MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. Ken-22-420

HUMAN RIGHTS DEFENSE CENTER,
Appellee,

v.

MAINE COUNTY COMMISSIONERS ASSOCIATION SELF-FUNDED RISK MANAGEMENT POOL,
Appellant.

On Appeal from the Superior Court, Kennebec County
Docket No. CV-21-131

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEE

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1 M.R.S. § 409(4).....13

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42 U.S.C. § 1983.....16

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Other Authorities

Amelia Thomson-DeVeaux et al., *Cities Spend Millions On Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*, (Feb. 22, 2021), https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/?itid=lk_inline_enhanced-template 11

Anne C. Lucey, *A Section-By-Section Analysis of Maine's Freedom of Access Act*, 43 Maine L. Rev. 169 (1991). 13, 14

Associated Press, *NYC to pay millions over police 'kettling' at Floyd protest* (Mar. 1, 2023), https://apnews.com/article/nypd-george-floyd-protests-settlement-kettling-2b8c40a36e2195b9a4b33fa2efaccf0a.....10

Callie Ferguson, *Maine guards mocked prisoners, disparaged minorities and shared confidential records*, Bangor Daily News (Feb. 13, 2023), https://www.bangordailynews.com/2023/02/13/mainefocus/maine-guards-mocked-prisoners-disparaged-minorities-joam40zk0w/ 11

Donald F. Fontaine, *Fee Shifting: A Proposal to Solve Maine's Intractable Access to Justice Problem*, 72 Me. L. Rev. 47 (2020).....17

Elise Schmelzer, *Denver pays $1.6 million to settle six more lawsuits brought by protesters injured by police in 2020*, The Denver Post, (Mar. 14, 2023), https://www.denverpost.com/2023/03/14/denver-police-protest-settlements/ 10

Emily Allen, *Family of man killed by Portland policeman gets $225,000 settlement,* Sun Journal (July 19, 2022), https://www.sunjournal.com/2022/07/18/family-of-man-killed-by-portland-police-gets-225000-settlement/ 12

Incarceration and the Law, Data Update (April 2022), https://incarcerationlaw.com/resources/data-update/ 17, 18

Jake Pearson, *As New York Pays Out Millions in Police Misconduct Settlements, Lawmakers Ask Why They Keep Happening*, ProPublica (Mar. 21, 2023), https://www.propublica.org/article/nyc-nypd-police-misconduct-settlements-protests.....11

Keith Alexander, et al., *The Hidden Billion-Dollar Cost of Repeated Police Conduct*, The Washington Post (Mar. 9, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/ 9

Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, New York Times (July 3, 2020) 9

Linda S. Simard, *Fees, Incentives, and Deterrence*, 160 U. Pa. L. Rev. Online 10 (2011)..…..14, 15

Mark Wilson, *Maine DOC, Medical Provider, Pay $250,000 Settlement Due to Excessive Force on 11-Year-Old*, Prison Legal News (Sept. 1, 2020), https://www.prisonlegalnews.org/news/2020/sep/1/maine-doc-medical-provider-pay-250000-settlement-due-excessive-force-11-year-old/ 12

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S. REP. 94-1011, 3, reprinted in 1976 U.S.C.C.A.N. 5908, 5910.....16

INTRODUCTION

At the heart of this case is a question of utmost interest to the public: how much money did Kennebec County and its insurer, the Maine County Commissioners Association Risk Management Pool (the "Risk Pool") pay a Black man who alleged he had been beaten and pepper sprayed by a white guard at the Kennebec County jail? The answer should have been reasonably easy to find out—it is undisputed that information relating to settlement agreements between individuals and public entities is subject to disclosure under the Maine Freedom of Access Act (FOAA). But instead, what began as a straightforward FOAA request resulted in over a year-and-a-half of time- and resource-consuming advocacy that ultimately revealed an overarching scheme of secrecy that unlawfully shields settlement amounts from the public.

