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9 **IN THE ARIZONA SUPREME COURT**

10 IN THE MATTER OF:
11 PETITION TO AMEND ARIZONA
12 RULE OF CRIMINAL PROCEDURE
13 39(b)(12)

R-22-0045

ARIZONA VOICE FOR CRIME
VICTIMS' COMMENT IN
OPPOSITION TO PETITION TO
AMEND ARIZONA RULE OF
CRIMINAL PROCEDURE 39(b)(12)

14 Pursuant to Rule 28(e) of the Rules of the Supreme Court of Arizona,
15 Arizona Voice for Crime Victims (“AVCV”) submits its Comment in opposition to
16 the “Petition to Amend Arizona Rule of Criminal Procedure 39(b)(12)” filed
17 December 1, 2022 (the “Petition”), and urges the Court to deny the Petition.

18 **I. ARIZONA VOICE FOR CRIME VICTIMS**

19 AVCV is an Arizona nonprofit corporation that works to promote and
20 protect crime victims’ rights and services throughout the criminal justice process.
21 To achieve these goals, AVCV empowers victims of crime through legal advocacy
22 and social services. AVCV also provides continuing legal education to the
23 judiciary, lawyers, and law enforcement.
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1 Part of AVCV’s mission is to defend Arizona’s laws that preserve and
2 protect rights for victims of crime.

3
4 **II. THE PETITION MISREPRESENTS THE STATUTE, THE**
5 **RULE, AND THE RESULT OF THE FEDERAL LAWSUIT**

6 The Petition claims that Ariz. R. Crim. P. 39(b)(12) should be amended by
7 removing its subsections (A) and (B) because in *Arizona Attorneys for Criminal*
8 *Justice; et al., vs. Mark Brnovich, in his official capacity as Attorney General of*
9 *the State of Arizona; et al.*, No. 2:17-cv-01422-SPL (the “Federal Lawsuit”), the
10 United States District Court for the District of Arizona found that A.R.S. § 13-
11 4433(B) violates the First Amendment of the United States Constitution. Calling
12 the Statute the “analogue statute” to subsections (A) and (B) of the Rule, the
13 Petition argues that since the Statute has been found unconstitutional:
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16 There is thus no reason for the continued existence of that rule.

17 In fact, the District Court’s order declaring the statute
18 unconstitutional and leaving the rule in place is already causing
19 confusion among judges presiding over criminal cases in Arizona,
20 lawyers involved in litigating those cases, the State Bar of Arizona,
21 and others. This Court should amend Rule 39(b)(12) on an emergency
22 basis to alleviate this confusion. More importantly, however, the
23 Court should amend the rule because, for the reasons thoroughly
24 explained by the District Court regarding A.R.S. § 13-4433(B), Rule
25 39(b)(12)’s restrictions on communications between criminal-defense
lawyers and crime victims violates their free-speech rights under the
U.S. and Arizona Constitutions.

...

... The court’s thorough Findings of Fact and Conclusions of
Law make clear that criminal-defense attorneys have a First
Amendment right to initiate contact with crime victims and to engage

1 with those victims in robust communications, including discussion
2 and questions about the facts and circumstances of any crime with
3 which the attorney's client is charged.

4 (Petition, at pages 2 and 4)

5 These statements are incorrect. First, as the District Court found, the Statute
6 and the Rule are not "analogous;" they are, in fact, materially different. (See, for
7 example, the "Amended Order" filed 12/09/22, Document 281 in the District Court
8 action, which is attached to this Comment as Exhibit F and discussed below,
9 especially its footnote 1.). Second, the District Court took pains to clarify the
10 differences between the Statute and the Rule, and what defense attorneys and their
11 agents can and cannot do relative to crime victims. (*Id.*)

