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7 **IN THE SUPREME COURT**

8 **STATE OF ARIZONA**

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

Supreme Court No. R-15-0007

11 **COMMENT TO AMENDED**  
12 **PETITION TO AMEND RULE 23,**  
13 **ARIZONA RULES OF CIVIL**  
14 **PROCEDURE**

15 Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, the William E.  
16 Morris Institute for Justice (“Institute”), Community Legal Services (“CLS”) and  
17 Southern Arizona Legal Aid (“SALA”) submit these comments in support of the Arizona  
18 Foundation for Legal Services and Education’s (“Arizona Bar Foundation” or  
19 “Foundation”) Amended Petition to Amend Rule 23 of the Arizona Rules of Civil  
20 Procedure. The proposed rule amendment would allow at least 50% of any residual class  
21 action funds to be distributed to the Arizona Bar Foundation to administer in support of  
22 projects promoting access to the justice system and the delivery of legal services for low-  
23 income residents of Arizona or such related projects as directed by the court.<sup>1</sup> In support  
24 of the amended petition, the Institute, CLS and SALA state the following:<sup>2</sup>

25 <sup>1</sup> The Arizona Bar Foundation submitted an initial Petition on January 8, 2015.  
26 On February 25, 2015, the Foundation submitted an Amended Petition.

27 <sup>2</sup> Last year the Arizona Bar Foundation submitted a Petition for Rule Change, R-13-  
28 0061, that would have required that 50% of any residual class action funds be distributed  
to the Foundation. Our programs supported that petition and continue to support a  
mandatory distribution requirement.

1 **I. Statements of Interest**

2 The Institute is a non-profit public interest program that works on issues of  
3 importance to low-income Arizonans. Access to justice is such an issue. CLS and SALA  
4 are federally funded civil legal services program for low-income Arizonans in Arizona.  
5 As front line providers of civil legal services, they know firsthand how limited resources  
6 affect access to justice. As explained below, the proposed rule will promote access to  
7 justice and legal services to low-income Arizonans.

8 **II. The Access to Justice Gap in Arizona is Huge**

9 Arizona has a high percentage of the population who qualify for assistance from  
10 the three legal services programs in Arizona. As of February 2015, over one million  
11 persons received food stamps in Arizona and approximately 1,354,000 persons received  
12 medical assistance through the state’s Medicaid program, the Arizona Healthcare Cost  
13 Containment System (“AHCCCS”) [https://www.azdes.gov/InternetFiles/Reports/pdf/  
14 dbme\\_statistical\\_bulletin\\_02\\_2015pdf](https://www.azdes.gov/InternetFiles/Reports/pdf/dbme_statistical_bulletin_02_2015pdf). (pages 2 and 3, respectively). These numbers  
15 understate the number of low-income persons in Arizona, because many persons eligible  
16 for public assistance programs do not participate in the programs for a host of reasons.  
17 Using these conservative numbers, we know that over well over 20% of the Arizona  
18 population lives below 150% of the federal poverty level. Given these persons’ low-  
19 income, if they have a legal issue, they are priced out of the private lawyer market. This  
20 recognition is the reason the legal services programs were established.

21 It is estimated that 80% of the “serious legal needs” of low-income Americans go  
22 unmet. *Can We Close the Justice Gap* at 23, found at [https://law.duke.edu/  
23 news/pdf/lawmagspring15.pdf](https://law.duke.edu/news/pdf/lawmagspring15.pdf). That sobering statistic is an understatement for  
24 Arizonans. Each year, the legal services programs document the number of persons who  
25 contact them for legal assistance on one day. In this one day count of requests for help in  
26 recent years, CLS, SALA and DNA People’s Legal Services documented that  
27 approximately 600 people sought assistance from the programs. In the most recent count,  
28 597 persons contacted the 3 legal services programs in April 2015. *See The Difference*

1 *One Day Makes-2015* found at <https://azflse.org/azflse/pressrelease.pdf>. Similar numbers  
2 of requests were documented in prior years. Extrapolating from these numbers, the  
3 programs receive almost 3,000 requests for assistance each week; over 12,000 requests  
4 each month and over 120,000 requests each year!

