 565. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A, except that rules adopted to establish rates of compensation for assigned counsel and contract counsel under subsection 3, paragraph F are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.
- G.** Defendants will issue regulatory agendas under 5 M.R.S. § 8060 as necessary to promulgate rules under this Agreement.

**VIII. Metrics re Caseloads/Workloads**

- A.** 6 months from Effective Date: Defendants will ensure that the caseloads of all Counsel can be accurately tracked and recorded consistent with (proposed) 94-649 CMR ch.4. The tracking system will be based both on reporting from Counsel and from judicial-branch data on the number of cases handled by Counsel.
- 1. Defendants have issued final rules establishing caseload standards for all Counsel. See 4 M.R.S. §1804(2)(C), (3)(G).
  - 2. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with those caseload standards.
- B.** 2 years from Effective Date:
- 1. No more than 25% of Counsel included on the roster(s) for representation of indigent defendants who have been indicted for a crime punishable by imprisonment are operating with waivers from the caseload limits, such that 75% or more of Counsel are operating within the caseload limits.

a. Until such time that MCILS alters the current “case type” roster categories, the “case types” from which the determination of compliance with caseload standards for §§VIII.B.1, 2, and 3 will be made are:

(i) “Cases with Drug Offense”;

(ii) “Homicide Cases”;

(iii)“Operating Under the Influence Cases”;

(iv)“Other Felony Cases”;

(v) “Serious Violent Felony Cases”; and

(vi)“Sexual Offense Cases”.

2. Recognizing that new national recommendations on caseload standards are being issued in 2023, Defendants will engage in a mandatory re-evaluation of their initial proposed caseloads standards in 2025 and evaluate whether those caseloads should be amended. Based on that review, MCILS will issue a written recommendation on whether the caseload standards should be amended. As part of this mandatory re-evaluation process, Defendants will consider, at minimum, the new national recommendations on caseload standards.

**C. 3 years from Effective Date and thereafter:**

1. No more than 10% of Counsel are operating with waivers from the caseload limits, such that 90% or more of Counsel are operating within the caseload limits.

**IX. Metrics re Minimum Qualifications and Conflicts of Interest**

**A. 1 year from Effective Date:**

1. Defendants will issue final rules establishing:

a. Revised minimum qualifications standards for all Counsel, including standards for minimum experience and initial training. See 4 M.R.S. §1804(2)(B).

b. Revised minimum eligibility standards for attorneys to serve as Counsel for specialized case types. See 4 M.R.S. §1804(2)(B), 3(E).

c. Standards requiring all Counsel to perform conflict checks before representation and standards for adequate representation of clients whose cases present conflicts of interest. See 4 M.R.S. §1804(2)(E).

2. At minimum, these qualifications, eligibility, and conflicts standards will

a. Include written procedures for implementing and enforcing these qualifications standards.

- b. Involve consideration of Massachusetts CPCS standards to the extent applicable. <https://www.publiccounsel.net/assigned-counsel-manual/>
  - c. Involve consideration of the existing eligibility requirements set forth in 94-649 C.M.R. ch. 3.
  - d. Take into account Plaintiffs' proposed standards provided to Defendants under this Agreement and recommendations of the consultants engaged under this Agreement.
  - e. Ensure that cases assigned to Counsel who do not meet the qualifications standards for that case type will be promptly rejected and reassigned unless Counsel obtains a waiver of the qualifications standards, and direct Counsel to promptly withdraw.
    - (i) MCILS will grant waivers only in extraordinary circumstances where doing so is necessary to protect a client's interest.
    - (ii) Waivers will be granted on a case-by-case basis (*i.e.*, they will allow an attorney to handle a specific case or cases, not to exceed the caseload limits generally).
    - (iii) Waivers will be capped based on the percentages set forth below (*i.e.*, after three years from the Effective Date, only 25% of Counsel may be operating outside the qualifications and eligibility standards at any given time).
  - f. Require that all participating attorneys agree, as a condition of accepting cases, to comply with all MCILS rules.
3. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with those qualification standards
- B. 2 years from Effective Date:**
- 1. 85% of Counsel new to the roster meet qualifications standards
  - 2. 50% of Counsel on existing roster (as of the date standards are issued) meet qualifications standards
- C. 3 years from Effective Date and thereafter:**
- 1. 75% of all Counsel meet qualifications standards

## **X. Metrics re Performance Standards & Evaluation**

- A. Within 3 months of the Effective Date, Defendants will initiate system-wide evaluation procedures consisting of the following:**
- 1. Plaintiffs and Defendants will jointly establish a schedule for observation of court proceedings in each of the eight prosecutorial districts to be completed within 12 months of the Effective Date of this Agreement. Those court proceedings will include Lawyer of the Day appearances.

