

**ACLU Foundation of Arizona**

3707 North 7th Street, Suite 235  
Phoenix, Arizona 85014  
Telephone: 602-650-1854

**Kathleen E. Brody** (State Bar No. 026331)  
Email: kbrody@acluaz.org

**Killmer, Lane & Newman, LLP**

1543 Champa Street  
Denver, Colorado 80202  
Telephone: 303-571-1000

**David A. Lane** (pro hac vice)  
Email: dlane@kln-law.com

**Andrew McNulty** (pro hac vice)  
Email: amenulty@kln-law.com

**Lewis Roca Rothgerber Christie LLP**

201 East Washington Street, Suite 1200  
Phoenix, Arizona 85004-2595

**Dan W. Goldfine** (State Bar No. 018788)  
Direct Dial: 602.262.5392  
E-mail: DGoldfine@lrre.com

**Ian M. Fischer** (State Bar No. 026239)  
Direct Dial: 602.262.5724  
E-mail: IFischer@lrre.com

*Attorneys for Plaintiffs*

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;  
State Bar of Arizona; Maret Vessella, Chief  
Bar Counsel of the State Bar of Arizona;  
Colonel Frank Milstead, in his official  
capacity as Director of the Arizona  
Department of Public Safety,

Defendants.

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  
27 basic rights of respect, protection, participation and healing of their  
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.

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

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

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

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

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

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

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

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

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

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.<sup>1</sup>

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 <sup>1</sup> 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.<sup>2</sup> 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 <sup>2</sup> 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

that convictions will be reliable and the innocent will not be convicted or will be exonerated.

90. Because other defense lawyers and members of defense teams have been threatened with professional discipline based on violations of A.R.S. § 13-4433(B), it carries with it a chilling effect which precludes Plaintiffs and other persons of ordinary firmness from engaging in the First Amendment protected speech activity of contacting and communicating with victims, their families, and others.

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

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

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

### *Count II: Overbreadth*

94. Plaintiffs repeat and re-allege the foregoing paragraphs.

95. A.R.S. § 13-4433(B) is overbroad and thus unconstitutional because it

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.

1 RESPECTFULLY submitted this 26th day of April, 2019.

2 ACLU FOUNDATION OF ARIZONA  
Kathleen E. Brody

3 KILLMER, LANE & NEWMAN, LLP  
4 David A. Lane  
Andrew McNulty

5 LEWIS ROCA ROTHGERBER CHRISTIE LLP

6 By: /s/ Ian M. Fischer  
7 Dan W. Goldfine  
Ian M. Fischer

8 Attorneys for Plaintiffs  
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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