5 At a time when the documented need for legal assistance is so high, reduced  
6 federal funding and the almost non-existent interest rates on Interest on Lawyers' Trust  
7 Accounts ("IOLTA") have strained legal services resources even further. Legal services  
8 programs suffered a one million dollar reduction in federal funding from the Legal  
9 Services Corporation since 2010. [www.lsc.gov/media/news-items/2014/fy-2014-grantee-](http://www.lsc.gov/media/news-items/2014/fy-2014-grantee-budgetallocations)  
10 [budgetallocations](http://www.lsc.gov/media/news-items/2014/fy-2014-grantee-budgetallocations). As a result, the legal services programs were forced to lay off staff  
11 and make drastic cuts in services.

12 At the same time, interest rates on the IOLTA accounts have been at record low  
13 levels, barely above zero for the sixth consecutive year. There is no indication that  
14 interest rates will increase sufficiently to make a significant difference in IOLTA funding  
15 in the upcoming years. Across the nation, from 2007 through 2011, the amount of IOLTA  
16 funding dropped by 68%. James Sandman, *Memorandum to Finance Committee,*  
17 *Request Recommendations July 19, 2013 pdf.* found at [www.lsc.gov/sites/lsc.gov/files/](http://www.lsc.gov/sites/lsc.gov/files/LSC/pdfs/Management_sRevisedFY2015Budget)  
18 [LSC/pdfs/Management\\_sRevisedFY2015Budget](http://www.lsc.gov/sites/lsc.gov/files/LSC/pdfs/Management_sRevisedFY2015Budget).

19 Clinics for the unrepresented, instructional materials and limited advice may fill  
20 some of the clients' needs. For many others who have a substantiated claim for public  
21 benefits such as health care or food stamps or for unemployment insurance; a defense to  
22 an eviction or creditor suit; or are the victim of domestic violence and need  
23 representation in a family court matter or to obtain an order of protection, an attorney or  
24 trained legal advocate is needed. The legal services programs are not able to represent all  
25 the persons contacting them with credible and substantiated claims and defenses.

26 Thus, it is imperative that new sources of funding be identified. The amended  
27 proposed rule is a modest effort to try to close the access to justice gap in Arizona.  
28 Nothing in the proposal requires that there be residual finds. The contrary is true. The

1 last sentence in subsection (g) (1) of the proposed rule provides that: “Nothing in this  
2 rule is intended to limit the trial court from approving a settlement or order that does not  
3 create residual funds.” Exhibit A to Amended Petition. This rule would only be applied  
4 if there are residual funds.

5 The proposed amendment does not interfere with the parties or their attorneys to  
6 craft and propose class action settlements. The proposal places no additional burdens on  
7 the courts or the parties in the management of class action cases. What it does, is provide  
8 that if there are residual funds, then 50% of those funds may go to support access to  
9 justice for the many Arizonans who otherwise would have no legal assistance.

10 The proposed amended rule recognizes the premise underlying all class actions is  
11 to make access to justice a reality for persons who otherwise would not realistically be  
12 able to obtain the protection of the justice system and that legal services programs also  
13 provide access to justice for those who otherwise would have limited or no access to the  
14 justice system. This proposal recognizes that the distribution of residual funds to legal  
15 services and access to justice programs for low-income persons serves the fundamental  
16 principle of access to justice and is a “next best use” in class action cases.

17 As documented by the legal services program, many low-income persons in  
18 Arizona have to go without needed legal representation. When the Court has the  
19 opportunity to increase access to justice, it should do so.

### 20 **III. Approval of the Amended Petition Furthers the Court’s Support for Access** 21 **to Justice**

22 The Court has established an Access to Justice Commission. The amended  
23 petition further supports the Court’s access to justice initiatives.

24 Moreover, the mended petition would expand on lower court approval of the  
25 application of the *cy pres* doctrine to class action cases.

26 ‘*Cy pres*’ is a derivative from French meaning ‘as near as.’  
27 Black’s Law Dictionary 415 (8<sup>th</sup> ed.2004) ... It is also used  
28 to distribute unclaimed portions of a class-action judgment or  
settlement funds to a charity that will advance the interests of  
the class. *Id.* In the context of a class action settlement

1 agreement, when it is not feasible to distribute the class  
2 recovery or when there is a balance that remains after  
3 distribution, the court may direct ‘undistributed funds to be  
4 applied prospectively to the indirect benefit of the class.’ 3  
5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* §  
6 10.17 (4<sup>th</sup> ed. 2005) (‘Newburg’). These funds are usually  
7 distributed to a third party for a specified purpose. *Id.*

8 *Charles I. Friedman v. Microsoft Corporation*, 213 Ariz. 344, 348, n. 7, 141 P.3d 824,  
9 828 n.7 (App. 2006).