2. On a quarterly basis, Defendants will collect and review system-wide data as outlined in Section XIII below, including concerning (i) the number of Counsel requests made for investigations and experts; (ii) the number of motions filed on substantive issues; (iii) the frequency with which cases are resolved by outright dismissal or nonconviction disposition; (iv) the frequency of pleas to a lesser charge; (v) the number of trials conducted and the outcome of the trials; and (vi) to the extent available from the Judicial Branch, outcomes of the weekly status conferences outlined in Section III above, including but not limited to modifications to bail; release; and dismissal of charges.
3. No later than 18 months after the Effective Date of this Agreement, the Parties will confer regarding areas in which the Parties agree that systemic improvements can be implemented through training and jointly agree to the subject matter and/or specific training to be provided in order to prioritize topics of concern arising out of the court observations, and system-wide data outlined above.
4. No later than two years after the Effective Date, Defendants will, based on the Parties' jointly identified areas of concern following observation, implement changes to Defendants' training program to focus on those areas of concern which the Parties agree could be constructively addressed by additional training.
5. Following the initial period of court observations, review of system-wide data, and training implementation, the Parties agree to continue joint observations of court proceedings and review of system-wide data. Defendants shall continually evaluate and, where supported by court observations and system-wide data, revise the training offered by MCILS to address identified areas of concern.
6. Conferences between the Parties and, when directed by the Executive Director, court observations, will include MCILS training staff.

**B. 2 Years from the Effective Date of this Agreement:**

1. Defendants will issue final rules establishing:
  - a. Performance standards for all Counsel for each of the following practice areas: juvenile practice; adult criminal practice; child protective practice; involuntary commitment practice; appellate practice; post-conviction practice; Lawyer of the Day practice. See 4 M.R.S. §1804(2)(D), 3(D).
  - b. Standards for supervision and regular evaluation of Counsel against those performance standards. See 4 M.R.S. §1804(2)(D), 3(D).
  - c. Standards for handling complaints regarding the performance of counsel.
2. At minimum, these final rules will:

- a. Include written procedures for implementing and enforcing these standards.
  - b. Involve consideration of Massachusetts CPCS standards to the extent applicable. <https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf>
  - c. Involve consideration of MCILS's existing performance standards, 94-649 C.M.R. ch. 102.
  - d. Take into account Plaintiffs' proposed standards provided to Defendants under this Agreement and recommendations of the consultants engaged under this Agreement.
  - e. Require attorneys to agree that, by accepting MCILS-assigned cases, they agree to abide by the applicable performance standards.
3. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with these standards for performance, supervision and evaluation, and complaint investigation
- C. 3 years from Effective Date and each year thereafter, Defendants will initiate individual evaluation of rostered counsel on a randomized basis, consisting of:
1. 20% of Counsel new to handling MCILS cases (defined as Counsel who have been handling MCILS cases for fewer than 5 years total), and 5% of experienced Counsel (defined as Counsel who have been handling MCILS cases for 5 years or more total) will have been randomly selected for evaluation and evaluated by MCILS against applicable performance standards in the past 12 months.
    - a. Evaluation will at minimum include review of: Counsel's submitted time records for the past twelve months; three randomly-selected case files for cases handled by Counsel in the past twelve months; three samples of Counsel's written work-product (for example, substantive motions) filed in the past twelve months; and at least one in-person court observation of Counsel.
    - b. MCILS staff will meet with Counsel selected for evaluation.
    - c. Evaluation criteria will be drawn from MCILS's enacted rules on performance standards and will focus on:
      - (i) Prompt and consistent client communication, including initial client interviews with client and communication with client concerning possible dispositions and plea negotiations;
      - (ii) Pretrial preparation, including witness interviews and appropriate use of investigators and experts;
      - (iii) Frequency and quality of legal research and filing of memoranda of law;
      - (iv) Conduct of trials and litigation of substantive motions;

