Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
Timothy Sandefur (033670)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-20-0034
PETITION TO RESTYLE AND AMEND SUPREME COURT RULE 31; ADOPT NEW RULE 33.1; AND AMEND RULES 32, 41, 42 (VARIOUS ERS FROM 1.0 TO 5.7). 46-51, 54-58, 60 AND 75-76.	**GOLDWATER INSTITUTE'S COMMENT IN SUPPORT OF THE PETITION**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Goldwater Institute hereby submits this comment in support of the Task Force on the Delivery of Legal Services' Petition to abrogate and amend Rule 31; amend Arizona Supreme Court Rules 32, 41, 42 (ERs 1.0, 1.5-1.8, 1.10, 1.17, 5.1, 5.3, 5.4, 5.7), 46-51, 54-58, 60, 75 and 76, and adopt Arizona Supreme Court Rule 33.1. ("AZSCR Rule 33.1").

The Goldwater Institute ("Goldwater") was established in 1988 as a nonprofit public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual liberty through litigation, research papers, editorials, policy briefings, and forums.

Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and files *amicus* briefs and comments when its or its clients' objectives are implicated. Among Goldwater's principal goals is defending the vital principles of economic liberty and private property rights, and the independent protections for these and other rights in state constitutions across the country. Promoting the enforcement of these independent guarantees is one of Goldwater's top priorities, and Goldwater has litigated and appeared as *amicus curiae* in the courts of Arizona, New Mexico, Texas, New Jersey, Illinois, Washington, Pennsylvania, and other states to promote the enforcement of state constitutional protections over and above those provided by the federal constitution. Goldwater scholars have also written extensively about the right to earn a living. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living* (2010).

The Goldwater Institute joins the Task Force on the Delivery of Legal Services' legal analysis as to why the abrogation and amendments are necessary and appropriate.

In addition to the reasons articulated in the Petition, the proposed amendment would ensure that AZSCR Rule 33.1 complies with the Arizona Constitution's prohibition on monopolies.

Article 14, Section 15 of the Arizona Constitution says that "[m]onopolies and trusts shall never be allowed in this state and no incorporated company, co-

partnership or association of persons in this state shall directly or indirectly combine ... in any manner whatever, to fix the prices, limit the production, or regulate the transportation of any product or commodity." The prohibition of monopolies in Article 14 was designed to protect consumers against "anti-competitive conduct" with a principal purpose of preventing overcharges to consumers. *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 486 ¶ 14 (Ariz. App. 2002).

In the state of Arizona, "[f]ree enterprise and competition is the general rule. Governmental control and legalized monopolies are the exception and are authorized under our constitution only for that class of business that might be characterized as a public service enterprise." *General Alarm, Inc. v. Underdown*, 262 P.2d 671, 672 (1953).

Neither the State Bar of Arizona, nor any other entity, may monopolize the practice of law. The Arizona Supreme Court through Rule 31(d) provides restrictions on who may practice law in the state. Through Administrative Order 2018-111 the Supreme Court requested a review and analysis of the provision of services in the state in response to perceived barriers to legal representation. Providing access to legal representation to those trying to navigate the legal system but who cannot afford an attorney is essential to ensure access to justice, regardless of a person's socioeconomic status. The Bar Examiner, *Limited Practice Legal*

Professionals: A Look at Three Models (2018-19).[1] Unfortunately, legal services in the United States is so prohibitively expensive that our country ranks near the bottom of developed nations for access to counsel in civil cases. Luz E. Herrera, *Educating Main Street Lawyers*, 63 J. Legal Educ. 189, 193 (2013).[2]

Allowing limited license legal practitioners ("LLLP") to provide services would help address some of these concerns. The LLLP model would break up the monopoly on the provision of legal services, which will in turn increase the number of providers who can supply these services. In harmony with the law of supply and demand, this will drive efficiency, improve customer satisfaction, and most importantly, lower prices to allow greater access to justice. Neil M. Gorsuch, *Access to Affordable Justice*, 100 Judicature 46, 49 (2016).

The provision of legal services by lay specialists has also been shown to be as effective in specialized areas, if not more so, than lawyers providing similar services. *Id.* The American Law Institute has found that "experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers." *Id.* (internal citations omitted). The Federal Trade Commission has not observed "any evidence of consumer harm

[1] https://thebarexaminer.org/article/winter-2018-2019/limited-practice-legal-professionals-a-look-at-three-models/

[2] The United States ranks 50th out of 66 nations in an individual's ability to obtain legal counsel. *Id.*

arising from the provision of legal services by nonlawyers that would justify foreclosing competition." *Id.* (internal citations and marks omitted). In fact, in some contexts, nonlawyers outperform lawyers in terms of the results and overall satisfaction by low-income clients. *Id.* The key predictor of quality is specialization rather than educational status. *Id.*

The Arizona Bar Association, through Ethics Rule 5.4, requires that no non-lawyer hold an ownership interest in a law firm. The purpose of this rule was *not* protection of the public, however, but protection of the lawyer's monopoly on the provision of legal services. *See* Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 Minn. L. Rev. 1115 (2000). It is mainly directed against entrepreneurial relationships with those who are not members of the bar. ABA Formal Ethics Opinion 01-423 (2001).

That is improper. The Court should *not* look to what is best for lawyers as an industry, but at what will best serve the public and the clients who rely on legal services. To borrow an analogy from antitrust law, concerns about monopolistic activities—as specified in the Arizona Constitution—should be focused on *consumer welfare*, not on protecting existing firms against competition. *See, e.g.*,

Elyse Dorsey, et al., *Consumer Welfare & the Rule of Law: The Case against the New Populist Antitrust Movement*, 47 Pepperdine L. Rev. __ (forthcoming, 2020).[3]

Abolishing ER 5.4 and allowing for multidisciplinary practice will further break up the monopoly on the provision of law. It will give those who would not otherwise have access to justice that which they desire, "competent answers, efficiency, and convenience." Kathryn Lolita Yarbrough, *Multidisciplinary Practices: Are They Already Among Us?*, 53 Ala. L. Rev. 639, 646 (2002). In those jurisdictions were these firms have been allowed to form they work to serve the needs of those in the middle and lower classes. Gorsuch, *supra*, at 50. They provide cross-disciplinary, comprehensive approaches to legal problems. Yarborough, *supra*, at 647. They also do so, not by limiting the demand for lawyers, but by providing opportunities for lawyers to expand their services without compromising their ethical obligations. *Id.* at 645-46.

For these reasons and those stated in AZSCR Rule 33.1's Petition, the Petition should be granted.

Respectfully submitted this 26th day of May 2020,

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE

[3] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592974