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8 **IN THE SUPREME COURT**

9 **STATE OF ARIZONA**

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

Supreme Court No. _____

**Petition to Amend Rule 23 of the
Arizona Rules of Civil Procedure**

13 Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, the Arizona
14 Foundation for Legal Services & Education (“Arizona Bar Foundation”) petitions the
15 Court to amend Rule 23 of the Arizona Rules of Civil Procedure to provide direction for
16 the distribution of residual funds in class action cases. The proposed rule amendment
17 specifically would allow for any residual class action funds to be distributed to the
18 Arizona Bar Foundation to provide legal services and access to justice for low-income
19 residents of Arizona. In support of this petition, the Arizona Bar Foundation states the
20 following:

21 **I. Background and Purpose of the Proposed Rule Amendment**

22 This petition arises from the recommendations of the State Bar of Arizona’s
23 Access to Justice Task Force (“AJTF”). The AJTF was established in 2011 by the State
24 Bar and its members were drawn from a broad group of legal professionals. In their final
25 report in the fall of 2011, the AJTF identified the use of *cy pres* awards to distribute class
26 action residual funds to access to justice initiatives as a way to increase financial support
27 for legal services. SBA Access to Justice Committee Report 2011. [http://www.azbar.org/
28 media/322784/access_to_justice_task_force_report.pdf](http://www.azbar.org/media/322784/access_to_justice_task_force_report.pdf).

1 As explained below, if the rule is adopted, Arizona would join the growing
2 number of states that have established similar methods of disbursement for class action
3 residual funds. Currently, there is no procedure that gives guidance to trial courts for the
4 disbursement of class action residual funds. The rule amendment proposed in this
5 petition would provide direction for the disbursement of these funds and is modeled after
6 similar rules of civil procedure in Indiana, Pennsylvania and Washington, except that the
7 disbursement to the Arizona Bar Foundation is not mandatory. *See Exhibit B.*

8 The Arizona Bar Foundation submitted a Petition to Amend Rule 23 of the
9 Arizona Rules of Civil Procedure in December 2013, Supreme Court No. R-13-0061,
10 which would have required that 50% of the residual funds go to the Foundation. The
11 Court denied the petition. Although the Arizona Bar Foundation continues to believe that
12 a mandatory disbursement is appropriate, the Foundation submits this Petition that allows
13 for the discretionary disbursement for all the same reasons given in the prior petition.

14 **II. Proposed Rule Amendment**

15 The proposed rule amendment is the following and is attached as Exhibit A:

16 Rule 23(g). Disposition of Residual Funds in Class Action
17 Cases.

18 (1) “Residual Funds” are (a) the funds that remain after the
19 payment of all approved class member claims, expenses,
20 litigation costs, attorneys’ fees, and other court-approved
21 disbursements to implement the relief granted, or (b) if it is
22 impossible or economically impractical to distribute the
23 settlement or judgment funds to the class at all, the funds
24 remaining after the payment of all approved expenses,
25 litigation costs, attorneys’ fees, and other court-approved
26 disbursements to implement the relief granted. Nothing in
27 this rule is intended to limit the trial court from approving a
28 settlement or order that does not create residual funds.

(2) Any order entering a judgment or approving a proposed
29 compromise or settlement of a class action certified under this
30 rule that establishes a process for identifying and
31 compensating members of the class, or where such process is
32 impossible or economically impractical, may provide for the

1 disbursement of residual funds. In matters where residual
2 funds remain, the residual funds may be disbursed to the
3 Arizona Foundation for Legal Services and Education to
4 provide legal services and access to the justice system for
5 low-income residents of Arizona.

6 Similar provisions have been implemented by seventeen other states by rule or
7 statute. *See* Exhibit B. The states adopting statutes include: California (1994), Illinois
8 (2008), Nebraska (2014), North Carolina (2005), South Dakota (2012) and Tennessee
9 (2006). The states that have amended court rules/orders include: Connecticut (effective
10 January 1, 2015), Hawaii (2011), Indiana (2011), Kentucky (2014), Louisiana (2012),
11 Maine (2013), Massachusetts (2009), Montana (effective January 1, 2015), New Mexico
12 (2011), Pennsylvania (2012) and Washington (2009).¹ Thus, since the Foundation’s
13 petition was filed in 2013, another three states have amended their civil rules and one
14 state amended a statute for the distribution of class action residual funds to legal services
15 programs.

