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.

AUGUSTA COURTS
MAR 22 '24 AM11:55

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND AND SUPPLEMENT COMPLAINT

Defendants begin their opposition by recognizing that amendment is proper "when justice so requires," M.R. Civ. P. 15(a), and further disclaiming any suggestion "that the Court is powerless to address what it considers to be an ongoing violation of a constitutional right." *Defendants' Opposition to Plaintiffs' Motion for Leave to Amend and Supplement Complaint* ("*Opp.*"), 1. But when faced with the amendments that will allow the Court to adjudicate this ongoing violation, Defendants raise a series of objections entirely at odds with both this Court's prior rulings and Defendants' position in related litigation. Defendants have failed to identify any basis to deny Plaintiffs' motion. Rather, Defendants primarily ask this Court not to add Defendants who are necessary for complete relief, while simultaneously arguing that the current Defendants are unable to provide the requested relief. The Court should reject Defendants' attempt to pass the buck and should grant the Motion for Leave to Amend and Supplement the Complaint.

AUGUSTA COURTS
MAR 22 '24 AM11:55

I. MCILS is an appropriate party to the Amended Complaint.

Defendants argue that the proposed First Amended Complaint ("FAC") is subject to dismissal because MCILS does not have the power either to provide counsel to the Subclass or to provide equitable relief for Subclass members who do not receive counsel within 48 hours of their initial appearance. *Opp.*, 8-9. Both arguments miss the mark.

Defendants first object that MCILS does not have the authority to "provide continuous representation of counsel," but as this Court recognized—in the order Defendants cite—the Legislature "delegated to MCILS the duty and authority to provide lawyers and maintain rosters sufficient to satisfy federal and state constitutional and statutory obligations." *Opp.*, 8 (quoting *Combined Order*, 13). Plaintiffs' requested relief directs MCILS to do precisely what MCILS is obligated to do: "[P]rovide efficient, high-quality representation to indigent criminal defendants … consistent with federal and state constitutional and statutory obligations" and "ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State." 4 M.R.S. § 1801. MCILS is statutorily responsible for "[d]evelop[ing] and maintain[ing] a system that employs public defenders, uses appointed private attorneys and contracts with individual attorneys or groups of attorneys," as well as "consider[ing] other programs necessary to provide quality and efficient indigent legal services." 4 M.R.S. § 1804(3)(A). MCILS is further responsible for "develop[ing] criminal defense . . . training and evaluation programs for attorneys throughout the State *to ensure an adequate pool of qualified attorneys*." 4 M.R.S. § 1804(3)(D) (emphasis added). While the judiciary also plays a critical role in this process, that in no way lessens MCILS's statutory and constitutional obligation to fulfill its duty to provide qualified lawyers.

AUGUSTA COURTS
MAR 22 '24 am11:55

As for equitable relief, Defendants focus on the wrong defendants. Plaintiffs' habeas claim—which would permit, for example, dismissal of indigent defendants—is brought not against MCILS, but rather against the Sheriffs for each county in Maine. *See* FAC p. 46. As the FAC explains, a county "sheriff has the custody and charge of the county jail and of all prisoners in that jail and shall keep it in person, or by a deputy as jailer, master, or keeper." 30-A M.R.S. §1501; FAC ¶ 23. Defendants do not argue that the Sheriffs are improper parties to the case. *Opp.*, 12-17. In fact, they spell out at length (at 13-14) why the Sheriffs are able to provide the requested relief. As they describe, the target of the writ is "the person having custody of the prisoner"—*i.e.*, the sheriff for the county where an indigent defendant is in custody. 14 M.R.S.A. § 5527; *see also* 14 M.R.S.A. §5515 (application issued to "the person by whom the restraint is made"); *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (explaining that habeas proceeding is "against some person who has the immediate custody of the party detained").

II. Plaintiffs have properly stated a claim under the Maine Civil Rights Act ("MCRA").

a. The State of Maine and its officials are proper defendants under the MCRA.