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14 Third, the District Court was never asked by the Plaintiffs to find, and did
15 not find, that any part of Rule 39(b)(12) violates any free-speech or any other
16 rights of anyone under the United States or the Arizona Constitutions. On the
17 contrary, the Court specifically stated that "nothing in [its] Order shall be
18 construed to enjoin enforcement of any other provision of Arizona law, including a
19 crime victim's right to refuse an interview, deposition or other discovery request
20 pursuant to Article II, § 2.1(A)(5) of the Arizona Constitution and the requirement
21 under Arizona Rule of Criminal Procedure 39(b)(12) that the defense must
22 communicate a request to interview a victim to the prosecutor rather than the
23 victim." ("Amended Order" filed 12/09/22, Document 281, footnote 1) And in the
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25

1 same footnote, the Court said: “Nor shall anything in this Order be construed to
2 enjoin A.R.S. § 13-4433(B)’s requirement that “[t]he prosecutor’s office shall
3 promptly inform the victim of the defendant’s request for an interview and shall
4 advise the victim of the victim’s right to refuse the interview.””

6 Fourth, it is incorrect to say, as the Petitioners do, that the District Court’s
7 “Findings of Fact and Conclusions of Law make clear that criminal-defense
8 attorneys have a First Amendment right to initiate contact with crime victims and
9 to engage with those victims in robust communications, including discussion and
10 questions about the facts and circumstances of any crime with which the attorney’s
11 client is charged.” (Petition, at page 4) Given not just the “Findings of Fact and
12 Conclusions of Law,” but the Orders entered by the District Court on 11/02/22,
13 Document 270, and 12/09/22, Document 281 (discussed below), all that can be
14 said is that while criminal defense attorneys have a First Amendment right to
15 “initiate contact” with crime victims, their right stops there.

19 By virtue of these inaccuracies, the Petitioners are attempting to gain
20 something they never sought to gain, and were in fact denied, in the Federal
21 Lawsuit, namely, a ruling that Rule 39(b)(12)(A) and (B) violate the First
22 Amendment of the United States Constitution and the State Constitution.

24 **II. THE STATUTE AND THE RULE ARE MATERIALLY**
25 **DIFFERENT**

1 As the District Court recognized, the Statute and the Rule are materially
2 different. The operative words of the Statute are “initiate contact with the victim.”
3 The operative words of the Rule are “requests to interview a victim.” There is a
4 material difference between merely “contacting” a victim, and “requesting to
5 interview” a victim, which the Petition conflates, notwithstanding that the District
6 Court refused to do so. An interview involves much more than “contact.”
7

8
9 Moreover, while, as the District Court noted, the Victims’ Bill of Rights in
10 the Arizona Constitution (Ariz. Const. art. II, § 2.1) does not preclude “contact”
11 with a victim by the defendant, the defendant’s attorney, or other person acting on
12 behalf of the defendant, Ariz. Const. art. II, § 2.1(A)(5) specifically protects
13 victims from being interviewed by such persons. Rule 39(b)(12)(A) implements
14 that right by ensuring that the defense may not request to interview victims directly
15 but only through the prosecutor. Common sense alone indicates that a victim’s
16 Constitutional right to refuse an interview can be easily undermined if defendants
17 or their agents may approach victims directly and ask to interview them.
18
19

20 While the Federal Court found that the prohibition in the first sentence of
21 A.R.S. § 13-4433(B) on “initiating contact” with victims only through the
22 prosecutor’s office runs afoul of the First Amendment, it did not find, and it was
23 not even asked to find, that the requirement of Rule 39(b)(12)(A) was violative of
24 the First Amendment or the State Constitution.
25

1 **III. THE HISTORY OF THE FEDERAL LAWSUIT MANDATES**

2 **THE DENIAL OF THE PETITION**

3 The relevant history of the Federal Lawsuit, much of which the Petition
4 obfuscates or simply ignores, indicates why the Petition should be denied.

5 ***The Renewed Motion***

6 The operative pleading in the Federal Lawsuit was “Plaintiffs’ Renewed
7 Motion for Preliminary Injunction” filed 06/24/22, Document 238 (the “Renewed
8 Motion”). While some documents from the Federal Lawsuit are attached as
9 Exhibits to the Petition, some of the key documents are not. The Renewed Motion
10 is not attached to the Petition. Accordingly, it is attached to this Comment as
11 **Exhibit A** and incorporated herein by this reference.

