SUPPLEMENTING SUPPLEMENTAL BRIEFING

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Appellate courts usually describe themselves as dispute resolution venues that only decide issues presented by the parties.[1] The logic is simple: parties know their case best, and it is not fair for an appellate court to address an issue if it is not fully informed by the lower court's findings or the parties' arguments.[2]

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1. *See, e.g.*, Greenlaw v. United States, 554 U.S. 237, 243 (2008) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); United States v. Hartmann, 958 F.2d 774, 792 (7th Cir. 1992) ("[A]rguments not made in the district court are waived on appeal . . . ."); Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'") (quoting Thayer v. American Financial Advisers, Inc., 322 N.W.2d 599, 604 (Minn. 1982)). Scholars have made this argument, too. *See, e.g.*, Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 252 (2000); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 449 (2009); Rosemary Krimbel, Note, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 941 (1989); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 n.23 (1982). One exception to this rule which virtually all agree upon is subject-matter jurisdiction. *See, e.g.*, Devins, *supra* note 1, at 252; Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 88 (Ill. 2013) (Thomas, J., specially concurring) ("[O]ther than for assessing subject matter jurisdiction, 'a reviewing court should not normally search the record for unargued and unbriefed reasons to *reverse* a trial court judgment.'") (emphasis in original) (quoting Saldana v. Wirtz Cartage Co., 74 Ill.2d 379, 386 (1978)).

2. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 120 (1976); Rollins v. Home Depot USA, 8 F.4th 393, 398 (5th Cir. 2021); Hartmann v. Prudential Ins. Co., 9 F.3d 1207, 1214–15 (7th Cir. 1993).

But it is not uncommon for appellate courts to raise issues *sua sponte*.[3] This matters because by raising issues unilaterally, appellate courts undermine core principles of the adversarial system. *Sua sponte* action also raises concerns about the accuracy of judicial decision-making and often is used arbitrarily and with little transparency.

Take Evelyn Sineneng-Smith's case. Sineneng-Smith was prosecuted under federal law.[4] She was convicted at the district court and appealed.[5] After hearing oral argument, the court of appeals decided that the case raised questions that neither Sineneng-Smith nor the Government presented.[6] The court wanted to know, among other things, whether one section in the conviction statute was unconstitutionally overbroad or vague and ordered the parties to supplementally brief these

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This idea has less force in the context of unrepresented litigants because such litigants are *viewed* as less capable of meaningfully advocating for themselves. *See, e.g.*, Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2022 (1999) (noting ways in which the current structure of adversarial litigation "prevent[s] unrepresented litigants from participating meaningfully in the legal system"). Yet the adversarial model remains the theoretical basis for the American judicial system. *See* Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 B.Y.U. L. REV. 899, 910 (2016) ("Adversary theory retains both historical and present-day currency, and is often articulated as a fundamental tenet of American adjudication.").

3. "*Sua sponte*" means "without prompting or suggestion; on its own motion." *Sua sponte*, BLACK'S LAW DICTIONARY (11th ed. 2019). Bryan Garner states that *sua sponte* denotes only the raising of an issue and not a form of decision-making. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 838 (2d ed. 1995). But scholars have opted to use the term more broadly to include decision-making. *See* Michael J. Donaldson, *Justice in Full is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals*, 36 QUINNIPIAC L. REV. 25, 27 n.5 (2017); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 251 n.16 (2002). The use of the term "*sua sponte* action" in this article includes various forms of judicial decision-making that present varying levels of judicial self-prompting of issues.

4. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1577 (2020).

5. United States v. Sineneng-Smith, 910 F.3d 461, 467 (9th Cir. 2018).

6. *Id.* at 469 (The panel "determined that [its] decision would be significantly aided by further briefing" and ordered the parties to brief specific questions.).

questions.[7] Eventually, the court of appeals rejected all arguments Sineneng-Smith originally presented and instead found one section of the conviction statute unconstitutional.[8] It acquitted Sineneng-Smith of some convictions, affirmed the rest, and remanded the case to the district court.[9]

These facts may seem extreme, but the underlying behavior of the court of appeals—raising a new issue and asking the parties to brief it—is not particularly unique.[10] In fact, although the United States Supreme Court granted certiorari[11] and heard argument in Sineneng-Smith's case on the question that the court of appeals reached *sua sponte*, it reversed the decision because it found—*sua sponte* yet again—that the court of appeals abused its discretion by raising the constitutional issue on its own motion.[12] And the Supreme Court's *sua sponte* action in *Sinneneng-Smith* is no outlier. Although rarely noted, many of the Court's most important precedents were decided without the parties

7. *Id.* The court also invited *amici curiae*—different public interest organizations—to submit briefs and even to participate in oral argument. *Id.*

8. *See generally id.*

9. *Id.* at 485.

10. Although the U.S. Supreme Court made much of the court of appeals' decision to invite amici to brief the court and argue before it, *see Sineneng-Smith*, 140 S. Ct. at 1581–82, many courts invite amici to supplementally brief them. *See, e.g.*, Warren v. Comm'r, 282 F.3d 1119, 1119–20 (9th Cir. 2002) (ordering supplemental briefing and inviting Professor Erwin Chemerinsky to brief the case as amicus curiae); Shuker v. Smith & Nephew, PLC, 885 F.3d 760,770 (3d Cir. 2018) (inviting the FDA to file an amicus brief); Alonzo v. First Transit, Inc., 2018 WL 5118644 (Cal. App. 2018) (inviting "amicus curiae briefs from the LWDA and other organizations); State v. White, No. M2009-00941-SC-R11-CD (Tenn. Aug. 23, 2011), https://www.tncourts.gov/courts/supreme-court/arguments/2011/11/01/state-v-jason-lee-white (directing supplemental briefing and inviting amicus curiae participation).

11. *See* United States v. Sineneng-Smith, 140 S. Ct. 36 (2019).

12. *Sineneng-Smith*, 140 S. Ct. at 1581–82. The petition for certiorari and merit briefs (including from *amici curiae*) did not argue that the court of appeals' *sua sponte* action should be reversed. The Justices did not raise the issue at oral argument, and neither did the parties. *See* Transcript of Oral Argument, United States v. Sineneng-Smith, 140 S. Ct. 36 (2019) (No. 19-67), https://www.oyez.org/cases/2019/19-67.

squarely raising the decisive issue, sometimes with[13] and sometimes without[14] any input from the parties.

And the Supreme Court is not alone. Appellate courts[15]—federal and state,[16] in criminal and civil

13. *See, e.g.*, Johnson v. United States, 576 U. S. 591, 595 (2015) (noting that the court granted certiorari on one issue and later asked the parties to address another one); *id*. at 636 (Alito, J., dissenting) (noting that the court "interjected [a new] issue into the case, requested supplemental briefing on the question, and heard reargument"); Citizens United v. FEC, 558 U.S. 310, 319, 322 (2010) ("The case was reargued in this Court after the Court asked the parties to file supplemental briefs addressing" the question which the Court framed early in the opinion as the issue [it] was "asked" to decide); Brown v. Bd. of Educ., 347 U.S. 483, 488 (1953) (noting that reargument was heard "on certain questions propounded by the Court").

14. *See, e.g.*, Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that the free exercise clause was irrelevant to a dispute about a law of general application) (as noted by Justice Souter in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J., concurring): "[n]either party squarely addressed the proposition the Court was to embrace"); Teague v. Lane, 489 U.S. 288, 299–310 (1989) (plurality opinion) (*sua sponte* (based on *amici* arguments) outlining how to resolve questions of retroactivity for cases on collateral review), *overruled in part by* Edwards v. Vannoy, 141 S. Ct. 1547, 1560 (2021); Washington v. Davis, 426 U.S. 229, 238–39 (1976) (deciding, contrary to both parties' positions, that the equal protection clause bars only intentional discrimination); Mapp v. Ohio, 367 U.S. 643, 646 n.3 (1961) (holding that the exclusionary rule applies to the states, although the parties made no such argument, but an amicus curiae did); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (overturning precedent *sua sponte* and holding that there is no federal common law).

15. The same is true for trial courts. *See, e.g.*, Donaldson, *supra* note 3. This article, however, focuses on appellate courts. Although some arguments raised hereinafter are relevant for trial courts, the paradigm shifts in these courts, as trial courts are known for being closer to the case and directly evaluating the evidence parties present. Trial judges are also encouraged, by rules and precedent, to take a more active role in adjudication, especially with *pro se* litigants. *See* Resnik, *supra* note 1, at 378; Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649–50 (2017).

16. This article tackles federal and state courts that generally espouse a similar *adversarial* model. *See, e.g.*, Horton v. Stovall, 2020 WL 7640042, *3 (Tex. Ct. App. Dec. 23, 2020); Timothy A. Baughman, *Appellate Decision Making in Michigan: Preservation, Party Presentation, and the Duty to "Say What the Law is,"* 97 U. DET. MERCY L. REV. 223 (2020). All jurisdictions grapple with the question that underlies this article. States adopt varied solutions to address courts acting *sua sponte*, but many times rely on federal jurisprudence. *See, e.g.*, Galvan v. People, 476 P.3d 746, 757 (Colo. 2020). Additionally, analyzing solutions from various jurisdictions assists the full consideration of the problems connected to *sua sponte* action and supplemental briefing.

cases[17]—often raise, address, and resolve issues parties forfeited, waived, or even intentionally excluded from their case.[18] These interventions do not stop at questions of subject-matter jurisdiction. Appellate courts routinely address—on their own motion—prudential questions, constitutional interpretation, precedential questions, and cases that involve "extreme circumstances" or "manifest injustice."[19]

Courts offer myriad justifications for *sua sponte* action,[20] but this article posits that these justifications all stem from at least one of two underlying rationales. First, "doing justice," a rationale related to appellate courts' equity jurisdiction and the current dearth of

17. This article addresses both civil and criminal cases. There are reasons to think that it is more appropriate for courts to raise issues *sua sponte* in criminal cases. *See* Barry A. Miller, Sua Sponte *Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1262 n.30 (2002). However, these differences have not prevented courts from using the same governing rules for all cases. Additionally, the framework this article lays out offers an opportunity to address these relevant differences—via rule-making or case law.

18. Courts can "create" issues neither party has raised. *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991); Aspen Orthopaedics & Sports Med., LLC v. Aspen Valley Hosp. Dist., 353 F.3d 832, 838 (10th Cir. 2003) (raising a statutory notice provision despite recognizing that "the parties and the district court failed to address the issue"); Frost, *supra* note 1, at 449. They can also address issues waived at trial but raised on appeal. *See, e.g.*, Yee v. Escondido, 503 U.S. 519, 534 (1992). And decide issues raised at trial but waived on appeal. *See, e.g.*, Thigpen v. Roberts, 468 U.S. 27, 29 (1984) (relying on the briefs below even though the issue was not briefed in the Supreme Court); Taylor v. Univ. of Utah, 466 P.3d 124, 133 (Utah 2020). *See generally* Milani & Smith, *supra* note 3, at 249–50; Miller, *supra* note 17, at 1272–73.

19. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) (standing doctrine); *Mapp*, 367 U.S. at 671–77 (Harlan, J., dissenting) (precedent overruling) (arguing that the majority's overruling of *Wolf v. Colorado*, 338 U.S. 25 (1949), was not briefed or argued); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (ripeness); Lucien v. Johnson, 61 F.3d 573, 575 (7th Cir. 1995) (dismissing a frivolous case); Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., 657 S.E.2d 361, 364 (N.C. 2008) (preventing manifest injustice). See also representative cases from these categories, *infra* notes 63–76.

20. These include jurisdictional questions, prudential concerns, resolving important cases, answering pure questions of law, preventing manifest injustice, and affirming the judgment below on other grounds. *See infra* Section I.A for a more detailed analysis.

procedures for pursuing equitable resolution of cases.[21] Second, "getting the law right," which flows from appellate courts' role of articulating norms and directing the development of the law.[22]

These rationales seem compelling, but their attractiveness must be measured against the harms *sua sponte* action may inflict. Courts acting *sua sponte* potentially put the integrity of the adversarial system at risk.[23] And without the parties' input and participation, *sua sponte* action also increases the risk of error, is arguably inconsistent with due process, is arbitrary, and lacks transparency.[24]

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21. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 120–21 (1976) (acknowledging a general rule against addressing issues not passed upon by lower courts, but allowing discretion to do so, particularly where proper resolution is beyond doubt, or injustice might otherwise occur); Bird v. United States, 241 F.2d 516, 520–21 (1st Cir. 1957) (citing a court's ability to act *sua sponte* in "exceptional cases or particular circumstances * * * where injustice might otherwise result") (quoting Hormel v. Helvering, 312 U.S. 552, 557 (1941)); Fujioka v. Kam, 514 P.2d 568, 570 (Haw. 1973) ("[A]n appellate court may deviate and hear new legal arguments when justice requires."); Butler v. Killoran, 714 A.2d 129, 134 n.9 (Me. 1998) (noting exception when general rule would obviously result in plain miscarriage of justice); Normand v. Dir. of Office of Medicaid, 933 N.E.2d 658, 665 (Mass. App. Ct. 2010) (addressing an unpreserved issue because of "fundamental justice"); MINN. R. CIV. APP. P. 103.04 ("[A]ppellate courts may reverse, affirm or modify the judgment or order appealed from or take any other action as the interest of justice may require."); Miller, *supra* note 17, at 1263 n.32, 1271.

22. *See, e.g.*, *Kamen*, 500 U.S. at 100 n.5; Williams-Guice v. Bd. of Educ., 45 F.3d 161, 164 (7th Cir. 1995) ("[L]itigants' failure to address the legal question from the right perspective does not render us powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances."); McDonald v. Fid. & Deposit Co. of Md., 462 P.3d 343, 349 (Utah 2020) ("We must get the law right, even if in so doing we establish a standard that differs from either of the approaches presented in the briefing on appeal."); Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 254–55 (2004); Frost, *supra* note 1, at 470–85. Some scholars view this as the courts' primary role. *See, e.g.*, Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 332 (2014); Cravens, *supra* note 22, at 294 ("[I am] strongly urging judges to follow their instincts about unargued points that they believe may be important to resolution of a particular case."). *But see* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011) (arguing against such a view of the judiciary, and insisting on a narrower view of courts as dispute resolution forums).

23. Frost, *supra* note 1, at 458; Milani & Smith, *supra* note 3, at 272.

24. *See, e.g.*, Richards v. Jefferson County, 517 U.S. 793, 799 (1996) ("[T]he right to be heard [is] ensured by the guarantee of due process . . . ."); Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary

On balance, the consensus is that appellate courts should be able to raise issues on their own motion, at least in some instances. Which instances? That question has been left mainly to the courts' discretion. And rather than imposing any limitations on "when," courts have instead opted to regulate "how" by asking parties for supplemental briefing.[25] Supplemental briefing allows parties to argue their views about the issue an appellate court wishes to raise *sua sponte*.[26] This practice has flourished in appellate courts, although not uniformly across the country.[27]

Courts and scholars have hailed supplemental briefing as a promising solution for the harms *sua sponte* action produces.[28] But only a few commentators have

process as the best means of ascertaining truth and minimizing the risk of error . . . ."); Heilman v. Courtney, 926 N.W.2d 387, 400 (Minn. 2019) (Hudson, J., concurring) (explaining that petitioner "was denied due process and a right to be heard when the court of appeals decided this case based on an issue that was not subject to adversarial briefing and argument" but noting that "any due-process violations have been remedied by his opportunity to brief the issue" in the state supreme court); Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 1004–05 (1989); Milani & Smith, *supra* note 3, at 262–72 (explaining how *sua sponte* action is inconsistent with due process); *id.* at 272–86 (inconsistent with the adversary process); Miller, *supra* note 17, at 1280–93 (explaining how *sua sponte* action is a due process violation); Ronald J. Offenkranz & Aaron S. Lichter, *Sua Sponte Action in the Appellate Courts: The "Gorilla Rule" Revisited*, 17 J. APP. PRAC. & PROCESS 113, 126–34 (2016) (explaining how *sua sponte* action creates waste and bad law and causes deprivation of due process).

25. *See, e.g.,* Batson v. Kentucky, 476 U.S. 79, 115 (1986) (Burger, C.J., dissenting) (collecting cases requiring supplemental briefing); Propper v. Clark, 337 U.S. 472, 476 n.6 (1949) (asking the parties to brief an issue that had been raised by petitioner, but as to which the Court had not originally granted certiorari); Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (I-III), 7 WIS. L. REV. 91 (1932); 7 WIS. L. REV. 160 (1932), 8 WIS. L. REV. 147 (1933); Dennerline, *supra* note 24; Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957); Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1958).

26. *See, e.g.*, Miller, *supra* note 17, at 1297–98.

27. *See infra* Section I.C. for a collection of cases on these points.

28. *See, e.g.*, New Jersey v. T.L.O., 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting) ("[T]he adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review."); Thomas v. Crosby, 371 F.3d 782, 802 (11th Cir. 2004) (Tjoflat, J., specially concurring); Hicks v. State, 277 So. 3d 153, 158, 162 (Fla. Dist. Ct.

examined supplemental briefing's effects in depth. This article suggests that supplemental briefing, as currently applied, is not an adequate remedy for the harm that *sua sponte* action creates.

Sua sponte action requires a more in-depth treatment, and this article proposes that courts answer the question "when" to act *sua sponte* together with the question "how." Otherwise, the ills of *sua sponte* action will not be cured. Building on the rationales underpinning *sua sponte* action and on the deficiencies with the current administration of supplemental briefing, this article creates a framework that addresses *sua sponte* action according to its effects and divides it into two categories: necessary and unavoidable action and broad-scope action.

This article proceeds as follows. Section I delves into the appellate courts' adversarial model, *sua sponte* action, and the practice of supplemental briefing. Section II addresses four problems with supplemental briefing that suggest it is not delivering a promised cure to the alleged harms that *sua sponte* action inflicts. Finally, section III offers a new framework for appellate *sua sponte* action and supplemental briefing.

I. THE ADVERSARY SYSTEM, *SUA SPONTE* ACTION, AND THE RATIONALES FOR SUPPLEMENTAL BRIEFING

The emergence of supplemental briefing is the result of a brewing dissonance in how American appellate courts work. Appellate courts repeatedly pronounce that their role is to resolve disputes based on the issues brought before them.[29] But at the same time, they decide issues *sua sponte*, without parties asking them to do so.[30]

App. 2019) (Kelsey, J., dissenting); Milani & Smith, *supra* note 3, at 294–304 (making the argument for supplemental briefing as a solution for *sua sponte* actions' harms but not analyzing its own effects).

29. *See, e.g.*, Greenlaw v. United States, 554 U.S. 237, 243 (2008); Guzzo v. Cristofano, 719 F.3d 100, 111–12 (2d Cir. 2013).

30. *See, e.g.*, Deloatch v. Sessoms-Deloatch, 229 A.3d 486, 492–94 (D.C. 2020) (dismissing appeals for delay despite no parties asked for such resolution).