Defendants' argument that public officials named in their official capacities are not proper defendants under the MCRA rests on a fundamental misunderstanding of civil rights law. *Opp.*, 10-11. Under *Ex parte Young*, when (as here) civil rights plaintiffs seek prospective injunctive relief to remedy constitutional violations, they may seek relief against public officials in their official capacities. 209 U.S. 123, 159–160 (1908).

Defendants rely on the Supreme Court's decision in *Will* that state officials acting in their official capacity are not "persons" under Section 1983 for purposes of actions seeking monetary damages. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *see also Jenness v. Nickerson*, 637 A.2d 1152, 1158–59 (Me. 1994) (relying on *Will* to reach same holding as to

AUGUSTA COURTS
MAR 22 '24 PM 1:55

MCRA). But as *Will* itself made clear, it did nothing to disturb the longstanding *Ex parte Young* exception permitting official capacity suits for prospective relief:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S., at 167, n. 14; *Ex parte Young*, 209 U.S. 123, 159–160 (1908). This distinction is "commonplace in sovereign immunity doctrine," L. Tribe, American Constitutional Law § 3–27, p. 190, n. 3 (2d ed. 1988) . . . .

Will, 491 U.S. at 71, n.10. The FAC seeks precisely what *Ex parte Young* allows: prospective injunctive and declaratory relief against the named public officials in their official capacities.

Plaintiffs agree that the State of Maine (unlike its officials) does typically enjoy sovereign immunity from MCRA suits for prospective relief. But this is not the typical case. Defendants have made repeated statements in this litigation that the State of Maine is the real party in interest. *See, e.g.*, Order Denying Preliminary Settlement Approval at 18 (Sept. 13, 2023) (quoting defense counsel's statements in this litigation that the "ultimate party in interest, again, is the State of Maine.") And as the State argued in its request to intervene—*to make itself a party*—in the parallel *Peterson* habeas case challenging non-representation, inclusion of the State as a respondent is necessary to ensure that "complete relief" can be achieved.[1] The State of Maine, like all other states, is obligated to "furnish counsel" to those accused of crimes who are unable to afford counsel on their own. *See Gideon v. Wainwright*, 372 U.S. 335, 343-345 (1963); *see also Peterson v. Johnson*, No. SJC-23-2, Final Decision and Order, at 12 (January 12, 2024) ("If a defendant cannot afford to hire an attorney, the State has an affirmative obligation to

[1] *Peterson v. Johnson*, SJC-23-2, State Respondent's Memorandum of Law (Oct. 27, 2023) (State of Maine's request to intervene as respondent to ensure that "complete relief" in the matter could be achieved); *Peterson*, SJC-23-2, Final Decision and Order (Jan. 12, 2024) (permitting habeas action to proceed against Respondent State of Maine, Party in Interest, following motion to intervene as Defendant by State of Maine); *see also Betschart v. Garrett*, 3:23-cv-01097-CL, 2023 WL 7220562, at *2 (D. Or. Nov. 14, 2023) (permitting class habeas action for non-representation to proceed against respondent State of Oregon, following motion to intervene by State of Oregon).

AUGUSTA COURTS
MAR 22 '24 AM11:55

assign counsel."). The State of Maine may not discharge its fundamental constitutional obligation by purporting to assign it to a specific person, agency, or political subdivision: the constitutional obligation to safeguard the right to counsel rests with the State itself.

b. Plaintiffs adequately allege a Maine constitutional violation actionable under the MCRA.

Relying on an outdated version of the MCRA, Defendants argue that Plaintiffs have not plausibly alleged a MCRA claim because they have not alleged "specific conduct, such as actual or threatened physical force against a person, to support" their claim. *Opp.*, 11 (citing 5 M.R.S. § 4682). But Section 4682 of the MCRA was amended effective October 25, 2023 to prohibit interference with a person's constitutional rights not only when that interference threatens "physical force or violence" or property damage, but also when that interference "would cause a reasonable person to suffer emotional distress or to fear death or bodily injury to that person or to a close relation." *See* An Act to Extend the Protections of the Maine Civil Rights Act to Actions That Cause Emotional Distress or Fear of Violence, Ch. 287, S.P. 365, L.D. 868 (eff. Oct. 25, 2023), *codified at* 5 M.R.S. § 4682(1-A)(B)(5).