12 The Renewed Motion began as follows:

13 Plaintiffs move the Court to issue a preliminary injunction
14 enjoining Defendants and their agents from enforcing Arizona
15 Revised Statutes (“A.R.S.”) § 13-4433(B), the Victim-Contact
16 Prohibition. Fed. R. Civ. P. 65. The Victim-Contact Prohibition
17 violates the free-speech rights of Plaintiffs . . . by prohibiting them
18 from initiating contact with crime victims except through the
19 defendant’s litigation adversary, the prosecutor.

20 (Renewed Motion, at page 2)

21 This concisely summarizes the nature of the Federal Lawsuit, and what the
22 Plaintiffs sought therein, and suggests why the Petitioners did not include it as an
23 Exhibit to their Petition. The only relief sought by the Plaintiffs was the issuance of
24
25

1 a preliminary injunction enjoining Defendants and their agents from enforcing the
2 first sentence of A.R.S. § 13-4433(B), “The defendant, the defendant’s attorney or
3 an agent of the defendant shall only *initiate contact* with the victim through the
4 prosecutor’s office.” The Plaintiffs themselves characterized this as “the Victim-
5 *Contact Prohibition*.” The Plaintiffs only sought to be able to “initiate *contact*”
6 with crime victims directly, without having to go through the prosecutor. The
7 Plaintiffs said nothing about Rule 39(b)(12).
8
9

10 ***The Defendants’ Response***

11 “Defendants Attorney General Mark Brnovich’s and Heston Silbert’s Joint
12 Response in Opposition to Plaintiffs’ Renewed Motion for Preliminary Injunction”
13 filed 07-22-22, Document 242 (the “Defendants’ Response”), is also not an Exhibit
14 to the Petition, and so is included as **Exhibit B** to this Comment and incorporated
15 herein by this reference.
16

17 The Defendants’ Response pointed out that “there is a separate,
18 unchallenged Rule of Criminal Procedure that likewise directs that ‘the defense
19 must communicate requests to interview a victim to the prosecutor, not the victim.’
20 Rule 39(b)(12).” (Defendants’ Response, at page 2)
21

22 And later, the Defendants said:
23

24 Plaintiffs . . . filed this lawsuit five years ago in May 2017,
25 approximately twenty-six years after the initial adoption of A.R.S. §
13-4433 and Rule 39. . . . Plaintiffs brought a facial First Amendment
challenge, on their own behalf only, to A.R.S. § 13-4433(B). . . .

1 Notably, Plaintiffs do not challenge the underlying rights victims have
2 pursuant to the Arizona Constitution or the restrictions in Rule of
3 Criminal Procedure 39.

4 (Defendants' Response, at page 6)

5 The Defendants' Response also discussed the history of Rule 39, noting that
6 "Comments to the Arizona Supreme Court supporting Rule 39 starkly show some
7 of the events that prompted the rule. Other letters to the court similarly illustrated
8 re-victimization that occurred without procedural protections in place."
9

10 (Defendants' Response, at page 4)

11 ***Findings of Fact and Conclusions of Law***

12 Following the Hearing and Trial on September 8, 2022, on 11/02/22, the
13 Court issued its "Findings of Fact and Conclusions of Law," Document 269
14 ("FFCL"), which is Exhibit 2 to the Petition.
15

16 The Court noted that the Statute, A.R.S. § 13-4433(B), was "the only
17 provision Plaintiffs challenge in this case." (FFCL, at page 4)
18

19 "In sum," the Court said: ". . . the Statute on its face prohibits an attorney or
20 other agent working on behalf of a defendant in an ongoing criminal proceeding in
21 Arizona from *initiating direct contact with the victim of the alleged crime . . .*
22 Instead, the attorney or agent must *initiate contact through the prosecutor*, who
23 must promptly inform the victim of the request." (FFCL, # 17, at pages 5-6;
24 emphasis added)
25