The Maine Association of Criminal Defense Lawyers, Maine Freedom of Information Coalition, Maine Press Association, New England First Amendment Coalition, and Public Justice submit this brief as *amici curiae* to urge the Court to affirm the Superior Court's finding that the Risk Pool acted in bad faith and therefore must pay the reasonable attorney's fees of the Human Rights Defense Center (HRDC). By intentionally omitting settlement sums from documents stating the terms of the settlement and by evading FOAA requests for that information, the Risk Pool has engaged in a bad faith attempt to withhold public records. Given this bad

faith, requiring the Risk Pool to pay reasonable attorney's fees to HRDC is necessary to deter the Risk Pool and other similar public entities from violating the FOAA, and to compensate HRDC for the time it spent litigating this appeal.

INTEREST OF *AMICI*

Amici are organizations that, through a variety of means, advocate for access to public records, open government, and a fair criminal legal system. *Amici* share an interest in exposing government abuses of power, and for that reason, seek to ensure that records of settlements in cases involving the use of force by law enforcement are accessible to the general public.

The Maine Association of Criminal Defense Lawyers (MACDL), founded in 1992, is a statewide organization of criminal defense attorneys dedicated to the fair administration of criminal justice throughout the State of Maine and the defense of all people accused of crimes. MACDL has an interest in the present case, as the clients its members represent are those most vulnerable to law enforcement abuse. Additionally, timely access to information regarding settlements involving law enforcement can be extremely important in investigating a client's case--and disclosure of such information is a Constitutional obligation of state actors in any criminal prosecution.

The Maine Freedom of Information Coalition (MFOIC) is a statewide organization whose mission is to educate Maine citizens and legislators about the

rights and responsibilities of citizens in accessing information so they may participate more fully in our democracy. MFOIC supports open access to government information, supports those who exercise their rights to access government information under the FOAA, and periodically conducts audits/evaluations of government agency practices in making government information available according to the spirit and letter of the Act.

The Maine Press Association (MPA), founded in 1864, represents more than forty Maine news organizations. Its goals are to promote and foster high ethical standards and the best interests of its members; to encourage improved business and editorial practices and better media environment in the state; and to improve the conditions of journalism and journalists by promoting and protecting the principles of freedom of speech and of the press and the public's right to know. The MPA has an interest in this case as part of its advocacy for First Amendment and public access issues.

The New England First Amendment Coalition (NEFAC) is the region's leading advocate for First Amendment freedoms and the public's right to know about government. The coalition is a non-partisan non-profit organization that believes in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, academics, and other private citizens. NEFAC frequently files

and joins amicus briefs in cases of First Amendment and open government significance.

Public Justice is a national public interest legal organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. As part of this work, Public Justice has long represented those whose rights have been violated by law enforcement officers. Public Justice also has a longstanding project devoted to fighting court secrecy, including cases challenging unlawful sealing orders, overbroad protective orders, or confidentiality provisions in settlement agreements used to hide corporate or governmental misconduct. For example, Public Justice previously filed an amicus brief in *Overbey v. Mayor and City Council of Baltimore*, 930 F.3d 215 (4th Cir. 2019), which explained why the inclusion of unilateral confidentiality clauses in settlement agreements violated public policy.

ARGUMENT

Through its practice of omitting settlement amounts from settlement agreements and through its evasive conduct, the Risk Pool has enacted a bad faith scheme of secrecy that allows it to avoid disclosing documents subject to the FOAA. This disregard for its obligations under the FOAA prevents the public from accessing information of significant public interest, and, by making it a time-intensive and expensive endeavor, makes it less likely that individuals will avail themselves of

their right to inspect government records. The Court must ensure that the Risk Pool's bad faith behavior does not continue, and it should do so by enforcing the consequences permitted by the statute: an award of reasonable attorney's fees.

In addition to preventing access to public information, the Risk Pool's conduct harms the public in other ways. Shielding settlement sums from the public eye inhibits the use of private litigation for enforcement of civil rights and hinders a litigant's ability to reach fair settlement terms. Furthermore, the Risk Pool's conduct raises serious ethical concerns that ultimately undermines the public's faith in the legal system and government.

For these reasons, the Court should affirm the lower court's finding that the Risk Pool acted in bad faith and affirm the award of attorney's fees to HRDC.

