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IN THE SUPREME COURT
STATE OF ARIZONA

Supreme Court No. R-24-0027

**PETITION TO AMEND RULE 23,
ARIZONA RULES OF CIVIL
PROCEDURE**

**COMMENTS IN SUPPORT OF
PETITION TO AMEND RULE 23
OF THE ARIZONA RULES OF
CIVIL PROCEDURE**

1 Pursuant to Rule 28 of the Rules of the Supreme Court, Community Legal
2 Services (“CLS”), DNA People’s Legal Services (“DNA”), Southern Arizona
3 Legal Aid (“SALA”), and the William E. Morris Institute for Justice (“MIJ”)
4 submit these comments in support of the Arizona Bar Foundation’s Petition to
5 Amend Rule 23 of the Arizona Rules of Civil Procedure (hereinafter “Rule 23”).
6 In the Petition, the Arizona Bar Foundation asks the Court to amend Rule 23 to add
7 a subsection providing direction for the distribution of residual funds in state class
8 actions in which there are no statutory directives governing such distributions. The
9 proposed rule change would direct the distribution of residual funds in state class
10 actions to the Arizona Bar Foundation to grant to Arizona legal services nonprofit
11 entities for use, in accordance with judicial instructions for the award, toward the
12 provision of legal services and access to justice for low-income Arizonans.

14 CLS, DNA, SALA, and MIJ generally support the Petition as a measure that
15 would enhance access to justice for Arizonans, and state the following:

16 **I. Statement of Interest**

17 CLS, DNA, and SALA are federally funded civil legal services law firms
18 that represent low-income Arizonans. Together, CLS, DNA, and SALA deliver
19 free, direct legal services statewide to low-income Arizonans in a variety of
20 priority civil practice areas affecting Arizonans’ most basic needs and their most
21 basic legal rights in the areas of consumer protection, family law, healthcare and
22 other public benefits, and housing safety and stability, among other practice areas.

23 MIJ is a non-profit organization established to advocate and to litigate on
24 behalf of low-income Arizonans on a statewide basis. MIJ works closely with the
25 three federally funded legal services law firms, other legal advocacy organizations,
26 and community groups on a variety of systemic poverty law and public interest
27 issues, including ensuring that economically vulnerable Arizonans have fair and
28

1 equal access to economic security, food and nutrition, healthcare, housing stability,
2 public programs and services, the legal system, and the courts.

3 CLS, DNA, SALA, and MIJ all receive financial support from the Arizona
4 Bar Foundation in the form of grants made possible by revenue generated from
5 interest on lawyer trust accounts (“IOLTA”). The Petition at issue has the
6 potential to increase the Arizona Bar Foundation’s revenue and thus to increase
7 critically necessary investments in legal services for economically vulnerable
8 Arizonans without financial resources to secure legal representation in their cases,
9 thus increasing access to justice for economically vulnerable and historically
10 marginalized Arizonans.

11
12 **II. The Court Should Join the Growing Trend of States Directing Residual
13 Funds in Class Actions to Support Civil Legal Aid.**

14 In 2023, the National Conference of Chief Justices endorsed a resolution
15 encouraging states who had not already done so to adopt a court rule or statute
16 regarding class action residual funds for civil legal aid.¹ At least 24 states and one
17 United States territory have already taken action in line with the resolution’s
18 goals.² The Arizona Bar Foundation’s Petition represents an opportunity for
19 Arizona to join the national movement to provide a rule-based pathway to new
20 investments in civil legal aid from residual funds in class actions.

21
22 ¹ Conference of Chief Justices, Conference of State Court Administrators,
23 *Resolution 2: In Support of Efforts by State Supreme Courts to Increase Funding
24 for Civil Legal Aid and Related Access to Justice Efforts Through Residual Funds
25 in Class Action Cases* (Feb. 13, 2023),
https://ccj.ncsc.org/_data/assets/pdf_file/0020/93431/Resolution-2-State-Supreme-Court-Leadership-Increasing-Funding-for-Civil-Legal-Aid_0723.pdf.

26 ² ABA Resource Center for Access to Justice Initiatives, *Legislation and
27 Court Rules Providing for Legal Aid to Receive Class Action Residuals* (2023),
28 https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls-sclaid-atj-cypres.pdf.

