

Casey D. Ball (#034987)
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-8137
caseydball@gmail.com

Kelley M. Jancaitis (#025555)
2800 N. Central Ave, Suite 1600
Phoenix, Arizona 85004
(602) 271-7701
kmj@bowlaw.com

**IN THE SUPREME COURT
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).

Supreme Court No. R-23-0026

Reply to Comments

Pursuant to [Rule 28\(e\)\(5\), Rules of the Arizona Supreme Court](#), Petitioners submit this Reply to the comments posted in this matter. Petitioners thank those who took the time to carefully consider this petition and weigh in on it—both for and against. This petition has the support of the Arizona Attorney General’s Office; the State Bar of Arizona; the Pima County Bar Association; Judge Morse of the Arizona Court of Appeals, Division One; and several attorneys. The comments in support validate Petitioners’ argument: the minimal (if any) benefits provided by Tables of Citations do not justify the cumulative cost of making them.

Although three appellate practitioners filed comments in opposition, their arguments provide no support for keeping the Table of Citations a mandatory section of appellate briefs. First, contrary to their assertions, Petitioners' estimates for the costs of creating a Table of Citations are not exaggerated. Second, to the extent some practitioners find building the tables beneficial for their own editing process, nothing in this rule change prevents them from continuing to use them. Third, use of the tables at oral argument in a relatively small percentage of cases hardly justifies the requirement that the tables be included in every brief. Fourth, the objectors fail to explain why getting a "first impression" of a case from the Table of Citations justifies the cost. Finally, to the extent a small minority of attorneys and judges regularly rely on their opposing counsel's Table of Citations, this rule change does not prevent them from creating the tables themselves, or from adapting to new forms of reviewing briefs.

This petition proposes a simple cost-savings adjustment to appellate briefs that will save substantial time and resources for appellate practitioners. Petitioners urge this Court to adopt the proposed rule changes.

I. While the average cost of building a Table of Citations is unknown, it cannot be denied that the cumulative cost is high.

As petitioners noted, given the number of factors that go into making a Table of Citations, "there may be no genuinely representative average time" for building one. *See* Pet. at 5. The comments in opposition take issue with

Petitioners’ suggestion that the costs for building a Table of Citations might run into the “hundreds of dollars.” *See id.* at 6. Charles Wirken suggests that Petitioners should not assume the tables are created by attorneys because the work “is a clerical function for the lawyer’s secretary.” *See Wirken, Comment in Opposition Filed May 1, 2023* (further suggesting that an attorney’s review of the table should take “only a few tenths of an hour to do”). David Euchner likewise suggests that most attorneys are not building the tables. *See Euchner, Comment in Opposition Filed April 28, 2023*, at 3 (“[A] firm is not billing \$500 per hour for a legal secretary to build and review the table of authorities.”).

In contrast, the State Bar suggests that “the cost per brief is at least in the hundreds of dollars, assuming the client is being billed for the preparation,” and that “[s]ome tables of authorities could run up to or over \$1,000, depending on how many people it requires to finalize the table.” *See State Bar of Arizona, Comment in Support Filed May 2, 2023*, at 2.

In an effort to get some better data on the cost of building a Table of Citations, Petitioners examined over 60 applications for attorneys’ fees from cases in the Arizona Court of Appeals, Division Two.¹ Unfortunately, the majority of

¹ Petitioners reviewed cases from Division Two because the documents are readily accessible and can be hyperlinked in this Reply.

the applications for attorneys' fees did not itemize the Table of Citations. Instead, those applications lumped the Table of Citations into a large block of time labeled "finalizing the brief" or "final edits." However, Petitioners found a few examples where the time spent building a Table of Citations was billed separately (or close to separate).

Starting with the least expensive example, in *John F. Long Properties LLLP v. Drury Southwest, Inc.*, 2 CA-CV 2022-0079, an attorney spent .3 hours "review[ing] and revis[ing] tables of contents and authorities," at a rate of \$470.24 per hour, for a cost of \$141. See *Statement of Costs and Attorneys' Fees*, at 11. However, there is no separate entry for the initial creation of the Table of Citations, *id.*, so we can assume the true cost to create the table was higher.