16 The states that have adopted provisions for the disbursement of *cy pres* funds to
17 legal services have varied directions for the class action residual funds distribution. *See*
18 Exhibit B. However, the one constant in these rules and statutory changes is that the
19 residual funds are designated to go to legal services programs providing assistance and
20 access to the justice system for low-income persons and all the recipients are entities
21 which serve similar functions to the Arizona Bar Foundation.

22 **III. Explanation of the Need for and Purpose of the Proposed Amendment**

23 **A. The Access to Justice Gap Continues to Grow in Arizona**

24 Funding for legal services for low-income persons has never been adequate to
25 meet the legal needs of this population. Two of the largest funding sources for legal

26 ¹ The American Bar Association’s (“ABA”) Resource Center for Access to Justice
27 Initiatives, a project of the ABA Standing Committee on Legal Aid and Indigent
28 Defendants, monitors the implementation of state rules and statutes that provide for legal
29 assistance programs to receive class action residual funds. The information cited was
30 provided by the ABA Resources Center in a summary dated October 17, 2014, and is
31 attached as Exhibit C.

1 services programs are federal funding and the Interest on Lawyers' Trust Account
2 ("IOLTA") program funds. Both of these funding sources have been reduced in the last
3 several years. In 2012, the Arizona legal services programs suffered a 13% reduction in
4 federal funding provided by the Legal Service Corporation. [www.lsc.gov/local-](http://www.lsc.gov/local-programs/state-profile?st-AZ)
5 [programs/state-profile?st-AZ](http://www.lsc.gov/local-programs/state-profile?st-AZ). The legal services programs in Arizona suffered a one
6 million dollar reduction in federal funding from the Legal Services Corporation.
7 [www.lsc.gov/media/ news-items/2014/fy-2014-grantee-budgetallocations](http://www.lsc.gov/media/news-items/2014/fy-2014-grantee-budgetallocations). As a result,
8 the programs were forced to lay off staff and make drastic cuts in services. Southern
9 Arizona Legal Aid closed two offices. Even with the most recent stabilization of federal
10 funding, it is unlikely the federal reductions will be fully replaced in the foreseeable
11 future.

12 At the same time, interest rates on the IOLTA accounts have been at record low
13 levels, barely above zero for the seventh consecutive year. There is no sign that interest
14 rates will increase sufficiently to rectify or make up for the significant lack of IOLTA
15 funding in the last seven years. Across the nation, from 2007 through 2011, the amount
16 of IOLTA funding dropped by 68%. James Sandman, *Memorandum to Finance*
17 *Committee*, Request Recommendations July 19, 2013 pdf. found at [www.lsc.gov/sites/](http://www.lsc.gov/sites/lsc.gov/files/LSC/pdfs/Management_sRevisedFY2015Budget)
18 [lsc.gov/ files/LSC/pdfs/Management_sRevisedFY2015Budget](http://www.lsc.gov/sites/lsc.gov/files/LSC/pdfs/Management_sRevisedFY2015Budget).

19 Even with the inevitable rise of interest rates on IOLTA accounts, history has
20 shown that this source of revenue "roller-coasters" every five to six years and other
21 sources of support are needed to continue providing access to justice during the inevitable
22 low times.

23 History also shows that while funding fluctuates, the demand for legal services
24 only increases. The United States Census Bureau reported that in 2013 poverty in the
25 U.S. dropped for the first time since 2006. In contrast, in Arizona poverty rose for the
26 third year in a row reaching 20.2 percent as the government estimates it. Only
27 Mississippi and New Mexico were worse among the states. [http://www.azcentral.com/](http://www.azcentral.com/story/money/business/2014/09/29/arizona-faires-poorly-new-poverty-growth-rankings/)
28 [story/money/business/2014/09/29/arizona-faires-poorly-new-poverty-growth-rankings/](http://www.azcentral.com/story/money/business/2014/09/29/arizona-faires-poorly-new-poverty-growth-rankings/)

1 16432447/. Arizona’s economy has been slow to recover from the major recession and
2 over 1.5 million persons in Arizona currently receive basic benefits such as food stamps
3 and medical care.² Thus, the number of persons eligible for legal services is huge.