1 **III. The Petition’s Proposed Rule Meets the Fundamental Tenets of the *Cy***
2 ***Pres* Doctrine.**

3 The distribution of residual funds in class actions has been guided by the *cy*
4 *pres* doctrine, derived from the Norman French term, *cy près comme possible*
5 which means “as near as possible.”³ The *cy pres* doctrine arose in the area of wills
6 and provided a means for effectuating a testator’s intent in making charitable gifts
7 that may otherwise default.⁴

8 Critics of the emerging trend providing for the distribution of residual class
9 action funds to civil legal aid organizations have based their criticisms on the
10 ancient, established common law nexus test of the *cy pres* doctrine.⁵ Otherwise
11 stated, critics state that civil legal aid’s work is not necessarily “as near as
12 possible,” with an appropriate nexus to the subject matter of all class actions or the
13 classes served in those cases.

14 The civil justice work that the Arizona Bar Foundation supports—and the
15 services that Arizona’s civil legal aid law firms provide—is incredibly broad in
16 scope and, most critically, provides access to justice to consumers, victims of
17 discrimination and predatory practices, and other vulnerable people who, but for
18 civil legal aid, would have no meaningful recourse to vindicate their rights. The
19 access to justice focus of the Foundation’s grant-making has a strong nexus to the
20 purpose of class action litigation, which seeks to achieve meaningful justice for
21 class members that would not be possible for individual claimants.

23 ³ See *Joffe v. Google, Inc. (In re Google Inc. St. View Elec. Commc'ns Litig.)*,
24 21 F.4th 1102 (9th Cir. 2021) (citing *In re Google Referrer Header Priv. Litig.*,
25 869 F.3d 737, 741 (9th Cir. 2017)); *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir.
26 2012).

27 ⁴ *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038, 11 Cal. Daily Op. Serv.
14067, 2011 Daily Journal D.A.R. 16793 (9th Cir. 2011).

28 ⁵ *Id.*, 663 F.3d at 1038-39.

1 Together, CLS, DNA, and SALA help over 20,000 Arizona families and
2 individuals each year. Along with other Foundation grantees, they protect the
3 basic legal rights and needs of people with disabilities, victims of domestic
4 violence, veterans, the elderly, children, new Americans, the poor, and other
5 vulnerable populations in communities throughout the State. They protect basic
6 needs in the areas of family safety and security, healthcare, food and nutrition,
7 housing safety and stability, and economic security. They protect historically
8 marginalized Arizonans from discrimination in housing and public
9 accommodations. They save consumers from predatory business conduct and
10 consumer exploitation. The work done by CLS, DNA, and SALA is critical to the
11 well-being of thousands of Arizonans who find themselves in need of legal help.
12

13 Fundamentally, the Foundation’s investments level the playing field for
14 Arizonans who—but for civil legal aid—would not have meaningful access to
15 justice. While Arizona’s civil legal aid providers do a remarkable amount of good
16 work, they are forced to turn away eligible families and individuals they could help
17 with additional funding. Tens of thousands of Arizonans navigate complex legal
18 and social services systems without the legal help they need to achieve efficient,
19 legally-required outcomes. And the Foundation is the best available investment to
20 help more Arizonans meet their basic needs. CLS, DNA, SALA, and other
21 Foundation grantees have historical, evolved relationships with stakeholders in
22 their communities, including local courts, public agencies, community agencies,
23 the private bar, and client communities.
24

25 With additional resources, CLS, DNA, and SALA could use their skilled and
26 innovative practices and community proximity to help more Arizona families and
27 individuals protect their homes, their family stability, their health and nutrition,
28 and their fundamental civil rights.

1 **IV. Conclusion**

2 For all of the above-stated reasons, the Court should amend Rule 23 of the
3 Arizona Rules of Civil Procedure, as proposed by the Arizona Bar Foundation.
4 The proposed amendment would have the likely effect of increasing investments in
5 the Foundation, which in turn would use the additional resources to increase access
6 to justice in Arizona. Arizona should not delay further in reforming applicable
7 civil rules to maximize funding for legal services to indigent Arizonans and
8 promoting access to justice, a core and foundational principle of the Court’s
9 prerogative and vision for the people of Arizona. Additional revenue directed to
10 the Foundation will help ensure that more low-income Arizonans, without the
11 means to retain counsel, will have access to non-profit, pro bono legal services,
12 and other resources to meet their legal needs.
13

14 Respectfully submitted this 30th day of April 2024.

15 COMMUNITY LEGAL SERVICES
16 DNA PEOPLE’S LEGAL SERVICES
17 SOUTHERN ARIZONA LEGAL AID
18 WILLIAM E. MORRIS INSTITUTE FOR
19 JUSTICE

20 By /s/ Andrew P. Schaffer

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