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**IN THE SUPREME COURT
IN AND FOR THE STATE OF ARIZONA**

In the matter of:

Petition to Amend [Arizona Rules of Civil Appellate Procedure 4\(b\)\(9\), 13\(a\), and 13\(i\)](#); [Arizona Rules of Criminal Procedure 31.6\(d\), 31.10\(a\), and 31.10\(j\)](#); and [Arizona Rules of Juvenile Procedure 607\(b\)\(3\) and 609\(d\)\(5\)](#).

Arizona Supreme Court
No. [R-23-0026](#)

Comment in Opposition to the
Proposal to Eliminate of the Table of
Citations Requirement in Appellate
Briefs

Pursuant to [Rule 28\(e\) of the Arizona Supreme Court Rules](#), I, Kevin D. Heade, recommend that this Court reject the proposal outlined in the Petition to eliminate the requirement that appellate briefs contain a Table of Citations. In my experience, the inclusion of a Table of Citations is for the benefit of the opposing party, the Court, and others such as amicus curiae who wish to quickly and easily grasp the legal reasoning of a brief. Striking them will cause more inconvenience than it saves.

This Court should reject the proposal outlined in the Petition.

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I. Statement of Interest

I am an indigent criminal defense attorney whose practice has focused nearly exclusively on criminal appeals since 2016. I have participated as counsel of record or co-counsel in over approximately 70 appeals. During my time as an appellate attorney, I have advised my colleagues and other criminal appellate attorneys on their cases. I regularly participate in moot courts to help others prepare for their oral arguments. I also participate as counsel or co-counsel for *amicus curiae* in appellate matters.

In each of these roles, I regularly rely on the table of citations to quickly assess the merits of a brief. This Court should not strike the requirement from the Rules of Civil Appellate Procedure and the Rules of Criminal Procedure because a vocal group of attorneys do not make use of this time-saving tool. Any convenience saved by those who will elect to forgo the creation of the table of citations will only shift costs to opposing counsel and third parties who rely on the table of citations for a host of purposes. The inclusion of a table of citations in appellate briefs is a courtesy that engenders respect for the profession and appellate practice in particular.

This Court should keep the requirement that all appellate briefs filed by members of the Bar contain a table of citations. If any change is considered, it should be limited to pro se litigants.

II. A Table of Citations is an Important Tool for the Opposing Party, the Court, and Third Parties.

This Court should keep the table of citations requirement because it promotes efficiency, accuracy, and competent representation. The inclusion of a table of citations also decisions to be rendered on the bases briefed by the parties. Whereas the proposal, if adopted will only undermine the quality of appellate briefs and lend to less confidence that decisions are rendered on bases briefed by the parties.

A. An efficient survey of the merits of a brief.

A table of citations provides readers of appellate briefs an efficient means of surveying the merits of a brief. As opposing counsel, I am often more concerned about the authority that my opponent relies upon than their actual argument. This is because I am concerned with convincing the court that the authority—not necessarily my argument—requires that my client to prevail.

When I get an opposing party's brief, I review the table of contents, hoping that opposing counsel has provided me the courtesy of including subheadings of their arguments in their briefs. I review the argument headings and then flip to the table of citations to review the authority offered to support their arguments. Within seconds, I have a strong grasp on the merits of their brief.

My subsequent review of the contents of the brief is aided by this efficient survey of the authorities provided by opposing counsel's table of citations. In a way, the table of citations serves an important foreshadowing function that aids the reader

in processing the argument. See Michael J. Higdon, *Something Judicious This Way Comes . . . the Use of Foreshadowing As A Persuasive Device in Judicial Narrative*, 44 U. Rich. L. Rev. 1213, 1219 (2010) (discussing how foreshadowing aids in information processing.).

The ability to efficiently survey the authorities in a brief also has a persuasive effect on the reader. Briefs that are supported by ample authority conveyed in a cleanly presented table of citations are likely to create a better first impression on the reader. The reader can anticipate that the argument sections will be rooted in controlling authority. Competence is pre-established. This, too, is a psychological benefit of foreshadowing provided by the table of citations. *Id.* at 1226-1233. (discussing role of foreshadowing in priming and schema theories of information processing.).

