EMBARGOED UNTIL 11 AM EST ON TUESDAY, MARCH 1, 2022

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

ANDREW ROBBINS; BRANDY GROVER; RAY MACK; MALCOLM PEIRCE; and LANH DANH HUYNH, on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES; JUSTIN ANDRUS, in his official capacity as Executive Director of the Maine Commission on Indigent Legal Services; JOSHUA TARDY, in his official capacity as Chair of the Maine Commission on Indigent Legal Services; and DONALD ALEXANDER, MEEGAN BURBANK, MICHAEL CAREY, ROBERT CUMMINS, ROGER KATZ, MATTHEW MORGAN, and RONALD SCHNEIDER, in their official capacities as Commissioners of the Maine Commission on Indigent Legal Services,

Defendants.

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CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Andrew Robbins, Brandy Grover, Ray Mack, Malcolm Peirce, and Lanh Danh Huynh hereby allege as follows:

INTRODUCTION

1. The right to assistance of counsel in criminal proceedings is a bedrock of our criminal justice system. Guaranteed by both the Sixth Amendment of the United States Constitution and Article 1, Section 6 of the Maine Constitution, the right ensures that the state

will provide counsel to indigent defendants facing the possibility of imprisonment. *See Gideon v. Wainwright*, 372 U.S. 335, 344–345 (1963); *State v. Cook*, 1998 ME 40, ¶ 6, 706 A.2d 603. In the half-century since *Gideon*, the United States Supreme Court has expanded that obligation in significant ways, requiring the states to provide counsel to indigent defendants facing incarceration, including for misdemeanors, and extending protections to juveniles in delinquency proceedings. But the animating principle has remained the same: it is the state's responsibility to ensure that "any person haled into court, who is too poor to hire a lawyer," is provided with an adequate legal defense. *Gideon*, 372 U.S. at 344.

2. The right to counsel means more than just the appointment of an attorney for trial. The government must provide *effective* counsel to indigent defendants under circumstances that allow for competent and meaningful representation. *See United States v. Cronic*, 466 U.S. 648, 659–60 (1984). Moreover, the right to assistance of counsel attaches well before trial begins, because "certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 217 (2008) (Alito, J., concurring).

3. This lawsuit challenges the failure of the Maine Commission on Indigent Legal Services ("MCILS" or "the Commission") to adequately supervise, administer, and fund an indigent defense system, in violation of state statute and the state and federal constitutions. While there are many skilled and committed defense attorneys in Maine, MCILS has failed in its constitutional and statutory obligation to supervise, administer, and fund a system that provides effective representation to indigent defendants throughout the entire criminal legal process.

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4. Indigent defense is the responsibility of MCILS. By law, MCILS is responsible for "[d]evelop[ing] and maintain[ing] a system that uses appointed private attorneys … to provide quality and efficient indigent legal services." 4 M.R.S. § 1804(3)(A). Maine is unique in the country as the only state where appointed private attorneys provide *all* indigent defense.

5. To carry out its mandate, MCILS must, among other duties, "develop standards governing the delivery of indigent legal services," 4 M.R.S. § 1804(2); "[e]stablish minimum qualifications to ensure that attorneys are qualified and capable of providing quality representation in the case types to which they are assigned, recognizing that quality representation in each of these types of cases requires counsel with experience and specialized training in that field," *id.* § 1804(3)(E); "[e]stablish rates of compensation for assigned counsel," *id.* § 1804(3)(F); and "[e]stablish a method for accurately tracking and monitoring case loads of assigned counsel and contract counsel," *id.* § 1803(G).

6. The statutory scheme likewise sets forth specific responsibilities for the Executive Director of the Commission. *See* 4 M.R.S. § 1805. In particular, the Executive Director must "[e]nsure that the provision of indigent legal services complies with all constitutional, statutory and ethical standards," *id.* § 1805(1); provide "regular" training, *id.* § 1805(5); and "[a]dminister and coordinate delivery of indigent legal services and supervise compliance with commission standards" *id.* § 1805(3).

7. MCILS and its Executive Director have failed to fulfill their statutory duties—resulting in a system that routinely and systematically denies indigent criminal defendants their constitutional right to representation. Specifically, MCILS and its Executive Director have not fulfilled their statutory obligations to promulgate and enforce standards; to monitor and evaluate the performance of rostered attorneys; or to adequately train and compensate rostered attorneys

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as necessary to maintain a system of effective representation for indigent clients. These failings not only subvert the Legislature's command in sections 1804 and 1805, they also create an unconstitutional risk that indigent criminal defendants will be denied their right to counsel.

8. Furthermore, MCILS employs a "lawyer of the day" program to provide representation at the 48-hour hearing for in-custody defendants and at the initial appearance for out-of-custody defendants. At these hearings, defendants are required to enter an initial plea. In-custody defendants are also given the opportunity to advocate for release from custody, including the granting of bail and the nature and extent of any conditions of release. There is nothing *per se* unconstitutional about a lawyer-of-the-day program, but as implemented by MCILS the program is under-resourced to the point of constitutional deficiency. On any given day, as few as two lawyers may be on hand to meet with over eighty defendants. This regime violates the Sixth Amendment because it does not come close to providing an adequate number of lawyers to even meet with—let alone provide competent representation to—defendants in need of counsel concerning the implications of potential pleas or advocacy on bail and conditions of release.

9. The system for providing indigent legal defense in Maine is broken. Dozens of attorneys have stopped accepting cases from the MCILS roster, and the crisis is set to worsen with the anticipated spike in trials as courts begin the process of working through the enormous backlog of cases the pandemic has created. The shortage of qualified and rostered defense attorneys is particularly acute in rural areas, forcing judges and MCILS to appoint attorneys from other counties despite the significant travel this requires.