This practice is antithetical to the adversarial nature of the American appellate system, and presents additional problems of fairness and arbitrariness. But because it could be justified on different grounds,[31] courts use a solution that allows them to continue acting *sua sponte* while mitigating the harms that their action creates. They continue to act *sua sponte* but order parties to supplementally brief the issue the court raised on its own motion, allowing the parties to adversarially argue for a resolution. To better evaluate supplemental briefing, this section delves into the background from which it has emerged.

A. Party Presentation versus Court's Sua Sponte *Action*

Appellate courts around the nation proclaim that the adversarial system requires them to only resolve disputes that litigants bring forward.[32]

In her penultimate opinion on the bench, Justice Ruth Bader Ginsburg, writing for a unanimous court, explained that in "our adversarial system of adjudication, we follow the principle of party presentation."[33] The Court emphasized that "in both civil and criminal cases, in the first instance and on appeal, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[34] As a general rule, the Court added, the American adversarial system is "designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."[35]

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31. *See infra* Section I.B.

32. *See, e.g.*, Turner v. Flournoy, 594 S.E.2d 359, 362 (Ga. 2004); *see also supra* notes 1, 29; Frost, *supra* note 1, at 451 ("[J]udicial opinions and the academic literature confidently promote party presentation, and are critical of judges who raise issues sua sponte.").

33. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).

34. *Id.* (quoting Greenlaw v. United States, 554 U.S. 237, 243 (2008)).

35. Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in judgment).

The upshot of the party presentation principle is that "courts are essentially passive instruments of government"[36] that "normally decide only questions presented by the parties."[37] And so, appellate courts do not consider issues "not passed upon below."[38] They also do not consider issues neither briefed nor argued before them (even if briefed or adjudicated below).[39] Some appellate courts have extended this rule of no adjudication to cover cases where parties brief an issue insufficiently.[40]

This limit on appellate courts' decision-making has several justifications. It helps protect the integrity of the

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36. United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in the denial of rehearing en banc).

37. *Id.*; *see* Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983); Kalil Bottling Co. v. Burroughs Corp., 619 P.2d 1055, 1058 (Ariz. Ct. App. 1980).

38. Singleton v. Wulff, 428 U.S. 106, 120 (1976). A federal court of appeals surveyed different meanings of the principle and listed them:

> One is a bald-faced new issue. Another is a situation where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented at trial. A third is a theory that was discussed in a vague and ambiguous way. A fourth is issues that were raised and then abandoned pre-trial. A fifth is an issue raised for the first time in an untimely motion. These are all different aspects of the same principle that issues not passed upon below will not be considered on appeal.

Lyons v. Jefferson Bank & Tr., 994 F.2d 716, 722 (10th Cir. 1994); *see also* Wabash Valley Power Ass'n v. Fed. Energy Reg. Comm'n, 268 F.3d 1105, 1114 (D.C. Cir. 2001).

39. United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in judgment); Knowles v. Iowa, 525 U.S. 113, 116 n.2 (1998); United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005); Blair v. Fullmer, 583 So. 2d 1307, 1312 (Ala. 1991). But most recently in *Sineneng-Smith* the Court identified the times it did address issues *sua sponte* when these issues were argued below. *See* 140 S. Ct. 1575, 1582 (2020).

40. *See, e.g.*, Prometheus Radio Project v. FCC, 824 F.3d 33, 53 (3d Cir. 2016) (noting arguments and issues "relegated to a footnote" are forfeited); Zimmerman v. Univ. of Utah, 417 P.3d 78, 80 (Utah 2018) ("Because these questions are not adequately briefed by the parties we decline to resolve them here."); Marion v. Lander, 394 P.2d 910, 915 (Wyo. 1964) ("It is counsel's job to point [the issues] up, and if it is not done with preciseness and supported by cogent argument and pertinent available authority there [is] little we can do to aid counsel in their effort."); *see also* Miller, *supra* note 17, at 1268; Benjamin D. Raker, *The Ambiguity and Unfairness of Dismissing Bad Writing*, 69 CLEV. ST. L. REV. 35, 35 (2021) ("Judges regularly ignore litigants' arguments because they are, in the judges' views, poorly explained.").

adversarial system[41] and its ideal of party presentation and control.[42] It also ensures fairness by not resolving issues that parties have not had an opportunity to address or have declined to argue,[43] and it promises an impartial adjudication.[44] A final justification is judicial efficiency. This general rule promotes efficiency in three ways. First, it makes sure that parties will offer all evidence they believe is relevant to the issues.[45] Next, it prevents a court from making an uninformed decision because the court has no idea what evidence a party might have offered if given an opportunity.[46] Finally, upholding

41. *Burke*, 504 U.S. at 246 (Scalia, J., concurring) (noting that the observing of passive judging, "at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one"); D.H. v. Adept Cmty. Servs., Inc., 271 So. 3d 870, 888 (Fla. 2018) (Canady, C.J., dissenting) ("[I]t is not the role of the appellate court to act as standby counsel for the parties.").

42. *See, e.g.*, *In re* Cullinan, 113 A.D. 485, 486 (N.Y. App. Div. 1906) ("That parties may stipulate what the law is that governs their dispute, as well as what the facts are from which it arises, cannot be doubted. And the courts should and will give as complete effect to the former as to the latter class of stipulations.").

43. *See* Miller, *supra* note 17, at 1266; *see also* SUP. CT. R. 14.1(a) ("Only the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court."); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400–08 (1995) (O'Connor, J., dissenting) (commenting on the "imprudence" of the Court addressing an issue not raised by the parties); Wood v. Milyard, 566 U.S. 463, 473 (2012) (noting that when appellate courts spot "an issue the parties did not air below," the parties "would not have anticipated in developing their arguments on appeal"); Simmons v. UBS Fin. Servs., 972 F.3d 664, 670 n.18 (5th Cir. 2020) (refusing to address an argument *sua sponte* that could grant federal jurisdiction because the appellant "not only fails to make that argument—he concedes" the contrary).

44. Polyglycoat Corp. v. Hirsch Distribs., 442 So. 2d 958, 960 (Fla. Dist. Ct. App. 1983) (stating that it is not "the function of the Court to rebrief an appeal" and "become an advocate"); STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2, 34 (1988) (court's "detachment" is claimed to "preserve[] the appearance of fairness as well as fairness itself.").

45. Hormel v. Helvering, 312 U.S. 552, 556 (1941) (holding that not giving "consideration to issues not raised below" is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide"); *see* Frost, *supra* note 1, at 461.

46. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 120 (1976); *Wood*, 566 U.S. at 473 (instructing that an appellate court should also have "[d]ue regard for the trial court's processes and time investment"); Hartmann v. Prudential Ins. Co., 9 F.3d 1207, 1214–15 (7th Cir. 1993); Bogenberger v. Pi Kappa Alpha Corp., 104 N.E.3d 1110, 1131 (Ill. 2018) (Theis, J., concurring in part and dissenting in

the rule avoids arbitrary decision-making where "in a sympathetic case an appellant can serve [] up a muddle in the hope that [a court] will find somewhere in it a reversible error."[47]

But this general rule and the rhetoric around it are not reflective of how the American appellate system works. Appellate courts do more than resolve disputes that parties present to them.[48] They raise and discuss issues *sua sponte*, on their own motion.[49] The term *sua sponte* action presents a range.[50] It includes courts addressing issues that parties forfeited or waived on appeal, even if they argued them below.[51] It also encompasses courts that address issues that a party raised belatedly on appeal after waiving it below.[52] Finally, it covers courts that resolve issues parties never raised at trial or explicitly assumed that are not in dispute.[53]

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part) (acting *sua sponte* "force[s courts] to speculate as to the arguments that the parties might have presented had these issues been properly raised.").

47. *Hartmann*, 9 F.3d at 1214–15.

48. Smith v. Farley, 59 F.3d 659, 665 (7th Cir. 1995) ("Judges are not umpires, calling balls and strikes; or judges of a moot court, awarding victory to the side that argues better . . . ."); *see* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1275 (1995); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221 (1999). *But see* Lawson, *supra* note 22 (arguing against such a view of the judiciary and insisting on a narrower view of courts as a dispute resolution forum).

49. But some jurisdictions caution against liberal use of such action. *See, e.g.*, TENN. R. APP. P. 13 advisory committee's comment (allowing *sua sponte* action only on narrow occasions other than jurisdiction); WASH. R. APP. P. 2.5(a) (permitting exception where no jurisdiction; insufficient facts to grant relief and constitutional right manifest error).

50. For an overview of the term, see *supra* note 3.

51. *See, e.g.*, State v. Johnson, 416 P.3d 443, 457–58 (Utah 2017) (detailing when such *sua sponte* action is merited); Kaiserman Assocs. v. Francis Town, 977 P.2d 462, 464 (Utah 1998) (providing an example of such occurrence). *But see Wood*, 566 U.S. at 472–73 (limiting a court's ability to act *sua sponte* when the Government or State knowingly chose to relinquish an affirmative defense of statute of limitations).

52. *See, e.g.*, Yee v. Escondido, 503 U.S. 519, 534 (1992); L.E.S. v. C.D.M (*In re* K.A.S.), 390 P.3d 278, 283–84 (Utah 2016) (holding that an exceptional circumstance excused preservation).

53. *See, e.g.*, U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36–37

Courts act *sua sponte* on many different occasions: when parties miss key precedents,[54] when the parties did not raise issues that the lower courts addressed,[55] jurisdictional questions,[56] prudential concerns,[57] dismissal of frivolous cases,[58] issues that *amici curiae* raised,[59] answering pure questions of law,[60] resolving important cases,[61] avoiding plain error,[62] preventing manifest

(1991) (Stevens, J., dissenting); *see also* Frost, *supra* note 1, at 472 (arguing this should be one of the primary reasons for *sua sponte* action).

54. *See, e.g.*, Zhislin v. Reno, 195 F.3d 810, 813 n.1 (6th Cir. 1999); Daniels v. Indus. Comm'n, 775 N.E.2d 936, 943 (Ill. 2002).

55. *See, e.g.*, Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379–81 (1995).

56. *See, e.g.*, Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884). This is the least controversial *sua sponte* action category because of the notion that without jurisdiction over a case, a court cannot validly act. *See* Devins, *supra* note 1, at 252; *see also* PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 1289 (2021) (granting certiorari in the case but asking the parties to brief the question, "[d]id the Court of Appeals properly exercise jurisdiction over this case," raised only by the Solicitor General as amici); Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 88 (Ill. 2013) (Thomas, J., specially concurring) ("[O]ther than for assessing subject matter jurisdiction, 'a reviewing court should not normally search the record for unargued and unbriefed reasons to *reverse* a trial court judgment.'") (emphasis in original) (quoting People v. Givens, 934 N.E.2d 470 (Ill. 2010)).

57. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) (standing doctrine); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (ripeness); *Ex parte* Baez, 177 U.S. 378, 390 (1900) (mootness). In some cases, courts assimilate prudential concerns to be jurisdictional. *See, e.g.*, Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993); Juidice v. Vail, 430 U.S. 327, 331 (1977).

58. *See, e.g.*, Lucien v. Johnson, 61 F.3d 573, 575 (7th Cir. 1995); Morters v. Aiken & Scoptur, S.C., 712 N.W.2d 71, 74 (Wis. Ct. App. 2006).

59. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 523 n.10 (1991) (Marshall, J., dissenting); Bisio v. City of Clarkston, 954 N.W.2d 95, 109–10 (Mich. 2020) (Viviano, J., dissenting).

60. *See* Raich v. Gonzales, 500 F.3d 850, 868 (9th Cir. 2007); *Bisio*, 954 N.W.2d at 101 n.7; *see also, e.g.*, Neese v. Utah Bd. of Pardons & Parole, 416 P.3d 663, 701 n.29 (Utah 2017) (Lee, A.C.J., dissenting).

61. *See, e.g.*, William C. Rooklidge & Matthew F. Weil, *Judicial Hyperactivity: The Federal Circuit's Discomfort with its Appellate Role*, 15 BERKELEY TECH. L.J. 725, 736–39 (2000) (making the argument about the federal circuit court of appeals *sua sponte* actions).

62. This is another area of broad consensus, especially in the criminal context. *See* Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 217–31 (2012) (collecting numerous federal and state cases).

injustice,[63] affirming the judgment below,[64] protecting *pro se* litigants,[65] reaching a factual determination,[66] and at times for no stated reason at all.[67]

This long but not exhaustive list of instances where courts acted *sua sponte* demonstrates that *sua sponte* action knows very few boundaries.[68] Yet all these instances can be attributed to two distinct rationales that arguably justify courts' action beyond the traditional adversarial system.[69] The first is grounded in appellate courts' desire to "do justice," and the second is borne out of appellate courts' constitutional responsibility to say what the law is. While scholars and courts noted these rationales in passing, this article is the first to use them as grounding principles for *sua sponte* action.

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63. *See, e.g.*, Bagot v. Ashcroft, 398 F.3d 252, 256 (3d Cir. 2005); Wall v. State, 379 So. 2d 529, 532 (Miss. 1980) ("[I]n extreme cases, this Court may raise an objection to a jury instruction in order to prevent manifest injustice," even absent such objection on appeal from defendant.); Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., 657 S.E.2d 361, 364 (N.C. 2008); State v. Archambeau, 820 P.2d 920, 923 (Utah Ct. App. 1991).

64. *See, e.g.*, Loftis v. United Parcel Serv., Inc., 342 F.3d 509, 514 (6th Cir. 2003).

65. *See, e.g.*, Greenlaw v. United States, 554 U.S. 237, 243–44 (2008); Erum v. Llego, 465 P.3d 815, 828 n.19 (Haw. 2020). *But see* Geboy v. Brigano, 489 F.3d 752, 767 (6th Cir. 2007) (stating that even pro se appellants must fairly raise and develop arguments, and otherwise courts should not *sua sponte* recharacterize them).

66. *See* Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521 (2012).

67. Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 249 (3d Cir. 2013) ("[I]t is within our discretion to consider an issue that the parties did not raise below."). In California, for example, "[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." People v. Williams, 948 P.2d 429, 437 n.6 (Cal. 1998). But in other cases, California courts proclaimed that raising issues *sua sponte* "outside the confines of . . . limited contexts is not judicial review, it is partisan advocacy." People v. Renteria, 2021 WL 37564, at *32 (Cal. Ct. App. Jan. 5, 2021).

68. Some limited boundaries appear to exist. *See* Wood v. Milyard, 566 U.S. 463, 472–73 (2012) (limiting appellate courts from raising habeas affirmative defenses if the government waived them explicitly); *Greenlaw*, 554 U.S. at 247–48 (allows *sua sponte* action only in instances where it benefits the party seeking the appellate court review, unless there is a cross-appeal).

69. Trial courts do not conform to adversarial norms when it comes to *pro se* litigants and take a more "active" role by intervening in different ways. *See, e.g.*, Carpenter, *supra* note 15, at 650 n.6.

At times courts explain their *sua sponte* action by the goal of "doing justice." Barry Miller argues that this goal is the modern reincarnation of American appellate courts' "equity" jurisdiction.[70] Equity jurisdiction has been historically understood as the power of a court to review any issue of law or fact regardless of whether it was in the record and "render any type of judgment it thought justice demanded."[71] In England, courts of equity were permitted to review law and fact de novo.[72] But despite possessing jurisdiction in common law and equity, American appellate procedure is "overtly based on the principles of writ of error review at common law, rather than the appeal in equity."[73] This focus limits appellate courts' adjudication to error correction. But *sua sponte* action gives courts the ability to conform to their equitable obligations.[74]

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70. Miller, *supra* note 17, at 1263–64; *see also, e.g.*, Blumberg Assocs. Worldwide v. Brown & Brown of Conn., Inc., 84 A.3d 840, 857–58 (Conn. 2014) (relying on Miller); Offenkranz & Lichter, *supra* note 24, at 117 (same); State v. Johnson, 416 P.3d 443, 448 (Utah 2017).

71. ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS 1027 (1983); *See, e.g.*, LA. UNIFORM R. APP. 1-3 ("The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise."); MD. R. 8-131(a) ("[T]he Court may decide [an unraised issue] if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."); N.C. R. APP. P. 2 (suspending rules when necessary to prevent manifest injustice or to expedite decision in public interest); TENN. R. APP. P. 36(b) ("When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.").

72. Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1026–27 (1987); Miller, *supra* note 17, at 1263–64 ("A showing of legal error was not required for a rehearing in equity.").

73. Miller, *supra* note 17, at 1264.

74. As one California appellate judge explained, an appellate court is "always allowed to read the whole record, search[] for issues and request[] supplemental briefing on anything [it] find[s]." People v. Gallo, 57 Cal. App. 5th 594, 601 (Cal. Ct. App. 2020) (Menetrez, J., dissenting); *see also* Normand v. Dir. of Office of Medicaid, 933 N.E.2d 658, 665 (Mass. App. Ct. 2010) (addressing an unpreserved issue because of "fundamental justice" considerations beyond "ordinary rules of practice and procedure"); *Johnson*, 416 P.3d at 448 ("This has created a system that, at times, appears to contain inherent conflicts and has given rise to

Miller's description of equity views it as a "recognition of an exception to a general rule" or a "moral reading of the law."[75] And although Miller describes such equity as "jurisdiction," it seems more of an exercise of discretion than the actual remedies and doctrines of English courts of equity.[76] The notion of equity jurisdiction is richer and more complex than what Miller necessarily presents.[77] Regardless, courts adopted Miller's argument.[78] And even the general connection between the idea of doing justice and historic equity is useful to explain how courts justify their interference with the adversarial model. Indeed, some reasons that courts use to explain why they raise issues *sua sponte* are well within the penumbra of equitable principles. These reasons include, for example, doing justice,[79] assisting parties who have not raised the proper legal issues,[80] and avoiding plain error.[81] But it is also worth noting that many *sua sponte* interventions can be cast as required for an

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a certain tension, if not murkiness, regarding preservation, waiver, and when a court may raise an issue *sua sponte*.").

75. *See* Samuel L. Bray, *A Student's Guide to the Meanings of 'Equity'* (2021), ssrn.com/abstract=3821861.

76. *See, e.g.*, Castro v. Melchor, 414 P.3d 53, 70–71 (Haw. 2018) (Nakayama, J., concurring) ("[O]ur discretionary authority should be used sparingly in circumstances where the interests of justice demand us to consider questions that the parties have not presented."); State v. Holmes, 315 N.W. 2d 703, 707 (Wis. 1982) ("That a court should raise issues *sua sponte* is the natural outgrowth of the court's function to do justice between the parties.").

77. *See, e.g.*, Samuel L. Bray, *The System of Equitable Remedies*, 63 U.C.L.A. L. REV. 530 (2016).

78. LexisNexis Shepard's report for the article includes references in thirteen cases from five states, three federal courts, and an agency (last visited Sep. 9, 2021). *See, e.g.*, *Blumberg*, 84 A.3d at 857–58; *Johnson*, 416 P.3d at 448.

79. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 120–21 (1976); Dorris v. Absner, 179 F.3d 420, 425–26 (6th Cir. 1999); *see also supra* note 63.

