AARON M. FREY
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES
84 HARLOW ST. 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

125 PRESUMPSCOT ST., SUITE 26
PORTLAND, MAINE 04103
TEL: (207) 822-0260
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

March 15, 2024

BY HAND-DELIVERY

Tamara Rueda, Clerk
Kennebec County Superior Court
1 Court Street, Suite 101
Augusta, ME 04330

Re: Andrew Robbins, et al. v. Maine Commission of Indigent Legal Services, et al.
Docket No. KENSC-CV-2022-54

Dear Ms. Rueda:

Please find enclosed, for the above-referenced matter, the Defendants' Opposition to Plaintiffs' Motion to Amend and Supplement Complaint and the Defendants' Consent Motion to Exceed Page Limits.

Sincerely,

Sean D. Magenis
Assistant Attorney General

SDM/tet
Enclosure
cc: Zachary L. Heiden, Esq. (via e-mail: zheiden@aclumaine.org)
Anahita Sotoohi, Esq. (via e-mail: asotoohi@aclumaine.org)
Matthew Warner, Esq. (via e-mail: mwarner@preti.com)
Gerard J Cedrone, Esq. (via e-mail: gcedrone@goodwinlaw.com)
Jordan Bock, Esq. (via e-mail: jbock@goodwinlaw.com)
Kevin Martin, Esq. (via e-mail: kmartin@goodwinlaw.com)

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.

DEFENDANTS' CONSENT MOTION TO EXCEED PAGE LIMITS

Defendants in the above-captioned action, by and through undersigned counsel, hereby move this Court for leave to exceed the page limits, pursuant to M. R. Civ,. P. 7(f), for Defendants' Opposition to Plaintiffs' Motion to Amend Plaintiffs' Complaint (Mar. 8, 2024) ("Plaintiffs' Motion"). As grounds for Defendants' request, while not a dispositive motion, Plaintiffs' Motion seeks to add substantive claims and additional parties, requiring more than the ten (10) pages provided, absent leave of court, in M. R. Civ. P. 7(f).

Plaintiffs do not object to the relief requested herein.

WHEREFORE, Defendants pray this Court grant their Motion to Exceed page limits, permit Defendants to file an Opposition to Plaintiffs' Motion exceeding ten (10) pages, and grant all such other and further relief as this Court deems just.

Dated March 14, 2024

Respectfully Submitted,

Sean D. Magenis (Bar No. 9495)
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8800
sean.d.magenis@maine.gov

NOTICE

Any opposition to this motion must be filed with the court no later than 21 days after the date this motion was filed, unless another time is set by the court or provided for in the Maine Rules of Civil Procedure. Failure to file a timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice or hearing.

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.

ORDER

Defendants' Motion for Leave to Exceed Page Limits is hereby GRANTED.

_____
Date

_____
Hon. Michaela M. Murphy
Justice, Superior Court

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.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND AND SUPPLEMENT COMPLAINT

Defendants in the above-captioned action, the Maine Commission on Indigent Legal Services, the Executive Director of the Maine Commission on Indigent Legal Services, in his official capacity, and each of the Commissioners of the Maine Commission on Indigent Legal Services in their official capacities (collectively "MCILS"), by and through undersigned counsel, pursuant to M.R. Civ. P. 7 and 15, hereby oppose Plaintiffs' Motion for Leave to Amend and Supplement Complaint ("Plaintiffs' Motion to Amend").

INTRODUCTION

The standard controlling leave to grant Plaintiffs' Motion to Amend is "when justice so requires." M. R. Civ. P. 15(a). MCILS is not suggesting that the Court is powerless to address what it considers to be an ongoing violation of a constitutional right. Instead, MCILS asks that the Court apply well-established and codified procedures on how to address the concern the Court has identified: indigent criminal defendants remaining unrepresented despite court orders that they are entitled to counsel. *See* Mead, Andrew M. and University of Maine, *Andrew M.*

Mead, 2001 UMaine Commencement Address (2001), at 2 ("So when we are attempting to measure justice, don't tell me about the result. Tell me about the process - how they got to the result - and then we can tell whether justice was served.") (available at: https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?article=2190&context=univ_publications) (last accessed Mar. 14, 2024).

Plaintiffs initiated this litigation alleging that MCILS's failure to effectively supervise defense counsel created a risk of ineffective assistance of counsel and asked this Court to remedy that allegedly unconstitutional risk by compelling MCILS to effectively supervise defense counsel. The Parties, with the assistance of two separate judicial neutrals, settled those claims three times. The case or controversy asserted by Plaintiffs has been resolved by fairly, reasonably, and adequately, addressing each and every claim asserted by Plaintiffs. M.R. Civ. P. 23(e). Compelling parties who worked collaboratively to further the well-established judicial preference for negotiated resolution over prolonged litigation to resolve new claims, joined by new defendants, unnecessarily locks the Court, Plaintiffs, and MCILS (and other proposed defendants) in adversarial positions divorced from their demonstrably shared interest in facilitating the effective protection of the Sixth Amendment rights of indigent defendants in Maine. Justice does not require such a process. M.R. Civ. P. 15(a). Plaintiffs' Motion to Amend should be denied.