4 With reduced funding and a significant percentage of the population eligible for
5 services, the legal services programs are not able to represent all the persons contacting
6 them with credible claims and defenses. This is shown by the number of persons seeking
7 legal assistance directly from the programs and those using the A2JAuthor online intake.
8 In April 2013, on a one day count of the number of persons who contacted the three legal
9 aid agencies (Community Legal Services, DNA-People’s Legal Services, and Southern
10 Arizona Legal Aid) for help, the programs documented that over 600 people sought
11 assistance from the programs in just that one day.³ Even larger numbers are reported by
12 the A2JAuthor online intake. During the first nine months of 2014, on a daily average,
13 approximately 738 persons applied for legal assistance through the A2J Author online
14 intake. <https://simplebooklet.com/accesstojusticeupdate>. The need for legal services is
15 growing and the current funding sources cannot keep pace, even with increased
16 efficiencies, use of technology, *pro bono* support, and *pro se* education. Thus, new
17 funding sources are needed. As recognized by the AJTF and other states, one such
18 additional funding source is the use of residual class action funds.

19 The proposed rule is a modest effort to try to close the access to justice gap in
20 Arizona. Nothing in this proposal requires that there be residual finds. The contrary is
21 true. The last sentence in subsection (g) (1) of the proposed rule provides that: “Nothing
22 in this rule is intended to limit the trial court from approving a settlement or order that

23 ² The Arizona Department of Economic Security publishes the number of persons
24 receiving public benefits each month. [www.azdes.gov/InternetFiles/Reports/pdf/
25 dbme_statistical_bulletin_11_2014.pdf](http://www.azdes.gov/InternetFiles/Reports/pdf/dbme_statistical_bulletin_11_2014.pdf).

26 ³ April 3, 2013 “The Difference One Day Makes” – snapshot service report of the
27 three Legal Service Corporation funded legal aid agencies in Arizona. Legal services
28 advocates understand that these are depressed numbers of unmet need because as a result
of the longevity of the reduced resources, it is recognized that many low-income persons
after being informed that legal services cannot assist them, may not contact legal services
for assistance in the future.

1 does not create residual funds.” Exhibit A. This rule would only be applied if there are
2 residual funds.

3 As more fully explained below, all the proposed rule does is recognize the premise
4 underlying all class actions is to make access to justice a reality for persons who
5 otherwise would not realistically be able to obtain the protection of the justice system and
6 that legal services programs also provide access to justice for those who otherwise would
7 have limited or no access to the justice system. This proposal recognizes that the
8 distribution of residual funds to legal services and access to justice programs for low-
9 income persons serves the fundamental principle of access to justice and is a “next best
10 use” in class action cases.

11 As documented by the legal services program, many persons in Arizona have to go
12 without needed legal representation. When the Court has the opportunity to increase
13 access to justice, it should do so.

14 **B. Funding for Legal Services is a Responsibility of the Legal Professional**

15 The Arizona Bar Foundation respectfully asserts that the responsibility for
16 ensuring legal services are available to those who cannot afford to pay for such services
17 is placed upon the lawyers through the Preamble to Rule 42 of the Arizona Rules of
18 Professional Conduct, Arizona Rules of the Supreme Court:

19 A lawyer should be mindful of the deficiencies in the
20 administration of justice and of the fact that the poor, and
21 sometimes persons who are not poor, cannot afford adequate
22 legal assistance. Therefore, all lawyers should devote
23 professional time *and resources and use civic influence* to
24 ensure equal access to our system of justice for all those who
25 because of economic or social barriers cannot afford or secure
adequate legal counsel. A lawyer *should aid the legal*
profession in pursuing these objectives and should help the
bar regulate itself in the public interest. (emphasis added).

26 The responsibility of funding legal services is not the sole responsibility of the
27 attorney, but there is a clear expectation that the attorney, as a professional member of the
28 legal/justice system, *should* accept a role in the pursuit of equal access to justice.

1 Thus, the Arizona Bar Foundation also respectfully asserts that this proposal
2 furthers the principles, purpose, and strategic goals of the Arizona Courts and the State
3 Bar of Arizona as evidenced in the Arizona Supreme Court Rules of Professional
4 Conduct and the Lawyer's Creed of Professionalism adopted by the State Bar.
5 <http://www.azbar.org/membership/admissions/lawyer'screedofprofessionalism>.

