**MAINE SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

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Docket No. Ken-24-132

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ANDREW ROBBINS, *et al.*
*Plaintiffs – Appellees,*

*v.*

MAINE COMMISSION ON INDIGENT LEGAL SERVICES, *et al.*
*Defendants-Appellants*

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On Appeal from Superior Court, Kennebec County
Superior Court Docket No. KENSC-CV-22-54

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# APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL AND TO PERMIT TRIAL COURT ACTION[1]

Appellants in the above-captioned matter, 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.

[1] Appellants respectfully request the opportunity for Oral Argument to address Appellees' Motion. M. R. App. P. 10 ("All motions will be acted upon without oral argument *unless otherwise ordered.*") (emphasis added).

App. P. 3, 4, and 10, hereby oppose Appellees' Motion to Dismiss and to Permit Trial Court Action ("Appellees' Motion to Dismiss") as follows:

## PROCEDURAL HISTORY

Appellees' Complaint below alleges that MCILS has failed to: (i) set and enforce standards for defense counsel caseloads, conflicts of interest, and attorney performance; (ii) monitor and evaluate rostered attorneys; (iii) ensure adequate funding and support for rostered attorneys; and (iv) provide training to rostered attorneys. Appellees' Class Action Complaint for Injunctive and Declaratory Relief ("Appellees' Complaint"), 30 – 31 (**Exhibit 1**). Appellees assert that MCILS's enumerated failures to act create a substantial risk of serious harm: constructive denial of counsel. *Id.* at 3-5, 13, 22, and 31. Appellees allege that the resulting risk of depriving indigent criminal defendants of their Sixth Amendment rights is unconstitutional. *Id.*at 22 (". . . MCILS's lax approach to its statutory obligations creates an unconstitutional risk that indigent defendants will be assigned an attorney who is ill-prepared and incapable of providing effective representation under the federal and state constitutions."). Appellees seek prospective injunctive relief to remediate the risk of constructive denial of counsel due to systemic inadequacies. *Id.* at 34 (requesting "Injunctive relief requiring [MCILS] to guarantee the assistance of counsel to Plaintiffs and those similarly situated *by establishing adequate gatekeeping, supervision, and training of state-*

*appointed counsel*, consistent with the Sixth Amendment to the United States Constitution[.]") (emphasis added). The Superior Court certified a class to pursue that claim, pursuant to M. R. Civ. P. 23(a) and 23(b)(2), defining the 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. §810 because they have been indicted for a crime punishable by imprisonment, and they lack sufficient means to retain counsel.

Order on Class Certification (Jul. 13, 2022) (**Exhibit 2**).

Following class certification, the Parties conducted discovery, including MCILS deposing each of the named class members whom Appellees could locate. The Parties litigated Appellees' Motion to Compel, briefing of which included the sole evidence submitted to the Superior Court at any point: an affidavit identifying MCILS employees and describing their job responsibilities. MCILS's Opposition to Appellees' Motion to Compel, Exhibit H (Affidavit of Justin Andrus, Executive Director, Maine Commission on Indigent Legal Services, ¶4 (Dec. 28, 2022)) ("Andrus Aff.") (**Exhibit 3**). Following multiple judicial settlement conferences, on or about March 3, 2023, the Court stayed litigation to allow the Parties to work towards a settlement of all claims. The Parties settled all claims in the underlying litigation on August 21, 2023.

By order of September 13, 2023 Order, the Superior Court denied the Parties' Joint Motion to Conduct Preliminary Review of Class Action Settlement

(Aug. 21, 2023). September 13, 2023 Order (**Exhibit 4**). The Parties addressed the four (4) concerns raised by the Superior Court's Order and filed their Supplemental Joint Motion to Conduct Preliminary Review of Amended Class Action Settlement on November 28, 2023 ("First Amended Joint Motion"). Following oral argument on December 15, 2023, during which the Court identified a fifth concern[2], the Parties re-negotiated their Amended Class Action Settlement to include dismissal of the litigation in lieu of a stay, withdrew their First Amended Joint Motion, and simultaneously filed their Second Amended Joint Motion for Preliminary Settlement Review on February 14, 2024 ("Second Amended Joint Motion"). Thirteen days later, the Superior Court issued an Order denying the Second Amended Joint Motion, identifying a new claim alleging actual denial of counsel, and designating a subclass to pursue that newly identified claim. Combined Order (Feb. 27, 2024) ("February 27th Order"). MCILS's Notice of Appeal (Mar. 15, 2024) seeks review of the February 27th Order.[3]

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[2] THE COURT: . . . I want to be clear, the four -- four out of the five areas of concern have been addressed adequately, and I think it's been done in good faith, after a lot of hard work, concessions likely on both sides, I would have no way to really know much about that other than what I read in the filings, but the fifth concern remains. And have you . . . come across a case that was settled in this way anywhere in the state of -- any state or any federal court, where what the agreement was was a four-year continuance or stay of the litigation?

