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7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 In the Matter of:

10 **PETITION TO AMEND RULE 23**  
11 **OF THE ARIZONA RULES OF**  
12 **CIVIL PROCEDURE**

Supreme Court No. R-24-0027

13 **COMMENT OF THE STATE**  
14 **BAR OF ARIZONA**

15 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar  
16 of Arizona (the “State Bar”) hereby submits the following as its comment to the  
17 above-captioned Petition.

18 The State Bar supports a modified version of the Petition to add a section (i)  
19 concerning the disposition of residual funds that remain from class settlements. In  
20 light of the worthy objectives of the Petition, the State Bar recommends adopting an  
21 amendment to Rule 23 along the lines of what the Petition proposes. The State Bar,  
22 however, suggests two modifications to the proposed amendment to clarify and  
23 confirm that (1) the disposition of residual funds as described in the new subsection  
24 23(i) is discretionary, not mandatory; and (2) the disposition of residual funds is  
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1 done in a manner consistent with the purposes of the class (i.e., that the rule change  
2 is consistent with the *cy pres* doctrine). The State Bar’s proposed modifications are  
3 shown below.  
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### 5 **Background**

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7 When a class action is settled via a “common fund” settlement, such  
8 settlements sometimes leave residual funds when not all funds can be distributed to  
9 the class or as otherwise contemplated by the settlement. The Petition would amend  
10 Rule 23 to “provide direction for the distribution of residual funds . . . where there  
11 are no statutory directives.” Pet. at 1. In those circumstances, the Petition’s  
12 proposed rule change would require the court to distribute residual funds “to the  
13 Arizona Bar Foundation to grant to Arizona legal services nonprofit entities for use,  
14 in accordance with judicial instructions for the award, toward the provision of legal  
15 services and access to justice for low-income residents of Arizona.” *Id.* The  
16 proposed rule does not require such a distribution to the Foundation if the parties to  
17 a class action settlement have designated a different recipient of residual funds.  
18 However, in the absence of such a choice or designation by the parties, the proposed  
19 rule would require the court to distribute the residual funds to the Foundation.  
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23 Similar amendments were proposed in 2013 and 2015 but were not adopted.  
24 Pet. at 2-3 (describing earlier proposals at Rule Petition R-13-0061 and R-15-0007).  
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1 As the Petition observes, these earlier proposals “did not clarify” that the proposed  
2 amendment would require the Foundation to “administer the *cy pres* residual funds  
3 in accordance with the judgment in each specific case, similar to the responsibility  
4 the Arizona Supreme Court has given the Foundation with” IOLTA revenue. Pet. at  
5  
6 2.

7         The State Bar created the Foundation as a separate 501(c)(3) organization in  
8 1978 with the mission of promoting access to justice for all Arizonans. The State  
9 Bar supports the efforts and work of the Foundation and believes it is well situated  
10 to administer residual funds in the public’s interest and consistent with the interests  
11 of the settlement class. The State Bar agrees, however, that under the sound  
12 principles of the *cy pres* doctrine, residual funds intended to benefit a class should  
13 also be distributed consistent with the purposes of the class. Accordingly, the State  
14 Bar supports the Petition with two modest modifications to ensure that the rule  
15 change is fully consistent with the substantive law of *cy pres*.  
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19 **I. The Petition Addresses the Acute Need for Funding Legal Services in**  
20 **Arizona Using a Tool Adopted in Many Other Jurisdictions.**

21         As the Petition correctly explains, funding for legal services programs has  
22 been under substantial pressure. The gap between funding and need in Arizona is  
23 significant, as the sources in the Petition show. Pet. at 6-8. The existing sources of  
24 funding are proving inadequate to meet this need. The main sources of funding—  
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1 federal funding through the Legal Services Corporation and IOLTA fund—fluctuate  
2 up-and-down with the economy while the need for legal services increases over time,  
3 especially when there is economic uncertainty.  
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5 The Petition’s proposal is a modest tool to help meet the extraordinary need  
6 for legal services funding. If adopted, Arizona would join a number of other states  
7 with similar rules or statutes. Since the Court last considered a similar proposal in  
8 2015, multiple additional jurisdictions have adopted similar provisions bringing the  
9 current, and growing, total to twenty-four states. Pet. at 5. Accordingly, adopting  
10 this rule now would put Arizona squarely in the mainstream of an established  
11 movement to put unused, unallocated residual class action settlements to good use.  
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14 **II. With Two Minor Modifications, the Petition Is Fully Consistent with**  
15 **Existing *Cy Pres* Law.**

