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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Arizona Attorneys for Criminal Justice;
Christopher Dupont; Rich Robertson;
Richard L. Lougee; Richard D. Randall;
Jeffrey A. Kirchler; John Canby,

Plaintiffs,

vs.

Mark Brnovich, in his official capacity as
Attorney General of the State of Arizona,

Defendant.

No. 2:17-cv-01422-SPL

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

(Assigned to the Honorable Steven P.
Logan)

INTRODUCTION

1
2 1. This action challenges the constitutionality of Arizona Revised Statutes
3 (“A.R.S.”) § 13-4433(B), which prohibits a criminal defendant’s attorney and others
4 working on a criminal defendant’s defense team from initiating contact with the victim
5 of the crime, including second-degree relatives of a crime victim who is killed or
6 incapacitated, except through the office of the prosecutor who is prosecuting the
7 defendant.

8 2. Because A.R.S. § 13-4433(B) prohibits and restricts speech by criminal-
9 defense lawyers, defense investigators, and others working on the defense team by
10 limiting to whom they may speak, with whom they may communicate, and how, the
11 statute implicates the free-speech rights protected by the First Amendment to the
12 United States Constitution.

13 3. In particular, A.R.S. § 13-4433(B) is an unlawful content-based and
14 overbroad prior restraint on the speech of criminal-defense lawyers and others on the
15 defense team that inhibits and outlaws speech fully protected by the First Amendment.
16 Plaintiffs bring this action to have A.R.S. § 13-4433(B) declared unconstitutional, and
17 its enforcement enjoined.

18 4. A.R.S. § 13-4433(B) is part of the statutory scheme that the Arizona
19 legislature enacted to protect the rights of crime victims as part of legislative efforts to
20 implement the Arizona Constitution’s Victims’ Bill of Rights, Ariz. Const. art. 2, § 2.1.

21 5. However, A.R.S. § 13-4433(B) goes beyond the protections afforded to
22 crime victims in the Victims’ Bill of Rights and is not appropriately tailored to the
23 state’s legitimate purpose of protecting a victim’s right to “be treated with fairness,
24 respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout
25 the criminal justice process.” Ariz. Const. art. 2, § 2.1(A)(1).

26 6. For criminal-defense lawyers and others working on the defense team,
27 attempting to contact victims and their family members is a crucial part of the effective
28 representation of the defendant. It is an essential part of pre-trial investigation

1 regarding culpability, other possible perpetrators, and potential mitigation evidence for
2 sentencing purposes. Likewise, contact with victims and their family members can be
3 crucial for post-conviction work on behalf of a defendant, including when investigating
4 claims of actual innocence. All criminal-defense attorneys, but particularly capital-
5 defense teams, have constitutional obligations to their clients to fully investigate
6 possible defenses to culpability and to seek out information that could mitigate a
7 sentence, including sparing the defendant from the death penalty.

8 7. Speech directed at crime victims is not only important for its implications
9 for attorneys representing the criminally accused and their ethical and constitutional
10 duties, it is also of grave public importance because of the crime victim's role in the
11 political campaign to abolish the death penalty, whether through active or passive
12 means. Victims are often the most important advocates for a sentence less than death,
13 which is a topic with significant political importance in modern America.

14 8. Moreover, past experiences in Arizona, and current practice in other
15 states, show that crime victims and their family members do not always wish to shut
16 off contact from the defense team; in fact, sometimes they welcome such contact.
17 Rather than allowing these potentially helpful and desirable discussions between the
18 victim, the victim's family, and the defense team, A.R.S. § 13-4433(B) places the
19 defendant's litigation adversary – the prosecutor – in the middle and shuts them down
20 before they can happen.

21 9. Criminal-defense lawyers and investigators have been subjected to, and
22 face the risk of, professional discipline, court sanctions, and criminal charges for
23 alleged violations of A.R.S. § 13-4433(B), and these adverse actions against members
24 of the criminal-defense community have chilled constitutionally protected speech and
25 hindered the ability of criminal-defense teams to effectively represent criminal
26 defendants and vindicate the rights afforded them in the criminal-justice process.