[3] Appellees sought leave to amend their Complaint on March 8, 2024. Appellants opposed that motion on March 15, 2024.

## ARGUMENT AND MEMORANDUM OF LAW

The February 27th Order, relying on M. R. Civ. P. 23(e),[4] identified a previously unasserted claim, arising out of the Court's "review of the available data," and denied the Parties' Second Amended Joint Motion to Conduct Preliminary Review of Second Amended Class Action Settlement because it did not resolve that previously unasserted claim.

Appellees contend that Appellants' appeal should be dismissed on three grounds: (1) this Court lacks jurisdiction over this appeal because the February 27th Order is not a final judgment, Appellees' Motion to Dismiss, 6-7; (2) the terms of the Parties' settlement agreement divests this Court of jurisdiction, *id.* at 8-10; and (3) the rapidly approaching trial on claims not currently plead will render the harm from the February 27th Order irreparable. *Id.* at 9 ("[A]ny appeal will quickly and inevitably be overtaken by intervening events.").

Contrary to Appellees' arguments, the February 27th Order's denial of the Parties' Second Supplemental Settlement Motion merits interlocutory review. This Court's review of the February 27th Order falls squarely within the judicial economy exception to the prudential bar on interlocutory appeals. Contrary to Appellees' contention, the terms of the Parties' Second Amended Settlement

[4] M. R. Civ. P. 23(e) renders the Parties request to dismiss the pending litigation subject to court approval, as a result of the Court's earlier designation of a Plaintiffs' class pursuant to M. R. Civ. P. 23(a) and (b)(2). *Cf.* M .R. Civ. P. 41(a)(1) (any civil action may be dismissed by stipulation of the parties, "[s]ubject to the provisions of Rule 23(e).").

Agreement neither controls the availability or standard to be applied on review nor do those terms render Appellants' request for review of the February 27th Order moot. Finally, the likelihood that an impending trial on previously unasserted claims pursued by a judicially designated subclass created *sua sponte* will render the February 27th Order unreviewable *supports* Appellants' request for immediate, interlocutory review.

### A. This Court's review of the February 27th Order meets established exceptions to the final judgment rule.

#### 1. The prudential "final judgment rule" does not bar all interlocutory appeals.

"When the purposes of the final judgment rule would be thwarted by the dismissal of an appeal, the rule will not be applied." *Moore v. Cent. Maine Power Co.*, 673 A.2d 699, 701 (Me. 1996). This Court, "will not consider an appeal unless it derives from a final judgment or order, or unless, notwithstanding the lack of finality, it falls within a recognized exception to the final judgment rule." *Connors v. Int'l Harvester Co.*, 437 A.2d 880, 881 (Me. 1981); *see also Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 12, 974 A.2d 918, 924. The final judgment rule is prudential, not jurisdictional. *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 16, 39 A.3d 74 ("[The final judgment rule] is intended to avoid piecemeal appeals and to promote the efficient and effective resolution of legal disputes." (citing *Millett v. Atl. Richfield Co.*, 2000 ME 178, ¶ 8,

760 A.2d 250)); *see also Harding v. Comm'r of Marine Res.*, 510 A.2d 533, 536 (Me.1986)). As a judicially created doctrine, the final judgment rule, "must be tempered with reason and applied with discretion." *Moore*, 673 A.2d at 701 ("The final judgment rule is a prudential rule, designed to avoid piecemeal litigation and to preserve our limited judicial resources.").

This Court has recognized exceptions to the final judgment rule where review of an interlocutory order would serve the goal of that rule: efficiently and effectively resolving legal disputes. *See United States of Am., Dep't of Agric., Rural Hous. Serv. v. Carter*, 2002 ME 103, ¶ 7, 799 A.2d 1232, 1234 ("We have recognized three exceptions to this so-called final judgment rule: the collateral order exception, the death knell exception, and the judicial economy exception."). This Court has endorsed additional exceptions, including where the trial court's disposition of a request for injunctive relief would result in "irreparable loss." *Dinerman v. Neal*, 450 A.2d 487, 487-88 (Me. 1982) (citing *Connors*, 437 A.2d at 881; *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 76-77 (Me. 1980); *Moffet v. City of Portland*, 400 A.2d 340, 343 n. 8 (Me. 1979). The exception to final judgment rule based on injunctive relief applies "where substantial rights of a party will be irreparably lost if review is delayed until final judgment." *Dinerman* at 488 (quoting *Connors*, 437 A.2d at 881)); *see also* Principles of the Law of Aggregate Litigation § 3.12 PFD Appellate Review of

Orders Rejecting a Proposed Class Settlement (2009) ("[I]f the trial court's concerns about the [class action] settlement were not justified, the court and the parties will have wasted valuable time litigating a case that could have been settled on terms acceptable to both sides."). Moreover, whether designated as a subset of the "judicial economy" exception, *see* Alexander, *Maine Appellate Practice* § 304, p. 225 (6th ed. 2022), or a separate exception, this Court has applied an "extraordinary circumstances" exception to the final judgment rule in matters challenging the acts or failures to act of executive agencies. *See* Harvey, 3A Maine Prac., Maine Civil Practice § A2C:5 (3d ed.) ("It is not entirely clear from the opinions of the Law Court whether there is a separate exception from the final judgment rule for extraordinary circumstances or whether opinions using this term are merely a subset of the judicial economy exception.").