1 As referenced above, the Court noted that while the rights set forth in the
2 VBR include the right “To refuse an interview” (Ariz. Const. art. II, § 2.1(A)(5)),
3 “The rights enumerated in the Victims’ Bill of Rights do not include the right to
4 not be contacted by the defense or anything else similar to the Statute.” (FFCL, #
5 19, at page 7) The Federal Court thus recognized that the right enshrined in the
6 Statute—a right *not to be contacted*—was not a Constitutional right, and that it
7 differed materially from the Constitutional right *not to be interviewed* also
8 enshrined in the Rule.
9

10
11 In a footnote referring to both the Statute and the Rule, the Court said:

12
13 Defendants argue that the Statute is not the only obstacle to
14 Plaintiff’s speech, as Arizona Rule of Criminal Procedure
15 39(b)(12)(A) contains a similar prohibition. But as the Ninth Circuit
16 held, the Statute is broader than Rule 39(b)(12)(A), so it is possible to
17 violate the Statute without violating the Rule. . . . Thus, “enjoining
18 Defendants from enforcing [the Statute] would relieve a discrete
19 injury.”

20 (FFCL, footnote 4 at page 10)

21 That is, while both the Statute and the Rule presented “obstacles” to the
22 Plaintiffs, the prohibition on *initiating contact* was broader than the prohibition on
23 *interviewing*. A Plaintiff could *contact* a victim without *interviewing* the victim.
24 Therefore, the Court could enjoin Defendants from *initiating contact* without
25 affecting the prohibition on *interviewing*. And that is all the Court wound up doing.

1 The Court acknowledged that the Plaintiffs wished not only to *contact*
2 victims, but to *interview* them. However, in another footnote, it said:

3
4 To the extent Plaintiffs argue that the Statute hinders their
5 ability to effectively represent their clients by limiting their ability to
6 investigate facts, circumstances, mitigation evidence, and the like . . .
7 the Court finds that these issues go not to Plaintiff’s First Amendment
8 rights but rather to their clients’ Sixth Amendment rights, which are
9 not at issue here.

10 (FFCL, footnote 5 at page 12)

11 The Court’s reflection on law in other jurisdictions further indicated the
12 Court’s recognition of the difference between *contacting* and *interviewing*: “More
13 than a dozen states give victims *the right to refuse an interview*, deposition or
14 discovery request by the defense. But no other jurisdiction limits the defense’s
15 ability *to initiate contact with crime victims* in the first place.” (FFCL, # 7, at pages
16 28-29; emphasis added)

17 The Court also found the text of the Statute to be “quite clear. . . . the Statute
18 covers exactly what it says it does: *direct contact initiated by the defense team to a*
19 *statutory victim* from the time that the criminal Defendant is formally charged until
20 final disposition.” (FFCL, # 37, at page 46; emphasis added)

21 ***The Original Order***

22 On the same date as its FFCL, the Court issued its “Order,” Document 270,
23 which is Exhibit 3 to the Petition (the “Original Order”). In its Original Order, the
24 Court granted the Plaintiffs the declaratory and injunctive relief they had sought,
25

1 declaring that A.R.S. § 13-4433(B) violates the First Amendment of the United
2 States Constitution, and permanently enjoining the Defendants from enforcing it
3 against a criminal defendant’s attorney or an agent of that attorney.¹ The first three
4 Orders on page 2 of the Original Order further permanently enjoined the
5 Defendants from taking actions that would interfere with the right of defense
6 attorneys or their agents to *directly initiate contact* with a statutory crime victim.
7
8 (Original Order, at page 2; emphasis added)
9

10 However, in footnote 1 of the Original Order, the Court also said:

11 . . . Nor shall anything in this Order be construed to enjoin
12 enforcement of any other provision of Arizona law, including a crime
13 victim’s right to refuse an interview, deposition, or other discovery
14 request pursuant to Article II, § 2.1(A)(5) of the Arizona Constitution
15 and the requirement under Arizona Rule of Criminal Procedure
16 39(b)(12) that the defense must communicate a request to interview a
17 victim to the prosecutor rather than the victim.