PROCEDURAL POSTURE

Plaintiffs commenced this action by filing a Complaint on March 1, 2022. Plaintiffs' Complaint named as defendants: (i) the Maine Commission on Indigent Legal Services, (ii) the Executive Director of the Maine Commission on Indigent Legal Services, in his official capacity, and (iii) each of the Commissioners of the Maine Commission on Indigent Legal Services in

their official capacities (collectively "MCILS"). Plaintiffs' Complaint asserted two (2) counts, one of which this Court subsequently dismissed on June 2, 2022. Plaintiffs' remaining claim, pursuant to 42 U.S.C.A. § 1983, alleged that that Defendants' failures to fulfill their statutory obligation to create and enforce standards for the qualification, training, and supervision of defense counsel, creates an "unconstitutional risk that [indigent criminal] defendants will be denied effective assistance of counsel in their criminal proceedings." Plaintiffs' Complaint, ¶ 39. Plaintiffs' Complaint alleges that *risk* of denial of effective assistance of counsel itself violated Plaintiffs' rights under the Sixth Amendment to the United States Constitution. *Id.*; *see also id.* at ¶ 108 (identifying the burden of plaintiffs seeking prospective relief as establishing, "the *likelihood* of substantial and immediate irreparable injury, and the inadequacy of remedies at law." (quoting *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988)) (emphasis in original).

This Court certified Plaintiffs' class as:

> 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.A. § 810 because they have been indicted for a crime punishable by imprisonment, and they lack sufficient means to retain counsel.

Order on Motion for Class Certification (Jul. 13, 2022). This Court subsequently issued a Scheduling Order, pursuant to M.R. Civ. P. 16, on August 4, 2022.[1]

The Parties engaged in written discovery, including the production of tens of thousands of documents by Defendants, motion practice with respect to Plaintiffs' request for approximately one million e-mails, and Defendants' depositions of each of the named Plaintiffs

[1] The Standard Scheduling Order established an 8-month period of discovery followed by expert disclosures, the opportunity for dispositive motions, motions in limine, pretrial practice, and contemplated a trial approximately one year after the Scheduling Order and 17 months after Plaintiffs commenced their action.

who could be located within the State.[2] This Court then stayed the litigation in order to allow the Parties to negotiate a settlement.

The Parties settled this litigation on August 21, 2023, and jointly sought this Court's preliminary approval of the class action settlement as required under M.R. Civ. P. 23(e). This Court denied the Parties' Joint Motion on September 13, 2023.

Following additional negotiations, the Parties again settled this litigation and again jointly sought this Court's approval of their Settlement Agreement on November 28, 2023. Following a series of conferences with this Court during the pendency of the Parties' Joint Motion, the Parties withdrew their pending Joint Motion and simultaneously filed another Motion for Preliminary Approval of a third settlement agreement: agreeing to the dismissal of this litigation in consideration of the resolution of each claim which Plaintiffs had asserted. Second Amended Joint Motion to Conduct Preliminary Review of Second Amended Class Action Settlement (Feb. 14, 2024).

This Court denied the Parties' Second Amended Joint Motion for Preliminary Settlement Review thirteen (13) days later. Combined Order (Feb. 27, 2024). Identifying the basis for its denial of the Parties' third settlement as the Parties' failure to resolve a claim that was not asserted in Plaintiffs' Complaint, *id.* at 13, the Court directed Plaintiffs to assert that claim and established a scheduling order compelling the Parties, as well as newly named defendants, to try the new claim(s) within three (3) months. *Id.* at 15 ("The Court will therefore create a Subclass consisting of Class Members who remain unrepresented after initial appearance or arraignment . . . .").

---

[2] Named Plaintiff Brandy Grover was, at the time depositions were scheduled in early 2023, unable to be located by Plaintiffs. Named Plaintiff Ray Mack was, as of early 2023, incarcerated out of state.

Notwithstanding the absence of evidentiary submissions in this litigation,[3] let alone evidence relevant to the unasserted claim that delays in appointing counsel for indigent criminal defendants violates those individuals' rights under the Sixth Amendment, this Court issued findings of fact and conclusions of law. *Cf. id.* at 12 ("[I]t is beyond dispute that insufficient numbers of qualified attorneys have been made available by Defendants for appointment by Maine jurists . . . .") and *id.* ("Obviously, no adjudication has occurred in this case."). Concluding that its "fiduciary" responsibilities to Plaintiffs' class extend to any potential claims available to the class, as opposed to those actually asserted by experienced class counsel in this litigation, *id.* at 14 ("*From the point of view of Class Members*, the issues of non-representation and the claims regarding the unconstitutional 'risk' of deprivation of counsel should be resolved in the same case.") (emphasis added), this Court denied Class Members any opportunity to express concerns about the Parties' Settlement and directed Plaintiffs to assert new claims against MCILS and new defendants. *Id.* at 16 ("[T]he Court will adjudicate the federal and state claims regarding non-representation as they relate to the subclass [consisting of Class Members who remain unrepresented after initial appearance or arraignment].").