10. Plaintiffs are five indigent defendants currently being represented in criminal proceedings by appointed counsel. They sue on their own behalf, and on behalf of all similarly situated individuals, to vindicate indigent defendants' right to adequate legal representation that

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is enshrined in the Maine and United States constitutions. More specifically, plaintiffs seek a judgment under 42 U.S.C. § 1983 that the deficiencies in the MCILS system create an unconstitutional risk that indigent criminal defendants will be denied the benefit of effective assistance of counsel at critical stages of their cases in violation of the Sixth Amendment of the United States Constitution and Article I, § 6 of the Maine Constitution. Plaintiffs also seek a judgment that the Commission's specific failure to promulgate statutorily required standards violates the Maine Administrative Procedure Act, 5 M.R.S. § 11001, and Article I, § 6 of the Maine Constitution. Plaintiffs respectfully request appropriate declaratory and injunctive relief.

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THE PARTIES

11. Plaintiff Andrew Robbins is a Maine resident who is currently incarcerated at Cumberland County Jail awaiting trial following an arrest in the summer of 2021 on weapons charges. He was initially released on bail, but he has been in custody since a subsequent October 30, 2021, arrest for violating his conditions of release and violating a protective order, as well as misdemeanor drug possession. At his initial appearance, Mr. Robbins was represented by a "lawyer of the day," but was subsequently assigned to another lawyer. Since that point, Mr. Robbins has met his attorney only once, in the summer of 2021 while he was released, for an approximately 30-second conversation at his door. Mr. Robbins has never had a follow-up visit from his lawyer, nor has his lawyer ever arranged a video call, communicated with him about a plea offer, or reviewed his discovery materials with him. When Mr. Robbins received a copy of his discovery material, he observed that it contained materials relating to another defendant, but as far as Mr. Robbins knows his attorney never took any action based on this mistake. And while Mr. Robbins has two young daughters, who his wife is attempting to care for alone (while

working full time), his attorney has refused to ask for a bail hearing following his October 30, 2021, arrest.

12. Plaintiff Brandy Grover is a Maine resident currently incarcerated in Somerset County Jail awaiting sentencing following a July 9, 2021, arrest for aggravated trafficking. Ms. Grover developed a substance-abuse disorder after being prescribed opioids following an injury in her job as a certified nursing assistant. She is currently in recovery, but she briefly relapsed following the deaths of three people close to her. After her arrest, Ms. Grover was assigned a lawyer through the "lawyer of the day" system, who did not advocate for her release, creating the impression for Ms. Grover that the lawyer believed she was better off in jail. Ms. Grover believes that her lawyer was annoyed and angry at her for not taking a plea deal. Ms. Grover has otherwise been unable to get in touch with her lawyer, who does not take her calls or the calls of family members, leaving Ms. Grover to resort to writing letters; however, she has also not yet received any responses, either by phone or by letter, to her letters. Ms. Grover eventually pled to Class B trafficking and awaits sentencing, but she is concerned that her attorney will not adequately advocate on her behalf at her sentencing. Her attorney has never advanced any mitigating circumstances, such as Ms. Grover's family status or her disability.

13. Plaintiff Ray Mack is a Maine resident currently incarcerated in Kennebec County Jail awaiting trial following his May 27, 2021, arrest on charges of possession of a firearm and threat with a dangerous weapon. Mr. Mack pled not guilty at his initial appearance, but he did not feel that he had sufficient information about the proceedings to understand what was happening. Mr. Mack describes his initial appearance as "entirely one-sided." His lawyer spoke with the court, but not with Mr. Mack, and Mr. Mack was not able to participate in the proceedings. Since that point, Mr. Mack has had only minimal contact with his attorney.

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Although Mr. Mack is currently set to go to trial in March, his attorney has never taken the time to go through his discovery with him or discuss the trial in any detail.

14. Plaintiff Malcolm Peirce is a Maine resident who is currently incarcerated at the Piscataquis County Jail awaiting trial following his December 12, 2019, arrest on several drug-related charges, as well as a charge of escape. Mr. Peirce was represented by a "lawyer of the day" attorney during his initial appearance. His first assigned attorney had to withdraw from the representation due to a conflict of interest, and Mr. Peirce has had minimal contact—a handful of conversations each lasting only a few minutes—with his current state-appointed attorney. Their last phone call left Mr. Peirce with the impression that his attorney did not want Mr. Peirce to contact him, and Mr. Peirce has not heard from his attorney since. Mr. Peirce's attorney has likewise not responded to a request to provide copies of discovery, and Mr. Peirce believes his attorney has not reviewed his discovery.

15. Plaintiff Lanh Danh Huynh is a Maine resident who is currently incarcerated at Cumberland County Jail awaiting trial following a June 1, 2021, arrest for possession of a firearm and bail violations. Mr. Huynh pled not guilty, but he did not feel that he had sufficient information about the charges against him to decide how to plead. Despite having been charged over eight months ago, he has had minimal contact with his state-appointed attorney. He has yet to see or review any of the discovery materials in his case and has had significant difficulty contacting his attorney, who does not return his calls. When Mr. Huynh tried calling his lawyer's office, he was told his lawyer was in court or busy, but his lawyer never called back. He has likewise tried having his brother and friends call this lawyer's office to set up a meeting or call, but to no avail. His attorney has otherwise had no engagement with his case; he has not filed any motions on his behalf, including any motions for Mr. Huynh to be released on bail, and Mr.

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Huynh does not know when his next court date is. His family has been attempting to put together enough money for him to hire a lawyer in an effort to find someone who would take a more active role in his case.

16. Defendant MCILS is statutorily directed to "provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations"; "ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State"; and "ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner, free from undue political interference and conflicts of interest." 4 M.R.S. § 1801.

17. Defendant Justin Andrus is the Executive Director of MCILS. He is required by statute to "[e]nsure that the provision of indigent legal services complies with all constitutional, statutory, and ethical standards," 4 M.R.S. § 1805(1), and to "[a]dminister and coordinate delivery of indigent legal services and supervise compliance with commission standards," *id.* § 1805(3).

18. Defendant Joshua Tardy is a MCILS Commissioner and Chair of the Commission.

19. Defendant Donald Alexander is a MCILS Commissioner.

20. Defendant Meegan Burbank is a MCILS Commissioner.

21. Defendant Michael Carey is a MCILS Commissioner.

22. Defendant Robert Cummins is a MCILS Commissioner.

23. Defendant Roger Katz is a MCILS Commissioner.

24. Defendant Matthew Morgan is a MCILS Commissioner

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25. Defendant Ronald Schneider is a MCILS Commissioner.

