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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF ARIZONA

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

17 Plaintiffs,

18 vs.

19 Mark Brnovich, in his official capacity as
20 Attorney General of the State of Arizona;
State Bar of Arizona; Maret Vessella, Chief
21 Bar Counsel of the State Bar of Arizona;
Colonel Frank Milstead, in his official
22 capacity as Director of the Arizona
Department of Public Safety,

23 Defendants.
24

No. 2:17-cv-01422-SPL

**SECOND 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 for alleged violations of A.R.S. § 13-4433(B),
23 and these adverse actions against members of the criminal-defense community have
24 chilled constitutionally protected speech and hindered the ability of criminal-defense
25 teams to effectively represent criminal defendants and vindicate the rights afforded
26 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 for violating the law.

8 11. Plaintiffs seek declaratory and injunctive relief against enforcement of
9 A.R.S. § 13-4433(B) on the grounds that: (1) the law is a content-based restriction on
10 constitutionally protected speech not narrowly tailored to a compelling government
11 interest, and (2) the law is overbroad, in violation of the First Amendment to the
12 United States Constitution.

13 **JURISDICTION AND VENUE**

14 12. This case arises under the United States Constitution and presents a
15 federal question within this Court's jurisdiction under Article III of the Constitution
16 and 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). This action is brought pursuant to 42
17 U.S.C. § 1983.

18 13. The Court has the authority to grant declaratory relief pursuant to the
19 Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

20 14. The Court has the authority to award costs and attorneys' fees under 42
21 U.S.C. § 1988.

22 15. Venue is proper in this District under 28 U.S.C. § 1391(b). Each of the
23 Defendants' official places of business is located within this District. The events giving
24 rise to this complaint are the enforcement, within this District, of an unconstitutional
25 statute of the state of Arizona by Defendants.

26 **PARTIES**

27 *Arizona Attorneys for Criminal Justice*

28 16. Plaintiff Arizona Attorneys for Criminal Justice is a statewide not-for-

1 profit membership organization of criminal-defense lawyers, law students, and
2 associated professionals dedicated to protecting the rights of the accused in the courts
3 and in the legislature; promoting excellence in the practice of criminal law through
4 education, training, and mutual assistance; and fostering public awareness of citizens'
5 rights, the criminal-justice system, and the role of the defense lawyer.

6 17. Arizona Attorneys for Criminal Justice counts among its membership
7 more than 500 lawyers and allied professionals who work in private law practice, in
8 public practice in the state's indigent-defense agencies, and as private investigators
9 retained to assist criminal-defense teams. Members of Arizona Attorneys for Criminal
10 Justice work on behalf of clients in all types of cases, including capital and non-capital
11 murders, sex crimes, other serious felonies, and misdemeanors, in all courts in the state
12 of Arizona.

13 *Individual Plaintiffs*

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

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

23 20. Plaintiff Richard L. Lougee, Jr., is a lawyer who has been licensed to
24 practice law in Arizona since 1989. He was first admitted to the practice of law in
25 Connecticut in 1977, and was also licensed to practice law in New Mexico, but is
26 currently on inactive status in those states. Mr. Lougee practices in the area of criminal
27 defense, including handling sex crimes and capital defense. Mr. Lougee is a member
28 of Plaintiff Arizona Attorneys for Criminal Justice.

1 Rights, as an amendment to the state Constitution. The Victims' Bill of Rights is
2 codified at Arizona Constitution, Article 2, § 2.1.

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

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

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

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

19 33. The legislative intent for the Crime-Victims' Rights Implementation Act,
20 as expressed in House Bill 2412, was as follows:

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

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

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

28 3. Ensure at all stages of the criminal justice process that the duties
established by article II, section 2.1, Constitution of Arizona, are

1 fairly apportioned among all law enforcement agencies, prosecution
2 agencies, courts and corrections agencies in this state.

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

8 34. A.R.S. § 13-4433(B) currently reads:

9 The defendant, the defendant's attorney or an agent of the defendant shall
10 only initiate contact with the victim through the prosecutor's office. The
11 prosecutor's office shall promptly inform the victim of the defendant's
12 request for an interview and shall advise the victim of the victim's right
13 to refuse the interview.

