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IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of PETITION TO AMEND)	Supreme Court
ARIZONA RULE OF CIVIL)	No. R-_____
PROCEDURE 4.1)	
)	
)	Petition to Amend
)	Arizona Rule of Civil Procedure
)	4.1
)	
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Pursuant to Arizona Supreme Court Rule 28, John D. Wintersteen respectfully petitions this Court to amend Arizona Rule of Civil Procedure 4.1 (“Rule 4.1”) to permit service by mail of citations for certain traffic and vehicle regulation infractions.

I. BACKGROUND AND SUMMARY OF PROPOSED CHANGES.

This Petition proposes limited changes to Arizona’s rules governing service of process that would apply when the State, or one of its political subdivisions, issues a photo enforcement traffic citation. *See* A.R.S. § 41-1722; Ariz. R. Civ. P. 4.1. Unlike the majority of other jurisdictions that have implemented photo enforcement, Arizona’s rules governing service of process have not been simplified to accommodate the unique challenges presented by the widespread use of photo enforcement equipment. As established below, the current service of process rules have resulted in millions of dollars

in unnecessary expense to governmental entities and citizens and have resulted in a system where dodging service of process is rewarded.

A. Arizona’s Current Rule.

In Arizona, an individual alleged to have committed a civil traffic offense must be served with a summons and pleading. *See generally* Ariz. R. Civ. P. 4.1. Governmental entities seeking to serve an individual who is alleged to have committed such an offense currently have two options to effect service. First, “[a] summons and complaint may be served by first-class mail along with two copies of a notice and acknowledgement of receipt of summons and complaint and a postage-paid return envelope.” *See Tonner v. Paradise v. Magistrate’s Court*, 171 Ariz. 449, 450-51, 831 P.2d 448, 449-50 (App. 1992); *see also* Ariz. R. Civ. P. 4.1(c)(2). Although most, if not all, governmental entities currently utilizing photo enforcement understandably attempt to use this option first,¹ valid service is only effectuated if the individual alleged to have committed a civil offense executes and returns the acknowledgement of receipt. *See id.* “If the acknowledgement of receipt is not executed, service is not complete under this method even if there is evidence that the summons and complaint were received.” *Id.* at 451, 831

¹ In the context of photo enforcement, for example, this Court has promulgated rules requiring the Arizona Department of Public Safety to “mail by first class mail to the defendant a copy of the complaint and provide the defendant the option to respond to the complaint by filing an admission or denial of responsibility with the court.” *See* Ariz. R. P. Civ. Traffic 45(a). The defendant then has 30 days “after the date the complaint and notice of option to respond was mailed in which to file an admission or denial of responsibility with the court.” Rule 45(d). If the defendant fails to file an admission or denial of responsibility, then the Department must personally serve the defendant under Arizona Rule of Civil Procedure 4.1(d).

P.2d at 450. Consequently, “[w]ithout a defendant’s voluntary compliance with the requirements of Rule 4.1(c)(2), service is not complete, and no personal jurisdiction over a defendant is achieved.” *Id.* And, of course, defendants have no incentive to cooperate.

As a result, with the present version of Arizona’s civil procedure rules, if a defendant does not voluntarily comply with the provisions of Rule 4.1(c)(2), then the governmental entity must next attempt service by one of the other methods contained in Rule 4.1. *See id.* With regard to service of process on individuals, Rule 4.1(d) requires that service be effected in one of the following three ways: (1) by delivering a copy of the summons and of the pleading to that individual personally; (2) by leaving copies of the summons and pleading at the individual’s dwelling house or usual place of abode with a person of suitable age and discretion; or (3) delivering a copy of the summons and pleading to an agent authorized by appointment or by law to receive service of process. *See Ariz. R. Civ. P. 4.1(d).* Rule 4.1 does not currently allow defendants in photo enforcement proceedings to be validly served with a copy of the summons and pleading by first-class mail.