Plaintiffs' Amended Complaint plainly alleges violations of the constitutional right to counsel since the date of the amendment that would cause a reasonable person to suffer emotional distress. *See, e.g.,* Amended Complaint ¶ 45 (when state fails to timely provide counsel, "the damage to the defendant's ability to contest the charges against him can never be repaired"); ¶ 46 (alleging effects of non-representation, including damage to "defendant's ability to work, maintain family connections, and avoid the significant physical and mental hazards associated with pretrial detention"); ¶¶ 54-57 (detailing litany of harms caused by delays in appointment of counsel, including denial of "opportunity to investigate their claims, effectively engage in plea negotiations, or advocate effectively for release"); ¶ 58 (detailing harms for

AUGUSTA COURTS
MAR 22 '24 AM11:55

individuals denied the chance to obtain prompt pretrial release with the assistance of counsel, including inability to access "medical care, mental health treatment, and substance use treatment" and prospect that they may "lose their jobs and lose contact with their families because they are locked up longer than necessary"); ¶ 59 ("Individuals who are innocent and who wish to defend their innocence are forced to wait in jail, while individuals who are willing to plead guilty may be released.").

III. The State of Maine, the Attorney General, and the Governor are proper defendants capable of providing the relief sought.

a. The Attorney General and Governor are proper defendants under Section 1983 and the MCRA.

Defendants argue that Plaintiffs have failed to allege any conduct by either the Governor or the Attorney General that caused members of the Subclass to be denied counsel when counsel was required. Opp. at 15, 17. Defendants have misread the law on official capacity liability.

As the Supreme Court recognized in *Ex parte Young*, official capacity liability requires that the state officer have "some connection" to the unconstitutional conduct by virtue of their office. 209 U.S. 123, 157 (1908). The Governor of Georgia, for example, was responsible for "law enforcement," for "executing the laws faithfully," and for "commenc[ing] criminal prosecutions." *Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir. 1988). That was enough for the Eleventh Circuit to find that the governor was an appropriate party "against whom prospective relief" ensuring access to qualified counsel for indigent individuals "could be ordered." *Id.* Similarly, the Governor of New York and the State itself were proper defendants in a civil rights case for prospective injunctive relief testing "whether the State has met its foundational obligation under *Gideon* to provide legal representation." *See Hurrell-Harring v. State*, 15 N.Y.3d 8, 19, 930 N.E.2d 217, 222 (2010).

AUGUSTA COURTS
MAR 22 '24 AM11:55

While it is the State of Maine's general obligation to guarantee the appointment of counsel under *Gideon*, the Governor and the Attorney General share in the responsibility to ensure that obligation is fulfilled. Under the Maine Constitution, the Governor is the unitary head of the executive branch. *See* Me. Const. art. V, § 1. Maine's governor is responsible for the "faithful" execution of the law. Me. Const. art. V, § 12. Maine's Attorney General "has the authority and the responsibility to act in the best interests of the people of Maine." *Opinion of the Justices*, 2015 ME 27, ¶ 22; *Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197, 1199 (Me. 1989); *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973). Under Maine law, the Attorney General is authorized to "institute and conduct prosecutions," and must consult with and advise prosecutors on matters related to their duties. 5 M.R.S. §199. And, like the Governor in Georgia, the Attorney General is obligated to "direct and control prosecutions" 5 M.R.S. § 200-A.

Defendants' reliance on *Whole Women's Health v. Jackson* is misplaced. *See Opp.*, 15. Plaintiffs in that case sought to prevent the Attorney General of Texas (and other state officials) from enforcing a statute regulating abortion that was purposefully drafted to insulate government officials from liability by relying entirely on private actors for enforcement. *See* David A. Strauss, *Rights, Remedies, and Texas's S.B. 8*, 2022 Sup. Ct. Rev. 81, 87. The Supreme Court held that, given the Texas law's uniquely private enforcement mechanism, the state's Attorney General was insulated from liability. *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 43 (2021). Defendants omit that necessary context from their discussion whether Maine's Attorney General has "enforcement authority." And of course, Maine's Attorney General, as "the legal representative of the people of the State," has specific enforcement authority with regards to ensuring that the constitutional rights of the people of Maine are respected.