In *Forest Ecology Network*, defendant administrative agency appealed the Superior Court's reversal of the agency's approval of a land use plan and order compelling the agency to hold an evidentiary hearing on that land use plan. 2012 ME 36 at ¶¶ 11-12. This Court concluded that policy considerations, specifically, "unnecessary judicial interference with an extensive rulemaking process by an Executive Branch agency," justified applying the judicial economy exception. *Id.* at ¶ 23 ("[T]he denial of appellate review could result in unnecessary judicial interference with an extensive rulemaking process by an Executive Branch agency,

thus burdening the separation of powers."). As an additional basis for applying the judicial economy exception to the final judgment rule, this Court noted, "the unprecedented and far-reaching effects of [the agency]'s approval of Plum Creek's petition," concluding that "immediate appellate review is necessary in the interests of justice." *Id.* (noting immediate review would avoid "potential waste of extensive agency resources").

In *Bar Harbor Banking*, this Court considered an appeal of a lower court order enjoining the Bureau of Consumer Protection from holding a hearing on a matter in which plaintiffs contended they would be adversely affected by the Bureau's incorrect interpretation of a controlling statute. 411 A.2d at 75. Plaintiffs did not contend that the Bureau lacked the power to hold the enjoined hearing. *Id.* at 78 ("Here it is undisputed that the appellant was authorized by the statutory scheme to conduct a hearing concerning possible violations of 9-A M.R.S.A. §2.504."). This Court held that, although appellant's claim, "comes within no previously articulated exception to the final judgment rule and is not otherwise excluded from the operation of the rule by statute, we are not precluded from fashioning an exception on the facts of this case." *Id.* at 77 (citing *Maine Central Railroad v. Bangor & Aroostook Railroad*, 395 A.2d 1107, 1113 (1978). This Court granted interlocutory review based on, [t]he constitutionally mandated separation of powers [which] forbids precipitous injunctive interference with the

legitimate, ongoing executive function. *Id.* at 77 (citing *Ex parte Davis*, 41 Me. 38, 53 (1856); *Bamford v. Melvin*, 7 Me. 14, 17 (1830)).

Similarly, in *Mahaney v. Miller's, Inc.*, this Court held that an order of the Superior Court remanding an appeal of a licensing decision of the Harness Racing Commission to the Commission for a new hearing was appealable, despite not being a final judgment. 669 A.2d 165, 168 (Me. 1995). Addressing the final judgment rule, this Court stated:

> We conclude nevertheless that the court's order is not a final judgment according to our prior cases, commencing with *Harris Baking Co. v. Maine Employment Sec. Comm'n*, 457 A.2d 427 (Me.1983). Rather than overrule Harris Baking and its progeny, we apply a judicial (and administrative) economy principle. Because the Commission's actions were proper in all respects, a dismissal of the appeals at this juncture would unnecessarily exacerbate the workload of both the agency and the courts.

*Id.*

This Court's assessment of the circumstances in which an interlocutory appeal is available accords with federal caselaw permitting immediate appeal of a court's denial of a motion for preliminary approval of a class action settlement. In *Carson v. American Brands, Inc.*, the Supreme Court considered the interlocutory appeal of a trial court's denial of preliminary settlement approval in a class action. 450 U.S. 79 (1980). The *Carson* court held that a litigant must "show that an interlocutory order of the district court might have a 'serious, perhaps irreparable consequence,' and that the order can be 'effectually challenged' only by immediate

appeal . . . ." *Id.* at 84. The *Carson* court further observed, "Because a party to a pending settlement might be legally justified in withdrawing its consent to the agreement once trial is held and final judgment entered, the District Court's order might thus have the 'serious, perhaps irreparable consequence' of denying the parties their right to compromise their dispute on mutually agreeable terms." *Id.* at 87-88. The First Circuit Court of Appeals observed that *Carson*, "made it clear that an interlocutory order denying a motion to enter a consent decree providing injunctive relief may be appealable . . . as an order refusing an injunction." *Durrett v. Hous. Auth. Of City of Providence*, 896 F.2d 600, 602 (1st Cir. 1990).[5] Noting that the plaintiffs' claim for injunctive relief addressing alleged substandard housing conditions necessarily alleged irreparable harm, the *Durrett* court also noted that the parties were, "obviously in danger of suffering loss to their right to compromise their dispute on mutually agreeable terms." *Id.* at 602 (quoting *Carson* at 88) (internal quotations omitted). Other federal courts considering appeals of the denial of settlement approval, where judicial settlement approval was required, have reached the similar conclusion that denying review creates

