ARIZONA SUPREME COURT

Supreme Court No. R-22-0041

REPLY TO COMMENTS ON PETITION TO AMEND ARIZONA RULES OF CIVIL APPELLATE PROCEDURE 15 AND 21, ARIZONA RULE OF CRIMINAL PROCEDURE 31, AND THE RULES OF THE SUPREME COURT

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5/25/2023

Pursuant to Rule 28(e)(5) of the Arizona Supreme Court Rules, the undersigned Petitioners reply to two of the comments that have been filed on this Petition.[1] Specifically, we reply to the following: (1) Chief Judge Vasquez and Chief Judge Cattani's opposition to our proposal regarding appellate decisions on an unbriefed basis and (2) the Directors of the Maricopa County Indigent Defense Agencies' proposed modification of our proposal regarding responses to friendly amicus briefs.[2]

1. Appellate Decisions on an Unbriefed Basis

Our proposed rule provides that before an appeal is decided on an unbriefed basis, the court—absent unusual circumstances—should notify the parties and give them an opportunity to submit supplemental briefs on the point. Judges Vasquez and Cattani agree (at 2) that the opportunity for such supplemental briefing should be "the default procedure" followed by the courts. They do not question that this procedure fosters due process principles and helps avoid judicial error. But the Judges nonetheless argue that courts should have the discretion to bypass notice and

[1] Judge Andrew Jacobs joined in this Petition while in private practice. He joins in Section 2 of this reply (concerning responses to amicus brief), but not Section 1 (concerning appellate decisions on an unbriefed basis).

[2] None of the comments disagreed with our proposal to clarify the procedure for contesting an opposing party's entitlement to attorneys' fees.

supplemental briefing whenever the court—without the benefit of the parties' views—believes that they are unnecessary.

We respectfully disagree that such open-ended discretion is appropriate. Our proposed rule recognizes that there may be "unusual circumstances" when allowing supplemental briefing (before the court decides a case on an unbriefed basis) would do more harm than good—such as when an immediate decision is necessary to prevent irreparable injury. But in the absence of such circumstances, it is only fair that parties have a chance to be heard through supplemental briefing. The waiver doctrine points in the same direction. "Although our appellate courts may choose to address issues the parties fail to address in the briefs, they should heed the principles underlying the waiver doctrine intended 'to prevent the court from deciding cases with no research assistance or analytical input from the parties.'" *State v. Robertson*, 249 Ariz. 256, 258 ¶ 9 (2020) (internal citations omitted).

Nor are there any compelling reasons why the discretion urged by Judges Vasquez and Cattani is appropriate. In particular, the Judges argue (at 2) that the concerns underlying our proposal are already "largely addressed by [the] current practice" of courts allowing supplemental briefing. But in our experience and that of our colleagues, current practice is far from uniform. Illustratively, David Euchner's Comment on our Petition (at 4-5) describes five recent cases in which the Arizona Court of Appeals decided cases on an unbriefed basis—including cases

where supplemental briefing may have avoided an incorrect outcome.[3] Likewise, the Directors of the Maricopa County Indigent Defense Agencies Joint Comment (at 4) states that decisions on an unbriefed basis present "a pervasive and ongoing problem."

Judges Vasquez and Cattani also fear (at 3) that our proposal "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.'" We don't minimize concerns about delay and expense. But the parties can always waive the chance for supplemental briefing if they don't think it would be helpful or worth the cost, and the court can always expedite the briefing (and limit the allowed pages). Nor should it be unusually difficult for the court to decide whether a basis for decision was briefed or not. This is the same decision courts now make in evaluating whether arguments have been waived and is also like the decision courts are called upon to make under Rule 56(f) of the Arizona Rules of Civil Procedure. Under that rule, courts must decide whether their summary

[3] Mr. Euchner suggests (at 9) that a rule on unbriefed basis for decisions should be placed in ARCAP and the corresponding provisions of the criminal rules as opposed to in the Supreme Court rules. We do not have a strong view on the rule's placement. We note, however, that rules analogous to our proposal do appear in the Supreme Court rules. *See* Supreme Court Rule 111.

judgment decision would be based "on grounds not raised by a party." If so, they must give the parties "notice and a reasonable time to respond."

In sum, the benefits of permitting further briefing—in terms of perceived and actual fairness and better decision making—are more than sufficient to outweigh the potential costs.

2. Responses to Amicus Briefs

The Directors of the Maricopa County Indigent Defense Agencies propose a modification to our proposal on responses to amicus briefs. Our proposal would allow responses only to address "points of disagreement with the amicus brief." The Directors would go further and also allow responses "to clarify" points raised by amicus curiae.

We disagree with the Directors' proposed modification. On one hand, the term "clarify" is virtually boundless—it simply means "[t]o make clear." *See clarify*, Oxford English Dictionary (oed.com),https://www.oed.com/view/Entry/33819?redirectedFrom=clarify& (last visited May 23, 2023). A clever advocate can easily justify their response to a friendly amicus brief as being merely a point of "clarification." That would drive a hole in our attempt to stop such responses from being used to extend and elaborate on a party's own arguments.

On the other hand, our proposal—requiring disagreement to justify a response to an amicus brief—should adequately address the Directors' concerns. For

example, they cite a case in which a party filed a response (to an otherwise friendly amicus brief) to ensure that the amicus's argument wouldn't be construed to deny relief to the party. But that situation should properly be considered a "disagreement." That is, the party disagreed with amicus to the extent amicus's argument would deny relief to the party.

Conclusion

Petitioners urge the Court to adopt the proposed amendments set forth in the Appendix to their Petition.

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