I. THE RISK POOL HAS ENACTED A BAD FAITH SCHEME OF SECRECY WARRANTING IMPOSITION OF ATTORNEY'S FEES

A. The Risk Pool's Bad Faith Would Likely Have Prevented an Ordinary Member of the Press or Public from Discovering Information of Public Interest

As a condition of settling a claim, the Risk Pool forces individuals to sign a General Release and Agreement to Defend, Indemnify and Hold Harmless (the "General Release"). *See* Appendix ("A") 133-136. The General Release does not include the true settlement amount, merely a generic statement that the agreement was reached for "one dollar and other good and valuable consideration" and a clause that specifically notes that "no other promises or agreements… have been made as

or in consideration for this release." A. 133-34. The release also contains a one-sided confidentiality provision preventing the releasor from disclosing the terms of the settlement. A. 133-34. This release, which is signed only by the plaintiff, is the only agreement signed in executing a settlement. A. 134, 148.

The intentional omission of the settlement amount from the general release is reflective of a larger scheme of secrecy involving both Kennebec County and the Risk Pool. A thorough recitation of facts is contained in Appellee's brief, but the following communications demonstrate Kennebec County's and the Risk Pool's evasiveness and willful neglect of their obligation to ensure "records of their actions be open to public inspection." 1 M.R.S. § 401.

- In its response to the initial FOAA request, Kennebec County characterized HRDC's request as "requesting the settlement agreement . . . in addition to other information regarding that claim," when the original request was for "records sufficient to show . . . the amount of money involved in the resolution and to whom it was paid." A. 105.

- In response to HRDC's clarification that it was looking for any documentation of the settlement amount that had been reported in a news article and that "[t]he general release . . . was only for a dollar," Kennebec County responded that the general release was "the only document which contains the terms of the settlement" without indicating whether there existed any other records sufficient to show the settlement amount, as was originally requested. A. 137.

- In response to HRDC's request to the Risk Pool asking for "any documents showing payments disbursed," the Risk Pool responded that Kennebec County had already provided a copy of the settlement agreement and stated, without supporting documentation, that "[t]he settlement amount is $30,000." A. 143.

- In response to HRDC's request for "any documentation that shows the $30,000 amount," the Risk Pool responded with a copy of the news article that reported the amount, which is not a government record. A. 142-43.

- After HRDC clarified that it was looking for the actual agreement showing the full settlement amount, the Risk Pool responded that Kennebec County had already provided the release, that the release was "the actual agreement," and that the Risk Pool had "already advised you that the settlement amount is $30,000," and did not indicate the existence (or lack thereof) of documents responsive to the initial request ("any documents showing payments disbursed"). A. 142.

- In response to a follow up letter from the ACLU regarding the document requests, the Risk Pool repeated that the General Release was the only settlement document and had already "advised [HRDC] of the settlement amount," again ignoring that the initial request called for "any documents showing payments disbursed." A. 144, 149.

As the lower court found, the Risk Pool's responses to FOAA requests that were reasonably specific and unambiguous revealed "semantic gamesmanship to avoid disclosing that it even possessed responsive documents." A. 21. This gamesmanship erected barriers to accessing information that that would likely have prevented an ordinary citizen from ever discovering information that is subject to public disclosure under the FOAA. HRDC was only able to overcome these barriers because it had sufficient resources to devote to pursuing follow-up requests and ultimately, an appeal. HRDC was also able to succeed because, unlike the average citizen, the organization had more specialized knowledge of how settlement agreements are commonly executed, having sought settlement agreements thought freedom of information act requests on hundreds of occasions. Sept. 29, 2022 Hr'g

Tr. 29:15-19. That knowledge informed their efforts to continue seeking documents relating to the actual amount of money paid, despite the Risk Pool's continued insistence there existed no document showing the actual amount paid.

HRDC's ability to prevail in this case should not be taken to mean that other individuals or organizations could prevail when public officials attempt to hide important documents and information. Even if members of the press or public could have similarly intuited in a case like this one that the expenditure of government funds must be documented somewhere, there are many other categories of documents and information that only the government knows exist. For those documents, requesters are entirely reliant on the government's representations and may not even know that there are documents that they should keep pushing for. Without time, resources, or specialized knowledge, a requester would be unlikely to continue to press for additional records, let alone file an appeal seeking enforcement of the FOAA. This would leave them with no choice but to accept an agency's denial for an answer, undermining the FOAA's very purpose.