18 The Court thus made it clear that even its Original Order did not affect Rule
19 39(b)(12).²

20 ***The Vessella Motion***

21 On 11/16/22, the Defendant Maret Vessella, Chief Bar Counsel to the State
22 Bar of Arizona, filed “Defendant Maret Vessella’s Rule 59(e) Motion to Alter or
23

24 ¹ The Plaintiffs did not seek the right to have defendants themselves directly
25 contact victims.

² Defendant Attorney General Mark Brnovich filed a Notice of Appeal, which is
pending, but it does not affect this Comment.

1 Amend the Judgment,” Document 274 (the “Vessella Motion”), which is Exhibit 4
2 to the Petition.

3
4 The Motion alleged that the Original Order (Document 270) was ambiguous
5 regarding the scope of the injunction. Referring to the language of the Statute and
6 the language of the Order, the Motion said:

7
8 The above-emphasized language [from the injunction in the
9 Original Order applicable to Defendant Vessella], “directly initiated
10 contact,” is what creates the ambiguity when read in context with the
11 Court’s footnote [footnote 1 to the Order], which expressly limits the
12 injunction’s scope. . . . This part of the order is confusing because a
13 “request to interview” is a specific type of contact that, logically
14 speaking, fits squarely within the “directly initiated contact” umbrella.

15 So, on the one hand, the Court broadly enjoined Vessella from
16 investigating or seeking discipline against any defense attorney who
17 “directly initiated contact” with crime victims in violation of A.R.S. §
18 13-4433(B). On the other hand, the Court seems to have carved out an
19 exception allowing Vessella to investigate and seek discipline against
20 defense attorneys who directly “request to interview” a crime victim
21 without going through the prosecutor, in violation of Rule 39(b)(12),
22 Ariz. R. Crim. P. This is not clear, however, given that a defense
23 lawyer cannot directly request to interview a victim without first
24 initiating contact with the victim.

25 (Vessella Motion, at page 2)

26 Defendant Vessella sought “clarification so that Vessella has clear guidance
27 from the Court regarding the injunction’s scope, and in particular whether she may
28 investigate and/or seek discipline based on a defense attorney’s direct request to
29 interview crime victims in violation of Rule 39(b)(12), Ariz. R. Crim. P.” (*Id.*)

The Plaintiffs’ Response

1 The Plaintiffs filed “Plaintiffs’ Response to Defendant Maret Vessella’s Rule
2 59(e) Motion to Alter or Amend the Judgment,” on 11/28/22, Document 277 (the
3 “Plaintiffs’ Response”), which is Exhibit 5 to the Petition.
4

5 The Plaintiffs appear surprised that anyone would think that the Court meant
6 what it said when it limited its ruling to the Statute and excluded the Rule.

7 The Plaintiffs began:
8

9 Plaintiffs do not oppose Defendant Maret Vessella’s request for
10 clarification in her Rule 59(e) Motion to Alter or Amend Judgment.
11 Plaintiffs believe, however, that this Court’s Findings of Fact and
12 Conclusions of Law (Doc. 269) make clear that criminal defense
13 attorneys have a First Amendment right to initiate contact with crime
14 victims and to engage with those victims in robust communications,
15 including discussion and questions about the facts and circumstances
16 of any crime with which the attorney’s client is charged. The Court
17 should not undermine its own ruling to authorize Defendant Vessella,
18 as her request suggests, to violate the First Amendment rights of
19 criminal defense attorneys and their agents by investigating and
20 disciplining them for making a “request to interview” a crime victim.

21 (Plaintiffs’ Response, at page 2)

22 In their Renewed Motion, the Plaintiffs had attacked a Statute that prohibited
23 “*contact*” only. Now, faced with the Vessella Motion, they claimed that what they
24 had sought all along, without ever before mentioning it, was not just “initiating
25 conduct,” that which they were prohibited from doing by the Statute, but
something much more, namely, “to engage with . . . victims in robust
communications” etc. Somehow merely “initiating contact” with victims had
morphed, for the Plaintiffs, into having “robust communications” with them.