27 10. Plaintiffs include an association of criminal-defense professionals,
28 criminal-defense lawyers, and investigators. Plaintiffs (including members of the

1 organizational Plaintiff Arizona Attorneys for Criminal Justice) work on behalf of
2 criminal defendants in trial and post-conviction cases, in all types of criminal matters,
3 including capital and non-capital murder cases, sex cases, and cases with claims of
4 innocence. A.R.S. § 13-4433(B) directly infringes the free-speech rights of Plaintiffs
5 because Plaintiffs are chilled from attempting to speak to victims and, if they do
6 undertake the risk of attempting to contact a crime victim, such speech may subject
7 them to professional discipline, court sanctions, or criminal prosecution for violating
8 the law.

9 11. Defendant is the chief legal officer of the state of Arizona. His office
10 prosecutes criminal offenses, and he has general supervisory authority over all county
11 and local prosecutors in Arizona. Defendant, either directly or through his supervisory
12 authority, is the litigation adversary that A.R.S. § 13-4433(B) places between Plaintiffs
13 and the targets of their speech, shutting Plaintiffs down before they may engage in
14 protected speech activity. Defendant stands between victims and criminal-defense
15 lawyers' and investigators' speech. Defendant also has the authority to bring criminal
16 charges, make complaints for professional discipline, and seek court sanctions against
17 criminal-defense professionals for alleged violations of A.R.S. § 13-4433(B).

18 12. Defendant is also responsible for the administration of the victims' rights
19 program established by A.R.S. § 41-191.06, which administers training on compliance
20 with A.R.S. § 13-4433(B) and monitors and ensures Arizona's state and local criminal-
21 justice agencies' implementation and compliance with victims' rights laws, including
22 A.R.S. §13-4433(B). Defendant also publishes brochures and other publications
23 encouraging compliance with victims' rights laws, including A.R.S. § 13-4433(B). By
24 doing so Defendant directly and indirectly suppresses Plaintiffs' speech and creates a
25 climate that chills Plaintiffs' speech.

26 13. Plaintiffs seek declaratory and injunctive relief against enforcement of
27 A.R.S. § 13-4433(B) on the grounds that: (1) the law is a content-based restriction on
28 constitutionally protected speech not narrowly tailored to a compelling government

1 interest, and (2) the law is overbroad, in violation of the First Amendment to the
2 United States Constitution.

3 **JURISDICTION AND VENUE**

4 14. This case arises under the United States Constitution and presents a
5 federal question within this Court's jurisdiction under Article III of the Constitution
6 and 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). This action is brought pursuant to
7 U.S.C. § 1983.

8 15. The Court has the authority to grant declaratory relief pursuant to the
9 Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

10 16. The Court has the authority to award costs and attorneys' fees under
11 U.S.C. § 1988.

12 17. Venue is proper in this District under 28 U.S.C. § 1391(b). Defendant is
13 sued in his official capacity, and his official place of business is located within this
14 District. The events giving rise to this complaint are the enactment, within this District,
15 of an unconstitutional statute of the state of Arizona, and its implementation and
16 enforcement by Defendant.

17 **PARTIES**

18 ***Arizona Attorneys for Criminal Justice***

19 18. Plaintiff Arizona Attorneys for Criminal Justice is a statewide not-for-
20 profit membership organization of criminal-defense lawyers, law students, and
21 associated professionals dedicated to protecting the rights of the accused in the courts
22 and in the legislature; promoting excellence in the practice of criminal law through
23 education, training, and mutual assistance; and fostering public awareness of citizens'
24 rights, the criminal-justice system, and the role of the defense lawyer.

25 19. Arizona Attorneys for Criminal Justice counts among its membership
26 more than 500 lawyers and allied professionals who work in private law practice, in
27 public practice in the state's indigent-defense agencies, and as private investigators
28 retained to assist criminal-defense teams. Members of Arizona Attorneys for Criminal

1 Justice work on behalf of clients in all types of cases, including capital and non-capital
2 murders, sex crimes, other serious felonies, and misdemeanors, in all courts in the state
3 of Arizona.

4 *Individual Plaintiffs*

5 20. Plaintiff Christopher R. Dupont is a lawyer who has been licensed to
6 practice law in Arizona since 1992. He is a criminal-defense attorney who defends
7 clients accused of both capital and non-capital crimes. As part of his practice, Mr.
8 Dupont also represents crime victims.

9 21. Plaintiff Rich Robertson is a private investigator who works with
10 criminal-defense lawyers on cases throughout Arizona, including capital and non-
11 capital cases. He is licensed as a private investigator by the Arizona Department of
12 Public Safety and owns R3 Investigations. Mr. Robertson is a member of Plaintiff
13 Arizona Attorneys for Criminal Justice.