[5] The *Durrett* court relied, in part, on a federal statute addressing appeals relating to injunctive relief. The basis for that exception is, functionally, identical to this Court's "death knell" exception. *Cf* 28 U.S.C A. S1292(a)(1) (authorizing appeals of interlocutory orders including orders, "granting, continuing, modifying, *refusing* or dissolving injunctions . . . .") and *Bruesewitz v Grant*, 2007 ME 13, ¶8, 912 A.2d 1255, 1258 ("The death knell exception allows for an appeal of an interlocutory order 'where substantial rights of a party will be irreparably lost if review is delayed until final judgment.'" (quoting *Webb v Haas,* 1999 ME 74, ¶ 5, 728 A.2d 1261, 1264)).

irreparable harm. *See, e.g., United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) ("[B]ecause litigation might cause an essential party to withdraw its assent to the [consent] decree, denying interlocutory review might destroy the conditions that permitted compromise in the first place, which would be in contravention of the strong public policy favoring voluntary settlement . . . ." (citing *Carson* at 87-88 & n.13)).

Federal courts evaluating the appealability of rejected settlements in contexts where, like here, settlements require court approval, have also considered whether the order denying preliminary settlement approval provided an opportunity for further negotiation. *See, e.g., U.S.S.E.C. v. Citigroup Glob. Markets, Inc.*, 752 F.3d 285, 293 (2d Cir. 2014) (accepting interlocutory appeal of order rejecting class action settlement where, "the district court expressed no willingness to revisit the settlement agreement with the parties, instead setting a trial date."); *New York v. Dairylea Cooperative, Inc.*, 698 F.2d 567, 568-69 (noting absence of irreparable harm to parties' ability to compromise their dispute on mutually agreeable terms where, "[t]he parties remain free to return to the bargaining table to devise a settlement which would respond to [the court]'s objections."); *In re Touch Am. Holdings, Inc. Erisa Litig.*, 563 F.3d 903, 906 (9th Cir. 2009) (noting that *Carson* holding deeming underlying order appealable relied on finding that the trial court's order, "completely foreclosed any further settlement negotiations short of outright

admission of [liability] . . . and complete restructuring of the class relief.") (citing *EEOC v. Pan Am. World Airways, Inc.*, 796 F.2d 314, 316 (9th Cir. 1986)). The Parties have twice previously addressed the Superior Court's stated concerns with amended settlements. The February 27, 2024 Order set a June trial date. The absence of any further opportunity to meaningfully negotiate is clear.

Finally, this appeal is distinguishable from recent caselaw noting that the complexity of the legal standard controlling appeal counseled against consideration of an interlocutory appeal even where policy considerations favored permitting an interlocutory appeal, i.e. potentially dispositive defenses such as immunity or claim preclusion. *See, e.g., Cutting v. Down E. Orthopedic Assocs.*, P.A., 2021 ME 1, ¶ 19, 244 A.3d 226, 232 (declining consideration of interlocutory appeal of decision denying application of claim preclusion where, "Far from being a clear application of claim preclusion, this appeal would require us to undertake a complex application of state and federal laws to the facts presented in order to determine whether [Appellant]'s malpractice claims are precluded.") (internal citation omitted). The question controlling this appeal is whether the Superior Court abused its discretion in determining that the Paeties' proposed settlement was not a "fair, reasonable, and adequate" resolution of the claims asserted in Appellees' Complaint. *See, e.g., Frank v. PEC Israel Econ. Corp.*, No. 99-261, 2000 WL 33675376, at *2 (Me. Super. May 12, 2000) ("The Stipulation and the Settlement

are approved as fair, reasonable, adequate and in the best interests of the Class."); *Cordy v. USS–Posco Indus.*, No. 12–553, 2013 WL 4028627, at *3 (N.D.Cal. Aug. 1, 2013) ("Preliminary approval of a settlement and notice to the proposed class is appropriate if the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with the range of possible approval." (internal quotation marks omitted)).

**2. The "judicial economy" exception to the final judgment rule justifies this Court's review of the February 27th Order denying preliminary approval of the Parties' Class Action Settlement.**

"A party urging that we reach the merits of an otherwise interlocutory appeal has the burden of demonstrating to us that ... [an] exception[ ] to the final judgment rule justifies our reaching the merits of the appeal." *Salerno v. Spectrum Med. Grp., P.A.*, 2019 ME 139, ¶ 7, 215 A.3d 804, 808 (quoting *Sanborn v. Sanborn*, 2005 ME 95, ¶ 6, 877 A.2d 1075). The February 27, 2024 Order is based on at least three (3) grounds which merit immediate review: (1) the Parties' failure to address unasserted claims identified by the court *sua sponte*; (2) MCILS's enactment of caseload regulations; and (3) MCILS's failure to admit liability.

