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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)
) Arizona Supreme Court No. R-22-
PETITION TO AMEND ARIZONA) 0041
RULES OF CIVIL APPELLATE)
PROCEDURE 15 AND 21,) COMMENT TO PETITION TO
ARIZONA RULE OF CRIMINAL) AMEND
PROCEDURE 31, AND THE)
RULES OF THE SUPREME COURT)

Pursuant to Rule 28(e), Rules of the Supreme Court of Arizona, Judge Garye L. Vasquez and Judge Kent E. Cattani, Chief Judges of the two Divisions of the Arizona Court of Appeals, submit the following Comment to the above-captioned Petition.

Petitioners propose that the Arizona Supreme Court adopt a new rule stating that an appellate court should, absent unusual circumstances, provide notice to the parties before it decides an appeal on a factual or legal basis not briefed or argued by the parties and allow them an opportunity to submit supplemental briefing. This proposal, based on the anecdotal perceptions of petitioners and other appellate practitioners that this occurs often enough to be a problem warranting correction, is in our view unnecessary and may result in unintended consequences.

The petitioners' concerns are largely addressed by current practice. The appellate court already orders supplemental briefing on potentially dispositive issues and arguments not raised by the parties if the court believes supplemental briefing is necessary. And the undersigned judges are of the view that this should be the default procedure followed by appellate judges before resolving an issue that has not been briefed by the parties.

Nevertheless, there may be instances in which the record or law is clear and additional briefing is unnecessary. The proposed new rule would take away the court's discretion to undertake its own analysis and issue a decision based on the applicable law and evidence. In addition, such a rule

could potentially delay the court's decisions, cause the parties to incur further expense preparing (sometimes unnecessary) supplemental briefs, and lead to disputes regarding whether the court's decision was based – in whole or in part – on an “unbriefed basis.”

There is no question that a party's opportunity to be heard before a court renders a decision is central to our adversary system and due process of law. The rules for civil and criminal appeals honor this principle by allowing both the appellant and the appellee to present written arguments to the court before it considers an appeal. ARCAP 13; Ariz. R. Crim. Proc. 31.10. But if the parties have not made controlling factual or legal arguments in their briefing, they should not automatically be entitled to submit additional briefing after the court has identified such arguments.

Finally, Petitioners acknowledge that, to the extent a practitioner believes an appellate decision has improperly resolved an issue that was not briefed by the parties, the practitioner can file a motion for reconsideration on that basis. Thus, there is already a mechanism in place to address the concern raised in the Petition.

Accordingly, we respectfully ask that the Court deny petitioners' request that the Court adopt a new rule prohibiting an appellate court from

deciding an appeal on a factual or legal basis not briefed or argued by the parties unless it first allows the parties an opportunity to submit supplemental briefing.

DATED this 1st day of May, 2023.

____/s/_____
Garye L. Vasquez
Kent E. Cattani
Chief Judges
Arizona Court of Appeals