14 35. A.R.S. § 13-4401(19) defines "victim":

15 "Victim" means a person against whom the criminal offense has been
16 committed, including a minor, or if the person is killed or incapacitated,
17 the person's spouse, parent, child, grandparent or sibling, any other
18 person related to the person by consanguinity or affinity to the second
19 degree or any other lawful representative of the person, except if the
20 person or the person's spouse, parent, child, grandparent, sibling, other
21 person related to the person by consanguinity or affinity to the second
22 degree or other lawful representative is in custody for an offense or is the
23 accused.

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

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

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

1 38. Thus, A.R.S. § 13-4433(B) operates to prohibit defense lawyers and
2 defense teams from contacting crime victims or their family members without the
3 consent of the prosecutor, the defense team’s litigation adversary.

4 ***The SBA and Chief Bar Counsel’s Authority to Enforce A.R.S. § 13-4433(B)***

5 39. The SBA and Chief Bar Counsel have authority to investigate and
6 prosecute attorneys admitted to the practice of law in Arizona for violations of the
7 Arizona Rules of Professional Conduct.

8 40. Arizona Rule of the Supreme Court 42, Ethical Rule (“ER”) 8.4(d), states
9 that it is professional misconduct for an attorney admitted to the practice of law in
10 Arizona to “engage in conduct that is prejudicial to the administration of justice.”

11 41. The SBA and Chief Bar Counsel have enforced A.R.S. § 13-4433(B) as
12 violations of ER 8.4(d) when criminal defense attorneys directly speak with crime
13 victims or their family members.

14 42. The SBA and Chief Bar Counsel have investigated and prosecuted
15 attorneys admitted to the practice of law in Arizona because they contacted crime
16 victims, or their family members, alleging that such contact violated ER 8.4(d). The
17 SBA and Chief Bar Counsel prosecuted these attorneys because the aforementioned
18 contact was in violation of A.R.S. § 13-4433(B).

19 43. The mere threat that the SBA or Chief Bar Counsel will initiate
20 disciplinary proceedings has a chilling effect on the willingness of Plaintiffs, and
21 members of the Plaintiff organization, to engage in speech with crime victims and
22 others, even when such speech might not be prohibited by A.R.S. § 13-4433(B). As
23 such, Plaintiffs, and members of their defense teams, have not directly contacted crime
24 victims or their families since the implementation of A.R.S. § 13-4433(B). In other
25 words, the credible threat (as evidenced by past enforcement) that the SBA or Chief
26 Bar Counsel will enforce the prohibitions of A.R.S. § 13-4433(B) has chilled Plaintiffs,
27 and members of the Plaintiff organization, from communicating in any way with crime
28 victims and their family members.

1 ***The DPS Director’s Authority to Enforce A.R.S. § 13-4433(B)***

2 44. The DPS Director administers all aspects of private investigator licensing
3 in Arizona. A.R.S. § 32-2402(A).

4 45. As part of the DPS Director’s administration of private investigator
5 licensing, the Department of Public Safety has a Licensing Unit that investigates
6 violations of the requirements to maintain a private investigator license in Arizona, and
7 prosecutes private investigators for such violations (including, for example, seeking to
8 revoke licenses).

9 46. Grounds for discipline of a private investigator licensed in the State of
10 Arizona include “[k]nowingly violating, or advising, encouraging or assisting the
11 violation of, a statute.” A.R.S. § 32-2457(A)(5).

12 47. The DPS Director has authority to investigate and prosecute private
13 investigators licensed in the State of Arizona for allegedly violating A.R.S. § 13-
14 4433(B), or advising, encouraging, or assisting someone else to do so.

15 48. The mere threat that the DPS Director will investigate or initiate
16 disciplinary proceedings has a chilling effect on the willingness of Plaintiffs, and
17 members of the Plaintiff organization, to engage in speech with crime victims and
18 others, even when such speech might not be prohibited by A.R.S. § 13-4433(B). As
19 such, Plaintiffs, and members of their defense teams, have not directly contacted crime
20 victims or their families since the implementation of A.R.S. § 13-4433(B).

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

22 49. As the chief legal officer of the state, the Attorney General has the
23 authority to initiate and handle any criminal prosecution in Arizona.

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

28 51. The Attorney General’s office serves as the prosecutor for many criminal

1 cases at the trial level, almost all felony direct appeals filed in criminal cases in
2 Arizona, and all capital habeas corpus litigation in federal court.