6 **C. The Rule 23 Amendment Furthers the Public Policy of the Arizona Bar**
7 **Foundation/IOLTA Program to Support Access to Justice**

8 It was in the early 1970s that discussion of IOLTA programs began to be explored.
9 The principle was simple; client funds in a lawyer's possession that are nominal or held
10 for a short time would be pooled in an interest generating trust account and the interest
11 would be allocated to law-related public activities through a nonprofit corporation.
12 Some states developed their IOLTA programs through state legislation and others
13 through court rule. In March 1978, the Supreme Court of Florida issued a decision
14 establishing the first United States IOLTA program with the interest going to the Florida
15 Bar Foundation. Key provisions in gaining approval for the IOLTA program concept
16 addressed the Internal Revenue Service's concerns that the funds generated would not
17 result in inurement to the benefit of private individuals and groups, but rather that they
18 would be used exclusively for public purposes.⁴

19 In 1983 – 1984 Arizona established an IOLTA program under court rule and the
20 Arizona Bar Foundation was entrusted with administrating the IOLTA funds. The
21 purpose of the IOLTA program is to create access to legal services and access to justice
22 by aggregating small amounts of interest earned on short-term or small deposits that
23 would not be sufficient to generate net earnings to their owners. Thus, the parallel
24 between the use of class action remedies and the IOLTA program supports use of the
25 residual funds by the Arizona Bar Foundation.

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27
28 ⁴ *Report to the Board of Governors Task Force and Advisory Board on Interest on
Lawyer (sic) Trust Accounts*, Section VII, pages 13-21, American Bar Association, July
26, 1982.

1 The Arizona Bar Foundation, after three decades of operation, has administrated
2 over \$41 million in IOLTA funding and continues to serve as the entity entrusted by the
3 Arizona Supreme Court with this important function. The Arizona Bar Foundation has a
4 proven track record and ensures that the IOLTA interest is used exclusively for the
5 public purposes defined under Rule 43 of the Arizona Rules of the Supreme Court. The
6 Arizona Bar Foundation is in the unique position of having a proven track record of
7 disbursing funds to a broad array of programs that provide legal services and access to
8 justice services to those in Arizona.

9 The proposed amendment confirms that there is a procedural nexus between the
10 ability of class members to secure relief in the judicial forum under Rule 23 and the
11 interests of others who may similarly need access to the justice system to assert or defend
12 critical legal rights and interests. The proposed amendment does not substantially
13 interfere with the freedom of the parties or their attorneys to craft and propose class
14 action settlements. Instead, it specifically allows for residual funds to go towards equal
15 access to justice.

16 Finally, the proposal places no additional burdens on the courts or the parties in
17 the management of class action cases. The amendment will support access to justice for
18 many Arizonans who otherwise would have no legal assistance.

19 **IV. The Proposed Rule Amendment Would Further the Public Policy of Access to** 20 **Justice in Arizona**

21 There is a growing recognition in states that the use of *cy pres* funds are
22 appropriate funds to support the work of legal services programs. *See, e.g.,* Thomas
23 Doyle, *Residual Funds in Class Action Settlements: Using “Cy Pres” Awards to Promote*
24 *Access to Justice*, The Federal Lawyer, Vol. 27, pp. 26 – 29, July 2010 (“*Residual Funds*
25 *in Class Action Settlements*”) found at <http://papers.ssrn.com>.

26 With this rule, Arizona would join the growing number of states that have
27 established similar methods of disbursement for class action residual funds. Since the
28 filing of the first petition in 2013, four additional states have addressed this matter.

1 Kentucky enacted a rule of civil procedure concerning residual funds distribution,
2 effective January 1, 2014. Kentucky’s civil rule requires that at least 25% of the residual
3 funds be disbursed to the Civil Rule 23 Account maintained by the Kentucky IOLTA
4 Fund Board of Trustees to be allocated to legal aid organizations. *See* Exhibit B.
5 Nebraska also passed a statute concerning residual funds distribution. *See* Exhibit B.
6 The statute provides that unless the court orders otherwise, the residual funds shall be
7 disbursed to the Legal Aid and Services Fund. Connecticut and Montana have rules that
8 were effective January 1, 2015. The Connecticut Supreme Court amended the Superior
9 Court Rules to require that unless there is an alternate designation, the residual funds
10 shall be disbursed to the program administering IOLTA accounts. *See* Exhibit B. The
11 Montana Supreme Court amended Rule 23 to require that at least 50% of the residual
12 funds go to an access to justice organization. *See* Exhibit B. With the four additional
13 states, currently 11 states have rules of civil procedure for the disbursement of residual
14 funds. Of the 17 states with either a rule or statute, all of the states have provisions that
15 provide for the disbursement of residual funds to entities such as a bar foundation, legal
16 assistance organization, and/or other organization that promotes access to justice. *See*
17 Exhibit B.