- (v) Billing practices, including whether counsel are maintaining contemporaneous time records showing time spent on each task for each case;
  - (vi) Cooperation with Defendants' training, supervision, evaluation, and complaint investigation procedures;
  - (vii) Lack of substantiated client complaints.
- d. MCILS staff will provide a written evaluation based on the above evaluation criteria and meet with Counsel to discuss that evaluation.
  - e. If an attorney has been evaluated as meeting performance standards, then the attorney will be exempt from selection for random evaluation for the next 3 years.
2. 95% of all complaints regarding Counsel's performance in past 12 months will have been investigated and resolved by MCILS staff.
  3. 95% of Counsel found to not meet performance standards as a result of their evaluation will be either:
    - a. removed from the roster, or
    - b. placed on a probationary period, provided with additional training and supervision for at least the next 12 months, and subject to a new evaluation at the conclusion of that 12 months.
  4. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with these standards for performance, supervision and evaluation, and complaint investigation.

## **XI. Metrics re Training**

### **A. 1 year from Effective Date**

1. Defendants will issue final rules establishing standards for initial and regular ongoing training, supplemental to 94-649 CMR ch. 2, §5. See 4 M.R.S. §1804(3)(D).
2. At minimum, standards will
  - a. Provide for a substantial portion of trainings to occur in-person.
  - b. Provide that counsel will be compensated for their time spent in trainings.
  - c. Provide that the content and frequency of trainings be re-evaluated by Defendants on an annual basis based on the outcome of the system-wide and individual evaluations outlined in Section X above and the system-wide data collected under Section XIII below.
  - d. Include written procedures for implementing and enforcing these training standards.

- e. Require that newly rostered attorneys without criminal defense experience complete a robust onboarding training analogous the “zealous advocacy training” provided by the Massachusetts Committee for Public Counsel Services.  
<https://www.publiccounsel.net/assigned-counsel-manual/>
- f. Require that attorneys participate in at least 8 hours of annual training to remain on the MCILS roster.
- g. Involve consideration of the Massachusetts CPCS standards to the extent applicable. <https://www.publiccounsel.net/assigned-counsel-manual/>
- h. Take into account Plaintiffs’ proposed standards provided to Defendants under this Agreement.

3. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with training standards

**B. 2 years from Effective Date**

Subject to the legislative appropriation of funding for training staff consistent with the FY ’24-’25 request of MCILS:

- 1. 85% of Counsel new to the roster have met training standards in past 12 months
- 2. 50% of Counsel on existing roster (as of the date standards are issued) have met training standards in the past 12 months

**C. 3 years from Effective Date**

Subject to the legislative appropriation of funding for training staff consistent with the FY ’24-’25 request of MCILS:

- 1. 85% of all Counsel have met training standards in the past 12 months

**XII. Metrics re Lawyer of the Day**

- A. While operating under the present, case-specific electronic docket access afforded to MCILS by the Judicial Branch, Defendants will continue to coordinate with the Judicial Branch, including individual courts and/or clerks, to facilitate the presence of qualified counsel to serve as Lawyer of the Day.
- B. Once MCILS has, in the discretion of the Executive Director, obtained timely access to data reflecting the performance of Counsel serving as Lawyer of the Day, Defendants will adopt performance standards for Lawyers of the Day and include the Lawyers of the Day in the supervision addressed in §X, above.
  - 1. Defendants will issue a written report on what (if any) additional statutory changes or budgetary initiatives are necessary to comply with those standards.