Next, in *Fontes v. AAA Cab Service, Inc.*, 2 CA-CV 2021-0026, an attorney billed 1.6 hours at the "paralegal rate" of \$100.00 per hour for "[w]ork on record citations, tables, etc. for Answering Brief," for a total cost of \$160. See *Application for Attorney Fees and Statement of Costs*, at 9. And in *Larry D. Spector v. Fitness & Sports Clubs, LLC*, 2 CA-CV 2022-0073, a paralegal billed 1.1 hours for "review[ing], edit[ing] and prepar[ing] table of authorities of opening brief," at a rate of \$175 per hour, for a total cost of \$192.50. See *Appellant's Application for Fees and Costs*, at 12.

In the middle range of the spectrum, we found *In Re the Marriage of Aboud*, 2 CA-CV 2021-0131-FC, in which an associate attorney billed 1.2 hours at a rate of \$275 per hour to make “final updates to the Table of Contents, Table of Authorities, and references to the records,” for a cost of \$330.00. See [Application for Attorneys’ Fees and Costs](#), at 7. In that same range, a paralegal in *Smith v. NGM Insurance Co.*, 2 CA-CV 2022-0003, billed 3.2 hours for “Revise appellate answering brief to properly format table of contents and table of authorities,” at a rate of \$105 per hour, for a total cost of \$336. See [Verified Statement of Attorneys’ Fees and Costs on Appeal](#), at 10.

Finally, we found a few cases at the higher end of the spectrum. However, most of these applications billed the Table of Citations with other tasks, so it is not entirely clear how much of the overall cost can be directly attributable to the Table of Citations. For example, in *Hartfield v. Kemp*, 2 CA-CV 2021-0136, an attorney billed 1.6 hours to “prepare brief for filing (draft Table of Contents, Table of Authorities, and insert hyperlinks to the record),” at a rate of \$350 per hour for a total cost of \$560. See [Appellee’s Statement of Attorneys’ Fees](#), at 3. And in *In re Marriage of Chapman*, 2 CA-CV 2020-0049-FC, a law clerk billed 3.2 hours at a rate of \$175 per hour to “finish drafting Response Brief; Create Table of Contents and Table of Citations; keycite cases/law,” for a total cost of \$560. See [Affidavit of](#)

Attorney's Fees and Costs, at 13. Had the costs been more itemized, we suspect these two Tables of Citations would be closer to the \$200-\$300 range.

Moving up the scale, in *In re Marriage of Yao and Zhang*, 2 CA-CV 2020-0142-FC, an attorney billed 2.4 hours at a rate of \$330 per hour to “[f]inalize Answering Brief (hyperlink citations to the record and legal authorities, complete table of authorities),” for a total cost of \$792. See *Attorney's Fees Application and Affidavit*, at 10. And in *In Re the Marriage of Rojas*, 2 CA-CV 2022-0035-FC, the application for attorneys' fees references the table of citations in three separate billing entries, but always with other tasks. The total sum for those three entries is \$1013.64, of which a significant portion is attributable to the Table of Citations. However, the three entries relate to both the opening and reply briefs, which reduces the per-brief cost. See *Appellant's Application for Fees and Costs*, at 7–8.

Petitioners recognize the limitations of these examples, particularly those in which the time spent building the Table of Citations is combined with other tasks. However, these examples show Petitioners were not off the mark by claiming the cost of creating a Table of Citations can run into the hundreds of dollars. Contrary to both Charles Wirken's and David Euchner's claims, these examples also show that building the Table of Authorities is not just “secretary work,” and even when a paralegal does perform the task, the rate charged ranges from \$100 to \$175 per hour—hardly chump change. Moreover, at the low end of the spectrum, even a

simple review of the Table of Citations by the attorney, which Charles Wirken suggests should take “only a few tenths of an hour to do,” can cost over \$140—and this does not account for the additional cost of actually preparing the table.²

Finally, as several commenters noted, these costs aggregate. *See* Kathleen Sweeney, *Arizona Attorney General’s Office Comment in Support Filed April 26, 2023* (noting that “[g]iven the large number of briefs” filed by the office, the proposed rule would “save the Office a substantial amount of time and resources”); Lisa Panahi, *Arizona State Bar’s Comment in Support*, at 4–5 (arguing that “[w]hile the saving may be modest, it will aggregate,” and “[a]nything that makes litigation more efficient and cost effective for parties deserves due consideration”); James Rappaport and Joseph Ezzo, *Pima County Bar Association’s Comment in Support*, at 2 (highlighting Petitioners’ “conservative” estimate that in 2020 alone, 275 days’ worth of time was spent building Tables of Citations).

