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6 IN THE SUPREME COURT
7 STATE OF ARIZONA

8
9 **PETITION TO AMEND RULE 23,
10 ARIZONA RULES OF CIVIL
11 PROCEDURE**

Supreme Court No. R-24-0027

REPLY TO COMMENTS

12 Pursuant to Rule 28(e)(5) of the Arizona Rules of the Supreme Court, the
13 Arizona Bar Foundation (Foundation) submits the following response to the three
14 supportive comments regarding our Petition to Amend Rule 23 of the Arizona
15 Rules of Civil Procedure. We appreciate there were zero comments in opposition
16 and only one supportive comment suggesting tweaks to the rule change as
17 proposed in the Petition. We submit this Reply to address various aspects of the
18 supportive comments submitted in response to our Petition.
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21 **I. Comment by William E. Morris Institute for Justice, Community Legal
22 Services, DNA People’s Legal Services, and Southern Arizona Legal Aid**

23 The comment submitted by Andrew P. Schaffer, Pamela Bridge, Charles W.
24 Doughty, and Alan R. Solot representing William E. Morris Institute for Justice,
25 Community Legal Services, DNA People’s Legal Services, and Southern Arizona
26 Legal Aid respectively (hereinafter “Legal Services Comment”), supports our
27 Petition and stresses that legal aid funding has a nexus to *cy pres* funds when given
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1 direction by the court. As stated in their comment the civil justice work supported
2 by the Foundation is incredibly broad in scope and “provides access to justice to
3 consumers, victims of discrimination and predatory practices, and other vulnerable
4 Arizonans who, but for civil legal aid, would have no meaningful recourse to
5 vindicate their rights.”¹
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8 Even using the most common example given when arguing against legal aid
9 as having a nexus – a dog food company is sued for tainted product – that example
10 is actually an illustration of how a *cy pres* award of residual settlement funds for
11 civil legal aid would have a direct nexus to the subject of the settled lawsuit and
12 the interests of plaintiff class members. It is the pet owner who individually did
13 not have a voice in the legal system, because it is not realistic to expect a single pet
14 owner to take on the burden and expense of a lawsuit about tainted dog food.
15 Instead, a class action lawsuit provides access to justice for a large number of pet
16 owners – and a *cy pres* award for legal aid will ensure that residual funds are used
17 in ways that do have a nexus to the class action. A court order awarding legal aid
18 organizations *cy pres* funding to support individuals in understanding their rights
19 as consumers, protect the homeless’ pets from dangerous products, ensure housing
20 protections for those with an emotional support or a service animal, or offering
21 consumer rights programs would provide the nexus in this sort of lawsuit. The
22 broad benefit of a rule directing *cy pres* awards to provide legal aid services is that
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28 ¹ Legal Services Comment, at p. 4.

1 every class action is a claim for some sort of access to justice – and a legal aid
2 service can be funded to provide support for individuals who have that sort of
3 claim.
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5 The Foundation administered online prequalifying interviews for Arizona
6 legal services. The 2023 annual report showed 10% of applicants stated consumer
7 issues as their legal need, which totals over 4,000 individual needing help with
8 consumer rights. The rule proposed in our Petition allows the judiciary to provide
9 guidance to ensure the legal services offered are targeted to the case’s purpose.
10 The Foundation commits to accept responsibility to fulfill and honor the text and
11 spirit of any and all court orders providing *cy pres* awards under the proposed rule.
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14 **II. Comment by the Arizona Commission on Access to Justice**

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16 Hon. Samuel A. Thumma, acting as Chair of the Arizona Commission on
17 Access to Justice, submitted a comment also supporting the Petition to Amend
18 Rule 23 (hereinafter “Commission Comment”). This comment further stressed our
19 clarification that the *cy pres* funds will be used in accordance with the judgment in
20 each specific case. “Prior similar petitions failed to clarify that the Arizona Bar
21 Foundation was proposing to administer the *cy pres* residual funds in accordance
22 with the judgment in each specific case. This petition clarifies this intent.”² The
23 Arizona Bar Foundation will not keep any funds for internal administration or
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² Commission Comment, at p2.

1 operational oversight of the *cy pres* funds awarded. The judicial order in each case
2 will direct the use of residual funds in entirety.