10 **A. Courts Have Recognized that Organizations that Provide Access to  
11 Justice Are Appropriate Beneficiaries of *Cy Pres* Awards**

12 Courts throughout the country have long recognized that organizations that  
13 provide access to justice for low-income persons are appropriate beneficiaries of *cy pres*  
14 awards from class action cases. *See, e.g., Lessard v. City of Allen Park*, 470 F.Supp.2d  
15 781, 783-84 (E.D. Mich. 2007) (“The Access to Justice fund is the ‘next best’ use of the  
16 remaining settlement monies in this case, because both class actions and Access to Justice  
17 programs facilitate the supply of legal services to those who cannot otherwise obtain or  
18 afford representation in legal matters.” (citations omitted)); *Jones v. Nat’l Distillers*, 56  
19 F.Supp.2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres*  
20 distribution designed to improve access to legal aid was appropriate); *In re Folding  
21 Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at \*7-8 (N.D. Ill.  
22 Mar. 5, 1991) (approving *cy pres* distribution of class action “Reserve Fund” to establish  
23 a program that would, in part, increase access to justice “for those who might not  
24 otherwise have access to the legal system”); *See also*, Thomas Doyle, *Residual Funds in  
25 Class Action Settlements: Using “Cy Pres” Awards to Promote Access to Justice*, *The  
26 Federal Lawyer*, Vol. 27, pp. 26-29, July 2010 (“*Residual Funds in Class Action  
27 Settlements*”) found at <http://papers.ssrn.com>. (providing examples of approved class  
28 action settlements with *cy pres* distribution components that improved access to justice  
for indigent litigants).

These awards are based on one of the underlying premises for all class action

1 cases: to provide access to justice for persons who would not otherwise be able to obtain  
2 the protections of the justice system. See Bob Glaves & Meredith McBurney, *Cy Pres*  
3 *Awards, Legal Aid and Access to Justice, Key Issues in 2013 and Beyond*, 27 Mgmt. Info.  
4 Exch. J., 24, 25 (Spring 2013) found at <http://americanbar.org>. (“[L]egal aid or [Access  
5 To Justice] organizations are always appropriate recipients of *cy pres* or residual fund  
6 awards in class actions because no matter what the underlying issue is in the case, every  
7 class action is always about access to justice for a group of litigants who on their own  
8 would not realistically be able to obtain the protections of the justice system.”); Doyle,  
9 *Residual Funds in Class Action Settlements*, at 27 (stating that the myriad of state statutes  
10 and rules enacted to “require residual funds to be distributed, at least in part, to legal aid  
11 projects ... provide(s) evidence of a public policy favoring *cy pres* awards that serve the  
12 justice system”).

13 *Cy pres* awards preserve the deterrent effect of class action litigation and allow  
14 courts to distribute residual funds to charitable causes that reasonably approximate the  
15 interests pursued by the class action for absent class members who have not received  
16 individual distributions. See Wilber H. Boies and Latonia Haney Keith, *Class Action*  
17 *Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*,  
18 *Virginia Journal of Social Policy & the Law*, February 2014, Vol. 21: 2 (“*Class Action*  
19 *Settlement Residue*”) found at <http://www.vjspl.org>.

20 **B. A Growing Number of States Have Adopted Rules and Statutes that**  
21 **Provide for the Distribution of *Cy Pres* Funds for Access to**  
22 **Justice/Legal Services Programs**

23 As of May 2015, 18 states have either a civil rule of procedure or a statutory  
24 provision that concerns the distribution of *cy pres* residual funds to legal services  
25 programs. Oregon is the most recent state to implement a rule. Oregon House bill 2700  
26 amends Oregon’s Civil Rule of Procedure, Rule 32, to require that in a class action  
27 settlement or judgment where there are residual funds “at least 50 percent of the amount  
28 not paid to class members be paid or delivered to the Oregon State Bar for the funding of

1 legal services provided through the Legal Services Program” established under state law.  
2 Several other state rules and statutes are mandatory. *See* Exhibit B to the Amended  
3 Petition. Significantly, the Foundation’s proposal is more modest and is not mandatory.