2. Defendants will take into account Plaintiffs' proposed standards provided to Defendants under this Agreement.

### **XIII. Data Collection and Reporting**

- A. The Parties jointly agree that thorough, accurate, and up-to-date data collection and analysis of Maine's indigent defense system is critical to Defendants' ability to perform its obligations as required by statute and this Agreement. To that end:
  1. Defendants will engage a consultant to advise the Parties on data collection and analysis.
  2. Defendants will engage the consultant and Defendants will pay the costs of the consultant. Defendants will seek grant funding to cover all or some of the costs of retaining the consultant, including available federal grant funding for indigent defense through the Byrne-Jag program and the BJA Strengthening the Sixth Program.
  3. By the Effective Date, the Parties will confer in good faith and agree on the contents of the Request for Proposals ("RFP") to be issued relative to the consultant. Neither Party will have supervisory authority over the consultant. The consultant will maintain the confidentiality of all confidential information they obtain.
- B. In order to permit Plaintiffs to assess compliance with the provisions of this Agreement, Defendants will:
  1. To the extent available from the Judicial Branch, Defendants will provide reports to Plaintiffs regarding Settlement Class Members awaiting appointment of counsel, including: the name of each affected Class Member, the docket number, the charges pending, the court in which charges are pending, whether the Class Member is in custody, where they are in custody, their last court date, and their next court date.
  2. Promptly provide to Plaintiffs copies of the following documents upon their finalization and any subsequent amendment:
    - a. The reports identified above on what (if any) statutory changes or budgetary initiatives are necessary to implement and enforce with the newly issued standards
    - b. Copies of all rules regarding which Defendants plan to issue notices of rulemaking hearings under 5 M.R.S. § 8053.
  3. Provide quarterly reports to Plaintiffs containing:
    - a. To the extent made reasonably available to MCILS, meaning in a form/manner not requiring individual access and review of the dockets of individual cases to which MCILS rostered counsel has been assigned by MCILS, data concerning case assignments (number and types of cases) and caseloads of each public defender and private contract attorney



- b. Data concerning (i) the number of counsel requests made for investigations and experts; (ii) the number of motions filed on substantive issues; (iii) the frequency with which cases are resolved by outright dismissal or nonconviction disposition; (iv) the frequency of please to a lesser charge; (v) the number of trials conducted and the outcome of the trials; and (vi) to the extent available from the Judicial Branch, outcomes of the status conferences outlined in Section III above, including but not limited to modifications to bail; release; and dismissal of charges.
- c. The number of complaints received concerning contract or employed counsel and how those complaints were resolved
- d. Copies of all new policies or procedures.

**XIV. Court Review and Approval.** This Settlement Agreement is subject to approval by the Court pursuant to M. R. Civ. P. 23 in the context of the Action.

- A. The Parties will use their best efforts to effectuate this Settlement Agreement, including cooperating in promptly seeking the Court's approval of the Settlement Agreement, the giving of appropriate Class Notice under M. R. Civ. P. 23(d) and (e), and the implementation of a four-year stay of the Remaining Claims, as follows:
  - 1. Within seven (7) days after the Execution Date, the Parties will jointly file with the Court a stipulation for suspension of all litigation deadlines pending approval of this Agreement.
  - 2. Within twenty-eight (28) days of the Execution Date, Class Counsel and Defendants' Counsel will file this Agreement with the Court and will file a joint motion for the Court to direct notice of the settlement to the class, requesting that the Court:
    - a. Determine, preliminarily, that it is likely to be able to approve this Agreement, justifying dissemination of Class Notice;
    - b. Schedule a Final Approval Hearing to:
      - (i) determine, finally, whether the Settlement Class satisfy the applicable requirements of M. R. Civ. P. 23(a) and 23(b)(2) and should be finally certified for purposes of judgment;
      - (ii) review objections, if any, regarding the settlement;
      - (iii) consider further the fairness, reasonableness, and adequacy of the settlement; and
      - (iv) consider whether the Court will issue the Final Order and Judgment Approving Settlement and issuing a four-year stay of the action;
    - c. Set a briefing schedule for the Final Approval Hearing;

- d. Consider and determine that the proposed Class Notice and Notice Program, including the deadline for members of the Settlement Class to assert objection(s) (“Objection Deadline”), comply with the guidance of M. R. Civ. P. 23(e), due process, and provide appropriate notice;
  - e. Direct Class Counsel and Defendants’ Counsel to cause the Class Notice to be distributed on or before the Notice Date in the manner set forth in the Notice Program, the cost of which will be paid by Defendants;
  - f. Require any member of the Settlement Class who wishes to object to the fairness, reasonableness, or adequacy of the settlement to submit to Class Counsel, postmarked on or before the Objection Deadline, a statement of his or her objection, as well as the specific reason(s), if any, for each objection, including any legal support that the Settlement Class member wishes to bring to the Court’s attention and any evidence that the Settlement Class member wishes to introduce in support of his/her objection, and to state whether the Settlement Class member and/or his/her counsel wish to make an appearance at the Final Approval Hearing, or be barred from separately objecting;
  - g. Require Class Counsel to file with the Court all objections received by the Objection Deadline.
  - h. Suspend and extend all applicable pretrial deadlines in the Action so that the Parties will in no way be prejudiced by their efforts to resolve the Action by means of this settlement; and
  - i. Establish the date and time of:
    - (i) the Final Approval Hearing;
    - (ii) the Notice Date; and
    - (iii) the Objection Deadline.
3. Within fourteen (14) calendar days after the Court’s order directing notice to the Class of this Agreement, Class Counsel and Defendants’ Counsel will cause the Court-approved Class Action Settlement Notice to be distributed to the members of the Settlement Class, in accordance with the Notice Program.
4. Members of the Settlement Class will have sixty (60) days, or such other time as the Court may provide, after the date of the Class Action Settlement Notice to object to the settlement.