80. *See, e.g.*, U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36–37 (1991) (Stevens, J., dissenting); *see also* Frost, *supra* note 1, at 472 (arguing this should be one of the primary reasons for *sua sponte* action). *But see Johnson*, 416 P.3d at 463–65 (Lee, A.C.J., concurring in the judgment) (arguing that courts cannot resolve new claims that parties never litigated, as opposed to arguments regarding issues that the parties did bring up).

81. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238 (1976).

equitable resolution, which provides little guidance as to which occasions are indeed appropriate for it.[82]

Second, courts and scholars justify acting *sua sponte* as an expression of the judiciary's role to say "what the law is."[83] Amanda Frost and Sarah M. Cravens explain that courts are viewed as "trustees" of the law under this rationale.[84] They retain "ownership of the law,"[85] in the sense that they are in charge of its evolution.[86] This rationale is understood as part and parcel of courts' power because "adjudication is about articulating public norms as well as settling private disputes."[87] It reflects the idea that "[a]djudication in the common law mold entails two simultaneously performed functions: dispute resolution

82. Some courts present general guidelines, *see, e.g.*, Raich v. Gonzales, 500 F.3d 850, 868 (9th Cir. 2007). But these guidelines include discretion which limits predictability, see, e.g., AMA Multimedia, LLC v. Wanat, 970 F.3d 1201 (9th Cir. 2020). Another limit to *sua sponte* action is the lack of "authority to grant a party relief on a non-jurisdictional timeliness defense that the party has waived." Dixon v. McDonald, 815 F.3d 799, 805 (Fed. Cir. 2016). But this lack of ability is limited in scope and courts can circumvent it in some instances, raising more arbitrariness questions. Finally, some courts establish limits around the distinction between arguments, issues, and claims—which provides some boundaries. *See, e.g.*, *Johnson*, 416 P.3d at 457–59.

83. Marbury v. Madison, 5 U.S. 137 (1 Cranch 137), 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

84. *See, e.g.*, Frost, *supra* note 1, at 452 ("Judges serve a dual role: they must resolve the concrete disputes before them, and yet under the constitutional structure and in the common law tradition they are also expected to make accurate statements about the meaning of law that govern beyond the parameters of the parties and their dispute"). Cravens, *supra* note 22, at 294, views this as the courts' primary role ("strongly urging judges to follow their instincts about unargued points that they believe may be important to resolution of a particular case"). *See also*, *e.g.*, Morley, *supra* note 22, at 332.

85. Cravens, *supra* note 22, at 255.

86. Smith v. Farley, 59 F.3d 659, 665 (7th Cir. 1995); Williams-Guice v. Bd. of Educ., 45 F.3d 161, 164 (7th Cir. 1995); Daniels v. Indus. Comm'n, 775 N.E.2d 936, 943 (Ill. 2002); Messiha v. State, 583 N.W.2d 385, 390 n.2 (N.D. 1998).

87. Bone, *supra* note 48, at 1275. There are exceptions on both sides. Owen Fiss views "dispute resolution" as a possible "consequence of the judicial decision," but posits that the "function of the judge" is to "give the proper meaning to our public values." Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979). On the other hand, Lawson, *supra* note 22, at 1228, believes courts should be strictly limited to dispute resolution model.

and norm articulation."[88] Therefore, a court's duty to norm articulation requires it to not cede to party presentation when it thwarts the meaning of a statute or resolution of a case as the court views it.[89]

This rationale also covers a wide array of reasons that courts use to justify their *sua sponte* actions. These include addressing key precedent that parties have missed,[90] analyzing a statutory provision that the parties interpreted wrongly but do not dispute,[91] prudential concerns,[92] answering questions of law,[93] and affirming the judgment below on different grounds than those adjudicated.[94] Like with the first rationale, many cases can be cast as requiring some correction of norm articulation, making them amenable to *sua sponte* action. And similarly, the norm articulation rationale provides little guidance as to which are cases appropriate for the treatment.

88. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 643 (1981).

89. McDonald v. Fid. & Deposit Co. of Md., 462 P.3d 343, 349 (Utah 2020) ("We must get the law right, even if in so doing we establish a standard that differs from either of the approaches presented in the briefing on appeal.").

90. *See, e.g.*, Elder v. Holloway, 510 U.S. 510, 511–12 (1994) (holding that an appellate court should take notice of legal precedent overlooked by the parties).

91. Moore v. Moore, 486 S.W.3d 766, 772 (Ark. 2016) (overturning precedent that interprets statutory language because "it is patently wrong to the extent we now must overrule it in order to return to the statute's plain language," although "neither party requested that those cases be overruled" and [n]either party had a quarrel with the rule announced [in them]," *id.* at 776 (Brill, C.J., concurring in part and dissenting in part)).

92. *See, e.g.*, Nair v. Oakland Cty. Cmty. Mental Health Auth., 443 F.3d 469, 474 (6th Cir. 2006) (courts can and should decide sovereign immunity *sua sponte*); Frost, *supra* note 1, at 463 (connecting the raising of prudential concerns to the protections of "resources and integrity of the federal judiciary").

93. *See, e.g.*, Diersen v. Chicago Car Exch., 110 F.3d 481, 485 (7th Cir. 1997) ("[W]e are confronted with a purely legal issue which has been fully briefed and argued by the parties. Thus, there is no reason to defer its resolution to another case. There will be no better time to resolve the issue than now.") (citations omitted).

94. *See, e.g.*, Victim Rights Law Ctr. v. Rosenfelt, 988 F.3d 556, 563 (1st Cir. 2021) ("The court may affirm a district court's ruling for any reason supported by the record" even when the lower court reasons "are not stated" as long as they can be "reasonably inferred.").

B. Evaluating Appellate Courts' Sua Sponte *Action*

The arguments in defense of *sua sponte* action derive their strength from the norm articulation rationale. In a 2009 article, Amanda Frost presented several defenses of courts raising issues *sua sponte* on this basis.[95] Frost connected the norm articulation rationale to the judicial power to say "what the law is," originating in *Marbury v. Madison*.[96] In her view, courts retain discretion to interpret the law as they see fit[97] and should not be constrained by the parties' interpretations[98] or lower courts' interpretations.[99]

Other than this inherent discretion, judicial independence presents additional support for *sua sponte* action. Without the ability to reach new issues independently, courts may be compromised by parties who seek to distort legal development.[100] Another defense line in Frost's article explains that *sua sponte* action

95. Frost, *supra* note 1.

96. 5 U.S. 137, 177 (1803); Frost, *supra* note 1, at 471.

97. Some courts are bound by rules or statutes that guide their interpretive process. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010). Additionally, some courts reject Frost's proposition and vacate *sua sponte* made decisions. *See, e.g.,* People v. White, 956 N.E.2d 379, 417 (Ill. 2011) (rejecting the Illinois court of appeals decision to reach a constitutional question *sua sponte*).

98. Frost, *supra* note 1, at 476; Cravens, *supra* note 22, at 252 (arguing that judges should implement the most correct reasoning, regardless of parties' arguments). For similar reasoning in courts, see, e.g., *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). *But see* Suarez-Valenzuela v. Holder, 714 F.3d 241, 249 n.2 (4th Cir. 2013) (refusing to address an argument about wrong standard of review—arguably a court's interpretive responsibility—because the party waived it when "he failed to raise it in his opening brief"); Goletz v. Prudential Ins. Co. of Am., 383 F. App'x 193, 197 (3d Cir. 2010) (same); TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 74 (2d Cir. 2002) ("[S]ince [Defendant] does not argue that there is no private cause of action, we need not reach the issue.").

99. *See, e.g.*, Gonzalez v. CoreCivic, Inc., 986 F.3d 536, 542–43 (5th Cir. 2021) (Oldham, J. dissenting).

100. Frost, *supra* note 1, at 483; *see also, e.g.*, D.G.L. Trading Corp. v. Reis, 732 N.W.2d 393, 395 (N.D. 2007). *But see* Prussner v. United States, 896 F.2d 218, 223 (7th Cir. 1990) (refusing to determine if a statutory concept differs from the common law one, because the appellee "does not argue" that).

should be viewed in the prism of limits on government power. "[C]ourts must be free to take notice of constitutional transgressions by the government even when the litigants would prefer not to raise those issues."[101] Another reason for *sua sponte* action is the judiciary's ability to prevent parties from ignoring or misrepresenting legislation in their cases.[102] Finally, Frost deems *sua sponte* action compatible with common law adjudication.[103] The resolution of a case can be precedential and apply to parties not before the court.[104] Accordingly, a court must retain the power to create precedent, shape it, and use it, even when parties ignore it or seek to misrepresent it.[105]

The supporting argument for courts acting *sua sponte* to do justice is simple. Courts rightfully should seek to do justice, and *sua sponte* action is their mechanism.[106] It is the courts' role to make sure that a case's outcome does not offend the fairness and integrity of the judicial process.[107]

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101. Frost, *supra* note 1, at 486; *see also, e.g.*, Ctr. for Investigative Reporting v. U.S. Dep't of Justice, 982 F.3d 668, 697 (9th Cir. 2020) (Bumatay, J., dissenting) ("[W]e never abdicate our independent role in interpreting the law. If the parties don't offer the correct reading of a particular statute, we are not bound to blindly follow their lead. Instead, as judges, our duty is to get the law right."), *withdrawn and amended by* 14 F.4th 916 (2021).

102. Frost, *supra* note 1, at 488; Bradley v. Romeo, 716 P.2d 227, 228 (Nev. 1986) (*sua sponte* consideration of issues where statute clearly controlling not applied by trial court).

103. Frost, *supra* note 1, at 491–94.

104. *See id.* at 492 ("[I]f litigants fail to . . . describe the law, judicial opinions may themselves contain flawed statements of law that will bind all who come after.").

105. Frost, *supra* note 1, at 492–95; *see also* Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 332 (1993) ("At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him.").

106. State v. Johnson, 416 P.3d 443, 448 (Utah 2017); Krimbel, *supra* note 1, at 930 (the equitable decision to rehear a case does not follow from common law and may originate from concepts as varied as "fairness," "moral good," and "justice"); Miller, *supra* note 17, at 1263–64; Offenkranz & Lichter, *supra* note 24, at 117.

107. United States v. Atkinson, 297 U.S. 157, 160 (1936) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if

Notwithstanding these compelling considerations, there are multiple arguments against courts acting *sua sponte*. The most frequent argument is that it harms the adversarial process.[108] The adversarial process's core is that competing arguments yield the best result in a legal deliberation. By diluting the role litigants play in the process, *sua sponte* acting courts damage the process's effectiveness.[109]

Closely related to the harm *sua sponte* action causes to the adversarial process is its results. Courts acting *sua sponte* bring important changes to the law without outside input.[110] This non-traditional development of the law is not merely injurious by itself. It may also lead to errors and an incomplete understanding by the courts of the changes they have enacted,[111] because of the lack of information from the parties.

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the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.").

108. *See, e.g.*, New Jersey v. T.L.O., 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting); Steiner v. Markel, 968 A.2d 1253, 1260 (Pa. 2009); People v. White, 956 N.E.2d 379, 417 (Ill. 2011).

109. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 316–17 (1989). This idea has less force in the context of unrepresented litigants because such litigants are viewed as less capable to meaningfully advocate for themselves. *See supra* note 2. The U.S. Supreme Court recognized that one of the most appropriate instances for a court to act *sua sponte* is when a litigant acts pro se. *See* Greenlaw v. United States, 554 U.S. 237, 244 (2008). *But see* Sousa v. Sousa, 143 A.3d 578, 595 (Conn. 2016) (holding that "the defendant's personal lack of legal knowledge does not equate to a lack of opportunity to litigate jurisdiction that would sustain the extraordinary measure of a collateral attack, despite the fact that she was a self-represented party").

Yet it must be noted that the adversarial model remains the theoretical basis for the American judicial system. *See* Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 B.Y.U. L. REV. 899, 910 (2016) ("Adversary theory retains both historical and present-day currency, and is often articulated as a fundamental tenet of American adjudication.").

110. See *supra* notes 13–14 for prominent examples.

111. *See* Milani & Smith, *supra* note 3, at 259–61; Elonis v. United States, 575 U.S. 723, 742 (2015) ("[F]ollowing our usual practice of awaiting a decision below and hearing from the parties would help ensure that we decide it correctly."); Maslenjak v. United States, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) ("[T]he crucible of adversarial testing . . . could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.").

Aside from harms to the adversarial mechanism and its benefits, *sua sponte* action is arguably inconsistent with due process.[112] The American commitment to due process by government entities is enshrined in its constitution.[113] The right to be heard before governmental decision-making is part and parcel of due process.[114] Adam Milani and Michael Smith argue that courts act inconsistently with due process when deciding issues *sua sponte*, without first hearing the parties, especially the losing side.[115] Barry Miller goes further to claim such decision-making violates due process.[116] The U.S. Supreme Court has not reached as far as to say that such action violates due process,[117] but other courts have hinted at it, at least in some situations.[118]

Even if *sua sponte* action is acceptable in principle, its application causes problems. Arbitrariness seems to be the most prominent concern.[119] Courts have no clear

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112. *See, e.g.*, United States v. McReynolds, 964 F.3d 555, 573 (6th Cir. 2020) (Griffin, J., concurring in part and dissenting in part); Miller, *supra* note 17, at 1260; Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–304 (2004) (articulating an account of procedural justice that links the legitimacy of adjudications to participatory procedures).

113. *See* U.S. CONST. amends. V, XIV.

114. Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

115. Milani & Smith, *supra* note 3, at 262–71.

116. Miller, *supra* note 17, at 1260.

117. *See, e.g.*, *id.* The Court was somewhat clearer when it comes to trial courts acting *sua sponte* in some contexts. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 848 (1999) (dismissing a party); Nelson v. Adams USA, Inc., 529 U.S. 460, 465–68 (2000) (adding another defendant and entering judgment). *But see* Milani & Smith, *supra* note 3, at 264 n.99 (arguing that a close case is Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673 (1930)). The Court in *Brinkerhoff-Faris* limited its decision to the case's merits and declined announcing a general rule. *See* 281 U.S. at 680.

118. *See, e.g.*, Maikotter v. Univ. of W. Va. Bd. of Trs., 527 S.E.2d 802, 808–10 (W. Va. 1999) (Davis, J., concurring in part and dissenting in part) (connecting *sua sponte* action and due process). Some courts moot the argument by granting certiorari in such cases. *See, e.g.*, Heilman v. Courtney, 926 N.W.2d 387, 392 n.2 (Minn. 2019); King v. Mosher, 629 A.2d 788, 790 (N.H. 1993).

119. *See, e.g.*, Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 845 n.1 (6th Cir. 2020) (declining to address an "antecedent question" to a dispute—

guiding principle when it is appropriate to act *sua sponte*, leaving the decision to their unfettered discretion.[120] This arbitrary nature of *sua sponte* action raises concerns of abuse of discretion.[121] It also raises concerns of fairness and of disparate treatment of similar harsh consequences for litigants.[122]

And there is transparency, or rather the lack of it. Many times, a court that decides an issue *sua sponte* does not reveal in the opinion that it is acting in such a manner. Instead, a reader learns of it only when a concurrence or a dissent condemns the action[123] or through

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the enforceability of an arbitration agreement the parties contest although it may impact the underlying dispute and standing).

120. Dennerline, *supra* note 24, at 1004–05.

121. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1578 (2020) ("[T]he appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion."); New Jersey v. T.L.O., 469 U.S. 325, 375 (1985) (Stevens, J., concurring in part and dissenting in part) (explaining that the Court, in "characteristic disregard of the doctrine of judicial restraint . . . avoided that result in this case by ordering reargument and directing the parties to address a constitutional question that the parties, with good reason, had not asked the Court to decide"); Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 711 (2020); Milani & Smith, *supra* note 3, at 287–90; Miller, *supra* note 17, at 1289–1295.

122. *See, e.g.*, Lawrence v. Wilkie, 33 Vet. App. 158 (Vt. App. 2020). The majority refused to engage with a relevant statutory provision because it wasn't raised by the veteran appellant despite the general tendency for leniency with veteran appellants. *See* Henderson *ex rel.* Henderson v. Shinseky, 562 U.S. 428, 441 (2011); Bogenberger v. Pi Kappa Alpha Corp., 104 N.E.3d 1110, 1130 (Ill. 2018) (Krameier, C.J., concurring in part and dissenting in part) (courts "should refrain from doing so when it would transform the court from arbiter to advocate."). Such arbitrariness is displayed prominently by jurists who swing from defending *sua sponte* action to rejecting it according to the issue at hand. *See* Miller, *supra* note 17, at 1259 n.22 (collecting such statements); *see also* NASA v. Nelson, 562 U.S. 134, 148 n.10 (2011) (where Justice Alito, answering a concurrence by Justice Scalia asking to decide a constitutional question *sua sponte*, collects cases where Justice Scalia fiercely objected to this course of action).

123. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 659–61 (1972) (Burger, C.J., dissenting) (criticizing the Court for raising the due process issue *sua sponte* without briefing and argument); Mapp v. Ohio, 367 U.S. 643, 671–77 (1961) (Harlan, J., dissenting) (arguing that the majority's overruling of Wolf v. Colorado, 338 U.S. 25 (1949) was not briefed or argued); Erie R.R. Co. v. Tompkins, 304 U.S. 81–90 (1938) (Butler, J., dissenting) (explaining that the overruling of application of common law in diversity cases was not presented by the parties or addressed below); Hargrove v. Sleepy's LLC, 974 F.3d 467, 475 n.5 (3d Cir. 2020) (addressing its *sua sponte* action in a footnote, responding to the dissent detailing it); Robinson v. Louisiana, 606 Fed. App'x 199, 212 (5th Cir. 2015) (Elrod, J.,

digging into a case's record and comparing the parties' arguments to the court's opinion. Sometimes the *sua sponte* action is only revealed in future cases.[124] This lack of transparency affects the entire system. Litigants cannot know the relative strength of the arguments that decisions are based on or if any contrary arguments were made.

With these arguments in the background, the judicial and scholarly consensus is that the use of *sua sponte* action in the American appellate system is a matter of degree rather than existence. Proponents of *sua sponte* action do not "contend that judges should be given the power to set their own agenda."[125] And the main focus of opposing voices is on "violations of form" by courts acting *sua sponte*.[126] This reflects the understanding that "while a judge isn't a pig hunting for truffles in the parties' papers, neither is he a potted plant."[127] And so, *sua sponte* action serves some legitimate goals and is not

dissenting) (accusing the majority of acting *sua sponte* and incorrectly); Bill Barrett Corp. v. Lembke, 474 P.3d 46, 52–53 (Colo. 2020) (Gabriel, J., dissenting) ("Notwithstanding the foregoing, the majority does not address either of these questions. Instead, it apparently asks and answers its own question . . . [which] is not an issue on which the division below opined, and, in my view, the parties were not given a full and fair opportunity to brief this question."); THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 122, 328 (1978).

124. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, Justice Souter noted in concurrence that the constitutional rule established in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990) (holding that the free exercise clause was irrelevant to a dispute about a law of general application), was decided *sua sponte*, with "[n]either party squarely address[ing] the proposition the Court was to embrace." 508 U.S. 520, 572 (1993) (Souter, J., concurring).

125. Frost, *supra* note 1, at 515; *id.* at 508 ("[T]he claim is only that if judges do see an argument missed by the parties, they should be free to raise it on the condition that it is closely related to the legal question before them, and the parties are given a chance to voice their views on the issue.").

126. *Id.* at 516; Milani & Smith, *supra* note 3, at 285 ("[T]here is no doubt that courts can raise issues sua sponte . . . .").

127. Potter v. District of Columbia, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, J., concurring).

categorically viewed as "a deviant act of judicial overreaching,"[128] even by those who criticize it.[129]

Recognizing that *sua sponte* action is here to stay, scholars and courts have attempted to alleviate its harmful effects by including litigants in the decision-making process, not by curtailing courts' discretion to act.[130] Several proposals emerged to attain that goal: remanding a *sua sponte* raised issue to a trial court,[131] a mandatory rehearing by the panel after it rendered a *sua sponte* decision,[132] and supplemental briefing with or without additional oral argument.[133] Of these solutions, supplemental briefing—a tool that allows courts to ask parties to brief additional questions—became a prominent feature in scholarly proposals and appellate courts' actions. Subsection I.C provides a descriptive account of this practice.

C. Supplemental Briefing—A Descriptive Account

"Supplemental briefing" refers to courts' practice of asking parties to submit briefs on issues they did not address in their original briefing and which the court is interested in addressing. Supplemental briefing was not "invented" to cure appellate *sua sponte* action. It has

128. Frost, *supra* note 1, at 455.

129. *See, e.g.*, Milani & Smith, *supra* note 3, at 250 ("[We] assume[] that courts do have the authority to raise issues sua sponte . . . ."). *But see* Lawson, *supra* note 22, at 1208–09 (asking to allow court *sua sponte* action only when it is "plain on the face of the record that a stipulation [that a court is challenging *sua sponte*] is false").

130. Some scholars suggest limitations on the issues courts can raise *sua sponte*. *See, e.g.*, John F. Muller, *The Law of Issues*, 49 WAKE FOREST L. REV. 1325 (2014) (suggesting to differentiate between issues, claims, and arguments); Steinman, *supra* note 66, at 1614–16 (offering a multi-step process to determine proper *sua sponte* invocation); Weigand, *supra* note 62, at 291–94 (suggesting another multi-step process).

131. Brianne J. Gorod, *The* Adversarial *Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 75–76 (2011); Miller, *supra* note 17, at 1256; Luke Ryan, *How the Party Presentation Rule Limits Judicial Discretion*, 4 ST. THOMAS J. COMPLEX. LITIG. 1, 9 (2017).

132. Milani & Smith, *supra* note 3, at 304–07.

133. *See* Section I.C *infra*.

known a long history and appears in many contexts.[134] The details below refer to how supplemental briefing emerged in the specific context of *sua sponte* action by appellate courts and how these courts use the tool.

Courts may ask for supplemental briefing at any stage of the litigation. It could cover any topic and be general or extremely specific. Usually, courts will issue an order requesting supplemental briefing and mandate a deadline and page limit for the submissions.[135] Many times, all parties will be required to submit their briefs simultaneously and reply at the same time.[136] Courts do not have clear guidelines on the structure or extent of supplemental briefing, and it may vary between general questions that allow parties to construct an argument and a list of questions that a court asks.[137] Although scholars and jurists sometimes discuss other procedures to address *sua sponte* action harms, like a remand to the trial court or a rehearing, supplemental briefing has become courts' preferred course of action. Three main reasons explain this: its alleged resemblance to the traditional adversarial process, the fact that it preserves courts' complete discretion to act *sua sponte*, and the alleged fairness it provides to litigants.

First, supplemental briefing allows for a quasi-adversary exchange between the parties regarding a court's *sua sponte* raised issue.[138] The ability to brief the court similarly to traditional appellate briefings can arguably

134. *See* Raker, *supra* note 40, at 83.

135. *See, e.g.*, Order, United States v. Kirilyuk, No. 19-10447, 1 (9th Cir. June 21, 2021) (ordering supplemental briefing on a designated date, addressing several questions, and limited to 3,000 words).

136. *See, e.g.*, *id.* (same submission deadline); Order, Doe v. Heil, No. 11-1335 (10th Cir., filed July 17, 2012) (requiring simultaneous briefs).

137. *See, e.g.*, Order, *Heil*, No. 11-1335 (10th Cir., filed July 17, 2012) (asking the parties to brief specific questions "without limiting the matters addressed"); Wisconsin Right to Life, Inc., v. Vocke, No. 12-2915 (7th Cir. 2013) (explaining the procedural background in detail in the supplemental briefing order before asking the parties to address highly specified and detailed questions).

138. *See, e.g.*, People v. Hobson, 7 N.E.3d 786, 794 (Ill. App. Ct. 2014) (Hyman, J., specially concurring) ("The benefit of the parties' advocacy by way of supplementary briefing or oral argument, preserves the adjudicatory process.").

prevent error[139] because the adversarial process is not only a ritual but also an aid to courts.[140] Thus, a court's choice of legal answer is "only as good as the information [it] receives" from the parties.[141] Such information plays a significant role in the "organizational decision making,"[142] and courts could not arrive at a correct conclusion without "sound information."[143] The quality of information a court has is tethered to "both a vigorous prosecution and vigorous defense of the issues in dispute."[144] And unlike remanding the case to the trial court, or allowing rehearing, supplemental briefing offers precisely that: more information for the court to make its decision, without making the parties return to a court—lower or the same one—for a more lengthy and less streamlined procedure.

Next, supplemental briefing preserves courts' discretion to act *sua sponte*. Nothing in how supplemental briefing is executed limits the range of issues or timing of a court's *sua sponte* intervention. It is only a procedural delay that requires courts to ask for parties' views on an issue.[145] Moreover, as Section II.B. explains below, supplemental briefing gives courts additional discretion—when to ask for supplemental briefing and to what extent. A remand, on the other hand, curtails the court's

139. *See, e.g.*, Alvarez v. City of Brownsville, 904 F.3d 382, 404 (5th Cir. 2018) (en banc) (Graves, J., dissenting); Turner v. Flournoy, 594 S.E.2d 359, 362 (Ga. 2004); Milani & Smith, *supra* note 3, at 259–61 (addressing Poyner v. Loftus, 694 A.2d 69 (D.C. 1997), and arguing that the court there acted *sua sponte* and missed a relevant piece of legislation which would have led it to the opposite outcome).

140. *See, e.g.*, Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 690 (1994).

141. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1990 (2007).

142. Orna Rabinovich-Einy & Yair Sagy, *Courts as Organizations: The Drive for Efficiency and the Regulation of Class Action Settlements*, 4 STAN. J. COMPLEX LITIG. 1, 20 (2016).

143. Diego A. Zambrano, *Judicial Mistakes in Discovery*, 112 NW. U. L. REV. ONLINE 217, 227 (2018).

144. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J., concurring) (quoting Christianburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978)).

145. Miller, *supra* note 17, at 1305.

discretion to intervene directly. A rehearing may limit the court's discretion post-hoc and reverse its intervention.

Finally, supplemental briefing arguably promotes fairness for the parties.[146] It "giv[es them] an opportunity to be heard on the [*sua sponte* raised] issue,"[147] before it is decided. Otherwise, parties may be "blindsided" when reading the court's opinion addressing an issue they had "no inkling that the court even thought about,"[148] without the ability to present a counter position or view.[149] Some scholars even say that *sua sponte* action without supplemental briefing causes "loss of litigant and public acceptance."[150] In another layer of fairness, supplemental briefing filed with a court before a final decision allegedly curbs judges' raising of issues *sua sponte* out of subconscious bias.[151] A remand or a rehearing may have the venire of fairness as they allow parties to address the issue raised. But they do so only after a court already made a substantive resolution or an initial resolution to remand. It is notoriously harder to convince a made-up mind that it is wrong.[152]

Perhaps with these benefits in mind, the United States Supreme Court has signaled a preference for

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146. *See, e.g.*, Turner v. Flournoy, 594 S.E.2d 359, 362 & n.2 (Ga. 2004); Mitchell v. Roberts, 469 P.3d 901, 903 n.3 (Utah 2020); Miller, *supra* note 17, at 1302; Laurens Walker, E. Allan Lind & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1416–17 (1979).

147. Blumberg Assocs. Worldwide v. Brown & Brown of Conn., Inc., 84 A.3d 840, 848 (Conn. 2014).

148. *Turner*, 584 S.E.2d at 362; *see also* United States v. Johnson, 921 F.3d 991, 1020–23 (11th Cir. 2019) (en banc) (Rosenbaum, J., dissenting).

149. *See, e.g.*, United States v. McReynolds, 964 F.3d 555, 573 (6th Cir. 2020) (Griffin, J., concurring in part and dissenting in part).

150. *See* Weigand, *supra* note 62, at 250.

151. Frost, *supra* note 1, at 504 (supplemental briefing may "counter any subconscious judicial bias by describing the flaws in the judge's legal analysis"); LON L. FULLER, THE ADVERSARY SYSTEM, IN TALKS ON AMERICAN LAW 43 (1961) ("[I]n the absence of an adversary presentation, there is a strong tendency by any deciding official to reach a conclusion at an early stage and to adhere to that conclusion in the face of conflicting considerations later developed.").

152. Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 37 (2001); *cf.* Milani & Smith, *supra* note 3, at 304 n.319.

supplemental briefing,[153] although it has not always followed its own advice.[154] And so, the Court has asked for supplemental briefing in many cases where it wanted to address unbriefed issues.[155] But it also adjudicated many other important cases on grounds the parties have not advanced and did not give the parties a chance to advocate for or against the resolution.[156]

Scholars make much of signals the Court has allegedly sent in some cases, and some argue that the Court practically compels supplemental briefing.[157] But they seem to be giving too much weight to remarks in dicta or to miss their context. For instance, in one case, the Court unanimously said that the "often . . . somewhat longer (and often fairer) way 'round [by asking for supplemental briefing] is the shortest way home."[158] Scholars maintain that the Court has followed that statement,[159] but that is factually incorrect. The Court continues to adjudicate issues *sua sponte* without supplemental briefing.[160] Moreover, the statement scholars build on is dicta that is a far cry from a rule. Indeed, in the same paragraph,

153. *See* Trest v. Cain, 522 U.S. 87, 92 (1997).

154. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1580 (2021) (Kagan, J., dissenting) (noting that the parties did not ask the court to overrule a past precedent, and arguing the majority did so there without asking for supplemental briefing); United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020) (deciding *sua sponte* that the court of appeals abused its discretion when it reached a constitutional question *sua sponte*); Maslenjak v. United States, 137 S. Ct. 1918, 1931–32 (2017) (Gorsuch, J., concurring in part and concurring in judgment) (pointing out that a test the Court announced was decided *sua sponte* without asking the parties for briefing).

155. In *Brown v. Board of Education*, the Court restored the cases to the docket and ordered supplemental briefing before deciding a question that the parties have not initially raised. 3 5 U.S. 972 (1953). This was not necessarily a "one-off." The Court acted similarly in other cases. *See, e.g.*, Slack v. McDaniel, 529 U.S. 473 (2000); Patterson v. McLean Credit Union, 485 U.S. 617 (1988); *see also supra* note 13.

156. *See supra* notes 14, 25, 123.

157. Milani & Smith, *supra* note 3, at 263–71, offer a construction that is based on the Court's views on the ability to be heard in other contexts—specifically res judicata and trial court dismissals. They argue it compels supplemental briefing in appellate *sua sponte* decision making.

158. *Trest*, 522 U.S. at 92.

159. *See* Milani & Smith, *supra* note 3, at 251.

160. *See supra* note 154.

the Court noted that it does not "say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued."[161]

Scholars also argue that the Court, or at least some justices on the Court, signaled that cases decided without full briefing merit lesser precedential weight.[162] But this argument is weak too. The statements that scholars use were not necessarily attributed to cases where the Court decided issues *sua sponte*.[163] When a member of the court did refer to a *sua sponte* decided case, their evaluation of the precedent relied only in part on the lack of briefing.[164] Most importantly, the Court simply does not follow this rule. Many of the Court's most revered and relied upon precedents include issues that were *sua sponte* decided.[165]

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161. *Trest*, 522 U.S. at 92.

162. *Johnson v. United States*, 576 U.S. 591 (2015), may be the strongest support for this assertion. There, Justice Scalia noted that a court is "'less constrained to follow precedent'" when it "opined" about an issue "without full briefing or argument." *Id.* at 606 (quoting Hohn v. United States, 524 U.S. 236, 251 (1998)).

163. For example, in summary dispositions. See *Hohn*, 524 U.S. at 251, where the Court noted, in dicta, that cases decided without the benefit of briefing merit lower precedential value. But there the Court was referring to cases decided in summary disposition, without merit briefing at all. Another instance is when the Court addressed appellate courts deciding an issue but not considering a claim or authority because of waiver. *See* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 100 n.5 (1991).

164. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) ("[A] constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.") (Souter, J., concurring). But Justice Souter mentioned many issues that make *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990) a weak precedent. In addition to the lack of briefing, he found the precedent to be "unnecessary to the outcome of [the] case," *id*., and of "recent vintage," *id.* at 573. Specifically, *Smith*'s value is still debated, and although it is at issue even today, *see* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021), the main argument about its weakness is not connected to its lack of briefing. Indeed, Justice Alito, concurring in *Fulton*, and arguing for *Smith* to be overruled, mentions the lack of briefing of the topic in *Smith* only in passing and not a main element of his reasoning. *See id.* at 1892, 1912, 1923 (Alito, J., concurring in judgment).

165. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961), still cited by courts around the nation and the Supreme Court approvingly for the proposition once decided *sua sponte*. That is because, as Justice Souter acknowledged, "Over time, such a decision may become part of the tissue of the law, and may be subject to reliance

But the U.S. Supreme Court is not the only appellate court that acts *sua sponte*. And its attitude towards supplemental briefing might not even be so relevant because of its different hierarchical position.[166] Other appellate courts, federal and state, act *sua sponte* too. Many of them adopted supplemental briefing in a wide variety of issues to different degrees. Some jurisdictions recognize that *sua sponte* action is common in their courts. In some states, legislatures enact legislation that compels courts to order supplemental briefing before adjudicating *sua sponte* any issue.[167] In other jurisdictions, courts make rules or precedents to that effect.[168] However, courts do not always follow the requirement for briefing.[169] Other courts manifest their general discomfort with *sua sponte* action and hold that it is even worse when courts do not ask for supplemental briefing.[170] A different subset of courts continues to act *sua sponte* with no supplemental

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in a way that new and unexpected decisions are not." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 573 (quotations omitted) (citations omitted).

166. *See, e.g.*, Frost, *supra* note 1, at 512–14; Steinman, *supra* note 66, at 1618.

167. *See, e.g.*, CAL. GOV'T CODE § 68081 (mandating supplemental briefing in every *sua sponte* action or rehearing alternatively).

168. *See, e.g.*, Blumberg Assocs. Worldwide v. Brown & Brown of Conn., Inc., 84 A.3d 840, 867–69 (Conn. 2014); State v. Johnson, 416 P.3d 443, 455–59 (Utah 2017).

169. *See, e.g.*, State v. Stephenson, 255 A.3d 865 (Conn. 2020) (addressing an issue *sua sponte* without supplemental briefing contrary to precedent and the Supreme Court held that addressing an issue *sua sponte* without supplemental briefing is a reversable error); Sousa v. Sousa, 143 A.3d 578, 600–01 (Conn. 2016) (Espinosa, J., dissenting) (noting the majority reached an issue *sua sponte* "without acknowledging that it [did] so" and should have "afford[ed] the parties an opportunity to brief that issue," according to Connecticut precedent).

170. *See, e.g.*, Galvan v. People, 476 P.3d 746, 758 (Colo. 2020); State v. Puckett, 640 P.2d 1198, 1201–02 (Kan. 1982). *But see* State v. Hollister, 329 P.3d 1220 (Kan. 2014) (adjudicating mootness *sua sponte* without supplemental briefing); State v. Hambright, 388 P.3d 613 (Kan. Ct. App. 2017), *rev'd on other grounds*, State v. Hambright, 447 P.3d 972 (Kan. 2019); People v. Butler, 319 N.W.2d 540, 547 (Mich. 1982) (Levin, J., concurring) ("When an issue is not presented in the form of a keenly contested and discrete controversy, a court is denied a valuable resource that contributes both to the legitimacy and wisdom of its judgment.").

briefing from the parties,[171] or shies away from any official rule or precedent.[172]

The issues that parties supplementally brief run parallel to issues courts raise *sua sponte*. Supplemental briefing orders range broadly. From questions concerning jurisdiction,[173] prudential concerns,[174] unbriefed issues apparent from the lower court record,[175] prior precedent overruling or an intervening statute,[176] positions not supported by any of the parties but by amici,[177] to completely new issues never raised before.[178]

In sum, supplemental briefing emerged as mitigation to the alleged harm that courts acting *sua sponte* inflict on the adversarial system. Its emergence and prominence are tied to its being adversarial in nature but still allowing appellate courts to act *sua sponte* without any limitations on their discretion and promoting fairness. But as Section II explains, this compromise is simply a

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171. *See, e.g.*, Pruitt v. Oliver, 2021 WL 298727, *39–40 (Ala. Jan. 29, 2021) (Parker, C.J., concurring in part and concurring in judgment) (noting that the court decided issues that "neither ruled on by the [trial] court nor argued by" [the parties] without any briefing); Bisio v. City of Clarkston, 954 N.W.2d 95, 101 n.7 (Mich. 2020).

172. *See, e.g.*, Moore v. Moore, 486 S.W.3d 766, 777 (Ark. 2016) (Wynne, J., concurring in part and dissenting in part) (arguing that the court "has been resolute in stating that we will not make a party's argument for that party or raise an issue sua sponte, unless it involves the circuit court's subject-matter jurisdiction" but "[i]n the present case, however, the majority breaks from this clear precedent and overrules a line of cases dating back nearly thirty years"); Blanke v. Utah Bd. of Pardons & Parole, 467 P.3d 850, 870–71 (Utah 2020) (Lee, A.C.J., concurring in judgment) (stating there is "no hard-and-fast rule" mandating supplemental briefing).

173. *See, e.g.*, PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 1289 (2021) (ordering jurisdictional supplemental briefing).

174. *See, e.g.*, *In re* Joan K., 273 P.3d 594, 596 (Alaska 2012) (mootness).

175. *See, e.g.*, People v. Hobson, 7 N.E.3d 786, 786 (Ill. App. Ct. 2014).