14 22. Plaintiff Richard L. Lougee, Jr., is a lawyer who has been licensed to
15 practice law in Arizona since 1989. He was first admitted to the practice of law in
16 Connecticut in 1977, and was also licensed to practice law in New Mexico, but is
17 currently on inactive status in those states. Mr. Lougee practices in the area of criminal
18 defense, including handling sex crimes and capital defense. Mr. Lougee is a member
19 of Plaintiff Arizona Attorneys for Criminal Justice.

20 23. Plaintiff Richard Randall is a lawyer who has been licensed to practice
21 law in Arizona since 1991. He practices in the area of capital defense and is trial
22 counsel for capital cases in Maricopa County.

23 24. Plaintiff Jeffrey Kirchler is a lawyer who has been licensed to practice
24 law in Arizona since 2002. He practices in the area of capital defense and is trial
25 counsel for capital cases in Maricopa County.

26 25. Plaintiff John A. Canby is a lawyer who has been licensed to practice law
27 in Arizona since 1986. He practices in the area of capital defense and is resource
28 counsel for capital cases in Maricopa County. Mr. Canby is a member of Plaintiff

1 Arizona Attorneys for Criminal Justice.

2 *Defendant*

3 26. Defendant Mark Brnovich is the Attorney General of Arizona, is the
4 chief legal officer of the state, and has general supervisory authority over county and
5 local prosecutors. Attorney General Brnovich has the authority to prosecute all
6 criminal offenses in the name of the state of Arizona. A.R.S. § 41-193(A)(1). Attorney
7 General Brnovich is also responsible for the administration, including funding and
8 compliance audits, of the victims' rights program, which administers a plan for
9 assisting, training, and monitoring state and local entities that are required to
10 implement and comply with victims' rights laws, including A.R.S. § 13-4433(B). *See*
11 A.R.S. § 41-191.06. Attorney General Brnovich is sued in his official capacity.

12 **FACTUAL BACKGROUND**

13 *The Statute*

14 27. In 1990, Arizona voters approved Proposition 104, the Victims' Bill of
15 Rights, as an amendment to the state Constitution. The Victims' Bill of Rights is
16 codified at Arizona Constitution, Article 2, § 2.1.

17 28. Among the provisions of the Victims' Bill of Rights is the right of a
18 crime victim "[t]o be treated with fairness, respect, and dignity, and to be free from
19 intimidation, harassment, or abuse, throughout the criminal justice process." Ariz.
20 Const. art. 2, § 2.1(A)(1).

21 29. Under the Victims' Bill of Rights, a crime victim also has the right "[t]o
22 refuse an interview, deposition, or other discovery request by the defendant, the
23 defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const.
24 art. 2, § 2.1(A)(5).

25 30. The Victims' Bill of Rights also provides that the legislature has "the
26 authority to enact substantive and procedural laws to define, implement, preserve and
27 protect the rights guaranteed to victims" by the constitutional amendment. Ariz. Const.
28 art. 2, § 2.1(D).

1 31. In 1991, the Arizona legislature passed, and the governor signed into law,
2 House Bill 2412, the Crime-Victims' Rights Implementation Act, which included in its
3 provisions legislation intended to implement the Victims' Bill of Rights, including an
4 earlier, but substantially similar version of A.R.S. § 13-4433(B).

5 32. The legislative intent for the Crime-Victims' Rights Implementation Act,
6 as expressed in House Bill 2412, was as follows:

7 The legislature recognizes that many innocent persons suffer economic
8 loss and personal injury or death as a result of criminal acts. It is the
intent of the legislature of this state to:

9 1. Enact laws that define, implement, preserve and protect the rights
10 guaranteed to crime victims by article II, section 2.1, Constitution of
Arizona.

11 2. Ensure that article II, section 2.1, Constitution of Arizona, is fully
12 and fairly implemented and that all crime victims are provided with
basic rights of respect, protection, participation and healing of their
13 ordeals.

14 3. Ensure at all stages of the criminal justice process that the duties
15 established by article II, section 2.1, Constitution of Arizona, are
fairly apportioned among all law enforcement agencies, prosecution
agencies, courts and corrections agencies in this state.

16 4. Ensure that employees of this state and its political subdivisions
17 who engage in the detention, investigation, prosecution and
adjudication of crime use reasonable efforts to see that crime victims
18 are accorded the rights established by article II, section 2.1,
Constitution of Arizona.