Thereafter, Plaintiffs, assigned to represent a judicially designated subclass defined by claims not alleged or supported in Plaintiffs' Complaint, sought leave to amend their Complaint on March 8, 2024, to assert such claims. The Court directed Defendants to respond to that Motion by March 15th. *Id.* at 16.

---

[3] The only evidence submitted to the Court in this litigation to date was an affidavit authenticating documents detailing the responsibilities of MCILS employees and the scope of confidential information contained in MCILS e-mails. MCILS's Opposition to Plaintiffs' Motion to Compel (Jan. 6, 2023), Exhibit H.

STANDARD OF REVIEW

"[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." M.R. Civ. P. 15(a). "A motion to amend may be denied based on one or more of the following grounds: undue delay, bad faith, undue prejudice, or futility of amendment." *Montgomery v. Eaton Peabody, LLP*, 2016 ME 44, ¶ 13, 135 A.3d 106 (citing *Bangor Motor Co. v. Chapman,* 452 A.2d 389, 392 (Me. 1982)).[4]

A motion to amend pursuant to M.R. Civ. P. 15 "will be granted in the absence of undue prejudice to the opponent. . . . obviously, prejudice means something more than an increased likelihood of defeat in the litigation if the amendment is granted." *Bangor Motor Co.*, 452 A.2d at 392 (quoting 1 Field, McKusick & Wroth, *Maine Civil Practice* § 15.4 at 304 (2d ed. 1970)). In reviewing the disposition of a motion to amend for "undue prejudice," the Law Court has consistently distinguished between amended complaints asserting new claims and those which do not. *See, e.g. Kelly v. Michaud's Ins. Agency, Inc.*, 651 A.2d 345, 347 (Me. 1994) ("[defendant] would not be unduly prejudiced" where the proposed amendment "would not add a new claim"); *Bangor Motor Co.*, 452 A.2d at 393 ("Allowing the movants to assert a claim of negligence directly against the law firm *raises no new issue*.") (emphasis added). In short, an amended complaint asserting new claims suggests undue prejudice.

Likewise, the proximity of a requested amendment to trial supports denial of a motion to amend. *See, e.g., Hamor v. Maine Coast Mem'l Hosp.*, 483 A.2d 718, 720 (Me. 1984) ("In the

---

[4] Following the commencement of suit on March 1, 2022, litigation of dispositive motions, and discovery, this litigation was stayed on March 6, 2023: a stay which continued until this Court's Combined Order of February 27, 2024. If the delay in establishing Plaintiffs' motivation and opportunity to assert a Motion to Amend becomes "undue" based on its proximity to the scheduled trial, this Court's current scheduling order, setting trial on new claims involving additional defendants in three (3) months, renders Plaintiffs' delay in asserting new claims designated by the Court "undue."

case at bar, the imminence of the scheduled trial at the time the motion to amend was filed was by itself sufficient justification for denial of the motion."); *Falvo v. Pejepscot Indus. Park, Inc.*, 1997 ME 66, ¶ 13, 691 A.2d 1240 (affirming denial where requested amendment "mid-trial to allege a new claim with an additional element of proof could have prejudiced defendant.").

With respect to futility, the Law Court has observed that, "[w]hen 'a proposed amended complaint would be subject to a motion to dismiss, the court is well within its discretion in denying leave to amend.'" *Montgomery*, 2016 ME 44 at ¶ 13 (quoting *Glynn v. City of S. Portland,* 640 A.2d 1065, 1067 (Me.1994)).

ARGUMENT AND MEMORANDUM OF LAW

Over two (2) years after the commencement of this lawsuit, following three settlements, and in response to this Court's direction to Plaintiffs, Plaintiffs move to amend their Complaint. *Cf. Lewiston Daily Sun v. Sch. Admin. Dist. No. 43*, 1999 ME 143, ¶ 12, 738 A.2d 1239 ("Courts cannot issue opinions on questions of fact or law simply because the issues are disputed or interesting. Courts can only decide cases before them that involve justiciable controversies."). Plaintiffs' proposed amendments seek to add:

- a new claim pursuant to Section 1983 alleging that MCILS and proposed additional defendants "have failed to provide attorneys to the Subclass of individuals within a reasonable time after the right to counsel attaches to allow for adequate representation at every critical stage, and have failed to provide attorneys to the Subclass at all critical stages of the proceedings." Plaintiffs' Proposed Amended Complaint, ¶ 131;

- two (2) new counts: alleging claims pursuant to 5 M.R.S.A. § 4682 alleging violation of Article I, Section 6 of the Maine Constitution, *id.* at ¶¶ 138–144, and petitioning for a writ of habeas corpus pursuant to 14 M.R.S.A. §§5501, et seq. *Id.* at ¶¶ 149-154; and

- three (3) new parties: Janet Mills, in her official capacity as Governor of Maine, Aaron M. Frey, in his official capacity as Attorney General of Maine, and The State of Maine.