3 52. The Attorney General's office takes steps to enforce A.R.S. § 13-4433(B)
4 in the cases handled by that office, including, for instance, standing in the middle of
5 communications between the defense team and victims in trial-level matters and filing
6 motions in capital habeas corpus proceedings asking the federal courts to preclude the
7 defense team from directly contacting crime victims consistent with A.R.S. § 13-
8 4433(B).

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

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

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

1 56. As the administrator of the victims' rights program under A.R.S. § 41-
2 191.06, the Attorney General monitors and assists state and local criminal justice
3 agencies to implement and comply with victims' rights laws. The Attorney General
4 conducts training and provides technical assistance for criminal justice agencies and
5 their employees on victims' rights laws, and publishes brochures and pamphlets about
6 victims' rights laws, including A.R.S. § 13-4433(B), for distribution to victims,
7 criminal justice agencies and the public at large.

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

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

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

22 60. The Attorney General's Office of Victims Services has a compliance
23 administrator that investigates allegations of victims' rights violations and works with
24 victims who believe their rights have been violated.

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

1 62. The Attorney General's office will file a complaint with the state bar or
2 other licensing agency against a Plaintiff, or member of the Plaintiff organization, if he
3 or she violates A.R.S. § 13-4433(B). The Attorney General's Office would also
4 instruct the Plaintiff, or member of the Plaintiff organization, not to violate A.R.S.
5 § 13-4433(B) again.

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

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

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

28 66. The attorney against whom the Attorney General files such a complaint

1 may also have to respond to the complaint, including potentially retaining counsel and
2 notifying her or his malpractice insurer. That attorney may also have to report the
3 complaint to future employers.

4 67. The Attorney General, as chief legal officer of the state and administrator
5 of the victims' rights program, has created an atmosphere of fear and enforcement that
6 chills Plaintiffs' speech and the speech of members of the Plaintiff organization.

7 68. As a high-ranking representative of the Attorney General's office stated
8 under oath, "any attorney should feel somewhat afraid of violating the law"; "it's a no-
9 brainer."

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

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

18 70. The attorney members of Arizona Attorneys for Criminal Justice and the
19 individual Plaintiffs are professionally obligated to render effective assistance of
20 counsel to all of their criminally accused clients by the Sixth Amendment.

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

24 72. In a capital case, the defense team's duty to investigate often includes
25 making overtures to the family of the deceased in an effort to understand whether they
26 desire the death penalty for the perpetrator or would be satisfied with a lesser sentence,
27 such as life imprisonment without parole. Victim impact testimony is often critical to

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

1 the jury's determination of the appropriate sentence in a capital case and if defense
2 counsel can persuade the victim's family not to desire the death penalty, it can literally
3 save the life of a defendant. In addition, prosecutors will sometimes acquiesce to the
4 wishes of the victim's family and drop their demand for death. A.R.S. § 13-4433(B)
5 prevents the defense team from engaging in these efforts.

6 73. In capital cases where a relative of the defendant is the victim, often the
7 best source of evidence regarding mitigation critical to saving a defendant's life is
8 found with the defendant's family, which is also the victim's family. A.R.S. § 13-
9 4433(B) precludes the Plaintiffs from speaking to those crucial witnesses except by
10 using the prosecutor as an intermediary.

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

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

27 76. Contacting victims and their family members is not only a crucial part of
28 effectively representing a capital defendant, it is also critical to lobbying for the passive

1 repeal of the death penalty. In a number of states, the unofficial repeal of the death
2 penalty has been achieved by criminal-defense attorneys who convince family
3 members of victims in capital crimes to speak out in opposition to the death penalty,
4 thereby pressuring prosecutors and the public to abandon capital prosecution.
5 Ultimately, this can lead to the official, legislative repeal of the death penalty.² Without
6 this important speech on a matter of grave public concern, the political campaign for
7 the passive repeal of the death penalty can be significantly hampered.