19 33. A.R.S. § 13-4433(B) currently reads:

20 The defendant, the defendant's attorney or an agent of the defendant shall
21 only initiate contact with the victim through the prosecutor's office. The
prosecutor's office shall promptly inform the victim of the defendant's
22 request for an interview and shall advise the victim of the victim's right
to refuse the interview.

23 34. A.R.S. § 13-4401(19) defines "victim":

24 "Victim" means a person against whom the criminal offense has been
25 committed, including a minor, or if the person is killed or incapacitated,
the person's spouse, parent, child, grandparent or sibling, any other
26 person related to the person by consanguinity or affinity to the second
degree or any other lawful representative of the person, except if the
27 person or the person's spouse, parent, child, grandparent, sibling, other
person related to the person by consanguinity or affinity to the second
28 degree or other lawful representative is in custody for an offense or is the
accused.

1 35. Thus, A.R.S. § 13-4433(B) prohibits criminal defense lawyers and
2 others working on the defense team from speaking to the victim of a crime without
3 using the prosecutor's office as a conduit for the communication. When a victim is
4 killed or incapacitated, the defense team may not speak to anyone within two degrees
5 of consanguinity or affinity to the victim without using the prosecutor's office as a
6 conduit. And when a victim is a minor child, the defense team may not speak with the
7 child victim or the child's parents or guardians.

8 36. In addition, A.R.S. § 13-4433 was amended in 1997 to add a provision
9 that allows a prosecutor to refuse to forward correspondence from the defense team to
10 victims and their families, further limiting the speech of defense lawyers and the
11 defense team. That provision, codified at A.R.S. § 13-4433(C), currently reads:

12 The prosecutor shall not be required to forward any correspondence from
13 the defendant, the defendant's attorney or an agent of the defendant to the
victim or the victim's representative.

14 37. Thus, A.R.S. § 13-4433(B) operates to prohibit defense lawyers and
15 defense teams from contacting crime victims or their family members without the
16 consent of the prosecutor, the defense team's litigation adversary.

17 ***The Attorney General's Authority to Enforce A.R.S. § 13-4433(B)***

18 38. As the chief legal officer of the state, the Attorney General has the
19 authority to initiate and handle any criminal prosecution in Arizona.

20 39. The Attorney General, or his designee, is required by state statute to
21 prosecute all indictments returned by a state grand jury, and the Attorney General has
22 the discretion to initiate a prosecution even when there is no state grand jury indictment
23 for any crime that is within the jurisdiction of the state grand jury. A.R.S. § 21-427.

24 40. The Attorney General's office serves as the prosecutor for many criminal
25 cases at the trial level, almost all felony direct appeals filed in criminal cases in
26 Arizona, and all capital habeas corpus litigation in federal court.

27 41. The Attorney General's office takes steps to enforce A.R.S. § 13-4433(B)
28 in the cases handled by that office, including, for instance, standing in the middle of

1 communications between the defense team and victims in trial-level matters and filing
2 motions in capital habeas corpus proceedings asking the federal courts to preclude the
3 defense team from directly contacting crime victims consistent with A.R.S. § 13-
4 4433(B).

5 42. The Attorney General supervises and may assist all county attorneys in
6 the state and has the authority to influence all criminal prosecutions in the state. *See*
7 A.R.S. § 41-193(A)(4) (stating that the Attorney General shall “[e]xercise supervisory
8 powers over county attorneys of the several counties in matters pertaining to that office
9 and require reports relating to the public business thereof”); *id.* § 41-193(A)(5) (stating
10 that the Attorney General shall “[a]t the direction of the governor, or when deemed
11 necessary, assist the county attorney of any county in the discharge of the county
12 attorney’s duties”).

13 43. As the chief prosecutor in Arizona, the Attorney General literally stands
14 between Plaintiffs and the targets of their intended speech, crime victims. If Plaintiffs
15 want to speak to or otherwise communicate with a statutory victim where they
16 represent the defendant in a pending criminal matter, Plaintiffs cannot do so directly,
17 but rather must initiate contact with the prosecutor, who could be the Attorney General
18 or another prosecutor that the Attorney General supervises.