3 4 **III. Comment by the State Bar of Arizona**

5 The third comment submitted by Lisa M. Panahi, on behalf of the State Bar
6 of Arizona (State Bar), also generally supports our petition with two suggested
7 modifications (hereinafter “State Bar Comment”). The first State Bar suggestion is
8 to make the distribution of residual funds to the Foundation discretionary, not
9 mandatory. Their comment explains, “This change is meant to confirm that the
10 superior court has discretion in the administration of residual funds.”³

13 As drafted, our petition does confirm the Court’s discretion when clarifying
14 that the Foundation will administer the *cy pres* residual funds in accordance with
15 the Court’s judgment in each specific case. The Foundation remains steadfast that
16 the greatest benefit for those traditionally represented in class action suits is for the
17 petition to remain with the mandate for disbursement of residual funds, as the court
18 directs, to the Foundation supporting legal aid and access to justice efforts. In
19 doing so, the Petition also moves toward ensuring the Conference of Chief Justices
20 and the Conference of State Court Administrators’ Resolution 2 (Feb. 2023): *In*
21 *Support of Efforts by State Supreme Courts to Increase Funding for Civil Legal*
22 *Aid and Related Access to Justice Efforts Through Residual Funds in Class Action*
23 *Cases.*

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³ State Bar Comment, at p. 4.

1 The unmet need for legal help in Arizona is great. During the last week of
2 October 2023, the three Legal Services Corporation funded Arizona agencies
3 (Community Legal Services, DNA – People’s Legal Services, and Southern
4 Arizona Legal Aid) underwent a five-day collective study including recording all
5 those requesting services that they were able to help against those who were turned
6 away due to lack of resources. The results showed that approximately one
7 individual is turned away for each person that they are able to serve. According to
8 the America Bar Association *ABA Array Data Collection Report*, updated
9 November 2022, Arizona is in the second quintile from the bottom when
10 comparing funding for legal services per capita poverty population.⁴ Providing a
11 mandatory *cy pres* residual fund distribution for legal services to indigent
12 Arizonans, as directed by the Court, will make strides in increasing access to
13 justice for all Arizonans.

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16 The second change suggested by the State Bar was to add the following
17 bolded verbiage to our petition:
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21 Any order entering a judgment or approving a proposed compromise
22 or settlement of a class action certified under this rule that establishes
23 a process for identifying and compensating members of the class, or
24 where such process is impossible or economically impractical, may
25 provide for the disbursement of residual funds **in a manner that is**
26 **consistent with the purposes of the class. If consistent with the**
purposes of the class and the parties have not directed otherwise,

27 ⁴ ABA Array Data Collection Report, American Bar Association,
28 <https://public.tableau.com/app/profile/abarray/viz/ABArrayNationalData/NationalLegalAidFunding> (May 8, 2024).

1 In matters where residual funds remain and are not subject to
2 statutory directives the residual funds ~~shall~~ **may** be disbursed to the
3 Arizona Foundation for Legal Services and Education to grant to
4 Arizona legal services nonprofit entities for use, in accordance with
5 judicial instructions for the award, toward the provision of legal
6 services and access to the justice system for low-income residents of
7 Arizona.⁵

8 The Foundation strongly agrees with the State Bar’s comment that all
9 residual funds should be distributed in a manner consistent with the purposes of the
10 class. There is a concern that adding “and the parties have not directed otherwise”
11 could be construed as minimizing the role of the court. While, in practice, the
12 parties and their counsel in class actions may play a role in identifying potential
13 recipients of *cy pres* awards, it is the court – not the parties or their counsel – that
14 ultimately directs the distribution of residual funds. The additional phrase can be
15 read as stopping judicial consideration if the parties have directed otherwise.

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17 **IV. Concerns Expressed by Some Members to the State Bar of Arizona**

18 While the Foundation maintains a mandatory rule is in the best interest for
19 access to justice in Arizona and disagrees with the additional wording to include
20 direction from the parties before *cy pres* funds are court directed, we appreciate the
21 general support and the careful consideration the State Bar gave in also addressing
22 concerns that some members had expressed.

23 The Arizona IOLTA Rule 43 is referenced in our petition to demonstrate the
24 Foundation’s experience with administrating funds created and directed by the

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29 ⁵ State Bar Comment, at p.5.