JURISDICTION AND VENUE

26. This Court has jurisdiction over this action pursuant to 4 M.R.S. § 105, 5 M.R.S. § 8058, 14 M.R.S. §§ 5951-5963, and 14 M.R.S. § 6051(13).

27. This Court has personal jurisdiction over the defendants pursuant to 14 M.R.S. § 704-A(2).

28. Venue is proper in Kennebec County pursuant to 14 M.R.S. § 501.

BACKGROUND

I. The Right to Counsel.

29. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

30. In the landmark decision *Gideon v. Wainwright*, 372 U.S. 355, 345–46 (1963), the Supreme Court held that the Sixth Amendment requires states to provide counsel to indigent criminal defendants. *Gideon*'s guarantee applies in any case that could result in imprisonment. *See Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (accused must receive counsel when case could result "in the actual deprivation of a person's liberty").[1]

31. The right to counsel is not fulfilled by the mere appointment of counsel; satisfaction of this constitutional obligation requires the *assistance* of counsel, and specifically the *effective* assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654 (1984) ("[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970))); *McGowan v. State*, 2006 ME

[1] The Maine Constitution affords a right to counsel that is coextensive with the federal Sixth Amendment. *State v. Watson*2006 ME 80, ¶ 14, 900 A.2d 702. As with the federal Constitution, "the constitutional right imposes an affirmative obligation on the State to provide court-appointed counsel if the defendant faces incarceration." *Id.*

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16 ¶ 9, 894 A.2d 493. If mere appointment of counsel were sufficient, the right would be "a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Cronic*, 466 U.S. at 654 (quotation marks omitted).

32. Because "the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate,'" the right to effective assistance is the "right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)). Once "the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656–657. In short, effective counsel is counsel that can, and does, put the prosecutor's case to the test.

33. When assessing effectiveness of counsel, "prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (cleaned up).

34. As relevant here, the American Bar Association has outlined ten principles to evaluate whether a state is providing assistance of counsel at all critical stages of a proceeding ("ABA Principles").[2] These standards are:

a. The public defense function, including the selection, funding, and payment of defense counsel, is independent.

b. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

[2] *See* American Bar Association, Ten Principles of a Public Defense Delivery System, *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.pdf (last visited Feb. 24, 2022).

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c. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment as soon as feasible after clients' arrest, detention, or request for counsel.

d. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

e. Defense counsel's workload is controlled to permit the rendering of quality representation.

f. Defense counsel's ability, training, and experience match the complexity of the case.

g. The same attorney continuously represents the client until completion of the case.

h. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

i. Defense counsel is provided with and required to attend continuing legal education.

j. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

II. Indigent Defense in Maine and the MCILS.

35. State law provides:

> 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, when it appears to the court that the accused has not sufficient means to employ counsel. The Superior or District Court may in any criminal case appoint counsel when it appears to the court that the accused has not sufficient means to employ counsel. The District Court shall order reasonable

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> compensation to be paid to counsel by the District Court for such services in the District Court. The Superior Court shall order reasonable compensation to be paid to counsel out of the state appropriation for such services in the Superior Court.

15 M.R.S. § 810. The statute is supplemented by Rule 44 of the Maine Rules of Unified Criminal Procedure, which "implements the constitutional right to counsel in a criminal proceeding." *State v. Smith*, 677 A.2d 1058, 1060 (Me. 1996). The rule specifies that a defendant has a right to be represented by counsel at every stage of the proceeding "unless the court concludes that in the event of conviction a sentence of imprisonment will not be imposed." M.R.U. Crim. P. 44(a)(1).

36. The State's current system of indigent defense took shape in 2009, with the passage of legislation creating MCILS.

37. MCILS was created to address concerns about the increasing cost and lack of independent oversight of the indigent defense system, which was then funded and administered by the judiciary. A February 2009 report ("the Clifford Commission Report")[3] attributed increased costs to a surge in felony charges (due to changes to rules and applicable laws) and an increase in the number of criminal defendants qualifying as indigent. The Clifford Commission Report recommended "that Maine implement an indigent legal services system that is independent from the judiciary, and that provides the training and oversight necessary to ensure quality representation to Maine's citizens."

38. According to its enabling legislation, MCILS is "an independent commission whose purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations." 4 M.R.S. § 1801. The

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[3] Indigent Legal Services Commission, Clifford Commission Report 10, *available at* https://www.maine.gov/mcils/sites/maine.gov.mcils/files/documents/Clifford-Commission-Report.pdf (Feb. 2009).

commission is tasked with "ensur[ing] the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the State" and "ensur[ing] adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner, free from undue political interference and conflicts of interest." *Id.*

39. As described in detail below, *see infra*, ¶¶ 46-71, MCILS has failed to fulfill these duties, leaving Maine with a system that creates an unconstitutional risk that defendants will be denied effective assistance of counsel in their criminal proceedings.

40. The Sixth Amendment Center, a nonprofit organization dedicated to ensuring compliance with the Sixth Amendment in localities around the country, has catalogued MCILS's systemic failures in this area. In particular, it detailed MCILS's failings in a 2019 report commissioned by the Maine Legislative Council, a 10-member body consisting of the President of the Senate, the Speaker of the House, and the Republican and Democratic Floor Leaders and Assistant Floor Leaders of each body. *See* Sixth Amendment Center, *The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services* (2019) ("*Sixth Amendment Center Report*"), excerpts of which are attached hereto as Exhibit 1.[4] Among other deficiencies, the report found that MCILS failed to impose adequate attorney qualification standards; ensure training of new attorneys and continuing education for experienced attorneys; adequately supervise attorneys; ensure meaningful representation at critical stages of criminal proceedings; compensate attorneys to cover overhead and an adequate fee; or guard against conflicts of interest. Ex. 1, at iv–ix.

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[4] *See* Sixth Amendment Center, The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services, *available at* https://sixthamendment.org/6AC/6AC_me_report_2019.pdf (last visited February 24, 2022).