B. The Risk Pool's Settlement Agreements Are of Significant Public Interest

The use of force by law enforcement officers and the racism deeply embedded in the U.S. criminal legal system are some of the most pressing public policy crises of our time. In the wake of the highly visible police killing of George Floyd, millions of people flooded the streets in the summer of 2020 to protest police brutality and

violence against Black people. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, New York Times (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html (noting that the Black Lives Matter protests in the summer of 2020 were the largest movement in U.S. history to date). With a steady stream of images and news stories relating to the unlawful use of force, the American public was forced to examine the roles of law enforcement agencies and punitive carceral institutions in perpetuating inequality and white supremacy. These issues remain firmly at the forefront of the public's mind.

Information relating to settlements between government entities and individuals whose civil rights have been violated is of clear public interest and is frequently reported. Of obvious interest is the settlement amount, which is commonly understood by the public to reflect at least some measure of the harm that was inflicted. A recent Washington Post investigation documented more than $3 billion in settlements within the last decade at twenty-five of the largest law enforcement officers in the US, including more than 1,200 officers who had been the subject of at least five payments. Keith Alexander, et al., *The Hidden Billion-Dollar Cost of Repeated Police Conduct*, The Washington Post (Mar. 9, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-

misconduct-repeated-settlements/. In the last two months alone, there has been widespread coverage of settlement amounts in cases against law enforcement agencies, including a $9.5 million settlement over police misconduct during in Philadelphia, $1.6 million to protesters in Denver, and $21,500 per person for at least two hundred people in New York City. Press Release, City of Philadelphia, City Announces Settlement in Class Action Lawsuit Related to Civil Unrest in 2020 (Mar. 20, 2023), https://www.phila.gov/2023-03-20-city-announces-settlement-in-class-action-lawsuit-related-to-civil-unrest-in-2020/; Elise Schmelzer, *Denver pays $1.6 million to settle six more lawsuits brought by protesters injured by police in 2020*, The Denver Post, (Mar. 14, 2023), https://www.denverpost.com/2023/03/14/denver-police-protest-settlements/; Associated Press, *NYC to pay millions over police 'kettling' at Floyd protest* (Mar.1, 2023), https://apnews.com/article/nypd-george-floyd-protests-settlement-kettling-2b8c40a36e2195b9a4b33fa2efaccf0a.

Information relating to settlements shows the public how their tax dollars are being spent, and importantly, it informs larger policy conversations about how governments should use their resources to address issues like police misconduct. As a recent ProPublica article described, record-high settlements in New York "are prompting some lawmakers to question not just the NYPD's actions but whether the city effectively enables expensive payouts by aggressively defending against

charges of police misconduct instead of leveraging its legal might to pressure the NYPD to change its behaviors and practices." Jake Pearson, *As New York Pays Out Millions in Police Misconduct Settlements, Lawmakers Ask Why They Keep Happening,* ProPublica (Mar. 21, 2023), https://www.propublica.org/article/nyc-nypd-police-misconduct-settlements-protests. *See also* Amelia Thomson-DeVeaux et al., *Cities Spend Millions On Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*, (Feb. 22, 2021), https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/?itid=lk_inline_enhanced-template ("Successful settlements are also a helpful source of information for places that are serious about police reform.").

In Maine specifically, there has been recent scrutiny of violations of constitutional and civil rights by law enforcement and in jails and prisons. For example, The Bangor Daily News recently reported on the existence of a Facebook Messenger chat between Main State Prison guards mocking and making disparaging statements about incarcerated people, as well as joking about use of force. Callie Ferguson, *Maine guards mocked prisoners, disparaged minorities and shared confidential records*, Bangor Daily News (Feb. 13, 2023), https://www.bangordailynews.com/2023/02/13/mainefocus/maine-guards-mocked-prisoners-disparaged-minorities-joam40zk0w/. These messages "provide a rare,