AUGUSTA COURTS
MAR 22 '24 AM11:55

For much the same reasons, Defendants' argument regarding joinder (*Opp.*, 12) is misguided. In the context of a motion to amend that adds new parties, the governing standard is the amendment standard—not joinder. *Chrysler Credit Corp. v. Bert Cote's L/A Auto Sales, Inc.*, 707 A.2d 1311, 1315 (Me. 1998) (evaluating amendment to add new party under M.R. Civ. P. 15). But even if Plaintiffs were obligated to meet the M.R. Civ. P. 19(a) standard, they have met that bar. Rule 19(a) requires joinder if, in the absence of the added party, "complete relief cannot be afforded among those already parties." The State of Maine, the Governor, and the Attorney General are each necessary defendants to achieve complete relief. Defense counsel has previously stated precisely that, moving to intervene in the parallel *Peterson* litigation on the ground that the State is a necessary party to ensure that "complete relief" is achieved. FAC ¶ 16. And while MCILS has statutory obligations, those do not relieve Defendants Frey and Mills of their own constitutional and statutory obligations. MCILS shares its duty to ensure that attorneys appointed to class members provide constitutionally adequate representation with the Attorney General and the Governor, by virtue of *their* obligations to carry out constitutional guarantees. All Defendants are necessary to achieve full relief for Plaintiffs, and so are proper parties.[2]

IV. Plaintiffs seek amendment properly and without delay, and amendment will not prejudice MCILS.

Defendants suggest that amendment should be denied because, given the upcoming trial date and the court's denial of preliminary settlement approval, it will cause MCILS "undue" prejudice. This is plainly wrong. To justify denying amendment, the undue prejudice must flow *from the amendment*, not from an external third source. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Undue prejudice requires showing a specific harm to the prejudiced party; an increased

[2] For the reasons explained above in Section II.a, the State of Maine is likewise a proper defendant in the Plaintiff Class's claims under Section 1983 and the MCRA, and a proper respondent for the Plaintiff Subclass's habeas claim. *See supra*, pp. 3-5 & n.1.

AUGUSTA COURTS
MAR 22 '24 AM11:55

likelihood of defeat is not enough. *Kelly v. Michaud's Ins. Agency*, 651 A.2d 345, 347 (Me. 1994); *Anderson v. Cigna Healthcare of Maine*, 2005 WL 3340127 at *3 (Me. Super. Ct. 2005).

Plaintiffs moved for amendment in compliance with the schedule set by the Court. *Combined Order*, 20. Any harm that results from the date of trial is not the result of Plaintiffs' requested amendment because the trial date—like all trial dates—has been set by the Court, not Plaintiffs. Crucially, Defendants have failed to identify any specific prejudice that will result if amendment is permitted—it has not identified an inability to prepare defenses or a witness who will be harmed.[3] In fact, MCILS has not opposed Plaintiffs' request to set trial one week earlier than the Court's initially ordered date. *See* March 8, 2024 Motion for Trial Protection. And the facts concerning the amended claims are scarcely in dispute—the State's own records clearly set forth the numbers of persons being denied counsel on a weekly basis.

Defendants' suggestion that the amendment is unduly prejudicial because the parties achieved settlement is also deeply flawed. The parties' proposed settlement was made contingent on court approval; without that approval, the agreement has no effect. No issues have been resolved in this case so as to render amendment prejudicial. Because Defendants have identified no harm that flows from the requested amendment and any harm attributable to the trial date does not flow from the amendment, there can be no undue prejudice.