41. These failures are also documented in extensive detail in government reports and MCILS's own assessment of its operations.

42. On January 10, 2020, the Maine Legislature's Government Oversight Committee directed its Office of Program Evaluation & Government Accountability ("OPEGA") to review MCILS's operations.[5] As described in the resulting report (attached as Exhibit 2), the Legislature requested that OPEGA focus on (as relevant here) the "adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose." Ex. 2 at 1. The Report concluded that, among other failings, "overall . . . MCILS lacks adequate standard operating procedures and formal written policies to govern its primary functions." *Id.* 33.

43. MCILS's Executive Director subsequently wrote a series of three memoranda in December 2021 and January 2022[6] discussing MCILS's compliance with various obligations, each of which likewise reveals the Commission's failure to fulfill its duties. These memoranda discuss MCILS's compliance with (1) its statutory obligations ("MCILS Statutory Memorandum," attached as Exhibit 3); (2) recommendations from the Sixth Amendment Center and OPEGA reports ("MCILS OPEGA Memorandum," attached as Exhibit 4); and (3) the ABA's Ten Principles ("MCILS Ten Principles Memorandum," attached as Exhibit 5).

44. An individual MCILS Commissioner provided his own commentary on the Executive Director's Ten Principles Memorandum ("Commissioner Redline," attached as Exhibit 6), concluding that the memorandum—which itself recognized MCILS's failings—

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[5] Office of Program Evaluation & Government Accountability of the Maine State Legislature, Report on the Maine Commission on Indigent Legal Services, *available at* https://legislature.maine.gov/doc/4769 (Jan. 2020).

[6] The MCILS Ten Principles Memorandum is dated January 2021, but it was produced in January 2022.

nevertheless did not go far enough in recognizing how substantially MCILS underperforms its obligations.

45. While these documents reveal extensive failings in multiple areas of MCILS's operations, two particular failures stand out with respect to this litigation: MCILS's failure to fulfill its statutory obligations, and its implementation of the "lawyer of the day" system.

(1) Failure to Fulfill Statutory Obligations

46. State statutes impose obligations that guide the State's stewardship of its indigent defense system. Both MCILS and its Executive Director have failed to comply with these statutory commands in multiple different categories.

(a) Development of Standards

47. First, section 1804(2) requires MCILS to "develop standards governing the delivery of indigent legal services, including:

> A. Standards governing eligibility for indigent legal services. The eligibility standards must take into account the possibility of a defendant's or civil party's ability to make periodic installment payments toward counsel fees;
>
> B. Standards prescribing minimum experience, training and other qualifications for contract counsel and assigned counsel;
>
> C. Standards for assigned counsel and contract counsel case loads;
>
> D. Standards for the evaluation of assigned counsel and contract counsel. The commission shall review the standards developed pursuant to this paragraph every 5 years or upon the earlier recommendation of the executive director;
>
> E. Standards for independent, quality and efficient representation of clients whose cases present conflicts of interest;
>
> F. Standards for the reimbursement of expenses incurred by assigned counsel and contract counsel; and
>
> G. Other standards considered necessary and appropriate to ensure the delivery of adequate indigent legal services.

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4 M.R.S. § 1804(2).

48. Likewise, section 1804(3)(M) provides that the Commission "shall … [e]stablish procedures for handling complaints about the performance of counsel providing indigent legal services." *Id.* § 1804(3)(M).

49. MCILS has not developed these standards and procedures. As OPEGA explained, "even when standards are required to be established specifically in statute, MCILS relies on informal methods or does not address the standard at all." Ex. 2 at 33.

50. In particular, the OPEGA Report details that MCILS has not promulgated *any* standards or procedures regarding counsel caseloads (subsection 2(C)); evaluation of counsel (subsection 2(D)); conflicts of interest (subsection 2(E)); or complaints about the performance of counsel (subsection 3(M)). *Id.*

51. Absent any standards in this area, MCILS has no mechanism for monitoring or rectifying the experience Plaintiffs have had in their cases—namely, attorneys who do not return their calls, set up meetings, review their discovery with them, or generally take an active role in moving their cases forward. *See supra*, ¶¶ 11-15.

52. And because Maine is unique as the only state where appointed private attorneys provide *all* indigent defense, there may be no one else able to step when an appointed attorney is unavailable. *See* Ex. 1 at 26.

53. MCILS has had ample time to comply with these obligations. The statutory mandates to implement requirements surrounding case load and conflicts of interest were enacted in 2009, and so have been in place for over a decade. P.L. 2009, ch. 419, § 2. The statutory mandates surrounding evaluation of counsel and a complaint procedure were enacted in 2017,

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likewise providing MCILS sufficient time to comply. P.L. 2017, ch. 284, Pt. UUUU, §§ 1, 2 (AMD).

54. MCILS itself has affirmed the accuracy of OPEGA's findings on statutory noncompliance. A December 28, 2021, MCILS memorandum on statutory compliance acknowledges that the "Commission has not yet promulgated case load standards," noting only that "Commission staff anticipates that case load standards will be part of the updated performance standards under development," while "[c]ase load tracking and management" will be "part of the system design for the next case management system." Ex. 3, at 102. Similar comments are made about evaluation standards and conflicts of interest. *Id.* at 102-03.

55. Moreover, this failure makes it impossible for MCILS to fulfill its overarching statutory role—namely, "to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and parents in child protective cases." 4 M.R.S. § 1801. Without a standard for the number of cases an attorney should be handling, MCILS has no way of "ensur[ing] the delivery of indigent legal services … in a manner that is fair and consistent throughout the State." *Id.* Likewise, with no standards for evaluating counsel, reviewing complaints about counsel, or resolving conflicts of interest, the Commission cannot evaluate whether indigent defendants are provided "qualified and competent counsel," let alone rectify any cases where they are not. *Id.*

(b) Attorney Qualification, Training, and Compensation

56. MCILS's failure to promulgate these standards is particularly problematic given its deficient standards for attorney qualifications and training. As described by the Sixth Amendment Center, "[j]ust as you would not go to a dermatologist for heart surgery, a real estate

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or divorce lawyer cannot be expected to handle a complex criminal case competently." Ex. 1 at 27. And yet, that is precisely what the State's system allows.