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

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

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

24 80. In communicating the defense team's desire to speak with crime victims,

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 the Attorney General sends a standard form letter that is not tailored in any way to the
2 individual speech of the defense attorney or member of the defense team. Instead of
3 communicating the message that the defense team wishes to convey to the crime
4 victims or the crime victims' family, the Attorney General instead substitutes its own
5 speech. Effectively, the defense team is not allowed to communicate its message and
6 speech to crime victims and their families at all; the only speech or message
7 communicated to crime victims and their families is the canned message of the
8 Attorney General.

9 81. Plaintiffs, and members of the Plaintiff organization, regularly represent
10 defendants accused of crimes involving victims. As part of their representation of
11 defendants in criminal cases, Plaintiffs, and members of the Plaintiff organization,
12 regularly wish to speak with victims of the alleged crime. Were it not for the restriction
13 in A.R.S. § 13-4433(B), these individuals would contact victims directly, and not by
14 initiating contact through the prosecutor.

15 82. Consistent with their professional and ethical obligations, Plaintiffs
16 would be courteous, polite, and respectful in communications with victims.

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

19 84. Because of the atmosphere of fear and enforcement created by the SBA,
20 Chief Bar Counsel, the DPS Director, and the Attorney General and A.R.S. § 13-
21 4433(B), Plaintiffs do not contact statutory victims and others directly for fear that
22 doing so would subject them to professional discipline prosecuted by the SBA, Chief
23 Bar Counsel, or the DPS Director, even when such speech might not be prohibited by
24 A.R.S. § 13-4433(B).

25 85. Because Plaintiffs have a First Amendment right to attempt to speak with
26 any and all witnesses and other persons connected with a criminal case, including the
27 persons precluded from direct contact by A.R.S. § 13-4433(B), and because Plaintiffs
28 have a right to attempt these interviews unfettered by the compulsion to use a

1 government go-between, A.R.S. § 13-4433(B) violates the First Amendment.

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

6 **STATEMENT OF CLAIMS FOR RELIEF**

7 ***Count I: First Amendment***

8 87. Plaintiffs repeat and re-allege the foregoing paragraphs.

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

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

- 14 • In capital murder cases, explaining to victims' families why the death
15 penalty should not be imposed by discussing factors at issue in current
16 public debate, including the possibility of mistaken identity, the public
17 cost of imposing the death penalty, the lack of deterrence resulting from
18 death sentences, the lack of finality for victims because the death penalty
19 extends criminal proceedings by decades, the cruelty of the death
20 penalty, and innumerable other reasons for the victims' families to
21 oppose its imposition;
- 22 • In non-capital cases, the victim's observation of the facts of the alleged
23 criminal incident, the victim's ability to have adequately observed the
24 key circumstances of the incident, and the victim's credibility, all for
25 various purposes related to conducting a thorough investigation,
26 including to prevent and remedy wrongful convictions;
- 27 • Engaging in speech designed to ensure the proper functioning of the
28 criminal-justice system in Arizona as a true and fair adversarial system so

1 prohibits any and all speech by defense lawyers and defense teams aimed at crime
2 victims and their families, not just speech that would be unlawful, harassing,
3 threatening, or obscene.

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

7 97. The state could put in place a more narrowly tailored rule that would
8 address the government interest in protecting crime victims and their families against
9 intimidation, harassment, or abuse, without restricting the speech of Plaintiffs and other
10 criminal-defense lawyers and defense teams.

11 98. A.R.S. § 13-4433(B) also fails to leave open ample alternatives for
12 Plaintiffs' expression.

13 99. A.R.S. § 13-4433(B) prevents a substantial amount of protected speech
14 from occurring due to its overbreadth and chills people of ordinary firmness, including
15 Plaintiffs, from engaging in protected speech.

16 **CONCLUSION**

17 **WHEREFORE**, Plaintiffs respectfully request that the Court:

18 A. Declare that A.R.S. § 13-4433(B) violates the First Amendment of the
19 United States Constitution;

20 B. Preliminarily and permanently enjoin the DPS Director, the SBA, Chief
21 Bar Counsel, and their officers, agents, servants, employees, and attorneys, and those
22 persons in active concert or participation with them from enforcing A.R.S. § 13-
23 4433(B);

24 C. Award Plaintiffs reasonable costs and attorneys' fees pursuant to 42
25 U.S.C. § 1988; and

26 D. Grant Plaintiffs such other and further relief as the Court deems just and
27 proper.

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RESPECTFULLY submitted this 26th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, 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