176. *See, e.g.*, People v. Frederickson, 457 P.3d 1 (Cal. 2020) (intervening U.S. Supreme Court precedent); Galindo v. City of Flagstaff, 452 P.3d 1185, 1187 n.2 (Utah 2019) (same).

177. *See, e.g.*, PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 1289 (2021) (ordering jurisdictional supplemental briefing following an argument by amicus curiae); New Jersey v. T.L.O., 468 U.S. 1214, 1215 n.2 (1984) (Stevens, J., dissenting) (asking for supplemental briefing on a constitutional question that the parties had no interest or qualm with according to oral argument).

178. *See, e.g.*, W. Air Lines, Inc., v. Bd. of Equalization, 480 U.S. 123, 129 (1987).

Band-Aid. Supplemental briefing does not address major concerns with *sua sponte* action, and it requires supplement of substance, and not just procedure.

II. THE PROBLEMS WITH SUPPLEMENTAL BRIEFING

Courts and scholars laud supplemental briefing as a remedy to the consequences of *sua sponte* action on litigants. But few scholars or courts have devoted time to examining the effects or function of this procedural tool.[179] Those who do dismiss most arguments against supplemental briefing as unconvincing.[180] This section suggests that some arguments have gone unexamined, and these arguments raise doubts about the efficacy of supplemental briefing as a remedy to courts acting *sua sponte*.[181]

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179. Miller, *supra* note 17, at 1301–04, is an exception. *See also* Raker, *supra* note 40, at 83–85 (arguing for supplemental briefing in cases of inadequate briefing and making arguments similar to Miller). *But see* Cravens, *supra* note 22, at 253 n.4 (pointing out that mandating supplemental briefing "is in the first place unrealistic, due to a lack of resources necessary to achieve it, and is furthermore a bad policy in that it permits bad lawyering to result in bad law, where that eventuality may be avoidable").

180. Miller, *supra* note 17, at 1304; Raker, *supra* note 40, at 83–85.

181. Neal Devins and Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859 (2013), challenge courts' ability to order supplemental briefing. They argue that supplemental briefing, when ordered by a federal court, poses a challenge to its Article III jurisdiction. *Id.* at 861. When courts order supplemental briefing, they go beyond their constitutional grant of judicial power, which is limited to a "case or controversy" brought by the parties. *Id.* The reason is that such action is akin to asking parties to file suits, which is inconsistent with the autonomy of parties in litigation and Article III obligation. For example, when parties refuse to purse a legal question that got certiorari, the court invites amici to argue the position, and does not force the parties to argue it. *Id.* at 873 n.61.

This article does not take that position. First, Devins and Prakash acknowledge that the problem does not arise when a federal court merely invites such briefing on unraised issues. *Id.* at 875. But that distinction seems simplistic. When a court requests supplemental briefing, parties rarely feel free to not supply one. *See, e.g.,* Frost, *supra* note 1, at 505. And when they do not, courts still issue opinions on the *sua sponte* issue they decided to reach. *See* U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993). Second, courts have rejected general arguments that they lack authority to order supplemental briefing, calling them "counter to notions of procedural due process."

A. Supplemental Briefing Creates More Sua Sponte *Action*

Supplemental briefing was never meant to curb the ability of courts to act *sua sponte*.[182] But it has created more incentives for courts to act *sua sponte*, in an arguably broader scope and consequently more intrusive on the adversarial process.

Courts raising and deciding issues *sua sponte* subvert the adversarial model and do not give litigants a say in the judicial decision-making.[183] Supplemental briefing is a fix, supposedly. It gives litigants a voice in the court-generated additional decision-making. But by providing a process for party participation, supplemental briefing normalizes *sua sponte* action as part of the adversarial process.[184] Because of this normalization, courts may be less reluctant to act *sua sponte* and address issues the parties have not brought before them.[185] Some jurists have opined that their courts' *sua sponte* actions have become inappropriate as a result.[186] And in some cases, *sua sponte* action of this caliber led to reversals on further appeal.[187] But other jurists seem to buy into this

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See State v. Curry. 931 P.2d 1133 (Ariz. Ct. App. 1996); People v. Hobson, 7 N.E.3d 786, 795 (Ill. App. Ct. 2014) (Hyman, J., specially concurring).

182. *See* Section I.C *supra*.

183. *See* Section I.B. *supra*.

184. *See, e.g.*, Crist v. Cline, 434 U.S. 980, 981–82 (1977) (Marshall, J., dissenting) (characterizing supplemental briefing orders as a "vehicle to change a long line of precedent," and doing "violence" to "assumptions underlying Art. III of the Constitution") (first citing Pennsylvania v. Mimms, 434 U.S. 106, 117 (1977) (Stevens, J., dissenting), and then citing Ashwander v. TVA, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring)).

185. *See, e.g.*, Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 170–73, 173 n.106 (Del. 2018) (raising a common law issue—the law of the case—*sua sponte* and asking for supplemental briefing that resulted in overruling of past precedent)

186. *See, e.g.*, *id.* at 190–91 (Valihura, J., dissenting).

187. *See, e.g.*, United States v. Sineneng-Smith, 140 S. Ct. 1575, 1581 (2020) (reversing *United States v. Sineneng-Smith*, 910 F.3d 461, 469 (9th Cir. 2018) that ordered supplemental briefing from the parties and resolved the case on these new grounds); *see also* State v. Stephenson, 255 A.3d 865 (Conn. 2020) (holding that addressing an issue *sua sponte* without supplemental briefing is a reversable error).

normalizing effect. They openly suggest that courts address issues they see proper and ask for supplemental briefing to include parties in the adjudication.[188]

The normalizing effect of supplemental briefing over *sua sponte* action seems to be a powerful source of reliance for judges attempting to question old precedent or insert constitutional issues into cases that parties have not raised.[189] While the use of *sua sponte* action to overrule precedent is nothing new,[190] nor is it assigned to one political camp,[191] ordering supplemental briefing provides a court with a façade of adversariness. Moreover, the normalizing of *sua sponte* action through supplemental briefing allows judges to advocate for judicial restraint while acting without it. Judges who wish to change the state of the law can do so *sua sponte* while claiming they are not overstepping or politically motivated because supplemental briefing makes their initiative adversarial in nature.[192] Thus, if *sua sponte* action may raise political concerns, supplemental briefing is

188. *See, e.g.*, Warren v. Comm'r, 282 F.3d 1119 (9th Cir. 2002) (ordering supplemental briefing on a *sua sponte* raised constitutional question with the dissent arguing it was out of line); Brady v. Park, 445 P.3d 395, 429 n.114 (Utah 2019) (Lee, A.C.J., concurring in part and dissenting in part) (suggesting the court should order supplemental briefing to remedy his suggestion to overturn precedent *sua sponte*); Waite v. Utah Labor Comm'n, 416 P.3d 635, 645 n.73 (Utah 2017) (noting the concurrence suggest the same as in *Brady*).

189. *See, e.g.*, Ctr. for Investigative Reporting v. U.S. Dep't of Justice, 982 F.3d 668, 697 (9th Cir. 2020) (Bumatay, J., dissenting); Anderson v. Neven, 974 F.3d 1119, 1123–37 (9th Cir. 2020) (VanDyke, J., dissenting from the denial of rehearing en banc) (making state law arguments about criminal law *sua sponte*); United States v. Romero-Coriche, 840 Fed. App'x 138, 142–43 (9th Cir. 2020) (VanDyke, J., concurring) (*sua sponte* addressing precedent making "little sense").

190. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 659–61 (1972) (Burger, C.J., dissenting) (criticizing the Court for raising the due process issue sua sponte without briefing and argument); Mapp v. Ohio, 367 U.S. 643, 671–77 (1961) (Harlan, J., dissenting) (arguing that the majority's overruling of *Wolf v. Colorado*, 338 U.S. 25 (1949) was not briefed or argued).

191. *Compare* Johnson v. United States, 576 U.S. 591 (2015) (finding a statutory provision that enhances sentences unconstitutional), *with* Citizens United v. FEC, 558 U.S. 310 (2010) (holding that corporations may contribute to political campaigns because their shareholders are persons).

192. *See, e.g.*, *Brady*, 445 P.3d at 429 n.114 (Utah 2019) (Lee, A.C.J., concurring in part and dissenting in part).

bound to make a political-based resolution seem neutral.[193]

Notably, supplemental briefing seems to have emboldened *sua sponte* action driven by the duty to "get the law right" and not so much action motivated by "doing justice."[194] This makes sense because *sua sponte* action with the goal of "doing justice" is usually closely related to the case and often does not involve considerations and interests broader than the parties before the court. Even if arbitrary in nature, it seems connected more clearly to the judicial function. On the other hand, "getting the law right" means at times opening the door to a whole new issue that the parties have not contemplated and may have broad effects. The merit of such intrusion, without party participation, seems dubious and may generate criticism. While it is clear that supplemental briefing is not meant to curb *sua sponte* action, it should not be used to increase its use.[195]

Indeed, scholars and jurists do not seem to engage with the possible effects that this additional procedural feature will have on how courts exercise their discretion to act *sua sponte* in the first place. But every addition to a system may have unintended consequences.

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193. *See, e.g.*, Warren v. Comm'r, 282 F.3d 1119 (9th Cir. 2002). The panel in *Warren* ordered supplemental briefing on the constitutionality of a statute, an issue the parties had not disputed. *Id.* at 1120. Judge Tallman, dissenting, argued the *sua sponte* raised issue was "improvidently raised," explaining that the subject—tax exemptions for religious organizations—has political salience. *Id.* at 1123–24. Yet, Judge Reinhardt, concurring, explained the matter neutrally and as part of the adversarial process. *Id.* at 1119–23 ("The purpose of requesting briefing in this case is to obtain more information in order to make a more informed and reasoned decision about *whether* to address an issue and, if so, *how* the issue should be resolved. Information, speech, and truth do not hurt; they only shed light. That is a fundamental tenet not only of our judicial system but of our democracy.") (emphasis in original).

194. *See, e.g.*, Doe v. Wasden, 982 F.3d 784, 796 (9th Cir. 2020) (VanDyke, J., dissenting in part and concurring in part).

195. Some scholars argue that courts merely ask for supplemental briefing, and parties may refuse such proposal. *See* Devins & Prakash, *supra* note 181, at 875; Milani & Smith, *supra* note 3, at 299. But as one justice at the Utah Supreme Court explained, "[a]sk is a euphemistic way to describe a supplemental briefing order." Waite v. Utah Labor Comm'n, 416 P.3d 635, 662 n.111 (Utah 2017) (Pierce, J., concurring). And in any case, even when parties refuse to supplementally brief, courts may still address the issue.

Additionally, in other contexts, procedural tools that were meant to regulate the manner courts apply their discretion have been arguably used and abused by courts. A prominent recent example is the U.S. Supreme Court's use of its "shadow docket" to resolve a growing number of disputes summarily while making substantial determinations on significant questions of law.[196] But there are others.[197] And so, any change to the current supplemental briefing status quo should consider that a procedural tool with no guidelines may lead to other unintended results.

B. Supplemental Briefing Adds Arbitrariness and More Lack of Transparency to Judicial Decision-Making

Two problematic aspects of courts acting *sua sponte* are the practice's arbitrariness and lack of transparency.[198] And while supplemental briefing is not meant to necessarily address these aspects, it actually aggravates them.

Take arbitrariness. The literature is replete with examples of similarly situated cases that received different treatment from courts, with no justification or explanation. An appellate court can raise an issue *sua sponte* in one case but not in another with similar facts and positions, possibly leading to contrasting results.[199] Supplemental briefing is not meant to fix the inherent arbitrariness in the discretionary choice of a court to raise an issue *sua sponte*.[200] Supplemental briefing, after all, is

196. *See, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

197. *See, e.g.*, Jesse D.H. Snyder, *Does Federal Rule of Procedure 62.1 Entice District Courts to Render Unconstitutional Advisory Opinions?*, 42 DAYTON L. REV. 1 (2017).

198. *See supra* Section I.C; *see also* Martineau, *supra* note 71, at 1061 ("The only consistent feature of the current system is its inconsistency."); Miller, *supra* note 17, at 1256–60.

199. Frost, *supra* note 1, at 464.

200. "[T]he nature and extent of an opinion rendered by an appellate court is largely discretionary." State v. Carter, 776 P.2d 886, 888 (Utah 1989); Frost, *supra* note 1, at 463 (*sua sponte* action "reflects the Court's discretionary

focused on a single case and does not help solve the disparity between different cases because of *sua sponte* action.[201] The real problem lies in how courts use supplemental briefing, which yields even more arbitrariness.

Most courts do not have rules regarding supplemental briefing orders when acting *sua sponte*.[202] Indeed, not every court acting *sua sponte* asks for briefs before adjudicating issues *sua sponte*.[203] Even courts with some guidelines or precedent that encourage supplemental briefing when acting *sua sponte* do not always follow those directives.[204]

It is difficult to discern when a court might order supplemental briefing. Contributing to this difficulty is a general lack of a mechanism to hold courts accountable for how they use supplemental briefing.[205] Some factors that appear to affect the decision to order supplemental briefing are the quality of representation, the urgency of resolving the case, and the clarity of the record about the *sua sponte* raised issue.[206] Yet, these are all anecdotal

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authority to dispose of cases in what it determines to be the most sensible and reasonable way.").

201. Miller, *supra* note 17, at 1305.

202. Blanke v. Utah Bd. of Pardons and Parole, 467 P.3d 850, 870 (Utah 2020) (Lee, A.C.J., concurring in judgment) (stating there is "no hard-and-fast rule" mandating supplemental briefing). Exceptions are Connecticut and California—but on the ground, even in these jurisdictions, courts act *sua sponte* without asking for supplemental briefing. *See, e.g.*, State v. Stephenson, 255 A.3d 865 (Conn. 2020) (holding that addressing an issue *sua sponte* without supplemental briefing is a reversable error).

203. *See, e.g.*, Moser v. Las Vegas Metro. Police Dep't, 984 F.3d 900, 912–13 (9th Cir. 2021) (Berzon, J., dissenting) (pointing out how the majority reached an issue that the plaintiff waived, without additional briefing).

204. See, e.g., Utah where *State v. Johnson*, 416 P.3d 443, 455–59 (Utah 2017), tried to offer such guidelines, but the members of the court still spar on where supplemental briefing is merited and its necessity. *See, e.g.*, *Blanke*, 467 P.3d at 870 (Lee, A.C.J., concurring in the judgment) (stating there is "no hard-and-fast rule" mandating supplemental briefing).

205. *But see* State v. Stephenson, 255 A.3d 865 (Conn. 2020) (holding that addressing an issue *sua sponte* without supplemental briefing is a reversable error).

206. See, e.g., Elzy v. United States, 205 F.3d 882, 887 (6th Cir. 2000) ("[W]e see no need in this case to invite supplemental briefs from the parties on the issue, as the procedural default is manifest in the record and there is nothing further that the parties could bring to our attention that could bear upon the default."); Davis v. State, 243 So. 3d 222, 235 n.12 (Miss. Ct. App. 2017)

impressions. The number of variables in consideration in every instance of *sua sponte* action precludes a more empirical analysis that would yield any concrete results. But there is no certainty or a measure of anticipation about whether a court would ask for supplemental briefing when it chooses to act *sua sponte*.[207]

As for lack of transparency, the situation is arguably less severe, but still worrisome. On its face, supplemental briefing increases transparency of a court's choice to raise an issue *sua sponte* when a court alerts the parties to it and notes so in its subsequent opinion. Supplemental briefing is not meant, however, to cure all the transparency problems of *sua sponte* action. Appellate courts may still not reveal in their opinion that they acted *sua sponte*. And yet, it adds to these problems. Usually, courts do not explain why they ordered supplemental briefing in one case and declined in another. Some dissenting or concurring judges use the option to order supplemental briefing as a sword to attack their colleagues in majority for addressing issues without briefing, or when they refuse to do so.[208] In other

(explaining a decision to address an issue without supplemental briefing because it was "straightforward").

207. Arbitrariness in *ordering* supplemental briefing might be explained by arguing that courts act according to a cost-benefit analysis. If accurate, it means that there is little to no arbitrariness, but rather a discretionary use of supplemental briefing in those cases where the costs of such supplemental briefing order would outweigh its benefits. This implies a solution to those issues with supplemental briefing in Section II.A. Section II.A. theorizes that supplemental briefing may be less beneficial when it addresses questions that parties can reasonably anticipate, questions that courts have superior knowledge about, or when courts have invested significant resources in researching the issues. According to the argument explaining arbitrariness with cost-benefit-based discretion, these cases should yield fewer supplemental briefing. Yet, there are many examples of courts asking for supplemental briefing on such occasions. Alternatively, it could mean that the calculus Section II.A offers does not correlate to courts' point of view on the benefits of supplemental briefing. Here, again, the complexity of variables makes it difficult to offer a resounding response. But the variety of cases that build the arbitrary practice argument, together with jurists' recorded dissents and concurrences to this point, lead to doubts about the cost-benefit-oriented discretion theory.

208. For opinions asking for supplemental briefing to address a *sua sponte* raised issue, see, e.g., *VG Marina Mgmt. Corp. v. Wiener*, 862 N.E.2d 638, 646–47 (Ill. App. Ct. 2007) (O'Malley, J., dissenting), and *Salt Lake City v. Carrera*,

instances, courts simply do not note that they asked for supplemental briefing or materially changed the course of the litigation. Only a dive into the docket reveals it—a dive that the ordinary reader would not know is needed.

Supplemental briefing adds more arbitrariness and lack of transparency to the judicial decision-making because it is discretionary and lacks guidelines and meaningful enforcement mechanisms. This may bring unfair results and litigant and public discontent from courts. This suggests that any proposed reform must curb courts' discretion instead of setting additional discretionary procedures to overcome the difficulties with supplemental briefing.

C. Supplemental Briefing (At Least) Sometimes Costs Too Much

Supplemental briefing is a procedural tool with costs and benefits. It distorts the parties' cost allocation in litigation and burdens them with costs they either did not contemplate or knowingly rejected. At least in some cases, these costs outweigh the benefits. The costs associated with supplemental briefing are time, effort, and money.[209]

First, time. When courts order supplemental briefing, it means that the decision in a case may be delayed, even for a long time.[210] Most times, when the U.S. Supreme Court asks for supplemental briefing, it also

358 P.3d 1067, 1074 (Utah 2015) (Lee, A.C.J., dissenting). For opinions objecting to supplemental briefing, see, e.g., *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1363 (11th Cir. 2018) (Martin, J., concurring) (disagreeing with the majority on whether it was appropriate to order supplemental briefing), and *United States v. Pridgette*, 831 F.3d 1253, 1259–60 (9th Cir. 2016) (O'Scannlain, J., concurring in part and dissenting in part) (same).

209. *See, e.g.*, Mitchell v. Roberts, 469 P.3d 901, 903 n.3 (Utah 2020) (recognizing a cost-benefit paradigm).