**a. The Court's insistence on resolving unasserted claims as part of an acceptable settlement risks the irreparable loss of the Parties' right to compromise a disputed claim.**

The Superior Court concluded:

> What was perceived and articulated by Class Counsel as an "unconstitutional risk" of deprivation of counsel has become more than a risk for many class members. . . . The Court concludes that it cannot as a fiduciary for the Class Members approve this S[ettlement ]A[greement], *or any S[ettlement ]A[greement]*, unless it addresses this primary obstacle to reaching other laudable aims of the proffered S[ettlement ]A[greement].

February 27th Order at 13 (emphasis added). The Superior Court's refusal to consider any settlement of the pending class action which does not address a claim *unasserted by Appellees below*, expressly forecloses any opportunity for further negotiation. That posture merits interlocutory review of the February 27th Order. *See Citigroup Glob. Markets, Inc.*, 752 F.3d at 293 (interlocutory appeal of order denying class action settlement appropriate where, "the district court expressed no willingness to revisit the settlement agreement with the parties, instead setting a trial date."); *Dairylea Cooperative, Inc.*, 698 F.2d at 568-69 (no irreparable harm where, "[t]he parties remain free to return to the bargaining table to devise a settlement which would respond to [the court]'s objections."); *In re Touch Am. Holdings*, 563 F.3d at 906 (noting *Carson* endorsed interlocutory appeal of an order which, "completely foreclosed any further settlement negotiations short of outright admission of [liability] . . . and complete restructuring of the class relief.") (citing *Pan Am. World Airways*, 796 F.2d at 316).

Consistent with the "clear policy in favor of encouraging settlements," this Court has advised that, when evaluating the fairness, reasonableness, and adequacy of a compromise resolution, "courts should uphold the public policy favoring the settlement of disputed claims by deferring to the reasonable judgments and compromises made by the settling parties." *Pike Indus., Inc. v. City of Westbrook*, 2012 ME 78, ¶ 25, 45 A.3d 707 (noting that "the court's deference should be tempered by" the relevant public policy addressed by the compromise resolution). Where, as here, parties will otherwise be compelled to litigate resolved claims, the irreparability of the harm to their ability to compromise those claims is self-evident. Interlocutory review is, therefore, justified.

**b. The Court's insistence that resolution of this class-action litigation include an admission of liability by MCILS forecloses the Parties' ability to resolve this litigation.**

While recognizing that MCILS, a statutorily established executive branch commission, cannot "fund" a system of indigent defense, the Superior Court has conditioned the acceptability of a settlement on MCILS conceding liability:

> [MCILS] can do what other defendants have done in similar situations. They could say we can't do it, we don't have the funds, we are failing in our obligations, not because we're not trying our damnedest, but we are failing. They could consent to that finding. . . . [I]f they were willing to do that, that might allow the Court to do something in a more conventional way, in a way that would be meaningful in terms of enforcement.

Transcript of Oral Argument (Dec. 15, 2023), 54:21- 55:6 (**Exhibit 5**). The Superior Court's insistence that any settlement of the claims asserted by Appellees include an admission of liability inherently denies the Parties the ability to settle the underlying litigation. *See, e.g., Nilsen v. York Cnty.*, 382 F. Supp. 2d 206, 218 (D. Me. 2005) ("My role is not to dictate the terms of settlement, but only to reject the settlement if it is not fair, reasonable and adequate.") (citing *Evans v. Jeff D.*, 475 U.S. 717, 726–27 (1986). Consistent with recognition that denial of the parties right to settle a disputed claim under any circumstances merits interlocutory appeal, *Citigroup Glob. Markets, Inc.*, 752 F.3d at 293; *Dairylea Cooperative, Inc.*, 698 F.2d at 568-69; *In re Touch Am. Holdings*, 563 F.3d at 906, interlocutory appeal of the February 27th Order is appropriate.

**c. The Court's denial of the Parties' right to settle the claims asserted in this litigation based on MCILS's separate enactment of caseload standards risks irreparable harm to MCILS's ability to conduct its statutorily mandated function.**

In addition to its creation of unasserted claims alleging actual denial of counsel, the February 27th Order relied on a finding that regulations enacted by MCILS to establish caseload standards will cause or contribute to the actual denial of counsel. February 27th Order, 4 ("The timing of these new [caseload limits] was what drew concern, as it was becoming clear by the end of 2023 that *the number of attorneys* provided to the courts for appointment was steadily

decreasing.") (emphasis added); Transcript of Oral Argument (Dec. 15, 2023), 20:4-8 ("And [caseload standards are] going to happen – it's self-effectuating, it has nothing to do with this case. So there's a regulation in place, it's going to happen. The legislation is self-effectuating . . . .") (**Exhibit 4**). MCILS's enacted caseload standards are consistent with Appellees' allegations that such standards would address their claims that overworked attorneys create an unconstitutional risk of providing ineffective assistance. *Cf.* Appellees' Complaint, 30-31 and 94-649 CMR Ch. 4, § 1, et seq. The Superior Court's "warnings" against implementing those regulations and subsequent conclusion that caseload standards were not "properly implemented," clearly implicate the constitutionally mandated separation of powers and address issues not presented for judicial review. February 27th Order at 5 ("Standards and accountability mean very little when very few attorneys, or not attorneys at all, have been made available by Defendants for judges and justices to appoint.").