57. MCILS is required by statute to "[d]evelop criminal defense, child protective and involuntary commitment representation training and evaluation programs for attorneys throughout the State to ensure an adequate pool of qualified attorneys." 4 M.R.S. § 1804(3)(D). It is also required to "[e]stablish minimum qualifications to ensure that attorneys are qualified and capable of providing quality representation in the case types to which they are assigned, recognizing that quality representation in each of these types of cases requires counsel with experience and specialized training in that field." *Id.* § 1804(3)(E).

58. The standards and systems MCILS has established with respect to attorney qualifications and training are woefully inadequate.

59. To receive an assignment from the Commission, in most cases an attorney need only attend a "Commission-approved training course for the area of the law for which the attorney is seeking to receive assignments." 94-649 C.M.R. ch. 2, § 4 (2) (2010).

60. This requirement can be satisfied by attending a single training course in criminal law. Ex. 1 at 30.

61. While there are greater qualifications for certain categories of serious offenses such as homicide and sex offenses, even in those cases an attorney can request a waiver. 94-649 C.M.R. ch. 3, §§ 3, 4 (1) (2010).

62. Thus, regardless of background, training, or prior case experience, MCILS allows attorneys to take on criminal representations after attending a single-day "Minimum Standards" course. This system does not satisfy MCILS's statutory obligation to "ensure that attorneys are qualified and capable of providing quality representation in the case types to which they are

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assigned," 4 M.R.S. § 1804(3)(E), particularly when coupled with MCILS's non-existent standards for evaluating counsel or resolving complaints about counsel, *see supra*, ¶ 50.

63. As an MCILS Commissioner has explained, the Commission's "basic eligibility requirements remain too low." *See* Correspondence from Ron Schneider (Jan. 10, 2022), attached as Exhibit 7. The Commission does "not want to admit that there are lawyers receiving assignments who should not be receiving them or are not really ready to receive them, even though full-time defense lawyers and judges could name them." *Id.* As a result, "MCILS still does not ensure that every assigned lawyer has the necessary ability, training and experience necessary to handle the case assigned to them as MCILS still permits lawyers just out of law school with a one-day Commission-sponsored or Commission-Approved training course to represent a person, who, by definition, faces jail, involuntary confinement in a hospital, or the loss of custody of a child." Ex. 6, at 5.

64. And while MCILS technically requires specialized training for certain representations, a recent report found that "more than 1 of every 8 case assignments that required specialized representation was given to an attorney who was supposed to be ineligible to serve."[7]

65. MCILS's mechanisms for training and supervision are also statutorily and constitutionally deficient. MCILS does not require appointed attorneys to obtain any training in any specific practice area, beyond the minimal requirements that the attorney must meet to first be placed on the roster. And while MCILS created a "Resource Counsel Program" to provide appointed attorneys with a resource for mentoring and supervision, the 25 attorneys who staff this program are capped at providing 10 hours of mentoring each month—a total of 250 hours to

[7] Samantha Hogan and Agnel Philip, *Lawyers who were ineligible to handle serious criminal charges were given thousands of these cases anyway*, The Maine Monitor (Feb. 23, 2021), *available at* https://www.themainemonitor.org/lawyers-who-were-ineligible-to-handle-serious-criminal-charges-were-given-thousands-of-these-cases-anyway/.

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mentor and supervise the hundreds of attorneys responsible for thousands of criminal representations in the state. Ex. 1 at 31. MCILS also has no authority to require any attorney to cooperate with this program, nor does it have any sort of planning for helping resource counsel attorneys identify performance problems or training needs.

66. Compounding these failings, MCILS has failed to ensure that attorneys are compensated in a manner commensurate with "quality and efficient indigent legal services." 4 M.R.S. § 1804(3)(A), (F). As MCILS itself acknowledges, its current rate of $80 per hour is inadequate, particularly because it does not incorporate overhead and administrative costs, such as the costs of support staff. *See, e.g.*, *Jewell v. Maynard*, 181 W. Va. 571, 578-79 (1989) (recognizing that states must account for overhead costs and expenses when evaluating adequate compensation for appointed attorneys). MCILS has conceded that the current rate "does not allow defense counsel to practice with the same resources as attorneys for [the] state," and that "the gulf between the practice conditions of assigned counsel and their state-employed peers is stark." Ex. 5 at 6. Such "[i]nadequate compensation 'leads to a decrease in the overall number of attorneys willing to accept court appointments' and can 'encourage some attorneys to accept more clients than they can effectively represent in order to make ends meet.'" Ex. 1 at 77. In MCILS's own words, "there is no parity between assigned counsel and the state, nor [is] the defense function an equal partner" in the criminal justice system. Ex. 5 at 6.

(c) Monitoring The Indigent Defense System

67. MCILS is separately required to establish certain processes for monitoring the indigent defense system. These include a statutory obligation to "[e]stablish a method for accurately tracking and monitoring caseloads of assigned counsel and contract counsel." 4 M.R.S. § 1804(3)(G).

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68. But MCILS does not actually know when a case is assigned, as a court does not directly inform MCILS that a lawyer has been assigned to a case.

69. As MCILS itself acknowledges, the Commission "does not yet have processes and procedures that track caseloads in real time." Ex. 3, at 104. MCILS does not have a target date for implementing such a system. *Id.*

70. While a lawyer can open a new matter in MCILS's database, many wait to do so until the case has been resolved and they start the process to apply for their voucher.

71. Absent this information, there is no way for MCILS to fulfill its obligation to track and monitor caseloads of assigned counsel. Learning of the representation after the fact is of little use because MCILS does not have an accurate understanding of an attorney's caseload at a given point in time, nor can MCILS take any responsive actions based on attorney caseload.

(d) MCILS's Executive Director

72. The statutory scheme likewise imposes a series of obligations on the Executive Director of MCILS. The Executive Director must, among other obligations, "[e]nsure that the provision of indigent legal services complies with all constitutional, statutory and ethical standards," 4 M.R.S. § 1805(1), "[a]ssist the commission in developing standards for the delivery of adequate indigent legal services," *id.* § 1805(2), and "[a]dminister and coordinate delivery of indigent legal services and supervise compliance with commission standards," *id.* § 1805(3).