5. Within twenty-one (21) calendar days after the Objection Deadline, Plaintiffs and Defendants will file a joint motion for final approval of this Agreement and the Parties' settlement. Such Final Order and Judgment Approving Settlement will:
  - a. Confirm the final certification of the Settlement Class;
  - b. Confirm that the Settlement Class comply with all requirements of M. R. Civ. P. 23(b), including confirmation of the adequacy of Plaintiffs as representatives of the Settlement Class;
  - c. Confirm that the Notice Program complied in all respects with the requirements of due process and M. R. Civ. P. 23 by providing appropriate notice to the Settlement Class;
  - d. Determine that this Agreement was entered into in good faith, is reasonable, fair, and adequate, and is in the best interest of the Settlement Class;
  - e. Make all appropriate and necessary findings of fact required to enter a final judgment pursuant to M. R. Civ. P. 58;
  - f. Issue a four-year stay of the Remaining Claims and bar Plaintiffs and all members of the Settlement Class from reasserting the Remaining Claims or substantially similar claims against Defendants for a period of four (4) years from the Date of Final Approval, unless as expressly permitted by the Court because the Court has determined that there has been a material and unremedied breach of this Agreement;
  - g. Order that each party will bear its own fees and costs in connection with the Action and the settlement thereof, except as provided in Section XX below;
  - h. Address any disputes regarding the construction and/or enforcement of this Agreement pursuant to the procedures set forth in Section II.H and II.I, above.
- B. The Parties will exercise their best efforts to schedule the Fairness Hearing within thirty (30) days after the Objection Deadline.
- C. In the event that the Court does not approve the Settlement Agreement, then the Parties will meet and confer for a period of 30 days to determine whether to enter into a modified agreement prior to the resumption of litigation. 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.

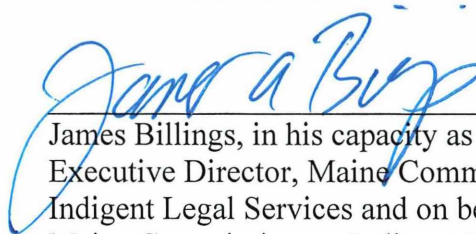
- XV. No Admission of Liability.** This Settlement Agreement is a compromise of disputed claims and does not constitute an admission by Defendant to any of the claims or allegations asserted by Plaintiffs in the underlying lawsuit: claims which Defendants expressly deny.
- XVI. Construction.** This Agreement has been negotiated and prepared among each of the Parties and their respective attorneys. The Parties accordingly agree that this Agreement shall be construed and interpreted without regard to the party drafting this Agreement, reflecting the involvement of all Parties in the drafting of this Agreement.
- XVII. Choice of Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Maine.
- XVIII. Advice of Counsel.** The Parties represent that they know and understand the contents of this Agreement and that this Agreement has been executed voluntarily. The Parties each further represent that they have had an opportunity to consult with an attorney of their choosing and that they have been fully advised by the attorney with respect to their rights and obligations under this Agreement.
- XIX. Entire Agreement.** No promise, inducement, understanding or agreement not expressly stated herein has been made by or on behalf of either Party. This Agreement contains the entire agreement of the Parties related to the subject matter of this Agreement.
- XX. Attorneys' Fees and Costs.** In resolution of Plaintiffs' claim for attorneys' fees, costs, and expenses, Plaintiffs accept and Defendants will cause to be paid, \$295,000.00 ("Fees Settlement Amount"). That payment will be effected by depositing the Fees Settlement Amount in an interest-bearing escrow account within 30 days of the Effective Date. The Fees Settlement Amount, plus accrued interest, will be paid to Plaintiffs' counsel within 30 days of the dismissal of the Action at the end of the four-year stay of litigation. If the Court lifts the stay prior to dismissal and the Parties resume litigation of the Action, then this provision for payment of the Fees Settlement Amount is void and has no effect, and Plaintiffs' claim for attorneys' fees will, instead, be decided by the Court in the ordinary course of litigation.