unfiltered window into the private communications between line staff at Maine's largest prison during a tumultuous period when corrections facilities confronted the early stages of the pandemic and the country grappled with a reckoning over racial justice in law enforcement." *Id.* Active litigation relating to prison conditions further reveals that allegations of government abuse are not uncommon in Maine. *See e.g., Burr v. Dep't of Corrections*, 2020 ME 130, ¶ 35, 240 A.3d 371 (ordering judgment in plaintiff's favor on § 1983 claims challenging unconstitutional practices related to solitary confinement at Maine State Prison); Complaint, *Swain v. Me. Dep't of Corrections*, No. 22-cv-408 (D. Me. 2022), ECF No. 1 (challenging deliberate indifference to serious medical need and disability discrimination, among other claims); Complaint, *Mascal v. Me. Dep't of Corrections*, No. 22-cv-292 (D. Me. 2022), ECF No. 1 (challenging excessive use of isolation, excessive use of force and restraint, and sexual assault). And recent excessive force settlements show the same, including $225,000 to the family of man killed by police, and $225,000 to an eleven-year-old child whose face was bashed into a metal bedframe by two guards at a juvenile detention center. Emily Allen, *Family of man killed by Portland policeman gets $225,000 settlement*, Sun Journal (July 19, 2022), https://www.sunjournal.com/2022/07/18/family-of-man-killed-by-portland-police-gets-225000-settlement/; Mark Wilson, *Maine DOC, Medical Provider, Pay $250,000 Settlement Due to Excessive Force on 11-Year-Old*, Prison Legal News

(Sept. 1, 2020), https://www.prisonlegalnews.org/news/2020/sep/1/maine-doc-medical-provider-pay-250000-settlement-due-excessive-force-11-year-old/.

The importance of public awareness of settlement agreements between individuals and government officials—particularly in cases involving violations of civil rights—cannot be overstated. Making such information accessible is exactly why the FOAA was enacted. *See MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 8, 82 A.3d 104 (noting that the FOAA's basic purpose "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed") (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). And as described below, it is for that reason that the Risk Pool's efforts to subvert the FOAA's basic purpose should be sanctioned.

C. The Risk Pool Should Pay Attorney's Fees for Acting in Bad Faith

The attorney's fees provision of the FOAA, 1 M.R.S. § 409(4), serves dual purposes, both of which would be effectuated in this case. First, because "[t]he cavernous room of a superior court and the attendant need to hire an attorney are intimidating barriers to seeking appeal of a public official's negative response to a request for inspection of a record," compensating successful FOAA appeal litigants serves to "encourage public utilization of the FOAA." Anne C. Lucey, *A Section-By-Section Analysis of Maine's Freedom of Access Act*, 43 Maine L. Rev. 169, 225

(1991). Second, by imposing a cost on a government official's failure to act in good faith, an award of attorney's fees deters future misconduct. The general theory of deterrence underpinning the attorney's fees provision is simple: "when an actor is threatened with liability for its harmful conduct . . . the actor will have an incentive to take precautions to avoid the injury." Linda S. Simard, *Fees, Incentives, and Deterrence*, 160 U. Pa. L. Rev. Online 10, 12 (2011). *See Dobson v. Camden*, 705 F.2d 759, 780 (5th Cir. 1983), on reh'g, 725 F.2d 1003 (5th Cir. 1984) ("[D]eterrence is concerned with establishing a rule to shape future conduct."). The threat of liability must be credible. *Id.*

Considering the import of the information at stake in this case, together with the Risk Pool's obfuscating conduct, the imposition of attorney's fees is warranted. HRDC undertook a significant investment of time and resources to litigate this matter, and their persistence in the face of continuing obstacles merits compensation. Without compensating HRDC for their efforts, others contemplating an appeal will be more likely to "take an agency's 'no' for an answer rather than go to the expense of appeal." Lucey, 43 Maine L. Rev. at 225. At the same time, the Risk Pool's pattern of conduct should be discouraged from being repeated, either by the Risk Pool or by other Maine government officials. So long as the Risk Pool believes FOAA appeals are not likely to be filed or that the plaintiff is unlikely to succeed in receiving attorney's fees, the Risk Pool will be less likely to adjust their practices and conduct

going forward. Simard, 160 U. Pa. L. Rev. Online at 13. Affirming the lower court's grant of attorney fees will send a clear message to the Risk Pool—and to all Maine government officials—that the threat of a financial penalty for failing to meaningfully comply with the FOAA is real.