73. As detailed above, *see supra*, ¶¶ 46-71, MCILS has failed in each of these categories: the provision of indigent legal services does not comply with all constitutional, statutory, and ethical standards, 4 M.R.S. § 1805(1); MCILS has failed to develop standards for the delivery of adequate indigent legal services, *Id.* § 1805(2); and MCILS does not coordinate and supervise the delivery of indigent legal services, *id.* § 1805(3).

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74. Moreover, given that the Commission has no way of tracking active MCILS cases, *see supra*, ¶¶ 68-69, it is impossible for the Executive Director to fulfill his statutory obligation to "[a]dminister and coordinate delivery of indigent legal services," 4 M.R.S. § 1805(3).

75. The Executive Director has thus failed in fulfilling these statutory obligations.

* * *

76. In addition to violating the statute, 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.

77. As discussed above, the constitutional right to counsel is not fulfilled by the mere appointment of counsel. *See supra*, ¶¶ 31-32; *Cronic*, 466 U.S. at 654. But the mere appointment of counsel is all that MCILS's system provides. Without any standards for evaluating caseloads, conflicts of interest, or attorneys' performance, MCILS has no baseline for establishing what effective representation requires—let alone mechanisms for measuring how appointed counsel are performing. And even where MCILS has ostensibly put standards in place—for example, with respect to attorney qualifications and training—these standards are far too low to ensure effective representation. *See supra*, ¶¶ 58-63.

78. As a result, MCILS's failure is not just a statutory violation, but a constitutional violation as well.

79. While courts are more accustomed to evaluating compliance with the Sixth Amendment in the context of the effectiveness of an individual attorney's performance, the Constitution's guarantee of the assistance of counsel is implicated when criminal defendants

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are—either actually or constructively—denied the assistance of counsel altogether. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). The two claims—ineffective assistance of counsel, on the one hand, and denial of counsel, on the other—are distinct. *Penson v. Ohio*, 488 U.S. 75, 88 (1988). A denial of counsel claim is not a claim of substandard representation but rather it is a claim of nonrepresentation, caused either by the actual failure to provide an attorney or by providing an attorney who is not able to provide real assistance. *Cronic*, 466 U.S. at 658-60.

80. The systemic structural limitations in Maine's system, including but not limited to MCILS's failure to even satisfy its own statutory requirements, have resulted in a system that denies Plaintiffs, and those similarly situated, with actual representation, as guaranteed by *Gideon* and its progeny. "Actual representation assumes a certain basic representational relationship," *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 22 (2010), which is impossible to develop and maintain when attorneys do not meet or communicate with their clients. *See Public Defender, Eleventh Jud. Cir. of Fla. v. State*, 115 So. 3d 261, 278 (Fla. 2013) (finding denial of counsel where attorneys were "mere conduits for plea offers," did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial).

<u>(2) The Lawyer of the Day System</u>

81. Rule 5 of the Maine Rules of Unified Criminal Procedure allows for the assignment of a "lawyer for the day . . . for the limited purpose of representing the [defendant] at the initial appearance or arraignment." M.R.U. Crim. P. 5(e). These lawyers appear at 48-hour hearings for in-custody defendants and at the initial appearance.

82. There is no per se problem with a lawyer-of-the-day system. But the State's lawyer-of-the-day system, as implemented, violates two fundamental tenets of effective

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representation: effective assistance of counsel at the outset of a criminal case and continuous representation through the completion of a case.

83. First, it is critical that a defendant receive effective representation "at the earlier stages of a criminal case." *Kuren v. Luzerne Cty.*, 637 Pa. 33, 80 (2016). Indeed, the "right to counsel is as important in the initial stages of a criminal case as it is at trial." *Id.*; *see also* ABA Principle 3.

84. The State's lawyer-of-the-day system fails to ensure effective representation at the start of a defendant's case, because it is woefully under-resourced. In Androscoggin County, for example, two lawyers of the day typically represent 200 defendants, with one lawyer estimating that they had about 5 minutes with each defendant. Ex. 1, at 52-53. Likewise, in Cumberland County there are an average of two lawyers of the day to handle 80 defendants. *Id.* at 52. These attorneys must set up a makeshift office in the courthouse, or else meet with defendants while in lock-up, requiring them to attempt to describe constitutional rights to an entire group of in-custody defendants, effectively leading to a group waiver of constitutional rights. *Id.*; *see also Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (finding that a "meet and plead" system, where clients met their attorneys for the first time in court and immediately accepted a plea bargain without discussing their cases in a confidential setting, resulted in the lack of a representational relationship that violated the Sixth Amendment).

85. This problem is not one of "limited representation," *State v. Galarneau,* 2011 ME 60, ¶ 8, 20 A.3d 99*,* but rather of no real representation at all. Because attorneys are often forced to communicate with defendants as a group, the "basic representational relationship" necessary for "[a]ctual representation" is lacking. *Hurrell-Harring*, 15 N.Y.3d at 22.

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86. The resource challenges are particularly acute for in-custody hearings, in which the lawyer of the day is also responsible for making arguments for release on bail. As detailed by MCILS's rules for criminal practice,[8] the attorney should conduct an initial interview and investigation, including health (mental and physical) and employment background, criminal history, and the general circumstances of the alleged offense. Recent amendments to the bail statute allow for further argument based upon caretaking responsibilities and other factors. *See* 15 M.R.S. § 1026 (4)(C)(4), (12)-(14); P.L. 2021, ch. 397, § 5 (AMD). Yet the current lawyer-of-the-day system provides insufficient time and resources for the assigned attorney to meaningfully confer on these topics with each person on the docket.

87. Compounding this problem, the defendant is typically assigned a different lawyer to handle the case going forward, resulting in a lack of continuous representation and requiring a new attorney who is unfamiliar with the case to step in. *See* ABA *Standards for Criminal Justice*, Standards 5-6.2 cmt (3d ed. 1992) (explaining that "the risk of substandard representation" increases given the new attorney's low familiarity with the case).