² Kevin Heade suggests 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.” Heade, at 11. This is both inaccurate, *see* Pet. at 6, and meaningless. The question before the Court is not whether it is easier to make the Table of Citations now than it was before, but whether there is still a need for the Table of Citations at all. Even accounting for time savings from modern technology, the time it takes to compile the Table of Citations, confirm its accuracy, and correct any errors is not insignificant, as seen by the examples above.

II. Any attorney who finds benefits to creating their own Tables of Citations can still do so under the proposed rule change.

Kevin Heade argues the Table of Citations “serves an important foreshadowing function that aids the reader in processing the argument,” and can convey the “strength of a brief.” Heade, at 4–6. While Petitioners doubt that the table has any meaningful persuasive function, nothing in this proposed rule change would prevent an attorney from continuing to include the table in their briefs. In a similar vein, both Kevin Heade and David Euchner argue that the process of building a Table of Citations helps them spot citation and formatting errors. Heade, at 14–15; Euchner, at 2. Again, nothing in this rule change prevents them from continuing to use the Table of Citations as a tool for proofreading their brief. But the requirement should not remain in place for every attorney simply because some attorneys use the Table of Citations as a final means of editing their work.

III. That some attorneys use the Table of Citations in oral argument hardly justifies the table’s inclusion in every brief because relatively few cases have oral argument.

Kevin Heade argues that his use of the table of citations to prepare for oral arguments justifies the continued requirement that the tables be included in all appellate briefs. *See* Heade, at 7-9. Yet, David Euchner concedes that this purpose, standing alone, does not justify requiring the tables because most cases do not have oral argument. Euchner, at 4. To provide some better perspective, in 2022, this Court heard argument in 46 cases, Division One heard argument in 132

cases, and Division Two heard argument in 20 cases.³ Thus, in total, only 198 cases had oral argument. While not a perfect comparison, this Court’s most recent annual report stated that in FY2021, 4,092 cases were filed in the appellate courts. *See Arizona Supreme Court, 2021 Judicial Data Report, at 5–7* (Petitioners added the new filings from each court to arrive at 4,092 cases). Assuming the ratio of oral arguments to case filings remains fairly constant, less than five percent of cases ever have oral argument. If an advocate, or judge for that matter, finds the Table of Citations useful for oral argument, the more efficient practice would be to build the table after oral argument is scheduled, not to require them in every case in the off-chance oral argument is ordered.

IV. The objectors’ reliance on opposing counsel’s Table of Citations for getting a “first impression” is inconsequential.

Both Kevin Heade and David Euchner assert that the Table of Citations is a valuable tool for quickly assessing the strength of a case. Heade, at 4–6, Euchner at 3. But neither convincingly explains *why* a first impression is valuable. No competent advocate will draft their responsive brief based solely on the contents of a Table of Citations because the merits of an argument, not the minutiae of a brief, ultimately carry the day. Whatever first impression a reader might scrape from a

³ These numbers were calculated by counting the oral arguments posted on the respective courts’ websites.

list of authorities and the pages those authorities are on provides no substantive value to addressing the merits of an argument. Petitioners have yet to hear a justifiable explanation for why, in appellate proceedings where parties and judges have time to read, digest, and respond to pleadings, a first impression matters at all.

For this same reason, Kevin Heade’s assertion that this proposed rule change conflicts with another rule change petition, R-22-0041, is a stretch. Heade, at 15. That rule petition seeks to add “procedural protection when an appeal . . . is decided on an unbriefed basis.” See R-22-0041, at 5. Heade claims that eliminating the Table of Citations would “only increase the likelihood that appellate decisions are decided on unbriefed bases.” Heade, at 5, but appellate courts rarely “stray[] from the briefing” in the first place, let alone avoid straying because there is a list of authorities placed at the beginning of a brief.