Apparently, I am not alone in valuing the table of citations for its efficient method of conveying the strength of a brief. Professor Tessa L. Dysart (James E. Rogers College of Law at The University of Arizona) also agrees. She explains that the table of citations offers “more than just getting the “feel” of a brief. It tells me the strength of the reasoning and points me to where in the brief I need to look if I am concerned about a particular case.” Tessa L. Dysart. *Should Courts Dispense with the Tables of Authorities?* Appellate Advocacy Blog (Feb. 06, 2023) (available at https://lawprofessors.typepad.com/appellate_advocacy/2023/02/should-courts-

[dispense-with-the-table-of-authorities.html](#)) (last accessed Apr. 29, 2023).

According to Professor Dysart, judges also rely upon table of citations to assess the merits of briefs. *Id.* The Petition asserts that judges don't use the table of citations anymore because briefs are filed electronically. Petition at 7 (citing Judge Philip G. Espinosa, *A Word from the Future the Virtually Paperless Court of Appeals*, *Judges' J.*, Summer 2010, at 10 (2010)). Yet, an electronic search of Judge Espinosa's article shows that the piece does not reference the utility of a table of citations, let alone establish that judges have abandoned them.

A tables of citations offer more than an efficient tool for surveying a brief. They are also very helpful in preparing for responsive briefing.

B. Promotes efficient responsive briefing.

The same features that make a table of citations effective tools to efficiently survey the merits of a brief serve to assist opposing counsel in drafting responsive briefs. Opposing counsel's table of citations provides a blueprint for a responsive brief. If opposing counsel's brief ignores the central authority offered in my opening brief, I know to highlight the failure to rebut the authority in my reply brief. If opposing counsel offers authority not included in my opening brief, I know to examine whether my initial argument was deficient and to conduct more research to rebut the new authority.

Opposing counsel's table of citations is also helpful at the back-end of my responsive briefing process. Once I am done with a draft my responsive brief, I compare my table of citation with that of opposing counsel. If my responsive brief does not include references to the central authority listed in opposing counsel's table of citations, I consider whether I have good reason for failing to distinguish or embrace the authority in my own brief. Often, this process leads to briefing that is more directly responsive to the issues raised in opposing counsel's brief.

Petitioners fails to acknowledge that a table of citations is useful to opposing counsel and others who read their briefs. Just because Petitioners have not recognized the utility of opposing counsel's table of citations in preparing responsive briefs does not mean that the utility is non-existent.

C. Important tool for oral argument preparation.

The table of citations offered by both parties and amicus curiae are invaluable in oral argument preparation. Perhaps I tend to over-prepare for oral argument, but I wouldn't like feeling unprepared if ever asked a question about a particular case at argument and I didn't know its relevance to the case at bar. I have avoided such awkward moments by scrupulously examining the table of citations in each brief during my oral argument preparation.

During my initial argument preparation, I combine the table of citations offered in each brief and compile the cited authority into a large file. I examine the

cases cited the most on each table. Then, I start compiling questions that could arise during the argument concerning the relevant authorities. After I am confident I have a grasp on the issues and a fluent understanding of the authorities, I start to outline my argument.

At each of these steps, I use the table of citations in my own briefs and those of opposing counsel and amicus curiae to guide my argument development. Once I've completed the outline of the argument, I practice my delivery by working through my outline and stopping to review the questions I've developed from my review of the briefs, including the table of citations. Before mooting the case, I compare the cases referenced in my list of questions and my outline to ensure that I am not missing important authority. Once I am confident that my preparation is sufficient, I test myself by reviewing the tables of citations to ensure the case name jogs the relevant facts, holding, and relevance to the argument.

During the heat of argument, I often find myself referring to the table of citations to find relevant portions of briefs during opposing counsel's argument to prepare my response.

Moreover, the table of citations offered in each brief serve as an efficient tool for others who are looking to quickly review a case and assist counsel of record in argument preparation by mooting the case. Lawyers are busy. We all have our own cases. So when we are asked to sit in on a moot court to help our colleagues, we

must be efficient in our preparation. Seasoned attorneys can quickly survey the table of contents and the table of citations, recognize the relevant authority, and ask questions of counsel at a moot with little or no preparation. I assume the same is true of the actual judges who hear the argument in open court.

This Court should encourage parties to be prepared for argument. Proper utilization of a table of citations is essential to such preparation. A table of citations is also helpful to amicus curiae when making decisions whether to participate in a case.