210. *See, e.g.*, *id.* at 901. The case—certification of a question from the district court—was filed in 2017 and heard on May 14, 2018. The Utah Supreme Court ordered supplemental briefing on September 25, 2019, and the case was decided on June 11, 2020, more than three years after filing.

restores a case to its calendar, which means a decision could be delayed by a year.[211] But while a year may be viewed as not detrimental, especially for a case heard by the U.S. Supreme Court, the delay might be much longer in other appellate courts. Unlike the U.S. Supreme Court, many appellate courts do not have a hard term limit, requiring them to issue opinions before a specific date or move a case for the following term.[212] That means that cases with supplemental briefing orders can—and do—take a long time to be issued, thereby delaying the litigants' hard-sought relief.[213]

The time toll that supplemental briefing imposes is not limited to the litigants who must wait for judgments in their case. It impacts the judiciary too. When courts ask for supplemental briefing often, it creates a backlog of cases—adding to their workload and potentially denting their reputation.[214]

Second, effort and money. These two costs are intertwined because the additional effort supplemental briefing requires, also means parties must spend more money.[215] When courts order supplemental briefing, attorneys must invest additional effort into a case already briefed and argued on appeal. Usually, this requires personnel and legal work on issues that are perhaps precedential or were never considered by the parties. Supplemental briefing bears monetary costs on the parties—

211. Notable examples include *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953).

212. *See, e.g.*, Commonwealth v. Hamlett, 234 A.3d 486, 522 (Pa. 2020) (Wecht, J., dissenting).

213. *See, e.g.*, People v. Frederickson, 457 P.3d 1 (Cal. 2020) (ordering supplemental briefing in late 2018 and resolving the case without addressing the underlying question in the briefing more than a year later).

214. For the connection between backlog and diminished reputation, see, e.g., Laura F. Edwards, *The Forgotten Legal World of Thomas Ruffin: The Power of Presentism in the History of Slave Law*, 87 N.C.L. REV. 855, 872 n.61 (2009); Russell Fowler, *History's Verdict: The Great William B. Turley*, 54 TENN. B.J. 33, 33 (2018).

215. *See, e.g.*, Florida Carry, Inc., v. Univ. of N. Fla., 133 So. 3d. 966, 988 (Fla. Dist. Ct. App. 2013) (Makar, J., concurring) (recognizing that supplemental briefing and *sua sponte* action (in the context of oral argument) "impose[] expense on the parties").

they must pay attorneys for their additional unexpected work, and monetary judgments they expect may be delayed.

Scholars describe these costs as negligible because parties assume such potential costs when they appeal their cases.[216] But even if attorneys are aware of courts' willingness to act *sua sponte* and possible need for supplemental briefing, they cannot always predict when a court will ask for supplemental briefing. With such knowledge, parties may prefer to not appeal or try to settle a dispute.[217]

Even if the assumption of costs by appeal made sense, it would be limited, namely at the U.S. Supreme Court. It does not make much sense when lower appellate courts ask the parties to supplementally brief cases. In those courts, litigants may often lack the financial ability or attorney-caliber required to capitalize on supplemental briefing effectively.[218] Moreover, some of these litigants may be seeking only modest relief, such as a small judgment or a ruling on a narrow procedural issue. Others—criminal defendants or personal-injury plaintiffs—may be seeking life-altering relief that would be extraordinarily inconvenienced by the delay that supplemental briefing can impose. These courts also have a more extensive docket which means that cases that require supplemental briefing may take much longer to be decided, requiring more significant effort and, in some cases, money from parties and the judiciary.

But supplemental briefing has benefits. When courts act on their own motion without hearing arguments from the parties, they deprive the parties from being heard about those matters,[219] creating due process concerns. In addition, courts surprise litigants unfairly with issues the parties deem irrelevant or chose to not

216. Miller, *supra* note 17, 1300–05.

217. *See, e.g.*, United States v. Haymond, 935 F.3d 1059, 1060–61 (10th Cir. 2019) ("After receiving our supplemental briefing order, the government filed a motion to dismiss this appeal. The parties also filed their supplemental briefs.").

218. Steinman, *supra* note 66, at 1618; Weigand, *supra* note 62, at 191.

219. *See supra* notes 112–118.

present.[220] Supplemental briefing has the potential to remedy these harms, by giving parties an opportunity to participate in the decision-making about the *sua sponte* raised issues.[221]

Supplemental briefing assists with public acceptance of the judiciary's work. Its existence—useful to courts or not—allows court discretion to act *sua sponte* with less criticism.[222] Supplemental briefing ensures a visage of participation that is viewed as valuable for the court's public image and for the acceptance of the judgment by the litigants.

Although scholars treat all *sua sponte* action the same,[223] this article proposes that weighing the costs and benefits depends on context. Perhaps easiest to understand, the value of supplemental briefing is clearly outweighed when courts decide to resolve a case on other grounds, after the parties spent time, money, and effort on additional briefs.[224] But even in less extreme situations, supplemental briefing benefits matter less and costs are much more burdensome.

First, there are circumstances where the judicial institutional knowledge about an issue raised *sua sponte* is superior to that of the parties. In these instances, supplemental briefing may be less valuable to the court. These situations arise when the issues that courts ask parties to brief are rare and complicated, but also when the issues raised are routine and have been adjudicated before, and when courts have exerted substantive efforts

220. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 29 (1960).

221. *See* Section I.C.

222. LANDSMAN, *supra* note 44, at 34 ("Adversary theory holds that if a party is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not.").

223. Scholars largely ignore the idea that *sua sponte* action is not all the same. *See, e.g.*, Milani & Smith, *supra* note 3, at 294 (asking for supplemental briefing in all circumstances); Miller, *supra* note 17, at 1297 (offering a unified approach of asking for party submissions).

224. *See, e.g.*, Peter A. v. State, 146 P.3d 991, 993 (Alaska 2006) (noting the court asked for supplemental briefing on four broad questions but did not decide the questions because it found the appeal to be moot).

and research on the questions before ordering supplemental briefing. In these circumstances, the litigants' ability to address the issue helpfully and diligently is questionable and the value of supplemental briefing may be symbolic.

In recent years, an increasing number of courts order parties to brief originalist arguments[225] and corpus linguistics analysis of statutory and constitutional language.[226] These issues are not in the skill set of every advocate.[227] This point is clearly discerned from the fact that courts issue opinions that guide litigants on how to craft such arguments[228] and rebuke litigants for not arguing them properly on supplemental briefing.[229] These issues also present questions that might be expensive to investigate and litigate. This is particularly true in criminal cases where public defenders usually lack the

225. *See, e.g.*, Waite v. Utah Labor Comm'n, 416 P.3d 635, 648 (Utah 2017) (Lee, A.C.J., concurring in judgment) (addressing ordering supplemental briefing order on "text and original meaning" of the Open Courts Clause (of the Utah Constitution)).

226. "Corpus linguistics is an empirical approach to the study of language in which we search large, electronic databases of naturally occurring language" to "draw inferences about the ordinary meaning of language based on real-world examples." Richards v. Cox, 450 P.3d 1074, 1079 (Utah 2019). For recent orders, see, e.g., Letter, Wright v. Spaulding, No. 17-4257, 1 (6th Cir. filed May 28, 2019), ECF No. 44 (requesting, among other issues, supplemental briefing on the original meaning of Article III "Cases or Controversies" requirement and asking how corpus informs such a determination).

227. Professor Josh Blackman argues that courts should routinely ask for originalist briefings, despite recognizing that "[m]ost attorneys—from judges to law clerks—simply lack the training to develop originalist research." *See* Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 NYU J.L. & LIBERTY 44, 58–59 (2019). And as for corpus linguistics, one federal judge noted the tool is "new to lawyers and continuing to develop." Wilson v. Safelite Grp., Inc., 930 F.3d 429, 440 (6th Cir. 2019) (Thapar, J., concurring in part). Another called it a "difficult and complex exercise." *Id.* at 446 (Stranch, J., concurring); *see also* State v. Lantis, 447 P.3d 875, 881 (Idaho 2019) (Brody, J., specially concurring) ("I have no training or experience with corpus linguistics and have no opinion as to whether this tool supports or does not support the Court's analysis of the statute at issue.").

228. *See, e.g.*, Salt Lake City Corp. v. Haik, 466 P.3d 178, 184 n.29 (Utah 2020).

229. *See, e.g.*, United States v. Aquart, 912 F.3d 1, 72 (2d Cir. 2018) (Calabresi, J., concurring in part and concurring in the result) (finding the appellant's originalist supplemental briefing, ordered by the court, not "all that helpful").

budget or the capacity to engage with such issues. Moreover, these questions do not always have conclusive answers and lead to inconclusive results susceptible to varied interpretations.[230] And so, even a well-briefed supplemental brief would likely not give much assistance or sway a court that is already immersed in these interpretive tools.[231]

But litigants' input is also of little value when the issue courts seize upon is simple and straightforward but was, for some reason, overlooked or missed. Some courts acknowledge the possible waste that supplemental briefing brings to the process in these circumstances.[232] Studies showing that judges use accurate rules even when receiving faulty briefs reinforce the relatively minor influence litigants have in these instances.[233] These studies emphasize the limited effect of poor advocacy on the quality of judicial work.[234]

Another situation where litigants' input has relatively little value for a court is when the court raising an issue *sua sponte* has invested significant work and

230. For Originalism, see, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), where Justice Gorsuch and Justice Thomas reached opposite outcomes based on an originalist analysis of the vagueness doctrine. *Compare id.* at 1224–28 (Gorsuch, J., concurring in part and concurring in judgment), *with id.* at 1242–50 (Thomas, J., dissenting). *See also Aquart*, 912 F.3d at 72 (Calabresi, J., concurring in part and concurring in the result) (noting that "academics are just beginning to explore" the original meaning of the Eighth Amendment, which the court asked the parties to brief). *Neese v. Utah Bd. of Pardons & Parole*, 416 P.3d 663 (Utah 2017), addressed the original meaning of the due process clause of the Utah constitution and presented competing accounts from the majority, *id.* at 682–93 and the dissent, *id.* at 698–711 (Lee, A.C.J., dissenting) (adding the issue *sua sponte* without supplemental briefing in both opinions). For corpus linguistics, see, e.g., *Wilson*, 930 F.3d at 445–47 (Stranch, J., concurring) (explaining the many discretionary elements in corpus linguistics that may lead to different results according to the interpreting judge).

231. This fact should play a role in a court's decision to address an issue that was not raised and is perhaps not necessary for the case's disposition. *See, e.g.*, Wright v. Spaulding, 939 F.3d 695, 700 n. 1 (6th Cir. 2019).

232. *See, e.g.*, Robinson v. Louisiana, 606 Fed. App'x 199, 209 n.11 (5th Cir. 2015).

233. Zambrano, *supra* note 143, at 237–38.

234. Courts also note this limited effect. *See, e.g.*, Smith v. Farley, 59 F.3d 659, 665–66 (7th Cir. 1995).

research before asking for supplemental briefing.[235] Such work may be reflected in the form of the questions the court asks the parties to brief. The more detailed and specific the supplemental briefing order, the more likely a court has done much research and preparatory work,[236] and perhaps already crafted some sort of resolution.[237]

Second, some *sua sponte* action is predictable enough to not necessarily raise due process or fairness concerns. Take subject-matter jurisdiction, an issue that courts must address *sua sponte*. Parties are not "blindsided" by courts raising it *sua sponte* and certainly cannot agree to not raise the matter.[238] Such circumstances raise few if any due process or fairness concerns. But subject-matter jurisdiction is not the only issue that courts raise *sua sponte* quite routinely. These issues include prudential concerns such as mootness, standing, and exhaustion.[239] Some courts routinely address various canons of construction.[240] Others treat prudential concerns and canons of construction as jurisdictional[241]

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235. Timing also matters in this context. Arguably, asking for supplemental briefing before oral argument allows parties to incorporate the argument into their main case and argue it cohesively. It allows the Court to hear argument about the various issues. *See, e.g.*, Vt. Agency of Nat. Res. v. United States, 528 U.S. 1015 (1999) (directing the parties to answer a jurisdictional question of standing underlying their case ten days before oral argument); Swint v. Chambers Cty. Comm'n, 513 U.S. 958 (1994) (asking the parties to address a jurisdictional question prior to oral argument and postponing the argument accordingly).

236. *Compare* Supplemental Briefing Order (Jan. 7, 2019), Utah Dep't of Transp. v. Target Corp., 459 P.3d 1017 (Utah 2020) (asking whether "any of the standards set forth in our cases [should] be refined or reformulated in any way"), *with id.* (asking a very specific question about statutory interpretation of a term and its comparison to other terms.

237. *See* Raker, *supra* note 40, at 85 (arguing that courts already have done much of the work prior to ordering supplemental briefing).

238. *See, e.g.*, Fitzgerald v. Seaboard R.R., Inc., 760 F.2d 1249, 1251 (11th Cir. 1985).

239. *See, e.g.*, Collins v. Daniels, 916 F.3d 1302, 1314 (10th Cir. 2019) (noting that it "can raise issues of standing and mootness *sua sponte* because" of an "independent obligation to determine" them); Wallace v. BLM, 169 Fed. App'x 521, 523 (10th Cir. 2006) (holding that mootness is a "threshold inquiry").

240. *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L. J. 341, 346 (2010).

241. *See, e.g.*, JEM Acres, LLC v. Bruno, 764 N.W.2d 77, 81 (Minn. Ct. App. 2009) ("[S]tanding is essential to a court's jurisdiction.").

and may have court-made rules requiring them to examine the questions regardless of party positions.[242] On these occasions, parties are on notice that such issues may arise, even if they are not aware of the specific issue.

Parties who are on notice may choose to brief issues that are not part of their desired argument. They would do so because of the anticipation that appellate courts would be interested in taking up those questions. But, as the cases in the article show, not all parties choose to brief these issues. Some of these parties may choose to not brief predictable issues for strategic or financial reasons. For those parties, ordering supplemental briefing because of due process or fairness concerns counters their interest to engage with the issues.

So in some cases the decision to order supplemental briefing raises a genuine need to evaluate costs versus benefits. And while this does not mean that supplemental briefing should be disallowed categorically, it raises the question of whether it should be used across the board and what is the proper way to use it. Likewise, when it is not used, this equation requires a decision about mitigating the harms that *sua sponte* action may still cause.

D. Supplemental Briefing Is Not Truly Adversarial

Supplemental briefing is often portrayed as injecting adversariality into the *sua sponte* action by inviting parties to brief—and presumably offer opposing views on—an issue a court has raised on its own motion. The adversarial element in this procedural scheme is most alluring. But adversarialism is more than briefing opposing views. When parties file supplemental briefs, they do not retain control of the litigation or navigate the trajectory of their case. Thus, compared to traditional briefing, supplemental briefing falls short. And so, supplemental briefing does not truly bring a *sua sponte* acting court

242. *See, e.g.*, *Collins*, 916 F.3d at 1314.

into the adversarial paradigm and merely mimics its form.

Sua sponte action is in tension with the adversarial system of appellate litigation. Instead of following the principle of party presentation, courts acting *sua sponte* take the rein in the framing and articulating the boundaries of a dispute.[243] There is a consensus about the need for some *sua sponte* action when adjudicating appeals,[244] and courts view and use supplemental briefing as a vehicle to facilitate party participation in these raised issues, arguably providing an adversarial process.

But supplemental briefing is not a replica of the actual adversarial process where both parties present their case and is arguably less adversarial. The term "adversarial" can narrowly mean dueling arguments by opposed parties,[245] and in this narrow sense, supplemental briefing is adversarial.[246] But American courts do not use the term "adversarial" in that limited sense. Instead, they understand the adversarial system more broadly to allow the parties—rather than the adjudicator—to control the litigation,[247] and the presentation of issues.[248]

243. Frost, *supra* note 1, at 495.

244. *Id.* at 496–99 (summarizing the positions of various scholars).

245. Adversary proceeding, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A hearing involving a dispute between opposing parties."); Adversarial, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Involving or characterized by dispute or a clash of interests.").

246. Raker, *supra* note 40, at 56–57.

247. LANDSMAN, *supra* note 44, at 2 (describing the American appellate system as "a unified concept that works by use of a number of interconnecting procedures, each of real importance to the process as a whole"); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 354 (1989) ("The adversary system is a highly individualistic method of dispute resolution, leaving the formulation and presentation of the dispute entirely to the parties."); Adversary system, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.").

248. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial . . . is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."); Raker, *supra* note 40, at 56 (noting that "[p]arty presentation is a component of, but not equivalent to, 'adversarialism'"). This principle has limits.

Courts ordinarily refuse to adjudicate arguments where the parties have not presented their case adequately.[249] And courts often equate the principle of party presentation to the adversarial nature of the American appellate system. The principle of party presentation means that the parties are those who bring up the issues, articulate them, and present them to the court. Following this logic, in the adversarial model, the parties may also narrow disputes (by waiver or forfeiture) and agree on specific points, negating the need for judicial intervention on these points.[250] Supplemental briefing includes none of these principles when compared to traditional briefing.

Supplemental briefing's lack of genuine adversariality is most apparent when courts ask to *sua sponte* overrule precedent or reach merit issues regardless of parties' waiver or forfeiture. By opening a new litigation front, a court acting *sua sponte* goes outside the adversarial framework.[251] Because supplemental briefing cannot undo that, it does not bring the case back to the party presentation adversarial track. Regular appellate briefing allows parties to develop arguments in support of their position. Even in appellate courts with control of their docket, where a court may limit the questions at issue, it would rarely rephrase or add substantive questions.[252] Even when applied, the practice of limiting the issues a court addresses does not invade the parties' presentation preferences. That is because it is done at the certiorari stage, and the parties can still file merit briefs that allow them to present their case as granted. Without this ability, on supplemental briefing, parties

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In the context of Rule 11 sanctions, one court of appeals explained that "[a]t the appellate level, the right to respond does not require an adversarial, evidentiary hearing." *See* Braley v. Campbell, 832 F.2d 1504, 1515 (10th Cir. 1987) (en banc).

249. Raker, *supra* note 40, at 57.

250. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1232 (2018) (Gorsuch, J., concurring in part and concurring in judgment) ("[N]ormally courts do not rescue parties from their concessions . . . .").

251. *See* Frost, *supra* note 1, at 470.

252. Supreme Court Rule 14(1)(a) provides: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." And the Court has stated that it follows the rule as a prudential matter. *See* Frost, *supra* note 1, at 464–65 n.68–70.

are confronted with a new substantive issue that may upend their other arguments without a meaningful ability to synthesize the issues or recast their original argument.

Additionally, traditional briefing on appeal shapes the discussion and a court's final resolution.[253] When courts raise issues *sua sponte*, they deprive the parties of such ability, even with supplemental briefing, because a court developed the argument, framed the discussion, and preordained the presentation.[254] A supplemental briefing order asks parties to address issues beyond their choice or control. Depending on the specificity of a court's order, parties may be forced to simply answer specific questions rather than develop an argument.[255] And so, even though supplemental briefing allows parties' input, it lacks the presentation and control features that symbolize adversariness and is inconsistent with the principles of adversarial justice.