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SEEN AND AGREED TO:

FOR PLAINTIFFS

FOR DEFENDANTS



James Billings, in his capacity as  
Executive Director, Maine Commission on  
Indigent Legal Services and on behalf of The  
Maine Commission on Indigent Legal  
Services, duly authorized

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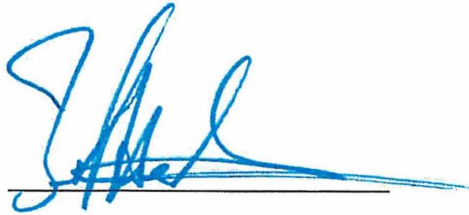
Zachary L. Heiden  
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Jordan Bock, Esq.  
GOODWIN PROCTER LLP  
100 Northern Avenue  
Boston, Massachusetts 02210  
Counsel for Plaintiffs

SEEN AND AGREED TO:

FOR PLAINTIFFS

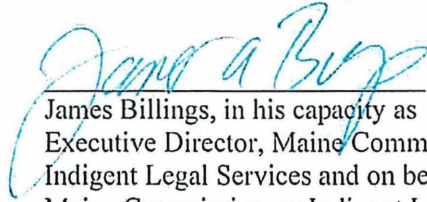


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Counsel for Plaintiffs

FOR DEFENDANTS



James Billings, in his capacity as  
Executive Director, Maine Commission on  
Indigent Legal Services and on behalf of The  
Maine Commission on Indigent Legal  
Services, duly authorized

**ATTACHMENT A**

STATE OF MAINE  
KENNEBEC, ss

SUPERIOR COURT  
Docket No. KENSC-CV-22-54

ANDREW ROBBINS, et al.,  
  
Plaintiffs,  
  
v.  
  
MAINE COMMISSION ON INDIGENT  
LEGAL SERVICES, et al.,  
  
Defendants

**ACKNOWLEDGMENT  
AND  
AGREEMENT TO BE BOUND**

The undersigned hereby acknowledges that he/she has read the Confidentiality Order dated \_\_\_\_\_ in the above-captioned action and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the Kennebec County Superior Court in matters relating to the Confidentiality Order and understands that the terms of the Confidentiality Order obligate him/her to use documents designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER in accordance with the Order solely for the purposes of the above-captioned action, and not to disclose any such documents or information derived directly therefrom to any other person, firm or concern.

The undersigned acknowledges that violation of the Confidentiality Order may result in penalties for contempt of court.

Name: \_\_\_\_\_

Job Title: \_\_\_\_\_

Employer: \_\_\_\_\_

Business Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

Signature

## EXHIBIT 2

### **Notice of Proposed Settlement**

***Robbins v. MCILS*, Case No. KENSC-CV-22-54, Kennebec Superior Court**

Please Read this Notice Carefully.

This is a Notice of a Class Action and Proposed Settlement Regarding Criminal Defense Representation in Maine for People Who Cannot Afford an Attorney.

A Maine State Court approved this Notice and authorized its posting.

This is **NOT** a solicitation from a lawyer. You will **NOT** be asked to pay any money for this case under any circumstances.

#### **What is the purpose of this Notice?**

This notice contains information about a proposed settlement of a class action case challenging Maine's criminal defense system for people who cannot afford an attorney. It summarizes the case and the proposed settlement, provides instructions on how to comment on or object to the settlement, and explains what happens next.

#### **What is this case about?**

Plaintiffs claim that the Maine Commission that oversees criminal defense attorneys for poor people has failed to ensure that those attorneys provide effective assistance of counsel, because the agency has not properly trained, evaluated, supervised, and supported those attorneys. Plaintiffs claim that, as a result, the State cannot guarantee that those attorneys provide effective assistance to their clients, including meeting with clients, counseling them about legal options, and advocating for them in court. This case is not about overturning anyone's criminal convictions. Instead, this case seeks to reform the public defense system by advocating for structural changes and requiring the Commission to create and enforce rules about how lawyers do their job.

#### **Who are the Class Members?**

All individuals who are or will be eligible for the appointment of competent defense counsel by the Superior or District Court pursuant to 15 M.R.S. §810 because they have been indicted for a crime punishable by imprisonment, and they lack sufficient means to retain counsel.

#### **Who brought this case?**

Plaintiffs Andrew Robbins, Brandy Grover, Ray Mack, Malcolm Peirce, and Lanh Danh Huynh filed this case on March 1, 2022 on behalf of themselves and all others in similar situations across the State.