B. The Proposed Changes to Rule 4.1.

To bring Arizona procedure in line with the practice of other states that have adopted photo enforcement, and for other reasons explained below, this Petition proposes limited changes to Rule 4.1 to allow any civil summons and pleading resulting from photo enforcement to be served by first-class mail. The specific proposed change, set forth in Exhibit 1, comes in the form of a new subparagraph to Rule 4.1 that would allow

for service of process via first-class mail in photo enforcement cases brought pursuant to A.R.S. § 41-1722.

This rule change is intended to be prospective, such that service of process via first-class mail will only be available in cases where the violation occurred on or after the effective date of the new rule. Moreover, the new rule is intended to have no effect on Arizona Rule of Procedure in Civil Traffic and Civil Boating Violation Cases (“Civil Traffic Rule”) 38, which allows the Department of Public Safety to commence a photo enforcement case by Notice of Violation. On the other hand, the proposed rule change will have a very slight effect on Civil Traffic Rule 45 (*see* Exhibit A) in that Rule 45(e) will be revised to allow for service to be effected personally under Rule 4.1(d), or by first-class mail under the new subsection (*see* Exhibit B).

Finally, and consistent with Civil Traffic Rule 40(b)(2), the proposed amendment to Rule 4.1 specifies that the address to be used for service of process via first class mail must match the address for the registered owner of the vehicle on file with the Arizona Department of Transportation, Motor Vehicle Division (or analogous authority if the owner resides out of state).

II. SUMMARY OF KEY ARGUMENTS FOR ALLOWING SERVICE OF PROCESS IN PHOTO ENFORCEMENT CASES VIA FIRST-CLASS MAIL.

The advantages of allowing service of process in photo enforcement cases via first-class mail are significant. First, efficiency will be improved. Currently, the administration of paperwork between law enforcement agencies, process servers and court personnel, as well as the preparation and filing of detailed affidavits of service, has

a significant impact upon personnel resources at the court. Elimination of this requirement would free up court personnel to deal with other issues of court administration.

Second, allowing service by first-class mail comports with Arizona statutes endorsing photo enforcement, promotes the underlying policies in Arizona's Rules of Civil Procedure, and enhances the rule of law. As expressly stated in Rule 4.1(c)(2), a defendant has the duty to avoid costs of service. Moreover, foundational to the rule of law is that the laws apply equally to all citizens. Regrettably, the current service of process rules have resulted in a system where those who purposefully avoid personal service are often rewarded.

Myriad examples abound of the efforts traffic violators have taken to thwart service under the rules. Aside from simply refusing to answer the door to a process server, individuals have created trusts and limited liability companies to register vehicles in those entities for the express and sole purpose of evading service. Moreover, people living in gated communities frequently evade service because process servers are unable to reach those homes. The proposed rule change will remedy these problems by ensuring that all who violate the law may be served with process, not just those who accept their duties to avoid costs of service and comply with Rule 4.1(c)(2).

Third, allowing service of process via first-class mail in photo enforcement cases will spare governmental entities and the citizens of this State millions of dollars in unnecessary personal service costs. Due to the current fiscal crisis, government budgets have been spread extremely thin. Requiring governmental entities to front or cover the

expense of personal service further pressures those already-thin budgets. Despite the potential that governmental entities may eventually pass the cost of personal service onto defendants in photo enforcement cases, these service costs amount to an unnecessary expense that could be avoided under the proposed rule. Moreover, these costs are disproportionate to the penalty amount for the violation. For example, the maximum penalty for a violation captured by the State's photo enforcement system is \$165.00, *see* A.R.S. § 41-1722, meaning that the fee for personal service of process often significantly increases the cost of the violation by 25% to 40%.

Fourth, allowing service of process via first-class mail is appropriate given that the punishment for photo enforcement violations is most often² limited to a small monetary penalty. For example, under the current statewide Department of Public Safety system, a civil photo enforcement violation has no effect whatsoever on a defendant's driving record. *See* A.R.S. § 41-1722(D) ("Notwithstanding any other law, if a person is found responsible for a civil traffic violation or a notice of violation pursuant to a citation issued pursuant to this section, the department of transportation shall not consider the violation for the purpose of determining whether the person's driver license should be suspended or revoked."). Additionally, as mentioned, the maximum civil fine for a photo enforcement violation is ordinarily between one hundred and two hundred dollars. The cost of personal service is simply not justified in these cases.