II. CONFIDENTIAL SETTLEMENT TERMS IN PRISONERS' RIGHTS CASES INHIBIT THE VINDICATION OF CIVIL RIGHTS THROUGH PRIVATE LITIGATION

The availability of information relating to settlement agreements in civil rights cases has a direct influence on an individual's ability to meaningfully vindicate their own rights. Knowledge relating to the types of injuries, the officials involved, and the sum of money paid demonstrates to potential litigants that civil rights litigation can result in reparation for harm and some semblance of justice. The availability of comparative data also helps inform assessments of how much a particular case is "worth," making it more likely that a litigant can find legal representation and that a fair settlement is reached. For pro se litigants in jail and prison who face additional barriers in accessing information by virtue of their incarceration, coverage of lawsuits and settlements from outside organizations like HRDC is particularly critical. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (noting that media "function[] as surrogates for the public" and "contribute to the public understanding of the rule of law") (citing *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 587 (1976)). With the invaluable knowledge of possible settlement ranges,

pro se litigants are better able to advocate for themselves and reach an agreement that is in line with comparable cases.

By impeding access to information that could improve litigants' access to justice, the Risk Pool's conduct contravenes public policy favoring the use of private litigation intended to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (citing *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)) (discussing litigation under 42 U.S.C. § 1983). As Congress has recognized, "civil rights laws depend heavily upon private enforcement." S. REP. 94-1011, 3, reprinted in 1976 U.S.C.C.A.N. 5908, 5910. This is why U.S. civil rights laws often contain fee-shifting provisions that allow recovery of reasonable attorney's fees upon the successful resolution of a claim. As Congress explained when passing 42 U.S.C. § 1988, which allows for attorney's fees in actions pursuing enforcement of various civil rights laws, "the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *Id.*

Embedded in Congress's choice to encourage private litigation of civil rights violations via attorney's fees provisions is the assumption that civil rights litigants should be represented by legal counsel. The Risk Pool's conduct undermines this public policy as well. Knowledge of settlement amounts can ultimately show attorneys that taking on certain civil rights cases is economically feasible. For that reason, the Risk Pool's practice of shielding settlement amounts from the public ultimately discourages the likelihood that attorneys in Maine will represent individuals with civil rights claims.

There is an urgent need to increase the rate of legal representation in civil proceedings nationwide and in Maine specifically. *See e.g.,* Donald F. Fontaine, *Fee Shifting: A Proposal to Solve Maine's Intractable Access to Justice Problem*, 72 Me. L. Rev. 47, 48 (2020) (discussing the results of four decades on studies that "have demonstrated over and over that Maine systematically denies its poor their day in court in civil cases"). The need for legal representation for incarcerated people—overwhelmingly black and poor—is particularly acute. Over 90 percent of prisoner civil rights cases in federal court—such as the underlying civil suit in this case—are filed pro se. Incarceration and the Law, Data Update, Table B: Pro se litigation in U.S. District Courts (April 2022), https://incarcerationlaw.com/resources/data-update/. And at least partly because of the low representation rate, only slightly over

ten percent of prisoner civil rights cases are ultimately successful. *Id.* at Table C: Outcomes in Prisoner Civil Rights Cases in Federal District Court.

As discussed in Section I.A., *supra*, Maine's law enforcement and carceral institutions are under constant scrutiny for civil rights violations. Ensuring that information relating to settlements in civil rights cases is easily available is one important tool that can be used to ensure civil rights can be meaningfully vindicated.

III. FORCING CIVIL RIGHTS PLAINTIFFS TO SIGN SETTLEMENT AGREEMENTS THAT DO NOT INCLUDE SETTLEMENT AMOUNT IS CONTRARY TO THE MAINE RULES OF PROFESSIONAL CONDUCT

Although it is not a settlement agreement by name, the Risk Pool's General Release is functionally a settlement document intended to legally bind the parties. However, the General Release in this case is ultimately unenforceable because it does not contain the most important material term of the settlement: the settlement amount. *Muther v. Broad Cove Shore Ass'n*, 2009 ME 37, ¶ 6, 968 A.2d 539 (noting that "[s]ettlement agreements are analyzed as contracts" and "in order to be binding, a settlement agreement requires the mutual intent of the parties to be bound by terms sufficiently definite to enforce"). "One dollar and other good and valuable consideration" is on its face not sufficiently definite to enforce. Had Mr. Afanador not received the full sum he was promised, he would have been unable to enforce

the General Release because it did not articulate the true settlement sum (and there exists no other agreement between the parties referencing the sum).[1]