18 **A. The History and Development of *Cy Pres* Awards Support the Petition**

19 *Cy pres* awards are distributions of the residual funds from class action settlements
20 or judgments that, for various reasons, are unclaimed or cannot be distributed to the class
21 members or other intended recipients. The term *cy pres* derives from the Norman-French
22 phrase, *cy pres comme possible*, meaning “as near as possible.” Edith L. Fisch, *Cy Pres*
23 *Doctrine in the United States (1950)* (“*Cy Pres* Doctrine”). The *cy pres* doctrine has its
24 roots in the laws of trust and estates, operating to modify charitable trusts that specified a
25 gift that had been granted to a charitable entity that no longer existed, had become
26 infeasible, or was in contravention of public policy. 3 Alba Conte & Herbert B.
27 Newberg, *Newberg on Class Actions* § 10:17 (4th ed. 2012). In such instances, courts
28 transferred the funds to the next best use that would satisfy, “as nearly as possible” the

1 trust settlor's original intent. Fisch, *Cy Pres* Doctrine at 1.

2 When class actions are resolved through settlement or judgment, there may be
3 residual funds because of the inability to locate class members or class members fail or
4 decline to file claims for settlement checks. Residual funds may also be generated when
5 it is not economically or administratively feasible to distribute funds to class members if,
6 for example, the cost of distributing individually to all class members exceeds the amount
7 to be distributed. *Cy pres* awards preserve the deterrent effect and allow courts to
8 distribute residual funds to charitable causes that reasonably approximate the interests
9 pursued by the class action for absent class members who have not received individual
10 distributions. See Wilber H. Boies and Latonia Haney Keith, *Class Action Settlement*
11 *Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, Virginia
12 *Journal of Social Policy & the Law*, February 2014, Vol. 21: 2 (“*Class Action Settlement*
13 *Residue*”) found at <http://www.vjspl.org>. The *cy pres* doctrine has been borrowed as a
14 device to facilitate the administration of class actions. Boies and Keith, *Class Action*
15 *Settlement Residue* at 289.

16 Similarly, Arizona courts have approved the application of the *cy pres* doctrine to
17 class action cases.

18 ‘*Cy pres*’ is a derivative from French meaning ‘as near as.’
19 Black’s Law Dictionary 415 (8th ed. 2004) ... It is also used
20 to distribute unclaimed portions of a class-action judgment or
21 settlement funds to a charity that will advance the interests of
22 the class. *Id.* In the context of a class action settlement
23 agreement, when it is not feasible to distribute the class
24 recovery or when there is a balance that remains after
25 distribution, the court may direct ‘undistributed funds to be
applied prospectively to the indirect benefit of the class.’ 3
Alba Conte & Herbert Newberg, *Newberg on Class Actions*
§10.17 (4th ed. 2005) (‘Newburg’). These funds are usually
distributed to a third party for a specified purpose. *Id.*

26 *Charles I. Friedman v. Microsoft Corp.*, 213 Ariz. 344, 348, n.7, 141 P.3d 824, 828 (App.
27 2006).

1 **B. Organizations that Provide Access to Justice are Appropriate**
2 **Beneficiaries of *Cy Pres* Awards**

3 Courts throughout the country have long recognized that organizations that
4 provide access to justice for low-income persons are appropriate beneficiaries of *cy pres*
5 awards from class action cases. *See, e.g., Lessard v. City of Allen Park*, 470 F.Supp.2d
6 781, 783-84 (E.D. Mich. 2007) (“The Access to Justice fund is the ‘next best’ use of the
7 remaining settlement monies in this case, because both class actions and Access to Justice
8 programs facilitate the supply of legal services to those who cannot otherwise obtain or
9 afford representation in legal matters.” (citations omitted)); *Jones v. Nat’l Distillers*, 56
10 F.Supp.2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres*
11 distribution designed to improve access to legal aid was appropriate); *In re Folding*
12 *Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at *7-8 (N.D. Ill.
13 Mar. 5, 1991) (approving *cy pres* distribution of class action “Reserve Fund” to establish
14 a program that would, in part, increase access to justice “for those who might not
15 otherwise have access to the legal system”); *see also Doyle, Residual Funds in Class*
16 *Action Settlements*, at 26 – 27 (providing examples of approved class action settlements
17 with *cy pres* distribution components that improved access to justice for indigent
18 litigants).