A. THIS COURT SHOULD DENY PLAINTIFFS' MOTION BECAUSE PLAINTIFFS' NEW CLAIMS ARE SUBJECT TO DISMISSAL AND/OR FUTILE.

"When 'a proposed amended complaint would be subject to a motion to dismiss, the court is well within its discretion in denying leave to amend.'" *Montgomery*, 2016 ME 44 at ¶ 13 (quoting *Glynn,* 640 A.2d at 1067).

1. MCILS does not have the power to provide the relief demanded in Plaintiffs' proposed Amended Complaint.

"When a party seeks to sue an agency of the State, the proper party defendant is any officer, office, department, agency, authority, commission, board, or institution *against whom the plaintiff has alleged a right to final relief.*" *Me. State Empl. Ass'n SEIU Local1989 v. Dep't of Corr.*, 682 A.2d 686, 689 (Me. 1996) (emphasis added). Plaintiffs' Proposed Amended Complaint seeks an injunction mandating MCILS to: (1) "provide continuous representation of counsel to all members of the Subclass;" (2) "release" all members of the Subclass not provided continuous representation," and "dismiss[] charges without prejudice." MCILS does not have the authority to provide any of the requested relief.

"The Legislature may have delegated to MCILS the duty and authority to provide lawyers and maintain rosters sufficient to satisfy federal and state constitutional and statutory obligations, but it preserved the Judicial Branch's role to 'assign' counsel." Combined Order at 13. "Before arraignment, competent defense counsel shall be assigned by the Superior or District Court, unless waived by the accused after being fully advised of his rights by the court, in all criminal cases charging a felony . . . ." 15 M.R.S.A. § 810; *see also id.* (granting "[t]he Superior or District Court" discretion to appoint counsel to represent indigent defendants "in any criminal case"). Rule 44 of the Maine Uniform Rules of Criminal Procedure "implements the constitutional right to counsel in a criminal proceeding . . . ." *State v. Smith*, 677 A.2d 1058,

1060 (Me. 1996); *see also* M. R. U. Crim. P. 44 ("If the defendant is without sufficient means to employ counsel, the court shall make an initial assignment of counsel."); *see also id.* (providing that "the court shall make an initial assignment of counsel" in prosecutions charging a Class D or Class E crime, "unless the court concludes that in the event of conviction a sentence of imprisonment will not be imposed.").

Once the court initially assigns counsel:

> Assigned counsel must be designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case to which counsel is assigned. The Maine Commission on Indigent Legal Service will, pursuant to procedures established by the Commission, accept the initial assignment made by the court or substitute other counsel for counsel assigned by the court.

M. R. U. Crim. P. 44. Thereafter, MCILS, through its executive director, is directed to "[a]dminister and coordinate delivery of indigent legal services . . . ." 4 M.R.S.A. § 1805(4); *see also* 4 M.R.S.A. § 1802(4) (defining "indigent legal services" to include "legal representation provided to . . . [a]n indigent defendant in a criminal case in which the United States Constitution or the Constitution of Maine or federal or state law requires that the State provide representation.").

Plaintiffs' Proposed Amended Complaint seeks the appointment of counsel for indigent criminal defendants. MCILS is not empowered to appoint counsel. *See* Combined Order at 13 (the Legislature "preserved the Judicial Branch's role to 'assign' counsel.") (citing 4 M.R.S.A. § 1801 and 15 M.R.S.A. § 810). Because MCILS cannot provide the relief demanded, Plaintiffs' motion seeking to add this new claim should be denied.

2. Count II of Plaintiffs' Proposed Amended Complaint fails to state a claim upon which relief can be granted.

In addition to Plaintiffs' previously asserted claim alleging violation of Plaintiffs' rights secured under the Sixth Amendment of the United States Constitution, Plaintiffs' Proposed Amended Complaint asserts a claim under Art. I, § 6, of the Maine Constitution (Count II). "The right to counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 6 of the Maine Constitution, which are "commensurate" with each other. *State v. Nisbet*, 2016 ME 36, ¶ 24, 134 A.3d 840, 850 (quoting *State v. Watson,* 2006 ME 80, ¶ 14, 900 A.2d 702).

In Count I, Plaintiffs allege entitlement to relief for Sixth Amendment violations pursuant to 42 U.S.C.A. § 1983, which establishes a cause of action whereby, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." In contrast, the claims in Count II of Plaintiffs' proposed Amended Complaint rely on 5 M.R.S.A. § 4682. That statute establishes a cause of action whereby, "[a] person whose exercise or enjoyment of the rights secured by the United States Constitution or the laws of the United States or of the rights secured by the Constitution of Maine or the laws of the State has been interfered with, or attempted to be interfered with, may institute and prosecute in that person's own name and on that person's own behalf a civil action for legal or equitable relief whenever any person, whether or not acting under color of law . . . [i]ntentionally interferes or attempts to intentionally interfere with the exercise or enjoyment by any other person of those secured rights," in five enumerated ways. 5 M.R.S.A. § 4682(1-A).

a. None of the defendants identified in Plaintiffs' Proposed Amended Complaint, including MCILS, are a "person" subject to suit pursuant to 5 M.R.S.A. § 4682.