² Individual municipalities may vary in their assessment of penalties for violations captured by photo enforcement.

Fifth, all due process considerations are satisfied by allowing service via first-class mail in photo enforcement cases. *See, e.g., State v. King*, 199 Or. App. 278, 281-82, 111 P.3d 1146, 1149-50 (Or. Ct. App. 2005) (holding that mailed service of process satisfies constitutional due process because (1) the private interest affected by the state action is minimal; (2) fines are not imposed unless a defendant fails to appear; and (3) a significant government interest in traffic safety exists); *Agomo v. Fenty*, 912 A.2d 181 (D.C. Ct. App. 2007) (holding mailed photo enforcement traffic citation complied with due process). Mailed service of process in Arizona will provide ample notice to violators and will have no measurable effect on a defendant's ability to defend against an alleged traffic infraction. For example, in cases involving the Department of Public Safety, a defendant will still receive a copy of the complaint and the option to respond by filing an admission or denial of responsibility with the court under Civil Traffic Rule 45(a). Only if a defendant chooses *not* to file such an admission or denial of responsibility within 30 days under Civil Traffic Rule 45(d) or fails to appear in court on the day scheduled in the complaint, *see* Civil Traffic Rule 45(b), will the defendant then be served with another copy of the complaint via first-class mail. And only after further failing to respond to this second complaint may default judgment be entered against the defendant. After twice having the notice and complaint mailed via first-class mail to the address Arizona drivers are required to have on file with the Motor Vehicle Division, very few defendants will have grounds to complain about the entry of default judgment should they fail to respond.

Moreover, sufficient safeguards exist to address exceptional circumstances. The courts will retain discretion to set aside a default judgment in appropriate instances, for

example, if a defendant can prove that the address on file with the State was incorrect through no fault of the defendant. In sum, the proposed rule change will not affect defendants' ability to receive actual notice of, and challenge, photo enforcement complaints.

Sixth, mailed service of process will bring Arizona in line with the numerous other jurisdictions that allow mailed service of process in photo enforcement cases. Arizona is currently one of at least twenty-five states and nearly 400 individual jurisdictions that have operational photo enforcement systems within their borders. Of those jurisdictions, the vast majority do not require personal service of process of photo enforcement citations (*see* Exhibit C). Arizona's Courts should come in line with the courts of their fellow States and permit service of process via first-class mail in photo enforcement traffic cases.

III. CONCLUSION.

For all the reasons stated above, Arizona should streamline its rules of civil procedure governing service of process in photo enforcement cases to permit service by first-class mail.

DATED this 7th day of January, 2009.

John D. Wintersteen
Retired Chief of Police, Town of
Paradise Valley

EXHIBIT A

Rule 4.1. Service of Process Within Arizona

- (a) Territorial Limits of Effective Service. All process may be served anywhere within the territorial limits of the state.

- (b) Summons; Service With Complaint. The summons and pleading being served shall be served together. The party procuring service is responsible for service of a summons and the pleading being served within the time allowed under Rule 4(i) of these Rules and shall furnish the person effecting service with the necessary copies of the pleading to be served.

- (c) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of such defendant.

(2) An individual, governmental entity, corporation, partnership or unincorporated association that is subject to service under paragraph (d), (h), (i) or (k) of this Rule 4.1 and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request:

(A) shall be in writing and shall be addressed directly to the defendant in accordance with paragraph (d), (h), (i) or (k) of this Rule 4.1, as applicable;

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and the complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under paragraph (d), (h), (i) or (k) of this Rule 4.1, together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

- (d) Service of Summons Upon Individuals. Service upon an individual from whom a waiver has not been obtained and filed, other than those specified in paragraphs (e), (f) and (g) of this Rule 4.1, shall be effected by delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the pleading to an agent authorized by appointment or by law to receive service of process.
- (e) Service of Summons Upon Minors. Service upon a minor under the age of sixteen years shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon the minor and upon the minor's father, mother or guardian, within this state, or if none is found therein, then upon any person having the care and control of such minor, or with whom the minor resides.
- (f) Service of Summons Upon A Minor With Guardian or Conservator. Service upon a minor for whom a guardian or conservator has been appointed in this state shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon such guardian or conservator and minor.