19 44. If a Plaintiff attempts to initiate contact with a victim through the
20 Attorney General, the Attorney General’s office sends a standard form letter to the
21 victim, the content of which remains the same no matter what message the Plaintiff
22 wants to convey to the victim. This means that no matter what reason the Plaintiff has
23 to speak to a victim, or what the Plaintiff wants to say, that reason for the message and
24 the content of the message will not be communicated to the victim.

25 45. As the administrator of the victims’ rights program under A.R.S. § 41-
26 191.06, the Attorney General monitors and assists state and local criminal justice
27 agencies to implement and comply with victims’ rights laws. The Attorney General
28 conducts training and provides technical assistance for criminal justice agencies and

1 their employees on victims' rights laws, and publishes brochures and pamphlets about
2 victims' rights laws, including A.R.S. § 13-4433(B), for distribution to victims,
3 criminal justice agencies and the public at large.

4 46. In literature published by his office, the Attorney General has stated that
5 he will take every action necessary to "help ensure justice is served through upholding
6 victims' rights."

7 47. As the administrator of the victims' rights program, the Attorney
8 General disburses monies from the victims' rights fund (established under A.R.S. § 41-
9 191.08) and audits state and local entities that receive state resources for victims' rights
10 so as to enforce "uniformity, efficiency and compliance by state and local entities that
11 are responsible for ensuring crime victims' access to justice." *Id.* § 41-191.06(A).

12 48. The Attorney General may require corrective action or withholding
13 monies from the victims' rights fund if a criminal justice agency does not comply with
14 victims' rights laws, including A.R.S. § 13-4433(B). This means that if a prosecuting
15 agency in Arizona permitted Plaintiffs to contact victims directly, without initiating
16 that contact through the prosecutor, the Attorney General could withhold victims'
17 rights funds from that agency.

18 49. The Attorney General's Office of Victims Services has a compliance
19 administrator that investigates allegations of victims' rights violations and works with
20 victims who believe their rights have been violated.

21 50. At the request of a victim, the Attorney General "may assert any right to
22 which the victim is entitled." A.R.S. § 13-4437. The Attorney General, thus, has
23 authority to enforce the prohibition on contact between the defense team and victims
24 (and victims' families) as outlined in A.R.S. § 13-4433(B).

25 51. The Attorney General's office will seek sanctions from the court or file a
26 complaint with the state bar or other licensing agency against a Plaintiff, or member of
27 the Plaintiff organization, if he or she violates A.R.S. § 13-4433(B). The Attorney
28 General's Office would also instruct the Plaintiff, or member of the Plaintiff

1 organization, not to violate A.R.S. § 13-4433(B) again and ask the court to advise the
2 same.

3 52. The mere threat that the Attorney General or another prosecutor under
4 the Attorney General's supervision will initiate disciplinary proceedings, seek court
5 sanctions, or pursue potential criminal prosecution has a chilling effect on the
6 willingness of Plaintiffs, and members of the Plaintiff organization, to engage in
7 speech with statutory crime victims and others, even when such speech might not be
8 prohibited by A.R.S. § 13-4433(B). As such, Plaintiffs, and members of their defense
9 teams, have not directly contacted crime victims or their families since the
10 implementation of A.R.S. § 13-4433(B) because the Attorney General's enforcement
11 of A.R.S. § 13-4433(B) makes the risk of such proceedings or sanctions much more
12 likely.

13 53. If the Attorney General files a complaint with the disciplinary authority
14 about an attorney failing to comply with A.R.S. § 13-4433(B), the disciplinary
15 authority is required under Arizona law to investigate such a complaint and will open
16 an investigation to determine whether a full investigation is warranted. If not
17 warranted, the disciplinary authority takes no further action. If a full investigation is
18 warranted, the matter is referred to bar counsel for further investigation.

19 54. Whether the complaint is terminated after the initial investigation or after
20 a full investigation, the fact that there was an investigation is subject to public records
21 disclosure under Arizona law and available for any person or potential client to
22 review. Thus, regardless of what action the disciplinary authority takes, the Attorney
23 General's filing of a complaint with a disciplinary authority is sufficient to create a
24 public record of a purported violation of law based solely on the unconstitutional
25 infringement of Plaintiffs' First Amendment rights.

26 55. The attorney against whom the Attorney General files such a complaint
27 may also have to respond to the complaint, including potentially retaining counsel and
28 notifying her or his malpractice insurer. That attorney may also have to report the

1 complaint to future employers.