1 And so, the Plaintiffs urged the Court to “not undermine its own ruling” by
2 confining it to the terms of the Statute, apparently unaware of the irony that the
3 Court’s “own ruling” had given the Plaintiffs exactly what *they themselves* had
4 requested, but no more than that. In their Response to the Vessella Motion the
5 Plaintiffs essentially sought what they had not sought before, namely, to have the
6 Rule swept into the Original Order along with the Statute and declared
7 unconstitutional as well, which is, of course, what they are seeking now by means
8 of their Rule Change Petition.
9

10
11 While parts of the Court’s FFCL *were* ambiguous, there could be no doubt it
12 had left the Rule standing. Any doubts along those lines were resolved by footnote
13 1 to the Original Order: “. . . to read Rule 39’s language this broadly [actually, to
14 read it as it is written] would negate much of this court’s 50-page Findings of Fact
15 and Conclusions of Law. Indeed, any clarification that limits what or how defense
16 attorneys may communicate with victims based on the ‘request to interview’
17 language of Rule 39 would violate the First Amendment, as explained in this
18 court’s Findings of Fact and Conclusions of Law.” (Plaintiffs’ Response, at page 2)
19
20

21 The Plaintiffs were arguing that the plain language of footnote 1—which
22 maintained the requirement of Rule 39(b)(12)(A)—could not really have meant
23 what it said because that “would negate much of this court’s 50-page Findings of
24 Fact and Conclusions of Law,” and because the Rule also violates the First
25

1 Amendment and the State Constitution. But the Plaintiffs never challenged the
2 constitutionality of the Rule, and the Court never found that the Rule violates the
3 Frist Amendment or the State Constitution. The Court merely recognized that the
4 prohibition of the Statute on “initiating contact” was materially different from the
5 prohibition of the Rule on “communicating requests to interview.” In finding the
6 Statute, but not the Rule, unconstitutional the Court gave the Plaintiffs exactly
7 what they asked for.
8
9

10 The Plaintiffs’ argument at page 3 of their Response that “requests to
11 interview a victim” in Rule 39(b)(12)(A) must refer to formal interviews under
12 Rule 15.3 is similarly unavailing.
13

14 In the “Conclusion” of their Response, the Plaintiffs finally explicitly sought
15 something they had never sought before in the six-year history of this litigation,
16 namely, the right to directly request interviews from crime victims. (Plaintiffs’
17 Response, at page 3)
18

19 Notwithstanding their language, the Plaintiffs were hardly seeking a mere
20 “clarification.” Rather, they were seeking wholly different declaratory and
21 injunctive relief.
22

23 ***The Brnovich Response***

24 On 11/30/22, Defendant Brnovich filed his “Response in Opposition to
25 Defendant Vessella’s Rule 59(e) Motion to Alter or Amend the Judgment,”

1 Document 278 (the “Brnovich Response”). It is not included in the Plaintiffs’
2 Exhibits, and so it is attached to this Comment as **Exhibit C** and incorporated
3 herein by this reference.
4

5 Defendant Brnovich opposed the Vessella Motion on the common sense
6 basis that nothing needed to be clarified, given that Rule 39(b)(12) was never
7 challenged in this action. “In fact,” said Brnovich,
8

9 . . . countless pages of briefing throughout this case were devoted to
10 Defendants’ arguments that Plaintiffs lacked standing *because Rule 39*
was not challenged. . . .

11 In that light, the Court correctly limited the injunction: [quoting
12 footnote 1 of the Order]. The Court could do no more than enjoin
13 Defendants from actions connected to A.R.S. § 13-4433(B) because
14 that was the only provision of Arizona law properly before the Court.
15 For Vessella now to ask the Court to provide guidance on Rule
16 39(b)(12)’s contours is beyond the scope of the issues over which the
17 Court has jurisdiction in this matter.

18 . . .