- (g) Service of Summons Upon Incompetent Persons. Service upon a person who has been judicially declared to be insane, gravely disabled, incapacitated or mentally incompetent to manage that person's property and for whom a guardian or conservator has been appointed in this state shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon such person and also upon that person's guardian or conservator, or if no guardian or conservator has been appointed, upon such person as the court designates.
- (h) Service of Summons Upon the State. If a waiver has not been obtained and filed, service upon the state shall be effected by delivering a copy of the summons and of the pleading to the attorney general.
- (i) Service of Summons Upon a County, Municipal Corporation or Other Governmental Subdivision. Service upon a county or a municipal corporation or other governmental subdivision of the state subject to suit, and from which a waiver has not been obtained and filed, shall be effected by delivering a copy of the summons and of the pleading to the chief executive officer, the secretary, clerk, or recording officer thereof.
- (j) Service of Summons Upon Other Governmental Entities. Service upon any governmental entity not listed above shall be effected by serving the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.
- (k) Service of Summons Upon Corporations, Partnerships or Other Unincorporated Associations. Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit in a common name, and from which a waiver has not been obtained and filed, shall be effected by delivering a copy of the summons and of the pleading to a partner, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party on whose behalf the agent accepted or received service.
- (l) Service of Summons Upon a Domestic Corporation If Authorized Officer or Agent Not Found Within the State. When a domestic corporation does not have an officer or agent in this state upon whom legal service of process can be made, service upon such domestic corporation shall be effected by depositing two copies of the summons and of the pleading being served in the office of the Corporation Commission, which shall be deemed personal service on such corporation. The return of the sheriff of the county in which the action or proceeding is brought that after diligent search or inquiry the sheriff has been unable to find any officer or agent of such corporation

upon whom process may be served, shall be prima facie evidence that the corporation does not have such an officer or agent in this state. The Corporation Commission shall file one of the copies in its office and immediately mail the other copy, postage prepaid, to the office of the corporation, or to the president, secretary or any director or officer of such corporation as appears or is ascertained by the Corporation Commission from the articles of incorporation or other papers on file in its office, or otherwise.

- (m) Alternative or Substituted Service. If service by one of the means set forth in the preceding paragraphs of this Rule 4.1 proves impracticable, then service may be accomplished in such manner, other than by publication, as the court, upon motion and without notice, may direct. Whenever the court allows an alternate or substitute form of service pursuant to this subpart, reasonable efforts shall be undertaken by the party making service to assure that actual notice of the commencement of the action is provided to the person to be served and, in any event, the summons and the pleading to be served, as well as any order of the court authorizing an alternative method of service, shall be mailed to the last known business or residence address of the person to be served. Service by publication may be employed only under the circumstances, and in accordance with the procedures, specified in Rules 4.1(n), 4.1(o), 4.2(f) and 4.2(g) of these Rules.
- (n) Service by Publication; Return. Where the person to be served is one whose residence is unknown to the party seeking service but whose last known residence address was within the state, or has avoided service of process, and service by publication is the best means practicable under the circumstances for providing notice of the institution of the action, then service may be made by publication in accordance with the requirements of this subpart. Such service shall be made by publication of the summons, and of a statement as to the manner in which a copy of the pleading being served may be obtained, at least once a week for four successive weeks (1) in a newspaper published in the county where the action is pending, and (2) in a newspaper published in the county of the last known residence of the person to be served if different from the county where the action is pending. If no newspaper is published in any such county, then the required publications shall be made in a newspaper published in an adjoining county. The service shall be complete thirty days after the first publication. When the residence of the person to be served is known, the party or officer making service shall also, on or before the date of the first publication, mail the summons and a copy of the pleading being served, postage prepaid, to that person at that person's place of residence. Service by publication and the return thereof may be made by the party procuring service or that party's attorney in the same manner as though made by an officer. The party or officer making service shall file an affidavit showing the manner and dates of the publication and mailing, and the circumstances warranting the utilization of the procedure authorized by this subpart, which shall be prima facie evidence of compliance herewith. A printed copy of the

publication shall accompany the affidavit. If the residence of the party being served is unknown, and for that reason no mailing was made, the affidavit shall so state.