Advising a client to use settlement agreements that contain unenforceable provisions in an effort to evade the application of FOAA is inconsistent with the framework established by the Maine Rules of Professional Conduct, which promote conduct that is honest and fair and prohibits lawyers from engaging in or counseling their clients to engage in dishonest, fraudulent, or illegal conduct. *See* M.R. Prof. Conduct Preamble. (noting that the Rules "provide a framework for the ethical practice of law" but do not "exhaust the moral and ethical considerations that should inform a lawyer."); M.R. Prof. Conduct 1.2(e) (prohibiting a lawyer from counseling or assisting a client in conduct that is criminal or fraudulent); M.R. Prof. Conduct 3.3 (requiring candor to the tribunal); M.R. Prof. Conduct 4.1 (prohibiting attorneys from making false statements of material fact or law to third parties); M.R. Prof. Conduct 8.4(c) (prohibiting from engaging in conduct that is dishonest or deceitful). In this case, the Risk Pool presents plaintiffs—most likely unrepresented by counsel—with a single document that intentionally omits the only settlement term that favors the plaintiffs. Meanwhile, the Risk Pool extracts significant benefits for itself, including confidentiality and non-disparagement provisions that bind only the

[1] The Risk Pool might argue that it does not require the litigant to sign the release until the payment is received, so there is nothing in the Release that would require a litigant's enforcement. If true, this only means that if a litigant reaches an understanding with the Risk Pool but receives no payment, he has no written contract to enforce. The choice between no contract or a non-enforceable contract is meaningless.

plaintiff. By conditioning payment of the agreed-upon settlement amount on signing the General Release, the lawyer coerces the plaintiff to waive significant rights while misleading them about the enforceability of the overall agreement. The exploitation of the power imbalance between the litigants is particularly egregious in civil rights cases where the plaintiff has experienced harm at the hands of the government. Such conduct should be deemed unethical.

On top of its efforts to evade the requirements of FOAA by coercing individuals to sign unenforceable agreements, the Risk Pool's conduct throughout this litigation has also demonstrated a disregard for ethical obligations. "In fulfilling his or her primary duties to the client, a lawyer must be ever conscious of the broader duty to the legal system and how it is perceived by the public." Maine State Bar Association, Guidelines of Professional Courtesy, https://www.mainebar.org/page/Guidelines. As the lower court found, counsel for "the Risk Pool has adopted absurd, blatantly untrue, and inconsistent legal positions . . . to avoid a ruling on the merits." A. 11. Ultimately, the scheme of secrecy relating to settlement amounts—including the evasive conduct in responding to the FOAA requests, the practice of omitting settlement amounts from its settlement agreements, and the aggressive litigation strategy defending that secrecy—undermines the integrity of legal profession, the integrity of the legal system, and the ability to "hold the governors accountable to the governed." *See MaineToday Media*, 2013 ME 100,

¶ 8, 82 A.3d 104. That unethical conduct should be deterred, and that can be done in this instance by imposing the cost of reasonable attorney's fees on the Risk Pool pursuant to the FOAA. [2] *See supra* Section I.C.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court affirm the decision of the Superior Court finding that the Risk Pool withheld FOAA-responsive documents in bad faith and affirm the entry of reasonable attorney's fees to counsel for HRDC.

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Respectfully submitted,

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[2] Sanctioning unethical conduct through the imposition of attorney's fees awards is common in other contexts. *See e.g.,* Fed. R. Civ. P. 11 (allowing for an order directing payment of reasonable attorney's fees as a sanction for violating Rule 11); *Linscott v. Foy*, 1998 ME 206, ¶ 16, 716 A.2d 1017 (1998) (noting that the trial courts "possess inherent authority to sanction parties and attorneys for abuse of the litigation process," including by awarding attorney's fees).

CERTIFICATE OF SERVICE

I, Jaqueline Aranda Osorno, Counsel for *Amici Curiae*, certify that I have electronically served this Brief of *Amici Curiae* in Support of Appellee on the attorneys listed below.

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