19 These awards are based on one of the underlying premises for all class action
20 cases: to provide access to justice for persons who would not otherwise be able to obtain
21 the protections of the justice system. *See Bob Graves & Meredith McBurney, Cy Pres*
22 *Awards, Legal Aid and Access to Justice, Key Issues in 2013 and Beyond*, 27 Mgmt. Info.
23 Exch. J., 24, 25 (Spring 2013) found at <http://americanbar.org>. (“[L]egal aid or [Access
24 To Justice] organizations are always appropriate recipients of *cy pres* or residual fund
25 awards in class actions because no matter what the underlying issue is in the case, every
26 class action is always about access to justice for a group of litigants who on their own
27 would not realistically be able to obtain the protections of the justice system.”).

1 **C. A Growing Number of States Have Adopted Rules and Statutes that**
2 **Provide that Access to Justice is an Appropriate Use of *Cy Pres* Funds**

3 In addition to cases supporting the use of *cy pres* awards to advance access to
4 justice, a growing number of states have adopted court rules or statutes codifying the
5 principle that *cy pres* distributions to organizations that promote access to justice are an
6 appropriate use of residual funds in class actions. *See* Exhibit B; Boies and Keith, *Class*
7 *Action Settlement Residue*, footnote 115 compiling state statutes and civil rules. The
8 rationale for the court rules can be summarized as (1) *cy pres* distributions are proper; (2)
9 charitable organizations that promote access to justice for low-income persons are
10 appropriate entities to receive *cy pres* funds; and (3) a minimum baseline distribution to
11 the entities is appropriate. By doing this, the statutes and rules recognize the connection
12 between access to justice through legal services programs and through class action
13 procedures. Doyle, *Residual Funds in Class Action Settlements*, at 27 (stating that the
14 myriad of state statutes and rules enacted to “require residual funds to be distributed, at
15 least in part, to legal aid projects ... provide(s) evidence of a public policy favoring *cy*
16 *pres* awards that serve the justice system”).

17 Arizona courts have recognized the role class actions serve in promoting access to
18 justice. *See ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203
19 Ariz. 94, 98, ¶ 14, 50 P.3d 844, 848 (2002) (A class action allows for the bringing of a
20 claim that is not economically feasible, thus, allowing for the “vindication of rights that
21 would otherwise go unprosecuted.”) The class action also serves to educate individuals
22 about their rights as well as protect those rights. *Id.*

23 Those are the very reasons legal services programs were established. They
24 represent low-income persons who financially cannot bring or defend cases. Without
25 legal services, these persons’ rights would go unprotected. The victim of domestic
26 violence who needs a divorce, custody and child support; the tenant living in substandard
27 housing without air conditioning; the farm worker being mistreated by her supervisor; or
28 the child improperly denied food stamps, cash assistance, or Medicaid. These are all

1 cases where rights would not be vindicated without legal services programs. The analogy
2 to class action cases is straight forward.

3 Legal services programs not only provide direct representation, they (and the
4 Arizona Bar Foundation) prepare legal educational materials, put on workshops and
5 clinics and make public presentations. They serve the same educational interests as class
6 actions. *See, e.g.*, Community Legal Services website at www.clsaz.org; Arizona Bar
7 Foundation resources at www.AZLawHelp.org; www.lawforseniors.org; www.lawforkids.org; www.lawforveterans.org.