Where allowing a court order to take effect without review could interfere with the authorized activity of an executive branch body, this Court has found interlocutory appeal appropriate. *See Forest Ecology Network*, 2012 ME 36 at ¶ 18 ("[W]e have, in a handful of instances, relaxed this first requirement when it is apparent that the denial of appellate review could result in 'judicial interference with apparently legitimate executive department activity' and therefore appellate

review is necessary to 'safe-guard the separation of powers.'") (collecting cases).[6] The February 27th Order is based, in part, on the Superior Court's disagreement with MCILS's enactment of regulatory caseload standards. This Court's review of the February 27th Order is, therefore, necessary, "[t]o avoid [disrupting the administrative process] and to safeguard the separation of powers." *York Cnty. Bd. of Realtors v. York Cnty. Comm'rs*, 634 A.2d 958, 959 (Me. 1993) (quoting *Bar Harbor Banking*, 411 A.2d at 77 (internal quotations omitted).

### 3. The "judicial economy" exception to the final judgment rule justifies this Court's review of the February 27th Order compelling a trial on claims not currently alleged by Appellees.

The February 27th Order conditions approval of any settlement of the claims actually asserted by Appellees on the resolution of new claims – currently unasserted – by mid-June. February 27 th Order at 16 ("The Phase 1 trial will take place during the last week of June 2024."). That condition meets the "judicial economy" exception to the final judgment rule by creating a risk of irreparable harm to: (1) MCILS's due process rights and (2) MCILS's ability to increase the number of available public defenders.

#### a. Absent review, MCILS's due process rights will be violated by the unreasonably accelerated trial schedule included in the February 27th Order.

[6] *Bar Harbor Banking*, 411 A.2d at 77; *York Cnty. Bd. of Realtors*, 634 A.2d at 959–60; *State v. St. Regis Paper Co.*, 432 A.2d 383, 385–86 (Me.1981).

Pursuant to the Maine Constitution, judicial power extends to justiciable controversies. *Flaherty v. Muther*, 2011 ME 32, ¶ 87, 17 A.3d 640 (citing *Connors,* 447 A.2d at 824). "A decision issued on a non-justiciable controversy is an advisory opinion, which we have no authority to render except on solemn occasions, as provided by the Maine Constitution." *Id.* This Court has held:

> Justiciability requires a real and substantial controversy, admitting of specific relief through a judgment of conclusive character. A justiciable controversy involves *a claim* of present and fixed rights based upon an existing state of facts.

*Madore v. Maine Land Use Regul. Comm'n*, 1998 ME 178, ¶ 7, 715 A.2d 157 (citing *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1379 (Me.1996); *Campaign for Sensible Transp. v. Maine Turnpike Auth.*, 658 A.2d 213, 215 (Me.1995)) (internal citations and quotations omitted) (emphasis added). "A court lacks subject matter jurisdiction when the case is of a type that falls outside a court's adjudicatory authority." *Mason v. City of Augusta*, 2007 ME 101, ¶ 15, 927 A.2d 1146, 1150 (citing *Landmark Realty v. Leasure,* 2004 ME 85, ¶ 7)). The new claim for actual denial of counsel created *sua sponte* by the February 27th Order, exceeds the Superior Court's authority.

In a class action seeking declaratory and injunctive relief, the Federal District Court for the District of Maine observed, "The fundamental requisite of due process of law is the opportunity to be heard. Such hearing must be at a

meaningful time and in a meaningful manner." *Desmond v. Hachey*, 315 F. Supp. 328, 332 (D. Me. 1970) (internal citations and quotations omitted). The Standard Scheduling Order pursuant to M. R. Civ. P. 16 provides for an approximately 12-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. In contrast, the February 27th Order mandates trial on newly conceived and asserted claims beginning on June 24, 2024: less than three (3) months from today. *Cf.* M. R. Civ. P. 16 (advisory committee notes 1980) (noting that continual reforms of Rule 16 are intended to facilitate the "just result of litigation" and "can be beneficial to all concerned by focusing productively on the genuine issues and expediting trials where necessary, settlements where possible."). "Basic notions of due process counsel that litigants are entitled to rely on established procedural rules—and those rules cannot be altered at a court's whim." *U.S. ex rel. D'Agostino v. EV3, Inc.*, 802 F.3d 188, 194 (1st Cir. 2015) (reversing trial court's imposition of "good cause" standard on proposed amendment where scheduling order did not establish a deadline for amendments).