D. Assists amicus curiae.

The reasons why a table of citations serve as an efficient tool to survey the merits of a brief also assist amicus curiae in deciding whether to participate in a particular case. Generally, amicus curiae may participate in a case if:

- (i) a party has incompetent representation or is self-represented;
- (ii) amicus curiae has an interest in another case that the decision in the present case may affect; or
- (iii) amicus curiae can provide information, perspective, or argument that can help the appellate court beyond the help that the parties' lawyers provide.

[Ariz. R. Crim. P. 31.15\(b\)\(2\)\(B\)](#).

An ability to review the table of citations is relevant to each of the considerations offered in [Ariz. R. Crim. P. 31.15\(b\)\(2\)\(B\)](#). One can quickly tell if a party has offered incompetent representation by comparing the absence of authority

in a table of citations or the paucity of the legal development based on how little a particular authority is cited in the brief. Similarly, a review of the authority in the table of citations helps amicus curiae quickly decide whether other the case reflects an interest in another case or whether additional information can be provided to assist the court. Alternatively, when a brief is well-written and thoroughly developed, the table of citations will assist potential amicus curiae in concluding that there is nothing more that can be offered that isn't already in a party's brief.

The Petition fails to recognize these important uses for a table of citations. Instead, the Petition asserts that the age of electronic briefing has rendered the table of citations obsolete. But electronic briefing tools only make the inclusion of a table of citations more—not less—desirable.

E. The reasons justifying the proposal actually undermine it.

The first reasoned offered by Petitioners to justify eliminating the table of citations requirement is that they are cumbersome to produce. Petition at 5. Next, the Petition asserts that the need for a table of citations is obviated by the ability to electronically search for authority in most briefs. Petition at 7. Petitioners also assert that the table requirement should be cut to save costs. Petition at 6. Finally, Petitioners assert that a table of citations is not useful if it merely replicates erroneously cited authority from the body of the brief. Petition at 10.

But each of these assertions actually support keeping the table of citations requirement.

1. Electronic briefing tools make the table of citations requirement less cumbersome.

Consider the first two assertions in tandem: 1.) cumbersomeness and 2.) electronic format conveniences. The Petition fails to acknowledge that the electronic format of briefs makes the creation of a table of citations far less cumbersome than before the era of electronic briefs. Software advances are available to nearly all practitioners. Indeed, none have professed to not have access to the feature offered in Microsoft Word or other tools such as Westlaw Drafting assistant. Rather, the Petition asserts that these tools are imperfect. Petition at 5. But the efficiency gains offered by the software tools reduce greatly the time it takes to review the software-generated tables and ensure their accuracy.

2. Searchable text functions are an inadequate replacement.

Moreover, the usefulness of searchable text applies with the same force to the increased efficiency of creating and proofing tables. What the Petition does not account for is the inefficiency of relying solely on electronic search functions within a text to assess what is *missing* from a brief. The absence of authority in a brief is quickly identified by reviewing a table of citations. Its absence can be obscured if the table has been omitted. Additionally, a table of citations cues counsel into the need for more research.

Consider a famous observation by Former Secretary of Defense, Donald

Rumsfeld:

Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tends to be the difficult ones.

[“Defense.gov News Transcript: DoD News Briefing – Secretary Rumsfeld and Gen. Myers, United States Department of Defense \(defense.gov\)”](#) (Feb. 12, 2002) (archived from original on March 20, 2018)

The absence of authority contained within a table of citations gives counsel pause for consideration of whether there are “unknown unknowns” about the case. Any reasonable attorney confronted with an “unknown” is likely to conduct more research and cure the deficit of knowledge and provide more legal development for the positions in the briefing.

Lastly, Petitioner’s reliance on electronic search functions presupposes a party has filed the brief in a format conducive to electronic search. I regularly encounter briefs filed by at least one government agency that are not optimized for digital convenience. I often have limited success in converting those briefs into a format

that works with an electronic search function. In those cases, the table of citations is invaluable.

3. The proposal shifts costs rather than save them.

Similarly, Petitioner's argument that the table requirement imposes unnecessary costs on litigants is unavailing. Petition at 6. As I have explained above, opposing counsel's table of citations promotes efficient review and responses. The tables also promote effective representation by encouraging thorough issue development. Thus, the table of citations requirement save costs and promote competent representations.