88. Mr. Robbins and Mr. Peirce both had to switch attorneys after initially being assigned a lawyer through the lawyer-of-the-day system.

89. Even for defendants who did not switch attorneys after their initial assignment, the lawyer-of-the-day system does not provide adequate time for defendants to have any meaningful communication with their assigned lawyers at their initial appearance or 48-hour hearing.

90. Mr. Mack, for example, pled not guilty at his initial appearance, but did not feel that he had sufficient information about the proceedings to understand what was happening, and

[8] https://www.maine.gov/mcils/sites/maine.gov.mcils/files/inline-files/Adult%20Criminal%20Standards%20Final%20Adopted%20to%20SOS%20effdate.pdf.

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he did not speak or otherwise participate at all in court. Nor did Mr. Mack feel that his attorney adequately advocated for him with respect to bail, pushing Mr. Mack to independently request that the state revisit bail in his case.

91. The same was true with respect to Mr. Huynh, who pled not guilty at his initial appearance, but did not feel that he had adequate information about the proceedings or the charges against him to decide how to proceed.

CLASS ACTION ALLEGATIONS

92. Plaintiffs bring this class action lawsuit pursuant to Rule 23 of the Maine Rules of Civil Procedure on behalf of all indigent persons who are now or who will be before a state court in Maine under formal charge of having committed any offense, the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correction facility (regardless of whether actually imposed) and who qualify for representation through Maine's indigent-defense system.

93. There are important questions of law and fact raised in this case that are common to the Class, including:

i. Whether Defendants have failed to comply with their statutory obligations to implement an effective indigent-defense system, including their specific obligations to develop standards governing the delivery of indigent legal services; establish training programs and attorney qualifications; and monitor the indigent-defense system;

ii. Whether Defendants' failure to adequately fund the delivery of indigent-defense services, and, in particular, to ensure that attorneys are appropriately

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compensated, results in the provision of constitutionally deficient representation;

iii. Whether Defendants' implementation of the lawyer-of-the-day system fails to ensure the provision of effective representation at the start of a defendant's case; and

iv. Whether Defendants failure to implement, administer, and oversee an adequate public-defense system results in a violation of the state and federal constitutions.

94. The claims of the Plaintiffs as Class representatives are typical of the claims of the Class as a whole. Like all of the Class members, the Class representatives are being denied their right to counsel in violation of the Sixth Amendment to the U.S. Constitution and Article I, § 6 of the Maine Constitution as a result of MCILS's ongoing failure to adequately supervise, administer, and fund indigent-defense services.

95. Also like all Class members, the Class representatives are being harmed by MCILS's ongoing failure to enact regulations setting standards for an adequate public defense system.

96. As discussed above, MCILS's failure to adopt standards or develop procedures governing the delivery of indigent-defense services creates a series of systemic failings. *See supra*, ¶¶ 46-71.

97. Without a limit on the number of cases each attorney should handle, attorneys can take on far more defendants than they are able to competently represent. Attorneys who do are then unable to communicate with defendants, promptly return their calls, review their discovery,

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and generally ensure that they can devote the level of attention needed for efficient representation—all problems experienced by Plaintiffs here. *See supra*, ¶¶ 11-15.

98. Similarly, without any procedure for evaluating counsel, MCILS has no way of knowing when particular attorneys fail to provide effective representation. MCILS has not even taken the basic step of setting up a formal system for reporting complaints about particular attorneys, which would allow it to investigate particular attorneys as necessary. These attorneys thus remain in the pool of rostered attorneys, continually picking up new defendants who likewise receive ineffective representation, even when it was clear to all that the attorney had a track record of failing to perform even basic functions of representation.

99. Likewise, without any procedure for evaluating conflicts of interest, MCILS leaves it to individual attorneys to identify conflicts and then recuse themselves from a case. MCILS has no way of knowing whether this is happening, and therefore has no way of preventing attorneys from representing defendants even when they are conflicted.

100. Even where MCILS has promulgated standards—with respect to attorney qualifications and training, for example—MCILS fails to ensure compliance with these standards, and, regardless, the standards are too low to guarantee effective representation.

101. The common questions of law and fact articulated above predominate over any individualized questions that may arise out of the Plaintiffs' or Class members' criminal cases. Accordingly, a class action is superior to other available methods for the fair and efficient adjudication of the allegations raised in this matter.

102. MCILS has failed to adequately supervise, administer, and fund an indigent defense system, thereby violating the rights of poor defendants across the State. In this way, Defendants have acted and refused to act on grounds generally applicable to the entire Class,

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making it appropriate for the Court to issue final injunctive and declaratory relief for all Class members.

103. The Class representatives will fairly and adequately protect the interests of the Class. The interests of the Class representatives are not in conflict with the interests of any other indigent defendant, and the Class representatives have every incentive to pursue this litigation vigorously on behalf of themselves and the Class as a whole.

104. The Class representatives are being represented by experienced, well-resourced counsel in this matter, including the American Civil Liberties Union of Maine, Preti Flaherty, Beliveau & Pachios, LLP, and Goodwin Procter LLP. The ACLU of Maine—an affiliate of the nationwide American Civil Liberties Union—has more than five decades of experience defending the civil liberties of the people of Maine, including through state and federal civil-rights actions. Counsel at Preti, Flaherty, Beliveau & Pachios, LLP, possess expertise in complex litigation, administrative law, and matters relating to Maine state government. And counsel at Goodwin Procter LLP have extensive experience litigating complex actions in trial and appellate courts, including a significant track record of litigating civil-rights suits in conjunction with ACLU affiliates.

COUNT I:
VIOLATION OF THE SIXTH AMENDMENT (42 U.S.C. § 1983)
Plaintiffs v. All Defendants

105. Plaintiffs reallege the preceding paragraphs as though fully set forth herein.

106. 42 U.S.C. § 1983 provides that "[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

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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."