1 Arizona Supreme Court. Beyond this corollary between our *cy pres* rule change
2 petition and the 1984 establishment of the Arizona IOLTA Rule, the Foundation
3 offers that there is equal authority for the Court to direct the use of both funds. In
4 its Comment, the State Bar correctly stated that class actions are judicial creations.
5 We support this recognition and offer that the Arizona Supreme Court's right to
6 such judicial creations was in evidence forty years ago with the Arizona IOLTA
7 Rule. In 1984, the Court recognized that client's funds held in an attorney trust
8 account, when no one individual could otherwise earn interest, had the potential of
9 creating a source of funding for individuals needing legal assistance and for other
10 such worthy purposes: Purposes that benefit the public and furthers the goals of the
11 Court. The intent of the Court was to create an avenue, when direct individuals
12 could not benefit, for supporting the purposes defined by the Court.
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17 Again, when the Court designated 15% of all Pro Hac Vice fees to be given
18 to the Foundation in support of approved legal aid entities, the Court demonstrated
19 their intent to find avenues for supporting legal aid and addressing the justice gap
20 that is overwhelming the courts with pro se litigants and consuming much valuable
21 time of our judiciary. The Foundation offers these examples to demonstrate the
22 Court's authority to create avenues for directed funds toward access to justice
23 efforts.
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27 The State Bar also included in their comment that some members expressed
28 concern our Petition would change the focus to exclusively providing access to

1 justice for low-income residents. The Foundation appreciates the State Bar's
2 understanding of our work and clearly expressing our purposes align with Rule 23
3 (b)(3). We would like to further explain that the Foundation's approved grantees
4 are allowed to serve those with higher income levels if they are provided with the
5 funding to serve that population. Two examples are:
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8 **Arizona Domestic Violence Legal Assistance Project**

9 ***1998- Present (Partnership with DES)***

10 Statewide collaborative of civil legal assistance provided by legal aid
11 lawyers, volunteer lawyers, and lay legal advocates. Services more than
12 10,000 victims each year. *Serves DV survivors to 250% of poverty*
13 *guidelines.*
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16 **Arizona Foreclosure Relief Legal Services**

17 ***2012-2015 (Partnership with Arizona Attorney General's Office)***

18 Statewide foreclosure relief legal assistance and public legal education
19 for Arizonans at risk of or experiencing foreclosure due to housing
20 crisis. In partnership with the Arizona Attorney General, funding was
21 from the National Mortgage Settlement. *This project allowed for*
22 *people who were 150% of County Average Median Income.*
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25 While it is correct that the target population for general funding of the three
26 federally funded legal aid programs are at 125% or below of poverty guidelines,
27 they do have allowed exceptions when funding is in place. In addition, the
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1 Foundation has other approved legal service agencies who provide specialized
2 areas of legal services and do not have the same restrictions as our federally funded
3 legal aid agencies.
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5 **V. An Alternative Consideration if the Court Deems It Appropriate**

6 The Foundation believes that our Petition, as submitted in January, provides
7 the greatest avenue for opening much needed funding toward legal aid and access
8 to justice for low-income Arizonans. It is our primary preference to have the Court
9 consider the petition without modification. Yet, our high regard for the State Bar
10 as an organization and for its members requires us to recognize an alternative
11 consideration if the Court does not determine our petition in its original submission
12 is best at this present time. For consideration, we share the below modification to
13 the State Bar's suggestion that the Foundation believes takes into consideration the
14 concerns while also moving Arizona forward in support of access to justice:
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19 (2) Any order entering a judgment or approving a proposed
20 compromise or settlement of a class action certified under this rule
21 that establishes a process for identifying and compensating members
22 of the class, or where such process is impossible or economically
23 impractical, may provide for the disbursement of residual funds **in a**
24 **manner that is consistent with the purposes of the class and/or like**
25 **populations of those harmed. ~~If consistent with the purposes of the~~**
26 **~~class and the parties have not directed otherwise,~~ In matters where**
27 **residual funds remain and are not subject to statutory directives the**
28 **residual funds, the Court must determine if a nexus is obtained**
through shall ~~may be disbursed~~ disbursement to the Arizona
Foundation for Legal Services and Education to grant to Arizona legal
services nonprofit entities for use, in accordance with judicial
instructions for the award, toward the provision of legal services and
access to the justice system ~~for low-income residents of Arizona.~~ If in

1 Original electronically filed with the
2 Clerk of the Supreme Court of Arizona
3 this 3rd day of June 2024.

4 By: /s/ Andrew P. Schaffer

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