2 56. Likewise, if the Attorney General seeks sanctions in court against a
3 Plaintiff or member of the Plaintiff organization for failing to comply with A.R.S. §
4 13-4433(B), a public record of that motion and claim of contempt is made,
5 permanently besmirching that attorney's record, regardless of whether a court takes
6 any further action.

7 57. The Attorney General, as chief legal officer of the state and administrator
8 of the victims' rights program, has created an atmosphere of fear and enforcement that
9 chills Plaintiffs' speech and the speech of members of the Plaintiff organization.

10 58. As a high-ranking representative of the Attorney General's office stated
11 under oath, "any attorney should feel somewhat afraid of violating the law"; "it's a no-
12 brainer."

13 59. Unless he is enjoined, the Attorney General will continue to enforce
14 A.R.S. § 13-4433(B) against Plaintiffs, members of the Plaintiff organization, and
15 other individuals serving on criminal defense teams. .

16 60. If the Attorney General were enjoined from enforcing A.R.S. § 13-
17 4433(B), neither his office nor any other county or local prosecutor who he supervises
18 could stand between the speech of defense lawyers and investigators, including
19 Plaintiffs and members of the Plaintiff organization.

20 61. An injunction against the Attorney General enforcing A.R.S. § 13-
21 4433(B) would also remove the atmosphere of fear and enforcement that chills
22 Plaintiffs and members of the Plaintiff organization from engaging in the
23 constitutionally protected speech of directly contacting crime victims.

24 62. Plaintiffs also incorporate by this reference their Motion to Supplement
25 the Record on Plaintiffs' Motion for Preliminary Injunction (Doc. 11) and Defendant's
26 Motion to Dismiss (Doc. 31) and the exhibits attached thereto, Doc. 110, 110-1 as
27 exhibits to this First Amended Complaint for Declaratory and Injunctive Relief.
28

1 ***A.R.S. § 13-4433(B) Violates the First Amendment***

2 63. A.R.S. § 13-4433(B) is an unlawful restraint on defense attorneys, their
3 investigators, and others working on behalf of a criminal defendant, precluding them
4 from engaging in constitutionally protected speech. It acts as an unconstitutional
5 licensing requirement and prior restraint on speech because defense lawyers and
6 defense teams must initiate contact with crime victims through the defense's litigation
7 adversary, the prosecutor, and must get permission from the government before
8 engaging in the protected speech.

9 64. The attorney members of Arizona Attorneys for Criminal Justice and the
10 individual Plaintiffs are professionally obligated to render effective assistance of
11 counsel to all of their criminally accused clients by the Sixth Amendment.

12 65. In a capital case, the United States Supreme Court deems it imperative
13 that the attorney representing the accused at the very least reach out and attempt to
14 make contact with any and all witnesses in the case.¹

15 66. In a capital case, the defense team's duty to investigate often includes
16 making overtures to the family of the deceased in an effort to understand whether they
17 desire the death penalty for the perpetrator or would be satisfied with a lesser sentence,
18 such as life imprisonment without parole. Victim impact testimony is often critical to
19 the jury's determination of the appropriate sentence in a capital case and if defense
20 counsel can persuade the victim's family not to desire the death penalty, it can literally
21 save the life of a defendant. In addition, prosecutors will sometimes acquiesce to the
22 wishes of the victim's family and drop their demand for death. A.R.S. § 13-4433(B)
23 prevents the defense team from engaging in these efforts.

24 67. In capital cases where a relative of the defendant is the victim, often the
25 best source of evidence regarding mitigation critical to saving a defendant's life is
26 found with the defendant's family, which is also the victim's family. A.R.S. § 13-
27 4433(B) precludes the Plaintiffs from speaking to those crucial witnesses except by

28 ¹ See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003).

1 using the prosecutor as an intermediary.

2 68. In non-capital cases, interviewing victims whenever possible is deemed
3 an essential duty of a conscientious criminal-defense attorney as part of efforts to
4 ascertain the facts of the case. A.R.S. § 13-4433(B) prevents the defense team from
5 conducting this type of thorough investigation.

6 69. In engaging with the family of the victim in a capital case, it is
7 incumbent upon defense counsel to discuss with any willing member of the victim's
8 family why the death penalty is not the best option for the good of the surviving family
9 members and why an option of life imprisonment may better achieve the ends they
10 seek. This discussion frequently includes such wide ranging topics as closure,
11 vengeance, rehabilitation, cost, deterrence, remorse, the impact on the victim's family,
12 the impact of an execution on the defendant's family, as well as the politics and
13 morality of the death penalty. There are innumerable other areas of discussion with
14 victims' families relevant to the death penalty. It is the goal of defense counsel to
15 attempt to change the hearts and minds of victims' families through a quiet, respectful
16 discussion about the appropriate resolution of the case without the death penalty being
17 sought.