MCILS, as well as the new defendants Plaintiffs' identify in their Proposed Amended Complaint, are all public officials named in their official capacities or the State of Maine. "[B]ecause the Legislature did not express an intent to include the State within the definition of a "person" under the MCRA, the Superior Court correctly determined that the State is not a 'person' within the scope of the statute." *Jenness v. Nickerson*, 637 A.2d 1152, 1158 (Me. 1994). This holding in *Jenness* is consistent with federal caselaw establishing that a public official acting in their official capacity is, likewise, not a "person" for purposes of 42 U.S.C. § 1983. *Id.* ("The MCRA 'was patterned after 42 U.S.C. § 1983.'" *Id.* (quoting *Grenier v. Kennebec County, Maine,* 733 F. Supp. 455, 458 n. 6 (D. Me. 1990)); *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 70-71 (1989). Accordingly, Count II of Plaintiffs' Proposed Amended Complaint would immediately be subject to dismissal.

b. Plaintiffs have failed to allege the conduct necessary to support an action pursuant to 5 M.R.S.A. § 4682.

Unlike Section 1983, Section 4682 requires allegations of specified conduct, such as actual or threatened physical force against a person, to support a claim. *Id.* None of Plaintiffs' allegations meet the requirements for a claim pursuant to Section 4682. Accordingly, Count II of Plaintiffs' Proposed Amended Complaint fails to assert a cause of action against any of the named Defendants upon which relief can be granted. Their motion seeking to add such a claim should be denied on the grounds of futility.

B. PLAINTIFFS' PROPOSED AMENDED COMPLAINT ATTEMPTS TO ADD PARTIES AGAINST WHICH RELIEF CANNOT BE GRANTED.[5]

1. Plaintiffs' Proposed Amended Complaint fails to state a claim against the State of Maine upon which relief can be granted.

a. The State of Maine is immune from suit under 42 U.S.C.A. § 1983 in the Courts of the State of Maine.

"While the Eleventh Amendment is inapplicable in state courts, absent a waiver, the State of Maine retains its privilege to assert sovereign immunity in its own courts." *Scott v. Androscoggin County Jail*, 2004 ME 143, ¶ 23, 866 A.2d 88; *see also Alden v. Maine*, 527 U.S. 706, 735–36 (1999) ("As we have explained, however, the bare text of the [Eleventh] Amendment is not an exhaustive description of the States' constitutional immunity from suit."); *Thiboutot v. State*, 405 A.2d 230, 237 (Me. 1979), *aff'd,* 448 U.S. 1 (1980) ("Though the question is not free from doubt, it is our conclusion that, in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under 42 U.S.C. s 1983 [alleging state underpayment of federal 'Aid to Families with Dependent Children' benefits]."); *Jackson v. State*, 544 A.2d 291, 299 (Me. 1988) ("For reasons similar to those expressed in *Thiboutot,* and still without conviction that this federal issue has been finally resolved, we conclude that the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under section 504 of the Rehabilitation Act.").

---

[5] Plaintiffs' Motion to Amend also fails to address the controlling standard to add new parties. M.R. Civ. P. 19(a) ("A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."). Because none of the grounds justifying addition of the State of Maine, Attorney General Frey, or Governor Mills as parties applies, their proposed addition in Plaintiffs' Proposed Amended Complaint is immediately subject to dismissal and, therefore futile.

As shown below, the claims asserted against the State of Maine by Plaintiffs' Proposed Amended Complaint are barred by sovereign immunity.

b. The State of Maine is not a proper defendant in Plaintiffs' proposed claim under 42 U.S.C.A. § 1983 or 5 M.R.S.A. § 4682.

Section 1983 authorizes suits against a "person" who allegedly deprived a plaintiff of their constitutional rights. 42 U.S.C.A. § 1983. A state is not a "person" under § 1983. *Will,* 491 U.S. at 64, 71. Section 4682, likewise, authorizes an action against a "person." The State of Maine is not a "person" for the purpose of Section 4682. *Jenness*, 637 A.2d at 1158. "[B]ecause the Legislature did not express an intent to include the State within the definition of a "person" under the MCRA, the Superior Court correctly determined that the State is not a "person" within the scope of the statute." *Id.*

c. The State of Maine is not the "custodian" of any Petitioner pursuant to 14 M.R.S.A. §§ 5501, et seq.

The statutes governing the writ of habeas corpus provide, "The person *having custody of the prisoner* may be designated by the name of his office, if he has any, or by his own name; or if both are unknown or uncertain, he may be described by an assumed name." 14 M.R.S.A. § 5527 (emphasis added); *see also* 14 M.R.S.A. §5515 ("The application shall be in writing, signed and sworn to by the person making it, stating the place where and *the person by whom the restraint is made*.") (emphasis added); 14 M.R.S.A. § 5525 (providing for alternate form of writ, "[i]n cases of imprisonment or restraint of personal liberty by any person *not a sheriff, deputy sheriff, constable, jailer or marshal, deputy marshal or other officer of the courts of the United States*," commanding, "the sheriffs of our several counties and their respective deputies," to bring petitioner before the Supreme Judicial Court) (emphasis added). The procedures established in 14 M.R.S.A. § 5501, et seq. are consistent with the nature of the writ, the federal counterpart to

which has been held to, "contemplate a proceeding *against some person who has the immediate custody of the party detained*, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885)) (emphasis added).