4 Other than Oregon, the states that have adopted court rules or statutes codifying  
5 the principle that *cy pres* distributions to organizations that promote access to justice are  
6 an appropriate use of residual funds in class actions are set out in Exhibit B to Arizona  
7 Bar Foundation Amended Petition. The rationale for the court rules can be summarized  
8 as (1) *cy pres* distributions are proper; (2) charitable organizations that promote access to  
9 justice for low-income persons are appropriate entities to receive *cy pres* funds; and (3) a  
10 minimum baseline distribution to the entities is appropriate. By doing this, the statutes  
11 and rules recognize the connection between access to justice through legal services  
12 programs and through class action procedures.

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

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

27 Legal services programs not only provide direct representation, they (and the  
28 Foundation) prepare legal educational materials, put on workshops and clinics and make

1 public presentations. They serve the same educational interests as class actions. *See,*  
2 *e.g.,* CLS website at [www.clsaz.org](http://www.clsaz.org); SALA website at [sazlegalaid.org](http://sazlegalaid.org); Arizona Bar  
3 Foundation resources at [www.AZLawHelp.org](http://www.AZLawHelp.org); [www.lawforseniors.org](http://www.lawforseniors.org); [www.lawforkids.org](http://www.lawforkids.org);  
4 [www.lawforveterans.org](http://www.lawforveterans.org).

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

#### 24 **IV. The Access to Justice Programs Will Maximize the Use of the Residual Funds**

25 The history of the implementation of similar provisions in other states shows that  
26 use of the residual funds can be an effective tool to support legal services. Legal  
27 services programs are very adept at making their funding go a long way. An attorney  
28 hired at \$50,000 can be expected to assist over 300 clients a year. Relatively small

1 amounts of money can print out educational brochures and support clinics. Additional  
2 funds can support the volunteer lawyers programs. These programs have modest office  
3 space and no frills.

4 Therefore, it came as no surprise that a recent study of the 3 legal services  
5 programs in Arizona, showed the huge social return on investment provided by these  
6 programs. *Arizona Legal Aid Services Social Return on Investment Analysis*, Community  
7 Services Analysis, LLC, found at <https://www.azcourts/Portals/74/ATJC/CSACO>  
8 *ArizonaConsolidatedSRORReport.pdf*. The study found that for every one dollar spent on  
9 legal services there is a return of anywhere between \$3 and \$8. These are certainly  
10 dollars well spent.

11 The approval of the amended petition will support legal services and access to  
12 justice programs in Arizona. Our legal services and access to justice programs will be  
13 able to reap the benefits of the use of residual funds to help low-income Arizonans as has  
14 occurred in other states. It is a win-win for us all.

15 **V. The Foundation Is an Appropriate Administrator of the *Cy Pres* Residual**  
16 **Funds**

17 The proposed amended rule is careful to explain that the Foundation will be the  
18 administrator for the *cy pres* funds and will distribute the funds to projects promoting  
19 access to the justice system and the delivery of legal services for low-income Arizonans  
20 or such related projects as directed by the court. The Foundation’s history demonstrates  
21 that it is an appropriate administrator for these funds.

22 Courts also look to see if the recipient of the funds has a “substantial record of  
23 service.” *Mexican Workers*, 904 F.2d at 1308. The Arizona Bar Foundation does. For  
24 35 years, the Court has entrusted IOLTA funds to the Foundation for distribution under  
25 Rule 43 of the Arizona Rules of the Supreme Court. The Arizona Bar Foundation, after  
26 three decades of operation, has administrated over \$41 million in IOLTA funding and  
27 continues to serve as the entity entrusted by the Arizona Supreme Court with this  
28 important function. The Foundation has a proven track record of receiving, disbursing

1 and managing funds from multiple regulated sources. The Foundation ensures that the  
2 IOLTA interest is used exclusively for the public purposes defined under Rule 43 of the  
3 Arizona Rules of the Supreme Court. The Arizona Bar Foundation is in the unique  
4 position of having a proven track record of disbursing funds to a broad array of programs  
5 that provide legal services and access to justice services to those in Arizona. They will  
6 ensure the *cy pres* funds are used as directed by the amended rule.

7 **Conclusion**

8 For the above reasons, the Institute, CLS and SALA respectfully request that the  
9 Court amend Rule 23 to allow at least 50% of the residual funds in class action cases to  
10 be distributed to the Arizona Bar Foundation to administer projects to provide legal  
11 services and access to the justice system for low-income residents of Arizona or such  
12 other related projects as directed by the court.

13 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of May 2015.

14 WILLIAM E. MORRIS INSTITUTE FOR  
15 JUSTICE

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19 Electronic copy filed with the Clerk  
20 of the Supreme Court of Arizona this  
20<sup>th</sup> day of May 2015

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