18 70. Contacting victims and their family members is not only a crucial part of
19 effectively representing a capital defendant, it is also critical to lobbying for the passive
20 repeal of the death penalty. In a number of states, the unofficial repeal of the death
21 penalty has been achieved by criminal-defense attorneys who convince family
22 members of victims in capital crimes to speak out in opposition to the death penalty,
23 thereby pressuring prosecutors and the public to abandon capital prosecution.
24 Ultimately, this can lead to the official, legislative repeal of the death penalty.² Without

25 ² See Cornell Law School Death Penalty Worldwide International Human Rights
26 Clinic, *Pathways to Abolition of the Death Penalty* (June 2016),
27 <https://www.deathpenaltyworldwide.org/pdf/Pathways%20to%20Abolition%20Death%20Penalty%20Worldwide%202016-07%20FINAL.pdf> (detailing how the passive
28 repeal of the death penalty in the state of Maryland, where no death sentences were imposed for almost a decade, led to the official, legislative abolition of the death penalty in 2013).

1 this important speech on a matter of grave public concern, the political campaign for
2 the passive repeal of the death penalty can be significantly hampered.

3 71. From a free-speech perspective, discussions between the defense team
4 and the victim's family in a capital case are the highest form of protected speech as
5 they clearly involve matters of grave public concern and may only be suppressed if the
6 government can show a compelling reason for such suppression.

7 72. In a more routine criminal case, defense lawyers and members of the
8 defense team should be able to approach crime victims to at least attempt to discuss the
9 facts and circumstances of the alleged crime. It is essential for a defense attorney to
10 attempt to ascertain a clear picture of the facts of a case and to determine the credibility
11 of a complaining witness, including whether the victim has accurately perceived the
12 facts and circumstances of the event in question.

13 73. A.R.S. § 13-4433(B) essentially makes it less likely, if not nearly
14 impossible, that defense lawyers and others on defense teams, including Plaintiffs, will
15 be able to speak with the individuals most necessary to interview in any criminal case.
16 Experience has shown that Plaintiffs are most frequently thwarted in their attempts to
17 speak with crime victims and their families when communications must be initiated
18 through the prosecutor.

19 74. In communicating the defense team's desire to speak with crime victims,
20 the Attorney General sends a standard form letter that is not tailored in any way to the
21 individual speech of the defense attorney or member of the defense team. Instead of
22 communicating the message that the defense team wishes to convey to the crime
23 victims or the crime victims' family, the Attorney General instead substitutes its own
24 speech. Effectively, the defense team is not allowed to communicate its message and
25 speech to crime victims and their families at all; the only speech or message
26 communicated to crime victims and their families is the canned message of the
27 Attorney General.

28 75. Plaintiffs, and members of the Plaintiff organization, regularly represent

1 defendants accused of crimes involving victims, or participate in their defense teams.
2 As part of their representation of defendants in criminal cases, Plaintiffs, and members
3 of the Plaintiff organization, regularly wish to speak with victims of the alleged crime.
4 Were it not for the restriction in A.R.S. § 13-4433(B), these individuals would contact
5 victims directly, and not by initiating contact through the prosecutor.

6 76. Consistent with their professional and ethical obligations, Plaintiffs
7 would be courteous, polite, and respectful in communications with victims.

8 77. Because of A.R.S. § 13-4433(B), Plaintiffs are forced to communicate
9 victim interview requests through the prosecutor instead of to the victim directly.

10 78. Because of the atmosphere of fear and enforcement created by the
11 Attorney General and A.R.S. § 13-4433(B), Plaintiffs do not contact statutory victims
12 and others directly for fear that doing so would subject them to professional discipline,
13 court sanctions, or criminal prosecution, even when such speech might not be
14 prohibited by A.R.S. § 13-4433(B).

15 79. Because Plaintiffs have a First Amendment right to attempt to speak with
16 any and all witnesses and other persons connected with a criminal case, including the
17 persons precluded from direct contact by A.R.S. § 13-4433(B), and because Plaintiffs
18 have a right to attempt these interviews unfettered by the compulsion to use a
19 government go-between, A.R.S. § 13-4433(B) violates the First Amendment.