Because the State of Maine is not a "person who has the immediate custody of the party detained," *Rumsfeld*, 542 U.S. at 435, it is not a proper respondent to Plaintiffs' proposed Petition for a Writ of Habeas Corpus.[6]

2. Plaintiffs' proposed Amended Complaint does not assert a claim upon which relief can be granted against Aaron Frey, in his official capacity as Attorney General of Maine.

Having identified their constitutional claims as alleged failures to provide attorneys to indigent criminal defendants who they claim are constitutionally entitled to counsel, Plaintiffs' Proposed Amended Complaint alleges that Attorney General Frey "has failed to exercise any oversight responsibilities to ensure that criminal prosecutions are carried out in a manner consistent with the Constitution." Plaintiffs' Proposed Amended Complaint at ¶ 61. Plaintiffs'

---

[6] The distinction between a "respondent" and a "party in interest" was addressed by a recent order of a single justice of the Law Court:

> Title 14 § 5522 does provide, however, that a petitioner "imprisoned on any criminal accusation" shall not be released "until sufficient notice has been given to the Attorney General or other attorney for the State that he may appear and object, if he thinks fit." Here, the Attorney General has requested to remain in the case as an interested party pursuant to section 5522. *See also* 5 M.R.S. § 191(3) ("The Attorney General or a deputy, assistant or staff attorney shall appear for the State ... in all civil actions and proceedings in which the State is a party or interested .... "). The request is granted over objection of Petitioners; and *the State of Maine is designated as a party in interest.*

Order on Request for Writ of Habeas Corpus, *Peterson, et al. v. Johnson, et al.*, SJC-23-2 (Nov. 6, 2023) (available at: https://www.courts.maine.gov/news/peterson/SJC-23-2_2023.11.06_order.pdf) (last accessed Mar. 14, 2024). The basis for Petitioners' claim of "unlawful" detention in Plaintiffs' Proposed Amended Complaint is not the existence or nonexistence of a court authorized commitment to the custody of the various sheriffs but an alleged constitutional infirmity in the commitment itself. Plaintiffs' Proposed Amended Complaint, ¶¶149 – 154. Petitioners' custodians, while nominally proper parties based solely on their custody of Petitioners, lack any role in the alleged "unlawful[ness]" or the necessary interest in the acts or failures to act allegedly creating that "unlawful[ness]." *See* M. R. Civ. P. 19(a) (permitting joinder of interested parties *if feasible*).

substantive constitutional claims allege failures to provide defense counsel to indigent defendants. Plaintiffs' Proposed Amended Complaint fails to assert claims against Attorney General Frey upon which relief can be granted for three reasons.

First, Attorney General Frey is not responsible for appointing counsel, 15 M.R.S.A. § 810, M.R.U. Crim P. 44, or designating counsel as eligible to receive appointments. 4 M.R.S.A. § 1801, et seq. The exception to sovereign immunity created by *Ex parte Young*, 209 U.S. 123 (1908), does not apply. "While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws," the state official in question must have "enforcement authority" over that law "that a federal court might enjoin him from exercising." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 534 (2021). Plaintiffs' Proposed Amended Complaint fails to allege any enforcement authority by the Attorney General with respect to the selection or appointment of counsel to represent indigent criminal defendants, nor does any exist.

Second, Plaintiffs' Proposed Amended Complaint fails to allege any conduct by Attorney General Frey that caused their injury, therefore failing to comply with Rule 12(b)(6)'s pleading standards. In actions brought under 42 U.S.C. § 1983, the plaintiff's allegations must support a finding that the individual, through his or her individual actions, violated plaintiff's constitutional rights. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (construing Fed. R. Civ. P. 12(b)(6)). To withstand a Rule 12(b)(6) motion, Plaintiffs must have alleged in their complaint a plausible claim for relief against Attorney General Frey; "[t]hreadbare recitals of the elements of a cause of action . . . do not suffice." *Id.* at 678. Here, the operative state authority underlying the claims included in Plaintiffs' Proposed Amended Complaint, 15 M.R.S.A. § 810, M.R.U. Crim P. 44, and 4 M.R.S.A. § 1801, et seq., identify responsible actors: none of whom are Attorney General Frey.

Third, none of Plaintiffs' alleged harm was caused by or can be redressed by Attorney General Frey. To have standing to bring these claims against Attorney General Frey, Plaintiffs' alleged injury must be "fairly traceable to the challenged action" of the defendant. *Collins v. State*, 2000 ME 85, ¶6, 750 A.2d 1257; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Moreover, the proper "When a party seeks to sue an agency of the State, the proper party defendant is any officer, office, department, agency, authority, commission, board, or institution *against whom the plaintiff has alleged a right to final relief.*" *SEIU Local1989*, 682 A.2d at 689 (emphasis added). The party against which a plaintiff seeks injunctive relief must be capable of providing that relief. *Id.* (concluding that defendant, "in his official capacity as the Director of Personnel for the Department of Corrections," which Department "has the responsibility for the administration of the State's correctional institutions," was the proper party defendant in a suit seeking injunctive relief compelling action by Department); *see also KHK Assocs. v. Department of Human Servs.,* 632 A.2d 138 (Me.1993); *Maine State Employees Ass'n v. State Dep't of Corrections,* 593 A.2d 650 (Me.1991); *see also Calnan v. Hurley*, 2023 WL 8351493, at *3 (Me. Super. July 13, 2023) (holding that director statutorily "charged with administer[ing] Maine Emergency Medical Services," was proper party where, "relief that if granted, would seemingly be enforceable against the director as head administrator.") (citing *SEIU Local1989*, 682 A.2d at 689).