9 Whether awarded by a court order or pursuant to a state statute or rule, class action
10 *cy pres* distributions to legal assistance organizations are widely recognized as an
11 appropriate and successful mechanism to further access to justice. *See, e.g.*, Daniel
12 Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 *Geo. J. Legal Ethics* 435, 438 (2012)
13 (*cy pres* distributions to specific legal aid organizations have advanced legal services);
14 Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: A Settling*
15 *Concept*,” 58 *La. B.J.* 248, 251 (2011) (discussing how *cy pres* awards made to local
16 legal aid organizations will promote access to the courts, in part, by funding and
17 coordinating a *pro bono* panel utilizing local attorneys); Danny Van Horn & Daniel
18 Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 *Tenn.*
19 *B.J.* 12, 13-14 (2009) (identifying legal aid organizations which have received residual *cy*
20 *pres* funds because of the indirect benefit they provide to class members, which is similar
21 to the central purpose for which rule 23 of the federal rules of civil procedure was
22 designed – access to justice); Nina Schuyler, *Cy Pres Awards – A Windfall for*
23 *Nonprofits*, 33 *San Francisco Attorney* 26, 27-28 (Spring 2007) (lauding the assistance
24 that Volunteer Legal Services has provide to low-income residents); *Cy Pres Nets*
25 *\$162,000 for Justice Foundation*, 30 *May Mont. Law.* 24, 24 (2005) (noting that a
26 significant *cy pres* distribution to the Montana Justice Foundation will help fund legal aid
27 for indigent individuals).

28

1 **D. This Petition Supports the Goals of the Access to Justice Commission**
2 **Established by the Court**

3 The Court established the Arizona Commission on Access to Justice in 2014.
4 Administrative Order No. 2014-83. The Court identified as one purpose of the
5 Commission during its first year to look at ways of “promoting access to justice for
6 individuals who cannot afford legal counsel” This Petition would promote that
7 purpose.

8 **V. Potential Benefit from Residual Funds Designation**

9 The history of the implementation of similar provisions in other states shows that
10 use of the residual funds can be an effective tool to support legal services. States vary in
11 their procedures for either mandating or providing an option for the residual funds
12 disbursement to an entity that supports legal services or access to the courts for low-
13 income persons.

14 The ABA Resource Center also attempts to collect information on how much
15 funding is being generated annually by states with rule or statutory class action residual
16 funds distribution provisions. There is not accurate or complete data for all states, but the
17 existing data shows that the amount collected annually varies significantly, both from
18 year to year within each state and from state to state. A chart prepared by the ABA
19 Resource Center shows that from 2005 to 2013, the reported *cy pres* funding going to
20 legal services programs each year has been between 4 million and 20 million dollars. *See*
21 Exhibit D.

22 This information demonstrates that there is the potential for a large increase in
23 funds designated toward access to justice efforts when rules and/or statutes concerning
24 class action residual funds are amended. With seven states added since 2011, it is clear
25 that there is a growing recognition and significant momentum toward the use of residual
26 funds as an appropriate way to obtain additional funding for legal services.

27 The Arizona Bar Foundation respectfully requests that the Court approve this
28 petition so that the legal services and access to justice programs in Arizona can reap the

1 benefits of the use of residual funds to help low-income Arizonans. This amendment is
2 consistent with the furtherance of important public policy goals, including the efficient
3 use and conservation of judicial resources, the promotion of settlements, the provision of
4 legal representation and services to low-income Arizonans and the improvement of the
5 administration of justice.

6 **VI. The Access to Justice Programs Will Maximize the Use of the Residual Funds**

7 The history of the implementation of similar provisions in other states shows that
8 use of the residual funds can be an effective tool to support legal services. Legal services
9 programs are very adept at making additional money go a long way. An attorney hired at
10 \$50,000 can be expected to assist over 300 clients a year. Relatively small amounts of
11 money can print out educational brochures and support clinics. Additional funds can
12 support the volunteer lawyers programs. These programs have modest office space and
13 no frills.

14 The approval of the petition will support legal services and access to justice
15 programs in Arizona. Then our legal services and access to justice programs will be able
16 to reap the benefits of the use of residual funds to help low-income Arizonans as has
17 occurred in other states. It is a win-win for all of Arizona.

18 **Conclusion**

19 For the above reasons, the Arizona Bar Foundation respectfully requests that the
20 Court amend Rule 23 to specifically allow for residual funds in class action cases to be
21 distributed to the Arizona Bar Foundation to provide legal services and access to the
22 justice system for low-income residents of Arizona.

23 RESPECTFULLY SUBMITTED this 8th day of January 2015.

24 Arizona Foundation for Legal Services &
25 Education

26 By /s/Thomas J. Giallanza
27 Thomas J. Giallanza
28 Past President and Current Board Member
of Arizona Bar Foundation

1 Electronic copy filed with the Clerk
2 of the Supreme Court of Arizona this
3 8th day of January, 2015

4 By: /s/Thomas J. Giallanza

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