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August 29, 2019

Supreme Court Clerk
P.O. Box 30052
Lansing, Michigan 48909

RE: Comments submitted on behalf of the Michigan Freedom Fund with respect to the Proposed Amendment of Rule 3.501 of the Michigan Court Rules (the "Proposal"); ADM File No. 2018-02

TO PERMIT A BINDING SETTLEMENT THAT REDIRECTS CLASS ACTION SETTLEMENT FUNDS FROM CLASS ACTION MEMBERS TO THIRD PARTIES (OFTEN ADVOCACY GROUPS) WOULD RAISE SERIOUS FIRST AMENDMENT CONCERNS.

The Proposal redirects class action settlement funds from unnamed class members to outside organizations, that admittedly were not injured by the defendant's conduct. The redirecting of residual funds from class members to nonparty entities effectively appropriates damages rightly due to the class members for injuries they suffered, to advocacy organizations that had no such harms and that are committed to advocating for causes that particular class members might not approve. In effect, class members are forced by the terms of judicial order settlement to support speech and advocacy activity chosen by class counsel and approved by the judge, with remedial funds that by rights should have been paid to them. In other words, the Proposal compels unnamed class members to support causes advocated by certain advocacy groups—compelled speech not unlike that at issue in *Janus v Am Fed'n*, 585 US ____ (2018), where the United States Supreme Court held that agency shop agreements violate the free speech rights of non-members by compelling them to subsidize private speech on matters of substantial public concern. Significantly, the Proposal raises the same kind of First Amendment concerns that were at issue in the *Janus* decision.

Quite simply, such compelled speech is contrary to the original understanding of the First Amendment. The founding generation voiced its concerns through debates over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. And the United States Supreme Court has often quoted Jefferson's argument that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), in *5 The Founders Constitution*, University of Chicago Press (1987 at 77 (quoted in, e.g., *Keller v State Bar*, 496 US 1, 10 (1990); *Chicago Teachers Union v Hudson*, 475 US 292, 305, n.15 (1986); *Abood v Detroit Board of Education*, 431 US 209, 234-35 n.31 (1977); *Everson v Board of Education*, 330 US 1, 13 (1947)), Jefferson went on to note "[t]hat even forcing him to support this or that teacher of his own religious persuasion, is depriving



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him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, *Religious Freedom*, *supra* at 77.

Although these statements were made in the context of compelled religious assessments, these same principles can be applied to compelled financial support of court-endorsed *cy pres* recipients. Requiring a class action plaintiff to give their settlement funds to an organization to engage in advocacy with which the litigant disagrees, would violate their First Amendment rights. Accomplishing the same thing by way of a *cy pres*-only settlement does not obviate the First Amendment problem.

Respectfully,

A handwritten signature in black ink that reads "Anthony R. Daunt". The signature is written in a cursive, flowing style.

Anthony Daunt
Executive Director
Michigan Freedom Fund