107. The Sixth Amendment to the United States Constitution, as applicable to the States through the Fourteenth Amendment, provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

108. As courts have explained, where, as here, plaintiffs sue for prospective relief in conjunction with the state's provision of indigent-defense services, the plaintiffs' burden is to demonstrate "the *likelihood* of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (quotations marks omitted; emphasis added). Plaintiffs have not yet been sentenced (or, in some cases, convicted), and are not seeking (through this suit) release from prison. Rather, they seek prospective relief to avoid future harm from the state's ongoing provision of insufficient indigent-defense services in their case. As a result, there is no need for plaintiffs to show prejudice in any individual case. *See id.* (differentiating a suit for prospective relief from a *Strickland* action where "a party seeks to overturn his or her conviction"). Plaintiffs can instead state a claim for relief based on, for example, "systemic" actions that "hamper the ability of their counsel to defend them" and "effectively deny them their eighth and fourteenth amendment right to bail." *Id.*

109. Applying these principles, the State's indigent defense system violates the Sixth Amendment in two ways.

110. First, MCILS has failed to develop and implement an effective system for the appointment of counsel for indigent defendants. In particular, MCILS has failed to (i) set and enforce standards for counsel caseloads, conflicts of interest, and attorney performance; (ii) monitor and evaluate rostered attorneys; (iii) ensure adequate funding and support for rostered

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attorneys; and (iv) provide training to rostered attorneys. Even where MCILS has set standards (with respect to attorney qualifications, for example), these standards are both insufficiently rigorous and not sufficiently enforced. These violations unconstitutionally infringe or imminently threaten to infringe Plaintiffs' rights under the Sixth Amendment to the U.S. Constitution.

111. Second, MCILS's implementation of its lawyer-of-the-day program to provide representation at criminal defendants' 48-hour hearings and initial appearances creates an unconstitutional risk of ineffective representation. No attorney reasonably can be expected to adequately represent all their clients when they are responsible for up to 100 defendants upon walking into court in the morning. Under these conditions attorneys are forced to describe constitutional rights to large groups of defendants, making it impossible to advise every defendant as to the proper course of action in his or her individual case.

112. The problems with the lawyer-of-the-day program persist throughout a defendant's case. A defendant who is not given effective counsel at the critical initial stage of his or her proceeding may make choices—as to whether to plead guilty, for example—that are impossible to undo later in the case. Denial of bail at the initial hearing also has serious consequences for the remainder of the case, with pre-trial detention significantly increasing the probability of conviction, primarily due to an increase in guilty pleas.[9]

113. Defendants have acted and threatened to act under the color of state law in depriving Plaintiffs of rights guaranteed by the Constitution and laws of the United States.

114. As a result, Plaintiffs are entitled to preliminary and permanent injunctive relief, a declaratory judgment, costs and attorney's fees, and such other relief as the Court deems just.

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[9] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. Law Econ. & Org. 511, 514 (2018).

115. Because Defendants have acted and threatened to act under the color of state law to deprive Plaintiffs of rights guaranteed by the Constitution and laws of the United States, Plaintiffs may sue and seek relief pursuant to 42 U.S.C. § 1983.

COUNT II:
FAILURE TO PROMULGATE RULES (5 M.R.S. § 8058)
Plaintiffs v. MCILS and the Director

116. Plaintiffs reallege the preceding paragraphs as though fully set forth herein.

117. Under the Maine Administrative Procedure Act, "[a]ny person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court. The relief available in the Superior Court shall include an order requiring the agency to make a decision within a time certain." 5 M.R.S. § 11001.

118. Likewise, "[j]udicial review . . . of an agency's refusal or failure to adopt a rule where the adoption of a rule is required by law, may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court conducted pursuant to Title 14, section 5951, et seq." 5 M.R.S. § 8058(1); *see also id.* ("[I]n the event that the court finds that an agency has failed to adopt a rule as required by law, the court may issue such orders as are necessary and appropriate to remedy such failure.").

119. Here, MCILS has failed to adopt rules required by two separate sources of law.

120. First, MCILS is statutorily mandated to promulgate standards governing the delivery of legal services—including standards for minimum qualifications of counsel, maximum caseloads, evaluation of counsel, and conflicts of interest. 4 M.R.S. § 1801(1); *see supra*, ¶¶ 47-52. Yet in the decade since its creation, the agency has not promulgated the required standards. *See supra*, ¶¶ 53-54.

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121. The Commission's and Executive Director's failures to comply with these statutory directives violate the Maine Administrative Procedure Act.

122. Second, MCILS is constitutionally required under the federal and state constitutions to provide effective representation to indigent defendants. To fulfill this constitutional requirement, MCILS must adopt rules to ensure that the provision of representation complies with constitutional standards. MCILS has failed to do so here. *See supra*, ¶¶ 46-71.

123. The Commission's and Executive Director's failures to comply with these constitutional directives likewise violates the Maine Administrative Procedure Act.

124. These violations can be remedied through the Declaratory Judgments Act, 5 M.R.S. §§ 5951-5963.

125. There is an actual controversy between the parties over the agency's failure to promulgate these statutorily required standards.

126. Pursuant to section 8508, Plaintiffs seek a declaration that the MCILS has failed to adopt a rule where the adoption of a rule is required by law, and the entry of an appropriate order to remedy that failure.

* * * * *

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

I. A declaratory judgment that Defendants' have denied the guarantee of the assistance of counsel to Plaintiffs and those similarly situated through their failure to ensure adequate gatekeeping, supervision, and training of state-appointed counsel violates the Sixth Amendment to the United States Constitution;

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II. Injunctive relief requiring Defendants 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;

III. A declaratory judgment holding that MCILS has failed to adhere to statutorily required rules for gatekeeping, supervision, and training of state-appointed counsel;

IV. An order requiring MCILS to adopt such statutorily required rules;

V. A declaratory judgment holding that the MCILS's implementation of the lawyer of the day program violates the Sixth Amendment to the United States Constitution;

VI. Injunctive relief requiring MCILS to ensure adequate representation of indigent defendants at their 48-hour hearings, consistent with the Sixth Amendment to the United States Constitution;

VII. An award to Plaintiffs of costs and attorney's fees; and

VIII. Any such other and further relief that this Court deems just and proper.

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Respectfully submitted.

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