Defendants next suggest that Plaintiffs' request is unduly delayed, because the motion to amend comes close to the trial date. This is an incorrect statement of the standard. To determine whether a delay in seeking amendment is "undue," courts look to "what the movant knew or should have known and what he did or should have done." *In re Lombardo*, 755 F.3d 1, 3 (1st Cir. 2014). Here, this suit was stayed from March 2023 to February 2024. There is no dispute

[3] Defense counsel also has the advantage of having previously defended a similarly premised case. *See generally Peterson v. State of Maine*, SJC-23-2.

AUGUSTA COURTS
MAR 22 '24 AM11:55

that when the stay was entered, the problem of actual non-representation was not the crisis it is today. *See* Combined Order, 13 ("Much has changed for Class Members since this case was filed almost two years ago."). Once the stay was lifted, Plaintiffs sought amendment promptly, in accordance with the Court's deadline. There can be no "undue" delay, or delay at all, when Plaintiffs seek leave to amend just ten days after receiving permission to do so and in accordance with the Court's order.

Defendants also wrongly suggest that because Plaintiffs' requested amendment adds additional facts and claims, it is impermissible. This is meritless on its face: Defendants' position would mean that a litigant who learns new facts in discovery or based on intervening events could never amend its pleading to reflect those facts. Rule 15(a) requires that amendments be "freely given" and Rule 15(d) expressly permits parties to supplement their pleadings based on intervening events, just as Plaintiffs have done here. M.R. Civ. P. 15(d) (permitting party to "serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," even if the original pleading was defective in its statement of relief or defense). Unsurprisingly, Defendants' argument is not supported by either of their cited cases. In *Miller*, the plaintiff sought leave to amend a mere eight days before trial after nearly three years of active litigation; amendment was denied due to imminence to trial. *Miller v. Szelenyi*, 546 A.2d 1013 (Me. 1988). *Foisy* allowed amendment based on facts present in the original complaint but said nothing to indicate that a different type of amendment would be impermissible. *Foisy v. Bishop*, 232 A.2d 797 (Me. 1967). There is no requirement that an amendment rely on facts identical to those in the initial pleading, and the Court should decline to create one—particularly because, as noted above, such a rule is flatly inconsistent with Rule 15(d). Allowing an amendment to "set[] forth" new "transactions or

AUGUSTA COURTS
MAR 22 '24 AM11:55

occurrences" as permitted by Rule 15(d) is particularly important when, as here, Plaintiffs' amendment seeks to address the constitutional problem of non-representation that has escalated dramatically since the original complaint was filed in March 2022.

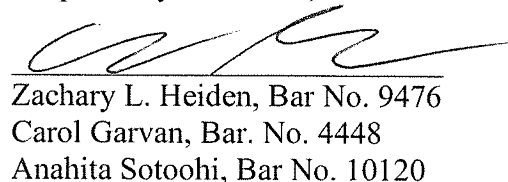
Defendants conclude by discussing, at length, the lack of factors justifying separate trials in this case. But as this Court recognized in its Combined Order, courts have broad authority to manage class actions, including by issuing "appropriate orders" to determine the course of the proceedings. M.R. Civ. P. 23(d). Moreover, to the extent applicable in this class action, M.R. Civ. P. 42(b) permits "separate trial[s]" on "separate issue[s]" "in furtherance of convenience." There is undeniably significant overlap between the designated Phases, because the Subclass's injury cannot be remedied by the appointment of an inadequately trained and supervised attorney who is unlikely to provide competent representation. But it is equally true that prompt resolution of the issues affecting Subclass members will promote convenience by resolving discrete legal and factual issues, and that the Phase II issue of how and whether attorneys for indigent criminal defendants are trained, evaluated, and supervised is significantly more complicated than the Phase I issue, making bifurcation appropriate. *Thornton v. Cressey's Estate*, 413 A.2d 540, 544-45 (Me. 1980).

V. Conclusion.

Plaintiffs respectfully request that the Court grant the Motion for Leave to Amend and Supplement Complaint and accept the proposed First Amended Complaint for filing.

March 22, 2024

Respectfully submitted,



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