Appellees' lack of concern regarding the limited time available to prepare evidence deemed sufficient by the Superior Court to establish the elements of the newly conceived claim is understandable. *See* February 27th Order at 13 ("What

was perceived and articulated by Class Counsel as an 'unconstitutional risk' of deprivation of counsel has become more than a risk for many Class Members."). Due process nevertheless dictates some degree of reasonableness and regularity in pre-trial scheduling – including sufficient time to identify the claims asserted, the parties against whom those claims are asserted, and litigate potentially dispositive defenses to those claims. *See U.S. ex rel. D'Agostino*, 802 F.3d at 194 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) for the principle that, "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). MCILS's procedural due process rights will be irreparably harmed if this Court does not now review the February 27th Order and allows a trial on a newly conceived claim of actual denial of counsel to proceed in June.

**b. Compelling MCILS to litigate new claims on an unreasonably accelerated schedule will reduce or eliminate MCILS's ability to execute the functions which the Superior Court, and now Appellees, claim require unreasonably accelerated judicial resolution.**

The February 27th Order relied, in part, on the number of attorneys available to represent indigent criminal defendants . February 27th Order, 1 ("It is undisputed that [MCILS has] not provided a sufficient number of qualified attorneys who are eligible to be appointed by the District or Superior Courts to

represent indigent defendants."). MCILS employs an operational staff of nine (9). Andrus Aff. at ¶4. Since the inception of this litigation, MCILS has been granted legislative authority to open three (3) public defender offices: one of which is open and operational in Kennebec County and two (2) of which were authorized to be opened in Aroostook and Penobscot Counties in legislation enacted less than a week ago. "An Act to Establish the Maine Commission on Public Defense Services and Establish Public Defender Offices for Aroostook, Penobscot and Piscataquis Counties, L.D. 653 (available at: https://legislature.maine.gov/backend/App/services/getDocument.aspx?documentId=106318) (last accessed March 27, 2024). In addition to locating, acquiring, and equipping two new offices, executing that legislative mandate requires MCILS to hire fifteen (15) employees, including ten (10) new public defenders. *Id.*; *see also* Transcript of Dec. 15, 2023 Oral Argument, 11:1-8.[7] The burden of preparing for trial on new claims, including responding to Appellees' recently served deposition notice and document requests addressing claims Appellees propose to assert in their proposed Amended Complaint, will inherently impose significant burdens on MCILS staff. *See, e.g.,* Plaintiffs' First Set of Requests for Production to Defendants (Phase 1) (Mar. 18,

[7] THE COURT: All right. But it was my understanding from what was filed that -- that the Commission did not want to ask for all of this to happen at the same time because you didn't think you could get approval for that or because you didn't think you needed that?
MS. MACIAG: We just don't have the manhours in the central office to -- to do all of the HR hiring all at one time.

2024) (**Exhibit 6**) (requesting, inter alia, "All documents created by [MCILS] concerning the nature and length of delays in appointment of counsel to Subclass members, including any analyses of the reasons for such delays."); Notice of Rule 30(b)(6) Deposition to [MCILS] (Mar. 18, 2024) (**Exhibit 7**) (identifying thirteen (13) topics on which Plaintiff seeks to depose one or more MCILS designees).

While the burden of litigation does not, inherently, constitute an irreparable harm, the burden of this litigation does. The February 27th Order concludes that MCILS has failed to provide sufficient numbers of defense counsel. Trial on whether that claim violates Appellees' rights will impair or prevent MCILS's ability to increase the number of available attorneys by almost 10%. *See* Appellees' Motion at 4-5. The same urgency which compelled the Superior Court to, erroneously, deny the Parties' settlement and establish an unreasonably accelerated pretrial schedule for new claims requires this Court to consider MCILS's appeal.

### B. This Court's review of the February 27th Order is not barred by mootness.

The Parties' Second Amended Joint Settlement Agreement provides:

> 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.

Second Amended Joint Settlement Agreement (Feb. 13, 2024), §XIV(C). MCILS timely filed its Notice of Appeal, meaning that the February 27th Order remains subject to potential remand, potentially including a direction to the Superior Court to grant preliminary approval pursuant to M. R. Civ. P. 23(e). The Parties' Settlement Agreement remains in effect by its terms, subject to approval by the Superior Court. *Id.* .

Where, "in response to public criticism," a party to a proposed settlement agreement resolving a class-action civil rights complaint sought to repudiate it after submitting it to the court for approval, the Court of Appeals for the Eleventh Circuit rejected that effort. *Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238, 1242 (11th Cir. 1997). The standard controlling this Court's review of the February 27th Order is whether the Superior Court abused its discretion in applying the "fair, reasonable, and adequate" standard to the Parties' proposed settlement of Plaintiffs' Class Action Complaint. *See In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2014 WL 3917126, at *3 (N.D. Cal. Aug. 8, 2014) ("Some district courts, echoing commentators, have stated that the relevant inquiry is whether the settlement 'falls within the range of possible approval' or 'within the range of reasonableness.'" (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp.2d 1078, 1079 (N.D.Cal.2007)). That standard applies to review of the Superior Court's disposition of the Joint Motion for Preliminary Approval of the settlement

agreement – not whether a party to that agreement now seeks to disclaim its bargain. *Stovall*, 117 F.3d at 1242..