(o) Service by Publication; Unknown Heirs in Real Property Actions. When in an action for the foreclosure of a mortgage on real property or in any action involving title to real property, it is necessary for a complete determination of the action that the unknown heirs of a deceased person be made parties, they may be sued as the unknown heirs of the decedent, and service of a summons may be made on them by publication in the county where the action is pending, as provided in subpart (n) of this Rule 4.1.

(p) Service by First-Class Mail for Certain Traffic and Vehicle Regulation Violations; Violation of Civil Traffic or Vehicle Regulation Laws Captured On State or Local Photo Enforcement System. Service of a violation captured by photo enforcement system may be made by mailing a copy of the traffic complaint to the address of the registered vehicle owner on file with Department of Transportation, Motor Vehicle Division.

EXHIBIT B

Rule 45. Service of Complaint; Hearing Date; Notice; Response to Complaint

- (a) Service of the complaint. Within 10 days after filing the Arizona Traffic Ticket and Complaint, the Department shall mail by first class mail to the defendant a copy of the complaint and provide the defendant the option to respond to the complaint by filing an admission or denial of responsibility with the court.
- (b) The scheduled appearance date stated on the complaint shall be calendared for a date that is not less than 30 days after the Department mails the citation to the defendant.
- (c) Notice of options to respond. The notice of options to respond shall:
 - (1) be in writing and addressed directly to the defendant,
 - (2) set forth the date on which the complaint and notice of option to respond were mailed,
 - (3) include a copy of the photograph of the violation,
 - (4) inform the defendant of the date after which the defendant's failure to either file a written response with the court or appear in court may result in personal service at the defendant's expense, unless good cause for the failure to respond is shown,
 - (5) inform the defendant that filing an admission or denial of responsibility with the court is an appearance that has the same effect as personal service,
 - (6) provide a prepaid means of requesting the Department to review the evidence, if the defendant denies responsibility because the defendant was not the driver of the vehicle at the time of the violation, and
 - (7) provide the defendant with a prepaid means of filing the admission or denial of responsibility with the court.
- (d) Time period. The defendant shall have 30 days after the date the complaint and notice of option to respond was mailed in which to file an admission or denial of responsibility with the court. Filing of an admission or denial of responsibility with the court shall constitute an appearance by which the defendant becomes subject to the personal jurisdiction of the court.

(e) Failure to respond. If a defendant fails to respond by either filing a written response with the court or appearing in court on the scheduled appearance date, service may be effected in the manner prescribed by Rules 4.1(d) **or (p)**, Arizona Rules of Civil Procedure, and the court shall impose the costs subsequently incurred in effecting personal service on the defendant, unless good cause for the failure is shown.

EXHIBIT C

<i>Jurisdiction</i>		<i>Personal Service Required?</i>
1.	Alabama	No*
2.	Arizona	<u>Yes</u>
3.	California	No
4.	Delaware	No
5.	District of Columbia	No
6.	Florida	No
7.	Georgia	No
8.	Illinois	No
9.	Iowa	No*
10.	Louisiana	No*
11.	Maryland	No
12.	Missouri	No*
13.	New Jersey	No
14.	New Mexico	No
15.	New York	No
16.	North Carolina	No
17.	Ohio	No
18.	Oregon	No
19.	Pennsylvania	No
20.	Rhode Island	No
21.	South Dakota*	No
22.	Tennessee	No
23.	Texas	No
24.	Utah	No
25.	Washington	No

*In municipalities authorizing photo enforcement.