4. The proposal will promote more inaccuracies.

Lastly, Petitioner's assertion that a table of citations merely encourages more erroneous citation is mistaken. Petition at 10. To support this claim, the Petition points to a couple of cases where courts have admonished or imposed sanctions for not complying with briefing requirements. Petition at 5, n.2. But in both cases, the failures of counsel were not limited to errors or omissions associated with the table of citations. Counsel in *Nixon v. City and County of Denver*, also failed to include "a jurisdictional statements" and a "statement of the issues." 784 F.3d 1364, n.1 (10th Cir. 2015). *In re Hernandez v. Orozco*, triggered sanctions for a "single page" brief that included no record citations, omitted the argument section, cited only "an irrelevant rule" and the jurisdictional statute, and failed to "comply in any

meaningful way with the requirements of [ARCAP 13\(a\)](#)” 1 CA-CV 19-0526 FC, [2020 WL 5423088](#), at *2 (App. Sept. 10, 2020).

Eliminating the table of citations requirement would have offered no refuge to counsel in either case.

Rather than promote inaccuracies in briefing, it is the final process of creating the table of citations that clues counsel or their staff to errors in citation within the brief, particularly if software such as Westlaw drafting assistant is used in either developing the table or linking the authority throughout the brief. Incorrectly cited authority will not generate links when submitted through Westlaw drafting assistant. Thus, counsel can quickly identify the errors when the authority is not linked in the table or in the brief. The same is true for using the same software to create the table.

But even if counsel or staff doesn't use such software, the tables offer a quick method of checking the accuracy of citation. First, if an authority is cited more than once in a brief, there is a chance one of the citations include an error. When compiling the table of citations, I or my staff often catch these errors because it becomes obvious when a case with the same name appears more than once on a table because numbers within the citation are transposed or off due to a typo. Second, the table of citations makes it easier to review each cite for accuracy by checking it against the source since I or my staff can work through the list quickly and

efficiently. Eliminating the table of citations requirement will not improve the accuracy of briefs; it will undermine it.

F. The proposal is at odds with section 2 of the Petition in [R-22-0041](#).

Lastly, the Petition should be rejected because it is at odds with a laudable proposal outline in section 2 of the Petition filed in R-22-0041 aimed at providing procedural protections against appellate decisions decided on unbriefed bases. *See [Petition to Amend Arizona Rules of Civil Appellate Procedure 15 and 12, Arizona Rule of Criminal Procedure 31, and the Rules of the Supreme Court at 5-7, R-22-0041 \(filed Nov. 09, 2022\)](#)*. I support the proposals in section 1 and section 2 of the Petition. But adopting the Petitioner’s proposal will only increase the likelihood that appellate decisions are decided on unbriefed bases because cutting the table of citations requirement will only more difficult to ensure that their decisions reflect the parties’ briefing.

I often review the decisions rendered in my cases for “stickiness.” “A citation is sticky if it appears in one of the parties’ briefs and then again in the court’s opinion.” Kevin Bennardo & Alexa Z. Chew, *[Citation Stickiness](#)*, 20 *J. App. Prac. & Process* 61 (2019). When a decision turns on a case that isn’t “sticky” or doesn’t appear in either party’s brief, it is a clue as to whether the decision was decided on an unbriefed basis. *Id.* at 67. The table of citations offered by the parties’ briefs make it very easy for me to conclude whether the appellate court has rendered a decision

based on the briefing. I imagine the tables must also be helpful in drafting the decisions and ensuring it hasn't strayed from the briefing.

This Court should keep the table requirement to encourage appellate courts to render decisions based on the brief.

III. Conclusion.

There are a myriad of reasons to keep the table of citations requirement for appellate briefs. The reasons offered in the Petition to eliminate the requirement aren't compelling. If adopted, the attorneys who fail to utilize tables or recognize their utility will abandon them. This will only shift preparation costs to opposing counsel and promote less developed appellate briefs, resulting in decisions that are more likely to be rendered on unbriefed bases.

The age of electronic briefing only makes the table of citations less cumbersome to produce. A table of citation is an essential tool to the thorough and eager appellate practitioner. This Court should keep the requirement for briefs submitted by members of the Bar.

Respectfully submitted this 30th day of April, 2023

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