Finally, Appellees' argument that "the Parties are proceeding to discovery and trial this June," to justify their claim that MCILS's appeal is barred by mootness ignores that MCILS's appeal challenges the potion of the February 27th Order compelling that trial. *See D'Agostino v. EV3, Inc.*, 802 F.3d at 194 ("Basic notions of due process counsel that litigants are entitled to rely on established procedural rules . . . ."). The potentially dispositive effect of this Court's action on the underlying litigation – the basis for this Court's "judicial economy" exception – likewise undermines Appellees' claim that this appeal is barred by mootness. The potential that allowing the February 27th Order to remain in effect will render it unreviewable – far from barring appeal – supports this Court's appellate review. *See, e.g., Moffett*, 400 A.2d at 343 n.8 ("failure to allow the police officers to appeal the denial of their motion for a preliminary injunction would mean that the interview transcripts would be publicly disclosed, and the issue of whether any part of the transcripts are exempt from the Freedom of Access Act would become moot."); *Hazzard v. Westview Golf Club, Inc.*, 217 A.2d 217, 222 (Me. 1966) ("Another test of a final judgment lies, not in the nature of the ruling, but in its effect in concluding the rights of the party appealing; if his rights are concluded so that further proceedings after the ruling cannot affect them, there is a final

judgment."); *Connors*, 437 A.2d at 881 (considering appeal of interlocutory order where, "[o]therwise the issue raised by the [Appellant] here would be effectively mooted."). Because failure to permit review of the February 27th Order would, necessarily, render the Superior Court's denial of the Parties' Second Amended Joint Motion final, foreclosing future review, this Court should not dismiss MCILS's appeal.

### C. Appellees have failed to justify continued trial court action pending resolution of this appeal pursuant to M. R. App. P. 3(d).

"When an appeal is taken from a trial court action, the trial court's authority over the matter is suspended and: 'The trial court shall take no further action pending disposition of the appeal by the Law Court....'" *Doggett v. Town of Gouldsboro*, 2002 ME 175, ¶ 5, 812 A.2d 256, 258 (quoting M. R. App. P. 3(b)). However:

> A party may, during the pendency of an appeal, file a motion in the Law Court to permit a specific trial court action that is not already permitted by Rule 3(c) of these Rules. The moving party shall include, in its motion to the Law Court, the reason for the request for trial court action and shall attach to the Law Court motion the proposed trial court motion.

M. R. App. P. 3(d); *see also In re Child of Radience K.*, 2019 ME 73, ¶ 48, 208 A.3d 380, 396 (The Law Court may authorize further trial court action, notwithstanding the pending appeal, "on a motion that states the reason for the request.") (citing M. R. App. P. 3(d)).

Appellees have moved this Court to permit the Superior Court to proceed with a trial on claims first identified in its February 27th Order, involving new parties, and scheduled for mid-June. Appellees' Proposed Motion to Trial court for Action Pending Appeal (Mar. 20, 2024) ("Appellees' Proposed Motion"). Appellees' contend that further trial court action, contrary to the stay required by M. R. App. P. 3, is justified by the fact that this Court's disposition of the pending appeal cannot alter the "need for the Parties to proceed to Phase 1 discovery and trial on the issue of non-representation." Appellees' Motion to Dismiss at 11; *see also* Appellees' Proposed Motion at 2 (appeal of February 27th Order "will only lead to distractions and delays from the urgent issue the court directed the [P]arties to focus on.").

As addressed above, Appellants seek this Court's review of the portion of the February 27th Order "direct[ing]" Appellees to assert new claims and setting those as-yet unasserted claims for trial in June. Appellees' Motion at 7. Allowing the trial to proceed in parallel to an appeal challenging the Superior Court's *sua sponte* identification of new claims and trial schedule on those claims is nonsensical. Appellees do not engage with that contradiction. Neither should this Court. Appellees' Motion to permit further trial court action during the pendency of this appeal should be denied.

Dated March 27, 2024

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2024, I served the foregoing Opposition to Appellees' Motion to Dismiss the Appeal and to Permit Trial Court Action upon counsel for Appellees by electronically transmitting a copy of the document to:

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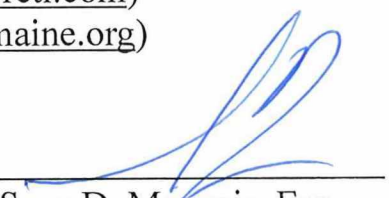

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