Plaintiffs fail to allege that Attorney General Frey took any action relating to their claims - let alone actions amounting to a violation of Plaintiffs' rights under the Sixth Amendment to the United States Constitution, the Maine Constitution, or any statutory rights.

3. Plaintiffs' proposed Amended Complaint does not assert a claim upon which relief can be granted against Janet Mills, in her official capacity as Governor of Maine.

Plaintiffs' Proposed Amended Complaint alleges that Governor Mills "has failed to take care that the laws guaranteeing the effective right to counsel are faithfully executed." Plaintiffs' Proposed Amended Complaint at ¶ 62. Plaintiffs' claims with respect to Governor Mills fail for three (3) reasons. First, Governor Mills is not responsible for appointing counsel, 15 M.R.S.A. § 810, M.R.U. Crim P. 44, or designating counsel as eligible to receive appointments. 4 M.R.S.A. § 1801, et seq. The exception to sovereign immunity created by *Ex parte Young*, 209 U.S. 123 (1908), does not apply. "While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws," the state official in question must have "enforcement authority" over that law "that a federal court might enjoin him from exercising." *Whole Woman's Health*, 142 S. Ct. at 534. Plaintiffs have failed to allege any enforcement authority by the Governor with respect to the selection or appointment of counsel to represent indigent criminal defendants, nor does any exist.[7]

Second, Plaintiffs' proposed Amended Complaint fails to allege any conduct by Governor Mills that caused their injury, therefore failing to comply with Rule 12(b)(6)'s pleading standards. In actions brought under 42 U.S.C. § 1983, the plaintiff's allegations must support a finding that the individual, through his or her individual actions, violated plaintiff's constitutional rights. *Ashcroft*, 556 U.S. at 676 (construing Fed. R. Civ. P. 12(b)(6)). To withstand a Rule 12(b)(6) motion, Plaintiffs must have alleged in their complaint a plausible

---

[7] In addition to the Plaintiffs' failure to state a cognizable claim against Governor Mills, the injunctive relief Plaintiffs' seek is unavailable with respect to the Governor in her official capacity. *Kelly v. Curtis*, 287 A.2d 426, 429 (Me. 1972) ("The Governor's immunity from judicial coercion by court order in the performance of his official duties, ministerial or discretionary, has never been questioned in this State since the [*In re Dennett, petitioner*, 1851, 32 Me. 508] decision until the present complaint was filed.").

claim for relief against Governor Mills; "[t]hreadbare recitals of the elements of a cause of action . . . do not suffice." *Id.* at 678. Here, the operative state authority underlying the claims included in Plaintiffs' proposed Amended Complaint, 15 M.R.S.A. § 810, M.R.U. Crim P. 44, and 4 M.R.S.A. § 1801, et seq., identify responsible actors: none of whom are Governor Mills.

Third, none of Plaintiffs' alleged harm was caused by or can be directly redressed by Governor Mills. The party against which a plaintiff seeks injunctive relief must be capable of providing that relief. *SEIU Local1989*, 682 A.2d at 689. To have standing to bring these claims against Governor Mills, Plaintiffs' alleged injury must be "fairly traceable to the challenged action" of the defendant. *Collins*, 2000 ME 85, ¶ 6, 750 A.2d 1257; *see also Lujan*, 504 U.S. at 560–61. Plaintiffs fail to allege that Governor Mills took any action relating to their claims - let alone actions amounting to a violation of Plaintiffs' rights under the Sixth Amendment to the United States Constitution, the Maine Constitution, or any statutory rights.

C. GRANTING PLAINTIFFS' MOTION TO AMEND WILL UNDULY PREJUDICE MCILS.

1. Allowing the amendment of claims following the resolution of all of Plaintiffs' originally pleaded claims by agreement unduly prejudices MCILS.

"When amendment as a matter of course may no longer be made, *absent undue prejudice to the opponent*, leave to amend should be freely granted by the court." *Kasu Corp. v. Blake, Hall & Sprague, Inc.*, 540 A.2d 1112, 1113 (Me. 1988) (emphasis added). As this Court has acknowledged, the Parties have resolved all of the claims in Plaintiffs' Complaint by agreement – denying the Parties the opportunity to finalize that settlement based on the Parties' failure to resolve the previously unasserted claims which the Court directed Plaintiffs to include in Plaintiffs' Proposed Amended Complaint. Combined Order at 14 ("*[B]ecause the S[ettlement] A[greement] fails to provide enforceable relief for the ever-increasing number of unrepresented*

indigent defendants, the S[ettlement] A[greement] cannot be said to be fair, reasonable, or adequate, or otherwise in the best interests of all the Class Members.") (emphasis added).[8] But for the procedural posture of this litigation as a certified class action, the Parties' settlement(s) would have terminated the litigation. *Cf.* M.R. Civ. P. 44(a)(1) (permitting dismissal of action "by filing a stipulation of dismissal signed by all parties that have appeared in the action") and M.R. Civ. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court . . . .").