#### **Where is this lawsuit pending?**

This case is pending in Kennebec County Superior Court before Justice Michaela Murphy.

#### **Who is this lawsuit against?**

This case is against the Maine Commission on Indigent Legal Services, its commissioners, and its Executive Director.

#### **Who is settling?**

The Plaintiffs and Defendants have agreed to a proposed settlement and jointly asked the Court to approve it.

#### **Who are the lawyers for the Plaintiffs?**

The class is represented by lawyers at the American Civil Liberties Union of Maine Foundation, P.O. Box. 7860, Portland, ME 04112; Preti Flaherty, 1 City Center, Portland, ME 04101; and Goodwin Procter, 100 Northern Avenue, Boston, MA 02210.

#### **Can I get any money from this lawsuit?**

No. This lawsuit is not about money. It seeks a court order explaining the Commission's obligations and requiring the Commission to meet them.



**Does this settlement limit me from bringing claims for denial of counsel or ineffective assistance of counsel in my case?**

No. This settlement does not prevent you from bringing claims for actual denial of counsel (e.g. failure to appoint counsel) or ineffective assistance of counsel in your individual case. The settlement does limit Plaintiffs' ability to revive the claims brought in this case against the Commission and its Executive Director and Commissioners for constructive denial of counsel, but it does not limit your ability to bring claims against the State of Maine or any other state entities or officeholders.

**Do I have to pay any lawyers?**

No. The Plaintiffs' attorneys will be paid by the State in connection with this settlement. You do not have to pay anything.

**What are the key terms of the settlement?**

You can review the full proposed settlement agreement and the motion to the court to approve the settlement here:

<https://www.aclumaine.org/en/cases/sixth-amendment-class-action>. Key terms of the settlement include:

- The Commission will pay for attorneys to appear at hearings for Class Members who are not promptly appointed counsel after their initial appearance, and will issue guidance that those attorneys should assert all reasonable claims for emergency relief for denial of counsel on behalf of Class Members, including but not limited to: motions for bail review; habeas corpus relief; and dismissal of charges.
- The Commission will adopt new rules governing who can be a lawyer for people who cannot afford a lawyer.
- The Commission will monitor the number of cases those lawyers are handling to make sure that every client gets proper attention.
- The Commission will adopt rules for minimum qualifications and training for lawyers.
- The Commission will evaluate the performance of lawyers to make sure they

are doing everything they should do for their clients.

- The Parties in this case will ask the legislature to open public defender's offices where needed to provide enough lawyers.
- The Commission will provide regular reports so that Plaintiffs can monitor whether the State is doing what it promised.
- The State will pay \$295,000 for Plaintiffs' attorneys' fees and costs.
- In exchange, this case will be put on hold and in four years, if the State has done everything it promised to do, then the case will be dismissed.
- If the Commission does not do what it promises to do, then the case will continue.

**What are my options?**

Any Class Member who objects to the settlement can submit an objection and appear at a Fairness Hearing that will be held on \_\_\_\_\_ at \_\_\_ a.m. at the Capital Judicial Center in Augusta. To submit a written objection, you must send a letter titled "Objection to Class Settlement in *Robbins v. MCILS*, No. KENSC-CV-22-54" to ACLU of Maine, P.O. Box. 7860 Portland, ME 04112. You can also write in support of the settlement. Any written comment or objection must be postmarked by \_\_\_\_\_. Your objections will be provided to the Court, which will consider them in deciding whether to approve the settlement.

If you send a written objection, please include your 1) name and address, 2) the specific reasons for your objection, 3) whether you plan to appear at the Fairness Hearing, and 4) any legal support, evidence, or documents you want the court to consider.

**What happens next?**

A Maine Superior Court Justice will hold a Fairness Hearing on \_\_\_\_\_ at \_\_\_ a.m. After that hearing, the judge will decide whether the settlement should be approved as fair and reasonable. You are not required to attend any hearing, but you may if you wish.

**How do I get more information?**

Do not call or write any judge or court seeking more information. If you have any questions concerning this notice or the settlement agreement, please contact ACLU of Maine at (207) 774-5444 or P.O. Box. 7860 Portland, ME 04112. You may review the full settlement agreement and court documents at <https://www.aclumaine.org/en/cases/sixth-amendment-class-action>.