16 Although the State Bar supports the proposal generally, this comment  
17 respectfully suggests two revisions to the Petition’s submitted rule amendment.

18 First, the State Bar suggests that the proposed text of Rule 23(i)(2) delete the  
19 word “shall” and insert the word “may.” Thus, the text would read: “In matters where  
20 residual funds remain and are not subject to statutory directives the residual funds  
21 ~~shall~~ may be disbursed to the Arizona Foundation for Legal Services and Education  
22 . . . .” This change is meant to confirm that the superior court has discretion in the  
23 administration of residual funds. That change is also consistent with the other  
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1 language in the proposed amendment, which provides that an order regarding a class  
2 settlement “*may* provide for the disbursement of residual funds.”

3  
4 Second, the State Bar proposes that text be added to the proposed text of Rule  
5 23(i) to ensure that any distribution of funds is consistent with the purposes of the  
6 class. Here is the Petition’s amendment with both proposed modifications in **bold**:

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8 (2) Any order entering a judgment or approving a proposed  
9 compromise or settlement of a class action certified under this rule that  
10 establishes a process for identifying and compensating members of the  
11 class, or where such process is impossible or economically impractical,  
12 may provide for the disbursement of residual funds **in a manner that  
13 is consistent with the purposes of the class. If consistent with the  
14 purposes of the class and the parties have not directed otherwise,**  
15 ~~in~~ matters where residual funds remain and are not subject to statutory  
16 directives the residual funds ~~shall~~ **may** be disbursed to the Arizona  
17 Foundation for Legal Services and Education to grant to Arizona legal  
18 services nonprofit entities for use, in accordance with judicial  
19 instructions for the award, toward the provision of legal services and  
20 access to the justice system for low-income residents of Arizona.

21 These changes accommodate the Petition’s laudable goal of promoting access to  
22 justice while ensuring that Rule 23 remains consistent with substantive law  
23 governing *cy pres* funds. *See, e.g., In re Google Inc. St. View Elec. Commc’ns Litig.*,  
24 21 F.4th 1102, 1116 (9th Cir. 2021) (describing the “factors that guide judicial  
25 oversight of *cy pres* settlement provisions” as “whether the distributions account for  
the nature of the plaintiffs’ lawsuit, the objectives of the underlying [claims], and  
the interests of the silent class members” (cleaned up)).

26 The proposal offers a flexible, reasonable alternative to the rigid rules adopted  
27 in other states by allowing—but not requiring—the distribution of residual funds to

1 promote access to justice. *See* Conn. R. Super. Ct. Civ. Sec. 9-9(g)(2) (absent  
2 designation, residual funds “shall be disbursed” to legal services organization); Ind.  
3 St. Trial P. Rule 23(F)(2) (50% of residual funds must go to legal services  
4 organizations); Ky. R. Civ. P. 23.05(6)(b) (25% of residual funds must go to legal  
5 services fund); Mont. R. Civ. P. 23(i)(3) (50% of residual funds must go to legal  
6 services organization); Pa. R. Civ. P. 1716(b) (50% of residual funds must go to  
7 legal services organization); S.D. Codified Laws § 16-2-57 (residual funds must go  
8 to legal services organization); Wash. Super Ct. Civ. R. 23(f)(2) (50% of residual  
9 funds must go to legal services organization). Moreover, it is important to note that  
10 the Petition does not give funds to the Foundation for its own discretionary use but  
11 rather requires the Foundation to grant the funds “in accordance with judicial  
12 instructions for the award.” Pet. at 1. This is another check to ensure that the funds  
13 go toward a purpose that aligns as closely as possible with the underlying goals of  
14 the class action, as is true in the current law of *cy pres*. Finally, the Petition as a  
15 whole leaves the parties and the court in control of whether to designate recipients  
16 of their choice to receive residual funds. The amended Rule 23(i)(2) merely provides  
17 that the court “may provide for the disbursement” of residual funds to the  
18 Foundation. Pet. at 4. In all of these ways, the proposed amendment to Rule 23  
19 should dispel any perception that the proposed rule amendment represents improper  
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1 favoritism of an entity that, though a 501(c)(3) organization separate from the State  
2 Bar, the State Bar long ago formed.