III. REPURPOSING SUPPLEMENTAL BRIEFING: A PROPOSED FRAMEWORK

Section I explores the tension between appellate courts' traditional adjudicatory role and their tendency to raise issues *sua sponte*. As Section II suggests, courts and scholars offered supplemental briefing as mitigation, but it acts merely as a fig leaf. This section builds on the issues Section II details and presents a framework where supplemental briefing can be put to better use. This framework recognizes that to cure the harms of *sua sponte* action, courts need to regulate their discretion to

253. *See* United States v. Gabrion, 517 F.3d 839, 845 (6th Cir. 2008); Miller, *supra* note 17, at 1302.

254. *See* Blumberg Assocs. Worldwide v. Brown & Brown of Conn., Inc., 84 A.3d 840, 865 n.26 (Conn. 2014) (Supplemental briefing "does not speak to the unrelated principle of adversarial justice, pursuant to which the parties, rather than the courts, are responsible for framing the issue.").

255. *Compare* Mitchell v. Roberts, 469 P.3d 901, 903 (Utah 2020) (asking for supplemental briefing on a broad question of constitutional interpretation), *with* Salt Lake Cty. v. State, 466 P.3d 158, 168 (Utah 2020) (asking four specific factual and legal questions).

act *sua sponte*—i.e., to regulate "when" courts can act *sua sponte*. Section III.A. explains the framework, and Sections III.B and III.C describe two categories of *sua sponte* action based on their effect on a case: necessary and unavoidable action and broad-scope action.

A. An Effect-Based Distinction for Sua Sponte *Action*

There is a consensus that courts need some discretion to act *sua sponte*,[256] but the boundaries for such discretion are not clearly marked. Scholars, recognizing this puzzle, have tried to articulate such boundaries. Some have focused on the distinction between issues and arguments and posed that courts may *sua sponte* decide the latter but not the former.[257] Others have created detailed multi-step lists that courts must follow to decide whether to act *sua sponte*.[258] But on the ground, the tool that courts look to is supplemental briefing. As discussed in Section II, this tool is wholly discretionary and does not place any boundaries on appellate *sua sponte* action. It merely regulates "how" courts should act before deciding an issue *sua sponte*. It does not answer the question "when."

Two observations crystallize from the exploration of the issues with supplemental briefing in Section II. First, a procedural solution is insufficient, and any remedy must include a substantive curb of courts' discretion to act *sua sponte*. Second, such curbing should consider that *sua sponte* action may come in different forms and affect cases differently. And so, the proposal below distinguishes between *sua sponte* action types by their effect on the case and treat them accordingly.

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256. Frost, *supra* note 1, at 496–99; Milani & Smith, *supra* note 3, at 285.

257. *See, e.g.*, Baughman, *supra* note 16; Cravens, *supra* note 22, at 256–57 & n.21 (making the same argument, although admitting that it is a tough line to separate along because of the muddy distinction).

258. Frost, *supra* note 1, at 509–15, suggests different treatment by factors (protection of law pronouncement, interpretative methods, and the integrity of legislation and by court hierarchy). Steinman, *supra* note 66, at 1614–16 (offering a multi-step process to determine proper *sua sponte* invocation); Weigand, *supra* note 62, at 291–94 (suggesting another multi-step process).

Looking at courts' actions through their effects is not new. Scholars have suggested this lens in other areas.[259] Courts distinguish their actions according to effects implicitly and explicitly.[260] Specifically, in the case of *sua sponte* action and supplemental briefing, the effects' perspective helps illustrate what boundaries are relevant, how much parties are harmed, and whether the parties can effectively help resolve a *sua sponte* raised issue.

Based on these criteria, two "kinds" of *sua sponte* action emerge. On the one end, "necessary and unavoidable" *sua sponte* action, borne mostly out of courts' "doing justice" justification for it or from courts policing their adjudication limits. On the other end, broad-scope *sua sponte* action, where courts raise issues that have a broader impact than the case before them, could be associated with their duty to "get the law right."

These two kinds of *sua sponte* action are materially distinct. First, they address issues that relate differently to the case a *sua sponte* acting court adjudicates, and therefore present different levels of judicial intrusion into the adversarial sphere. Second, litigants' supplemental briefing can help to varying degrees in these two different types of *sua sponte* action. And because of these metrics, courts should treat them differently and set out clear rules for when *sua sponte* action may occur and how courts should procedurally handle it.

The transparency and reasoning that this framework yields may also assist in curbing *sua sponte* action that has arguably become more prominent due to the use of supplemental briefing, as Section II.A. suggests.

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259. Scott Dodson, *Jurisdiction and its Effects*, 105 GEO. L.J. 619 (2017); Ziv Schwartz, *Fixing a Failed Jurisdictional Revolution*, 90 MISS. L.J. 729, 780–85 (2021).

260. *See, e.g.,* Diersen v. Chicago Car Exch., 110 F.3d 481, 485 (7th Cir. 1997) (explaining that because the appellant raised the issue below (although late) and specially briefed the issue on appeal, "there is no danger that any of the litigants will be surprised on appeal if [the court] address and resolve" the issue) (internal quotations omitted); Zip Sort, Inc., v. Comm'r of Revenue, 567 N.W.2d 34, 39 n.9 (Minn. 1997) (allowing for courts to act *sua sponte* "where there is no possible advantage or disadvantage to either party in not having had a prior ruling on the question by the trial court").

B. Necessary and Unavoidable Sua Sponte *Action*

The term "necessary and unavoidable" refers to instances where appellate courts raise issues on their motion based on two primary considerations: doing justice and judicial power. The first consideration compels courts to act in a more active role than merely resolving a dispute parties bring before them because they find such resolution would lead to injustice,[261] or that there is some more appropriate way to resolve the dispute.[262] Courts acting *sua sponte* for judicial power reasons when following the parties' arguments means that courts would act beyond their judicial power and render a decision without authority.[263] Both considerations focus more on the case before the court rather than on systemic concerns.[264] Although such effects may appear, they are not the root cause for the courts' *sua sponte* action.[265]

Courts that act *sua sponte* for necessary and unavoidable reasons usually address jurisdictional points.[266] However, some jurisdictions view interpretive methods and rules such as constitutional avoidance,[267] the canon

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261. *See supra* note 63.

262. *See, e.g.*, *Zip Sort, Inc.*, 567 N.W.2d at 39 n.9.

263. *See, e.g.*, Robinson v. Omaha, 866 F.2d 1042 (8th Cir. 1989) (holding that the "court may raise the issue of the appropriateness of abstention sua sponte" which is "equitable in nature") (first citing Bellotti v. Baird, 428 U.S. 132, 144 n.10 (1976), and then quoting *id.* at 143 n. 10). *But see* State v. McElveen, 802 A.2d 74, 83 (Conn. 2002) (Connecticut's "state constitution does not confine the judicial power to actual cases and controversies. Rather, 'the jurisdiction of courts shall be defined by law.'") (quoting State v. Bostwick, 740 A.2d 381 (Conn. 1999)).

264. *See, e.g.*, Krimbel, *supra* note 1, at 930.

265. For example, a court's *sua sponte* decision about subject matter jurisdiction in one case could very well effect other cases. It would be surprising if it would not.

266. *In re* Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988); Dixon v. State Tax. & Revenue Dep't, 89 P.3d 680, 687 (N.M. Ct. App. 2004).

267. For the use of the canon of constitutional avoidance, see, e.g., *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 138 (1974); *Boynton v. Virginia*, 364 U.S. 454 (1960); Ashwander v. T.V.A., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (analyzing the historical development and implementation of, and the justification for, the "last resort rule"). *But see* Michael A. Berch, *Reflections on the Role of State Courts in the Vindication of State Constitutional Rights*, 59

of absurdity,[268] or other canons as part of their judicial power.[269] In this capacity, courts acting *sua sponte* also may raise other substantive arguments relevant to resolving the specific case on the narrowest ground[270] and issues that would prevent manifest injustice.[271]

Currently, these instances of intervention lack guidelines and procedure. Parties do not know what issue a court is likely to address *sua sponte* or when. Parties can also rarely predict when courts would prefer affirming a lower court's judgment on a narrower ground. The question of "when" courts should act *sua sponte* is one of degree. Courts should not be free to invoke every non-jurisdictional concern at their pleasure. That is why courts should offer clarity in this context. Parties should know when to reasonably expect a court to raise an issue *sua sponte* despite forfeiture or waiver.

U. KAN. L. REV. 833 (2011) (urging courts to raise state constitutional issues *sua sponte* in criminal cases).

268. Utley v. Mill Man Steel, Inc., 357 P.3d 992, 1001 (Utah 2015) (Durrant, C.J., concurring in part and dissenting in part) (explaining that the "absurd consequence canon" resolves ambiguities in a statute, leading courts to choose "the reading that avoids absurd consequences"); *see also* Newman v. Planning & Zoning Comm'n of Town of Avon, 976 A.2d 698, 702 (Conn. 2009) (using the canon). But the absurdity doctrine is different, and it relates to plain text that leads to absurd results. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419 (2003) (noting that the absurdity doctrine is viewed as a "qualification to textual interpretation").

269. *See, e.g.*, *Ex parte* Kelley, 296 So. 3d 822, 829 (Ala. 2019) (explaining in the context of immunities to state agency employees that "this Court will not address every applicable issue in a case if the resolution of another issue makes doing so unnecessary"). Some courts abide using legislative history. *See, e.g.*, Phillips/May Corp. v. United States, 524 F.3d 1264, 1270 n.3 (Fed. Cir. 2008) (noting that neither party cited legislative history that the court found dispositive of a legal question in the case). Other courts follow originalist interpretation. *See In re* Adoption of B.B., 469 P.3d 1083, 1090 (Utah 2020) ("[Petitioner] has ignored this settled mode of constitutional interpretation. He has made no attempt to establish an originalist basis for his proposed due process right and remedy."); *see also* Frost, *supra* note 1, at 479, 481.

270. *See, e.g.*, Doe v. Heil, No. 11-1335 (10th Cir. July 17, 2012) (asking supplemental briefing because "[a]t this point the briefing is insufficient to resolve this appeal").

271. *See, e.g.*, United States v. McReynolds, 964 F.3d 555, 566 (6th Cir. 2020); *In re* Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 133 (2d Cir. 2008); Bagot v. Ashcroft, 398 F.3d 252, 256 (3d Cir. 2005).

And while parties should not expect appellate courts to adjudicate *every* claim and argument they present,[272] some clarity could prove valuable. And even though there is no judicial invasion into an adversarial territory by declining to address arguments,[273] it does not give courts an opening to do so without any discernible principle.

This clarity should preferably be done by court rulemaking. Rulemaking is not the same across states,[274] but in broad strokes, in most states, last resort courts hold rulemaking authority over their procedures, evidence, and the regulation of the legal profession and the judiciary.[275] The process of rulemaking in the states is considered even more inclusive than that of the federal system.[276]

Rulemaking is preferable in this context because any rule made about *sua sponte* action would have input from the legal community through the rulemaking committee and offer more transparency.[277] Compared to precedential decisions, rulemaking is more likely to properly balance between the impulses of a court and the practical needs of litigants. Rulemaking could also have

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272. *See, e.g.*, State v. Carter, 776 P.2d 886, 888 (Utah 1989) (appellate court "need not analyze and address in writing each and every argument, issue, or claim raised and properly before" it); State v. Waste Mgmt. of Wis., Inc., 261 N.W.2d 147, 151 (Wis. 1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

273. *See, e.g.*, Empire Life Ins. Co. of Am. v. Valdak Corp., 468 F.2d 330, 334 (5th Cir. 1972) ("Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.") (citations omitted); *Carter*, 776 P.2d at 888 (Utah 1989) (calling it a "principle generally applicable to all civil and criminal cases"); Weigand, *supra* note 62, at 191.

274. Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 9–11 (2018) (describing the different mechanisms by which states make procedural rules).

275. *Id.* at 9 n.32 (naming the 41 states identified as "rule states"); *id.* at 9 n.33–34 (noting three rule states—Delaware, Tennessee, and Rhode Island—that empower a different entity than their highest court in rule-making).

276. *Id.* at 37–45 (discussing the various metrics by which state procedure is more inclusive and diverse, but also its relative lack of public transparency).

277. *See id.*

an enforcement mechanism.[278] On the other hand, precedent can only be applied through a costly appeal if an intermediate appellate court does not follow it, and not at all if it is a court of last resort.[279] Finally, rules benefit from controlling court practices across areas, while case law may be limited by subsequent courts to the specific type of issue that the earlier court raised.[280]

These rules should include general instances on which courts will act *sua sponte*. This will give courts much-missing criteria to act on their justice-oriented concerns. For example, the ability to *sua sponte* raise a party's failure to comply with a filing requirement when the opposing party does not object to the noncompliance.[281] Courts have puzzled over their ability to raise such an issue and the appropriate circumstances for action.[282] Current U.S. Supreme Court case law addresses

278. *See, e.g.*, State v. Lujan, 459 P.3d 992, 995 (Utah 2020) (explaining, for example, that the state rulemaking procedure "lends itself nicely to adaptation over time in response to developments in scientific and legal scholarship in this important field").

279. *See, e.g.*, Balducci v. Cige, 223 A.3d 1229, 1248 (N.J. 2020) (establishing an ad-hoc committee and discussing the benefits of the practice). See also Connecticut, where the supreme court ruled that courts must order supplemental briefing before acting *sua sponte*, *Blumberg Assocs. Worldwide v. Brown & Brown of Conn., Inc.*, 84 A.3d 840, 857–58 (Conn. 2014), but the intermediate appellate court continues to act *sua sponte* without supplemental briefing, and the only possible enforcement is appeal, see *State v. Stephenson*, 255 A.3d 865 (Conn. 2020). Another recent example is the Fifth Circuit Court of Appeals. Although it recently held that courts cannot impose Rule 11 sanctions on their own motion, Tejero v. Portfolio Recovery Assocs., L.L.C., 955 F.3d 453 (5th Cir. 2020), it refused to enforce that ruling because the party sanctioned waived the issue.

280. *See, e.g.*, Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1180–86 (10th Cir. 2018) (debating the weight that the court should give to a Supreme Court precedent on a similar issue, despite contrasting circuit precedent); Ahmed v. United States, 396 F. Supp. 3d 600, 603, 603 n.4 (M.D.N.C. 2019) (refusing to follow the U.S. Supreme Court newly established framework on classification of bars to litigation, because the Court "has not explicitly overruled" the much older case that predated the Court's new framework).

281. Schwartz, *supra* note 259, at 769 & n.218.

282. For example, should a court dismiss a case *sua sponte* for an untimely filing that does not affect its jurisdiction? The Fourth Circuit Court of Appeals opined that courts should do that only when the institutional interests outweigh the interest in adversarial party presentation. United States v. Oliver, 878 F.3d 120, 128 (4th Cir. 2017). Other circuits look at the length of the delay in filing. *See, e.g.*, United States v. Gaytan-Garza, 652 F.3d 680, 681 (6th Cir. 2011) (dismissing an appeal *sua sponte* for a four-year delay); United States v. Mitchell,

the issue only in passing and determines the question only in habeas proceedings.[283] And so, the courts of appeals apply different standards, sometimes ignoring the relevant U.S. Supreme Court precedent altogether.[284] An appellate rule, even a local one, would be more coherent and predictable. And in this process, a related benefit of rulemaking would be reducing arbitrariness and unfairness that parties may find in the courts' current status quo.[285]

If courts act according to their published rules, there should not be a general requirement for supplemental briefing any time they raise an issue *sua sponte*. Parties would be on notice that these issues may come up even if not briefed.[286] Courts use the notice standard when they

518 F.3d 740, 750, 750 n.13 (10th Cir. 2008) (declining to dismiss when the delay is one day).

283. *See* Day v. McDonough, 547 U.S. 198, 209–10 (2006).

284. United States v. Manrique, 618 Fed. Appx. 579, 583 (11th Cir. 2015) (holding that appellant's challenge to his restitution amount is jurisdictionally barred because he did not file a notice of appeal despite opposite relevant precedent from the Supreme Court); Okla. Dep't of Envtl. Quality v. EPA, 740 F.3d 185, 191 (D.C. Cir. 2014) (holding that the time to file an appeal regarding an agency action is jurisdictional). *But see* Util. Air Regulatory Grp. v. EPA, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring) ("I note simply that the . . . [Clean Air Act] rule we describe today likely should not be considered jurisdictional under the Supreme Court's recent cases that have tightened the definition of when a rule is considered jurisdictional."); Mendoza v. Perez, 754 F.3d 1002, 1018 & n.11 (D.C. Cir. 2014) (citing multiple additional cases; questioning "the continuing viability of" prior cases holding that the statute of limitations applicable to Administrative Procedure Act (APA) cases is jurisdictional "in light of recent Supreme Court decisions").

285. *See, e.g.*, *In re K.A.S.*, 390 P.3d 278, 293 (Utah 2016) (Lee, A.C.J., dissenting) ("This is a court of law. We owe it to both the parties and the lower courts to operate in accordance with a transparent set of legal principles. Such principles assure the opportunity for evaluation of our decisions. They minimize the risk of arbitrary decision making. And they facilitate reliance on our caselaw."); Christopher Edmunds, Comment, *The Judicial Sieve: A Critical Analysis of Adequate Briefing Standards in the Federal Circuit Courts of Appeals*, 91 TUL. L. REV. 561, 563–64 (2017) (collecting cases where issues were ignored due to procedural issues).

286. A relevant example is courts that have rules about interpretive methods. *See* Gluck, *supra* note 97, at 1754. If parties do not raise or address an interpretive theory that the rule stipulates, they should not be afforded supplemental briefing to address it belatedly.

decline to address an issue *sua sponte*.[287] And although the notice component of due process is less discussed, it provides a meaningful avenue for courts to act consistently with due process and historically was thought to be an important counterpart to the opportunity to be heard.[288]

There may be occasions where the surprise that a court's *sua sponte* action induces is significant, even assuming clear rules. These instances include, among other issues, obscure jurisdictional and doctrinal questions,[289] and alternative procedural grounds for affirming the trial court that are not apparent from the record.[290] These cases especially merit supplemental briefing because they go beyond what could be foreseeable from the rules. Accordingly, the rules should reference such instances and offer supplemental briefing procedures for courts to use. But supplemental briefing

287. *See, e.g.*, *In re* Asbestos Prods. Liab. Litig. (No. VI), 873 F.3d 232, 237 (3d Cir. 2017) (declining to consider argument raised in a footnote because "it fail[ed] to give fair notice of the claims being contested on appeal").

288. *See* Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U ANN. SUR. AM. L. 23, 61, 80 (2018); Greene v. Lindsey, 456 U.S. 444, 449–50 (1982).