20 80. Moreover, A.R.S. § 13-4433(B) is overbroad because it stops not only
21 speech that would be deemed criminal or unethical, such as harassing, abusive, or
22 threatening speech, but also eliminates all speech of any kind, including that which is
23 afforded the highest protections under the First Amendment.

24 **STATEMENT OF CLAIMS FOR RELIEF**

25 ***Count I: First Amendment***

26 81. Plaintiffs repeat and re-allege the foregoing paragraphs.

27 82. The prohibition against Plaintiffs contacting victims or their families
28 pursuant to A.R.S. § 13-4433(B) is an unlawful restraint on protected speech.

1 83. The members of Arizona Attorneys for Criminal Justice and the
2 individual Plaintiffs seek to engage in speech involving matters of great public concern
3 that goes to the heart of the functioning of the criminal-justice system, such as:

- 4 • In capital murder cases, explaining to victims’ families why the death
5 penalty should not be imposed by discussing factors at issue in current
6 public debate, including the possibility of mistaken identity, the public
7 cost of imposing the death penalty, the lack of deterrence resulting from
8 death sentences, the lack of finality for victims because the death penalty
9 extends criminal proceedings by decades, the cruelty of the death
10 penalty, and innumerable other reasons for the victims’ families to
11 oppose its imposition;
- 12 • In non-capital cases, the victim’s observation of the facts of the alleged
13 criminal incident, the victim’s ability to have adequately observed the
14 key circumstances of the incident, and the victim’s credibility, all for
15 various purposes related to conducting a thorough investigation,
16 including to prevent and remedy wrongful convictions;
- 17 • Engaging in speech designed to ensure the proper functioning of the
18 criminal-justice system in Arizona as a true and fair adversarial system so
19 that convictions will be reliable and the innocent will not be convicted or
20 will be exonerated.

21 84. Because other defense lawyers and members of defense teams have been
22 threatened with professional, judicial, and criminal sanctions based on violations of
23 A.R.S. § 13-4433(B), and because the Attorney General creates an atmosphere of fear
24 of such threats through his enforcement of A.R.S. § 13-4433(B), including directly
25 when his office is prosecuting a case and through supervision and compliance
26 enforcement when another prosecuting agency is handling a case, it carries with it a
27 chilling effect which precludes Plaintiffs and other persons of ordinary firmness from
28 engaging in the First Amendment protected speech activity of contacting and

1 communicating with victims, their families, and others.

2 85. Because the functioning of the criminal-justice system is a matter of
3 utmost public importance, the government must advance a compelling reason for the
4 prohibition on protected speech.

5 86. A.R.S. § 13-4433(B) is a prior restraint that authorizes suppression of
6 speech in advance of its expression by requiring defense lawyers and members of a
7 defense team to initiate contact with a crime victim only through a prosecutor's office
8 and allowing the prosecutor unfettered discretion to communicate whatever he or she
9 wants to the crime victim at the same time he or she communicates to the victim the
10 right to refuse an interview with the defense team. In cases prosecuted by the Attorney
11 General, his office sends a standard form letter to a victim when the defense requests to
12 speak to the victim, wholly preventing the speech of defense lawyers and investigators,
13 including Plaintiffs and Plaintiff organization's members.

14 87. A.R.S. § 13-4433(B) is not a permissible prior restraint because it
15 regulates speech based on the viewpoint of the speaker and based on the content of the
16 speech, it is not narrowly tailored to the government's interest in protecting victims
17 against harassment (or any other important, significant, or compelling government
18 interest), and does not leave open ample channels for communication between the
19 defense team and crime victims.

20 ***Count II: Overbreadth***

21 88. Plaintiffs repeat and re-allege the foregoing paragraphs.

22 89. A.R.S. § 13-4433(B) is overbroad and thus unconstitutional because it
23 prohibits any and all speech by defense lawyers and defense teams aimed at crime
24 victims and their families, not just speech that would be unlawful, harassing,
25 threatening, or obscene.

26 90. A.R.S. § 13-4433(B) is not narrowly tailored to achieve the government
27 interest in protecting crime victims and their families against intimidation, harassment,
28 or abuse, or to achieve any other legitimate government interest.

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RESPECTFULLY submitted this 4th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties.

/s/ Joye Allen
Employee of Lewis Roca Rothgerber Christie LLP