3 **III. The Proposed Amendment Permissibly Modifies a Rule of Judicial**  
4 **Construction—It Does Not Alter the Substantive Law.**

5 The State Bar also supports the Petition because it believes that potential  
6 criticisms of it are ultimately incorrect.

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8 First, while some members of the Bar are concerned that the proposed rule  
9 amendment alters a substantive aspect of the law, making legislation the appropriate  
10 vehicle to effect any such change, the State Bar believes that concern is misplaced  
11 for multiple reasons. For one thing, class actions are judicial creations; “[e]quity  
12 courts created class action procedures to manage group litigation fairly and  
13 efficiently.” Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, FOURTH  
14 § 21, at 243 (2004). The 1966 amendments to Federal Rule of Civil Procedure 23  
15 then gave rise to damages class actions. Similarly, it is widely recognized that “[c]y  
16 *pres* is an equitable doctrine with roots in trusts and estates law . . . .” William B.  
17 Rubenstein, *et al.*, 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 12:32 (6th  
18 ed. 2023 Update). Because this is a judicially created device, there is no impediment  
19 to modifying it through a procedural rule that this Court adopts. In explaining that  
20 a number of jurisdictions have similar rules or statutes, the leading class action  
21 treatise noted, “Providing legal services for the indigent is surely a worthy goal, so  
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1 much so that one wonders why all unclaimed class action funds are not simply  
2 shifted to that end.” 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 12:35. At  
3 bottom, the criticism also fails because the Petition—especially with the State Bar’s  
4 proposed modifications—makes clear that it is not effecting a substantive change to  
5 the law of *cy pres*. The trial court retains complete discretion to designate recipients  
6 of residual funds as it deems appropriate. Where designation to the Foundation  
7 would not further the purposes of the class action suit and its resolution, the trial  
8 court can do justice as it sees fit. This is no change in the law at all.  
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11       Second, some have also raised concerns that the proposed rule change focuses  
12 exclusively on providing access to justice for low-income residents, but that purpose  
13 does not necessarily align with the purpose of Rule 23(b)(3) class actions generally.  
14 Under this view, the class action device is a procedural tool designed to make it  
15 feasible to pursue claims that would otherwise be economically infeasible because  
16 of the small damages at issue. The State Bar appreciates the sincerity of this view  
17 but believes it is erroneous. Rather than focusing on *who* benefits from the  
18 Foundation’s work, it is more appropriate to focus *what* that work does. That is, the  
19 Foundation facilitates access to justice when it otherwise would not exist. In that  
20 respect, the underlying purposes of Rule 23(b)(3) class actions squarely align with  
21 the goals of the Foundation. Moreover, the proposal in the Petition would make it  
22 possible to pursue some claims that would not otherwise be pursued, for reasons  
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1 including the inefficiency or difficulty of litigating small claims, thus contributing  
2 to the goals and purposes of Rule 23(b)(3).

3  
4 **Conclusion**

5 For the foregoing reasons, the State Bar respectfully asks the Court to approve,  
6 with minor modifications, the change proposed in Petition No. R-24-0026 to Amend  
7 Rule 23 of the Arizona Rules of Civil Procedure.

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9 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May 2024.

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12 \_\_\_\_\_  
13 Lisa M. Panahi  
14 General Counsel

15 Electronic copy filed with the  
16 Clerk of the Supreme Court of Arizona  
17 this 1<sup>st</sup> day of May 2024.

18 by: PSequin