289. Corpus linguistics is a useful example. Jurists recognize that the tool is "new" and regard it as a "difficult and complex exercise." *See supra* note 227. Courts that wish to use it should set clear boundaries for when and how parties should brief it. *See, e.g.*, Murray v. BEJ Minerals, 464 P.3d 80, 96 (Mont. 2020) (McKinnon, J., concurring) (urging for a rule that Montana courts use corpus linguistics when the ordinary and natural meaning of a term is in dispute between dictionaries); *see also* Salt Lake City Corp. v. Haik, 466 P.3d 178, 184 n.29 (Utah 2020) (explaining how parties should brief corpus linguistics). Without such rule, the tool remains "complex" and when courts choose to utilize the tool in circumstances beyond the established ones, they should let parties brief the matter. *See* State v. Burke, 462 P.3d 599, 602 n.2 (Id. 2020).

290. A recent Utah case provides an example. In *In re Adoption of B.B.*, 469 P.3d 1083 (Utah 2020), the Utah Supreme Court questioned the standing of the petitioner–father in the case. The issue required factual information that was not apparent in the record. *See id.* at 1092. The court ordered supplemental briefing and was unsatisfied with the response. *See id.* Instead of deciding the case, under the new rule proposed here the court would have remanded for a trial court inquiry that may have yielded more information. Another example is a Fifth Circuit Court of Appeals case where the court "could not find proper allegations or evidence of the parties' citizenship" to confirm its diversity jurisdiction and thus ordered factual supplemental briefing on the issue. MidCap Media Fin., LLC, v. Pathway Data, Inc., 929 F.3d 310, 313 (5th Cir. 2019).

should not be a doorway to a factual exploration by appellate courts.[291] The notion of appellate courts' intervention in fact-based questions creates unease and thus should be limited.[292] If a court finds that factual issues are pervasive in resolving a *sua sponte* raised question, it should remand the case to the trial court for fact-finding.[293] Clearly, such a solution bears costs on the litigants and the system. But the proper role of appellate courts and the idea that trial courts can better discern facts through their fact-finding procedures make remanding the better option.[294]

One relevant example for a scenario that falls within this category of actions is the case that this article begins with, *United States v. Sineneng-Smith*.[295] There, the U.S. Supreme Court granted certiorari on a constitutional question that the court of appeals reached *sua sponte*. But the Court did not decide this question. Instead, the Court reversed because it found, *sua sponte*, that the court of appeals abused its discretion when it reached a constitutional question without the parties' initial presentation of it.[296] In addition, the Court did not ask for supplemental briefing before acting.

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291. *See, e.g.*, Harms v. Independent Sch. Dist. No. 300, LaCrescent, 450 N.W.2d 571, 577 (Minn. 1990) ("No party is disadvantaged when the facts are undisputed.").

292. *See, e.g.*, People v. Hobson, 7 N.E.3d 786, 795 (Ill. App. Ct. 2014) (Mason, J., specially concurring) ("Because the evidentiary issue raised by the court *sua sponte* is inherently fact-bound and case-specific and because competent appellate counsel elected not to raise the issue on appeal, I believe that we should be careful not to overstep the bounds of our role as neutral arbiter to request the parties to address issues they have chosen not to raise.").

293. *See, e.g.*, Gorod, *supra* note 131. In some instances, such remand is also not extremely burdensome, such as sentencing. *See, e.g.*, United States v. Sabillon-Umana, 772 F.3d 1328, 1334 (10th Cir. 2014) ("A remand for resentencing, after all, doesn't require that a defendant be released or retried but simply allows the district court to exercise its authority to impose a legally permissible sentence.").

294. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (quoting Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam)) (noting that the U.S. Supreme Court is "'a court of final review and not first view").

295. 140 S. Ct. 1575 (2020); *see also supra* notes 4–12 and accompanying text.

296. 140 S. Ct. at 1578; *see also* Gabriel Chin, *Opinion analysis: Lawyers should lawyer, judges should judge—The court remands* Sineneng-

Under this article's framework in this subsection, the U.S. Supreme Court's action, in this case, could be described as narrowing its decision making and based on constitutional avoidance because this question was not necessary to decide Sineneng-Smith's appeal. Thus, if the Court had put a rule in place that notified parties that it may resolve a case on narrower grounds due to constitutional avoidance, the parties would have been on notice that such possibility exists. If they wished, they could have briefed that point[297] and consequently could have impacted the Court's resolution.

C. Broad-Scope Sua Sponte *Action*

Sometimes courts raise issues *sua sponte* not because the case before them requires so, but because they prefer to announce a broad rule as part of their common law-based "norm articulation" role.[298] This article refers to this type of *sua sponte* action as "broad-scope *sua sponte* action." Broad-scope *sua sponte* action includes *sua sponte* action involving the reversal of precedent or statutory and constitutional interpretation issues that are not necessarily needed for resolving the dispute before the court. It also includes newly raised substantive issues that are not apparent from the trial court record.[299]

The argument for such action is that if a case presents an ample opportunity to further develop the law, but the parties missed it, courts should home in and resolve the matter in such a way.[300] Such action is also

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Smith, SCOTUSBLOG (May. 7, 2020, 4:24 PM), https://www.scotusblog.com/2020/05/opinion-analysis-lawyers-should-lawyer-judges-should-judge-the-court-remands-sineneng-smith/.

297. Which they chose not to do in this case. *See supra* note 12.

298. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 720 (2012) ("In our legal tradition courts are organs of government with duties and responsibilities that these heuristic models cannot be allowed to compromise.").

299. Hormel v. Helvering, 312 U.S. 552, 557 (1941).

300. *See, e.g.*, Manzara v. State, 343 S.W.3d 656, 665 (Miss. 2011) (Wolff, J., concurring) (suggesting that the court could "get the law right" and resolve a

related to courts controlling their judicial work and shaping it, rather than allowing parties—with their interests—to change the course of a legal framework.[301]

But these important goals may make a court exceed the boundaries of a concrete dispute.[302] The adversarial system is the conceptual backbone of the American judicial system. As much as courts' need to maintain the regulation of the law intact,[303] their primary commitment should be to the preservation of the adversarial system.[304] This commitment would be best achieved through limiting broad-scope *sua sponte* action to important questions that are likely to repeat but evade

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standing issue *sua sponte*). *But see id.* at 678–79 (Smith, J., concurring) (arguing that would the issue be dispositive she would ask for supplemental briefing).

301. Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1278 (11th Cir. 2020) ("[O]ur first obligation—our oath—is to get the law right."); *In re* B.T.B., 472 P.3d 827, 835 (Utah 2020) ("When interpreting a statute, a court is not bound to rely only on information the parties provide. Stated differently, the parties cannot force a court into a strained interpretation of a statute by the arguments they advance. A court's duty is to get the law right and parties cannot push us off that path.").

302. Green Valley Special Util. Dist. v. City of Schertz, 969 F.3d 460, 493 (5th Cir. 2020) (en banc) (Elrod, J., concurring) ("[W]e must be careful when, without the benefit of adversarial briefing from the parties, we worry over hundred-year-old Supreme Court precedent that the parties have not challenged.").

303. Ctr. for Investigative Reporting v. U.S. Dep't of Justice, 982 F.3d 668, 697 (9th Cir. 2020) (Bumatay, J., dissenting) ("[W]e never abdicate our independent role in interpreting the law. If the parties don't offer the correct reading of a particular statute, we are not bound to blindly follow their lead. Instead, as judges, our duty is to get the law right . . . . This principle applies even if the matter involves a weighty issue of first impression . . . . After all, judges are not like lemmings, following the parties off the jurisprudential cliff.") (citing Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991)).

304. Frost, *supra* note 1, at 492–95; 515 ("judges should [not] be given the power to set their own agenda"). *But see* Cravens, *supra* note 22, at 253 n.4 (claiming that such construction is not sustainable).

review, in a parallel analysis to the exception to mootness,[305] or to prevent mistaken legal resolutions.[306]

The first category the article suggests—important issues that are likely to repeat but evade review—allows courts to act *sua sponte* only when there is a weighty reason to believe that these issues will continue despite their importance and repetition "evading review" in future cases.[307] It does not allow courts to add claims and issues parties have not raised as they wish.[308] The test for such cases should draw inspiration from the test courts use for the exception to mootness.[309] This makes sense because, like mootness, the limitation on court *sua sponte* action stems from prudential common law

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305. In cases that do not evade review, courts potentially could note it in a footnote and perhaps put a thumb on the scale. *See, e.g.*, Wells v. Caudill, 967 F.3d 598, 602 (7th Cir. 2020) (pointing out that it is not the court's "job to recast the parties' arguments, but it remains appropriate to identify assumptions that may need attention in future suits," then identifying them, decline "to decide them, but to make clear that we have not decided them in passing"). They should not, however, write prospective concurrences on the issue. *See id.* at 602. This solution potentially raises concerns about the role of courts as "law-makers."

306. For example, when parties agree on ignoring a relevant precedent, thereby shifting not only the result in their case, but potentially future precedent. *See, e.g.*, Kaiserman Assocs. v. Francis Town, 977 P.2d 462, 464 (Utah 1998) ("[A]n overlooked or abandoned argument should not compel an erroneous result. We should not be forced to ignore the law just because the parties have not raised or pursued obvious arguments.").

307. This was not the case in *Ctr. for Investigative Reporting*, 982 F.3d at 686, where the court declined to address an issue despite the fact the case implicates it, because it did not have enough information and analysis about it. *See also id.* at 685 n.6. However, a case from an Illinois appellate court fits the bill. Selby v. O'Dea, 156 N.E.3d 1212 (Ill. App. Ct. 2020). There the court explained that it ordered supplemental briefing on an issue not raised below because it is likely to recur in the case and has general meaning—specifically, if a party can rely on a privileged attorney–client communication in a motion for summary judgment and then refuse to disclose it to opposing counsel and the court. *Id.* at 1241.

308. The proposed rule will not allow a decision like *Pruitt v. Oliver*, 2021 WL 298727, at *39–40 (Ala. Jan. 29, 2021) (Parker, C.J., concurring in part and concurring in judgment), where the court reached out and decided issues of breaching "safety-feature requirement for motor vehicles" with no clear necessity.

309. *See, e.g.*, Weinstein v. Bradford, 423 U.S. 147, 148–49 (1975) (per curiam) (creating an exception to mootness for cases "capable of repetition, yet evading review" when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again").

adjudication concerns.[310] But the mootness comparison is merely inspiration. Mootness is evaluated differently across the nation, and some courts view it as an impediment to their judicial power.[311] In the context of *sua sponte* action, before raising a broad-scope issue *sua sponte*, courts would evaluate if (1) the issue could repeat in other cases; and (2) it is likely to not be addressed head-on by litigants in those circumstances.[312]

This limitation should yield much fewer cases where courts raise broad-scope issues *sua sponte*. In these exceptional circumstances, courts should issue an order explaining the rationale for acting *sua sponte* and allow parties to brief the invocation of the issue the court raised. It may well be that most parties will object to courts inserting an issue *sua sponte*, and many such objections may be boilerplate in style and unhelpful. But courts can curb that by limiting the briefing on that question to few pages. When ordering supplemental briefing in such instances, courts should also allow the parties to

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310. *See* Davis v. United States, 512 U.S. 452, 464 (Scalia, J., concurring) ("[T]he refusal to consider arguments not raised is a sound prudential practice."); Eric D. Miller, Comment, *Should Courts Consider 18 USC § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1049–51 (1998).

311. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 395–401 (1980); Seo v. State, 148 N.E.3d 952, 965–66 (Ind. 2020) (Massa, J., dissenting) (noting the difference between the strict federal test and the more relaxed state one).

312. A recent case from the Indiana Court of Appeals shows a de-facto application of this idea. Abbott v. State, 164 N.E.3d 736 (Ind. Ct. App. 2021). The opinion was subsequently transferred and vacated, Abbott v. State, 171 N.E.3d 616 (Ind. 2021), but the underlying propositions are useful as illustration.

The concurrence in part and dissent in part in *Abbott* points out that the majority decided *sua sponte*, without briefing, that defendants may use seized money to pay for an attorney in a civil forfeiture proceeding. 164 N.E.3d at 751–52 (Vaidik, J., concurring in part, dissenting in part). The majority's response is illuminating. The court explains that it was "not sure how much more developed this issue could be," because:

> Abbott is a *pro-se* litigant and the issue is a *pro-se* litigant's lack of access to counsel. Waiting for further development would require waiting for the perfect *pro-se* litigant, one with extensive legal training who can point out the injustice created by both withholding the *res* and declining to appoint counsel. Meanwhile, other litigants would be left to defend their interests without counsel. Furthermore, we note that anyone represented by counsel would not have a stake in raising this issue because that litigant would already be represented.

Id. at 744 n.6.

brief the issue and amend their original briefing. The parties' ability to amend their original brief will allow them to reconstruct their argument according to their new vantage point after understanding how the court views the case.

Alternatively, there might be situations where courts find it impossible or impractical to ask for supplemental briefing. These situations should be rare, although they might occur. In such circumstances, courts' opinions should explain why the court acted *sua sponte* action and why it did not ask for supplemental briefing. Courts should also provide a robust post-hoc avenue to address the *sua sponte* action—rehearing by another panel, en banc review, or some other review mechanism that would provide the parties with an impartial audience.[313]

A recent Fourth Amendment *sua sponte* decision from the Eleventh Circuit Court of Appeals provides an example of a resolution that the new rule would preclude.[314] In *United States v. Johnson*, an en banc court decided *sua sponte*, without briefing, that a police officer may always seize ammunition during a *Terry* frisk.[315] This decision addressed the scope of a constitutional right, but the case could have been resolved—and was argued—using existing doctrine.[316] Thus, there was no immediate necessity to address the argument about ammunition seizure. It was likely to recur without evading review because seizing ammunition during a *Terry* frisk is not uncommon.

By contrast, a recent Utah Supreme Court *sua sponte* overruling of precedent would be appropriate action within this category. In *Thomas v. Hillyard*,[317] the

313. An example would be the mechanism of visiting judges in circuits. *See generally* Marin K. Levy, *Visiting Judges*, 107 CAL. L. REV. 67 (2019).

314. United States v. Johnson, 921 F.3d 991 (11th Cir. 2019).

315. *Id.* at 1020 (Rosenbaum, J., dissenting); *see also id.* at 1003 (the majority explaining that although the new rule of law is not a complete rejection of *Terry* as the dissent alleges).

316. *Id.* at 1021–22 (Rosenbaum, J., dissenting).

317. 445 P.3d 521, 526 (Utah 2019).

court addressed when does a malpractice cause of action accrue.

Although the parties did not ask the court to do so, the court *sua sponte* engaged with two contradicting lines of cases on the topic and overruled one.[318] The court could have resolved the case by adopting one line of precedent and ignoring the other one, as the parties argued. But under this article's proposed rule several factors show the court was correct to act *sua sponte*. First, the two lines of precedent created confusion and inconsistency.[319] Second, accrual questions appear with some frequency at trial and may lead to dismissals, but the cost of an appeal is often much higher than the compensation parties seek. That seems especially true with malpractice claims, which have many other obstacles to overcome. And so, the question the court addressed seems likely to repeat (in lower courts) but evade review (by the supreme court).[320]

The second category includes instances where *sua sponte* action allows courts to avoid mistaken legal results. It makes sense because it prevents courts from declaring legal mistakes only because parties presented a case in such a posture.[321] Although this category requires courts to act *sua sponte*, their action might not be broad-scope at all times. Yet, the broad-scope aspect of it is the fact that by acting *sua sponte* courts prevent parties from imputing a legal mistake of their creation on a system.[322]

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318. *Id.*

319. *See id.*

320. It is unclear if the court asked for the parties' input. The opinion mentions that "the parties each look to other jurisdictions in arguing the proper approach for accrual" but also that they "have not asked" the court for overruling of precedent. *Id.* at 526–27. Under this article's proposed rule, the court should have, as detailed below.

321. Ctr. for Investigative Reporting v. U.S. Dep't of Justice, 982 F.3d 668, 697 (9th Cir. 2020) (Bumatay, J., dissenting) ("After all, judges are not like lemmings, following the parties off the jurisprudential cliff.").

322. In the constitutional aspect, *see, e.g.*, *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885) (it is a Court's practice "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."). *See generally* Stoughton Trailers, Inc., v. Labor & Indus. Review Comm'n, 735 N.W.2d 477, 499 (Wis. 2007) (Prosser,

This category ensures the courts' role as trustees of the law in common law[323] and allows them control of their norm articulation responsibilities.[324]

When courts raise issues *sua sponte*, to avoid legal mistakes, they may in effect be stipulating that the attorneys for the parties—officers of the court—did not act in good faith. This defies a maxim by which attorneys abide by their ethical responsibilities. Usually, when a court reaches such a conclusion, according to Federal Rule of Civil Procedure 11, or other similar statutes or rules, it offers the relevant attorney an opportunity to be heard and a reasoned opinion.[325] That is yet another reason why courts raising an issue *sua sponte* in this context should provide a meaningful supplemental briefing option about their action and an opportunity to amend filings if appropriate.

IV. CONCLUSION

American appellate courts proclaim themselves as venues for dispute resolution led by litigants. But their actions signal they have a more significant role in the molding and presentation of issues. Based on their desire to "do justice" and "get the law right," courts *sua sponte* adjudicate issues parties have waived, forfeited, or never raised. Attempting to alleviate the tension between the

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J., dissenting) (arguing that the majority decided the case on narrower grounds while "determine[ing] facts sua sponte"). *Stoughton* presents issues of factual *sua sponte* determinations which should not be allowed without supplemental briefing. *See supra* Section III.B.

323. *See, e.g.*, Sarah M. R. Cravens, *In Good Conscience: Expressions of Judicial Conscience in Federal Appellate Opinions*, 51 DUQ. L. REV. 95, 115 (2013).

324. An example is when federal courts certify questions to state courts without parties asking them. It should be considered part of their norm articulation limit setting. *See, e.g.*, Ideus v. Teva Pharm. USA, Inc., 986 F.3d 1098, 1103 n.3 (8th Cir. 2021) (noting that "neither party ha[d] requested" certification of the question as a reason to not certify); *id.* at 1103–05 (Kelly, J., dissenting) (arguing for certification of a question of state tort law nonetheless). In a sense, certification may also fall into the case-oriented decisions that should be codified.

325. *See* FED. R. CIV. P. 11(c)(1) (requiring "notice and a reasonable opportunity to respond" before imposition of sanctions); *see also* Goldin v. Bartholow, 166 F.3d 710, 722 (5th Cir. 1999).

two threads—dispute resolution and *sua sponte* issue raising—courts have opted to ask parties for supplemental briefing, allowing them to weigh in on the issues courts seek to resolve unprompted.

This article presents an account of how supplemental briefing is administered in various courts. Despite its merit, supplemental briefing also has problems. It incentivizes more *sua sponte* action, increases arbitrariness in decision-making, and does not always alleviate the tension between *sua sponte* action and adversarial principles. These problems prevent supplemental briefing from being a "silver bullet" and render it more akin to a Band-Aid.

Curbing and codifying *sua sponte* action and using supplemental briefing in the right instances will better align *sua sponte* action with the adversarial system, reduce arbitrariness, and increase transparency.