The addition of new claims in this fashion, following resolution of all claims asserted in a plaintiff's original complaint, is unduly prejudicial to MCILS. *See, e.g. Diversified Foods, Inc. v. First Nat. Bank of Boston*, 605 A.2d 609, 616 (Me. 1992) ("[W]hen summary judgment has been entered, the court should be reluctant to allow the addition of a new cause of action . . . ." (citing *Dugan v. Martel,* 588 A.2d 744, 747 (Me. 1991))); *Nadeau v. State,* 395 A.2d 107, 117–18 (Me.1978) ("Where, however, summary judgment has been entered, a court is ordinarily reluctant to permit the plaintiff to amend his complaint to assert a different cause of action." (citing *Dugan*, 588 A.2d at 747))).

2. Requiring newly asserted claims of hundreds of class members against MCILS and newly added defendants to be tried within less than fourteen (14) weeks from today unduly prejudices MCILS.

Plaintiffs' Motion to Amend arrives in the context of this Court's Combined Order mandating a trial on newly conceived and asserted claims beginning on June 24, 2024: about three (3) months from today. The Standard Scheduling Order, as well as the Scheduling Order issued in this litigation, *see* Scheduling Order (Aug. 4, 2022), provides for an approximately 12-

[8] The Combined Order also identifies an "obstacle" to approval unrelated to the claims asserted in Plaintiffs' proposed Amended Complaint and absent from the September 2023 Order denying the Parties' proposed settlement. Combined Order at 2 – 3 (noting absence of "meaningful judicial enforcement" of Defendants' contractual obligations to conduct "monitoring and performance reviews of contract counsel, along with caseload limits.").

month period for parties to conduct discovery, litigate dispositive motions, attend the Alternative Dispute Resolution Conference mandated by M.R. Civ. P. 16B, and participate in a pretrial conference to facilitate the efficient and effective conduct of a trial. M.R. Civ. P. 16; M.R. Civ. P. 16B. The schedule mandated by the Court exacerbates the undue prejudice resulting from Plaintiffs' proposed amendment of its Complaint.

3. Plaintiffs' Motion to Amend, mandated by the Court's February 27, 2024 Order, should be denied because it does not assert claims supported by the facts alleged in Plaintiffs' Complaint.

A court is "well within its discretion" to deny leave to amend a complaint where the amended complaint asserts claims unsupported by facts in the original complaint. *Miller v. Szelenyi*, 546 A.2d 1013, 1023 (Me. 1988) (affirming denial of amendment to add conspiracy claim to wrongful death action pursuant to 42 U.S.C.A. §1983); *see also Foisy v. Bishop*, 232 A.2d 797, 800 (Me. 1967) (holding that, where plaintiff's complaint, "alleged as a basic factual occurrence the wilful destruction of commonly owned buildings," amendment was permissible to remedy misstatement of "[plaintiff's] theory of recovery or measure of damages.").

There is no reason for the newly asserted claims in Plaintiffs' proposed Amended Complaint to be included in the present litigation. The addition of new claims, expressly designated as "Phase 1" in the Court's Combined Order, are specially set for a trial separate from *and prior to* the claims asserted by Plaintiffs in their Complaint. *Cf. Thornton v. Cressey's Estate*, 413 A.2d 540, 545 (Me. 1980) (noting factors justifying separate trials include, "where one issue can be ready for trial immediately, and another more complicated issue involving more and different witnesses would take much longer to prepare."); *see also* M.R. Civ. P. 42(b).

In contrast to the guidance provided by M.R. Civ. P. 42, applicable to cases in which separable issues and claims are alleged by a plaintiff, the proposed Amended Complaint and

attendant schedule, Combined Order at 16, would postpone resolution of the claims asserted in Plaintiffs' Complaint following the separate trial on the new claims in Plaintiffs' Proposed Amended Complaint. *Cf.* M.R. Civ. P. 42(b) (allowing trial courts to order separate trial of any claim, "in furtherance of convenience or to avoid prejudice"). The public policy favoring a single trial on multiple claims is well-established, and separating claims for separate trials is strongly disfavored. *See, e.g., Thornton*, 413 A.2d at 545 ("[W]e cannot fairly conclude, absent a plainer indication than appears in this record, that the presiding Justice must have deemed [the potential that a favorable verdict on one claim would eliminate the second claim] so weighty that he acted on his own motion to order separate trials as to the two claims.").

CONCLUSION

For the reasons stated above, Plaintiffs' Motion to Amend should be denied.

Dated March 14, 2024

Respectfully submitted,

Sean D. Magenis (Bar No. 9495)
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8800
sean.d.magenis@maine.gov