Take, for example, Justice Scalia’s concurrence in *National Aeronautics & Space Administration. v. Nelson*, in which he chided respondents for failing to identify which constitutional provision they claim had been violated. [562 U.S. 134, 160 \(2011\)](#) (Scalia, J., concurring). Referring to the brief’s “Table of Authorities,” Justice Scalia provided the following critique:

Before addressing the constitutional issues, however, I must observe a remarkable and telling fact about this case, unique in my tenure on this Court: Respondents’ brief, in arguing that the Federal Government violated the Constitution, does not once identify which provision of the Constitution that might be. The “Table of Authorities” contains citations of cases from federal and state courts,

federal and state statutes, Rules of Evidence from four States, two Executive Orders, a House Report, and even more exotic sources of law, such as two reports of the Government Accountability Office and an Equal Employment Opportunity Commission document concerning “Enforcement Guidance.” And yet it contains not a single citation of the sole document we are called upon to construe: the Constitution of the United States.

Id. Although Justice Scalia used the Table of Citations as his punching bag, he did not stop his review of the brief at the tables. Instead, he reviewed the “body of the brief,” which “include[d] a single, fleeting reference to the Due Process Clause, buried in a citation of the assuredly inapposite *Lawrence v. Texas*[.]” *Id.* He also examined the briefing in the courts below, going so far as to quote a footnote in the Ninth Circuit briefing. *Id.* As this example demonstrates, a careful advocate or judge will review the entire brief before responding to an argument (or the lack thereof).⁴

V. Those few who regularly rely on the tables should either bear the cost of creating them or adapt to zero-cost alternatives.

Charles Wirken argues that “[a]lthough readers could create their own Tables, that task should not be imposed on judges and their staff, or opposing counsel.” Kevin Heade expresses a similar sentiment. Heade, at 13. If, as

⁴ As an aside, although Justice Scalia used the Table of Citations to demonstrate that the brief was missing citations to a constitutional provision, the phrase “Table of Authorities” could have easily be replaced with “brief” without any loss of meaning.

Petitioners argue, and the comments tend to show,⁵ only a small minority of practitioners and judges use the Table of Citations at all, let alone regularly, then it is the current rule, not the proposed rule, that unfairly shifts the costs of building a Table of Citations. It is wasteful and unfair to require every brief to include a table that only a few will use. Notably, no appellate judges weighed in against the proposed rule change, further demonstrating that the Table of Citations is not a crucial component of the brief. With time, Petitioners suspect even those few who regularly use the Table of Citations will learn to adapt to other more efficient means of searching a brief. *Cf. Hon. Philip G. Espinosa, A Word from the Future: The Virtually Paperless Court of Appeals, 49 Judges J. 10 (2010)* (describing the ease with which even judges who “grew up” using printed versions of court documents transitioned to the paperless format).

⁵ See Judge James Morse, *Comment in Support Filed on April 19, 2023* (providing “anecdotal support for the proposition that the Tables of Authority are rarely used as a navigational tool”); Kevin Morrow, *Comment in Support Filed on April 20, 2023* (remembering only one occasion in the last year while working as a judicial law clerk and then an appellate attorney where he used a Table of Citations); Julie Pack, *Comment in Support Filed on April 20, 2023* (former clerk at the Arizona Supreme Court stating that she never used the Table of Citations when reviewing briefs); Lisa Bivens, *Comment in Support Filed on April 19, 2023* (describing building the Table of Citations as a “time consuming and thankless task” and a “fruitless requirement”).

Conclusion

Ultimately, this Court must decide whether the cumulative costs of creating Tables of Citations are justifiable in light of other, zero-cost methods for searching electronic briefs. Petitioners have shown the costs are high in the aggregate, while the benefits are negligible. We respectfully request that this Court grant the petition to make the Table of Citations an optional component of appellate briefs.

Respectfully submitted on June 1, 2023.

/s
Casey D. Ball (#034987)

/s
Kelley M. Jancaitis (#025555)