19 Plaintiffs ask the Court to go even further [than interpreting the
20 Rule]. Plaintiffs effectively ask the Court to hold (post-trial) that Rule
21 39(b)(12) is unconstitutional. But as already discussed, Plaintiffs did
22 not challenge Rule 39(b)(12). The constitutionality and/or
23 interpretation of the Rule is not, nor has it ever been, before this
24 Court. And like Vessella, Plaintiffs provide no legal reason why the
25 court should (or could) resort to the “extraordinary remedy” they seek
through their “non-opposition.”

(Brnovich Response, at page 2; emphasis in original)

The Vessella Reply

On 12/05/22, Defendant Vessella filed her “Reply in Support of Defendant
Maret Vessella’s Rule 59(e) Motion to Alter or Amend the Judgment,” Document

1 279 (the “Vessella Reply”). It is not included in the Plaintiffs’ Exhibits, and so it is
2 attached to this Comment as **Exhibit D** and incorporated herein by this reference.

3
4 Vessella argued that the Responses to her Motion from the Plaintiffs and
5 Defendant Brnovich confirmed that “the judgment is ambiguous and requires
6 clarification.” (Vessella Reply, at page 2)

7 ***Order Filed 12/09/22***

8
9 On 12/09/22, the Court issued its Order granting Vessella’s Motion,
10 Document 280. It is not included in the Plaintiffs’ Exhibits, and so it is attached to
11 this Comment as **Exhibit E** and incorporated herein by this reference.

12
13 In the Order, the Court agreed with Vessella that its injunction was
14 ambiguous:

15 Because “communicat[ing] a request to interview a victim” to the
16 victim directly (which the Order claims not to enjoin) falls within the
17 scope of “directly initiat[ing] contact with a statutory crime victim”
18 (which the Order does claim to enjoin), the Court agrees with
19 Defendant Vessella that the injunction is ambiguous as to whether
20 Defendants may pursue discipline against attorneys and their agents
21 who communicate a request for an interview to the victim rather than
22 the prosecutor.

21 (Order, at page 2)

22 Referring to a statement made by the Ninth Circuit to the effect that it would
23 be possible to violate the Statute without violating the Rule, and so enjoining
24 Defendants from enforcing the Statute “would relieve a discrete injury,” the Court
25 said:

1 Implicit in that holding is that the Court can enjoin enforcement of §
2 13-4433(B) without necessarily enjoining enforcement of Rule
3 39(b)(12). Because Plaintiffs challenged the constitutionality only of
4 §13-4433(B) and because the Court therefore declared only § 13-
5 4433(B) unconstitutional, the Court will not enjoin enforcement of
6 Rule 39(b)(12).

7 (*Id.*)

8 Granting Vessella’s Motion, the Court continued:

9 To clarify the ambiguity highlighted by Defendant Vessella’s
10 Motion, the Court will issue an Amended Order that prohibits
11 Defendants from pursuing investigations or disciplinary action against
12 defense attorneys and their agents based on an alleged violation of §
13 13-4433(B). In conjunction with the Court’s admonition that the
14 injunction does not enjoin enforcement of Rule 39(b)(12), this will
15 make clear that Defendants may still pursue investigations or
16 discipline based on an alleged violation of Rule 39(b)(12). The Court
17 will also make clear that the injunction does not enjoin the
18 requirement in the second sentence of § 13-4433(B) that prosecutors
19 must promptly inform a victim of the defense team’s request for an
20 interview.

21 (Order, at page 3)

22 ***The Amended Order***

23 On 12/09/22, the Court issued its promised Amended Order, Document 281
24 (the “Amended Order”). It is not included in the Plaintiffs’ Exhibits, and so it is
25 attached to this Comment as **Exhibit F** and incorporated herein by this reference.

The material differences between the Original Order and the Amended
Order *on both pages 1 and 2* may be seen by laying the two Orders next to one

1 another. We limit ourselves here to simply quoting from footnote 1 of the
2 Amended Order:

3
4 . . . Nor shall anything in this Order be construed to enjoin
5 A.R.S. § 13-4433(B)'s requirement that "[t]he prosecutor's office
6 shall promptly inform the victim of the defendant's request for an
7 interview and shall advise the victim of the victim's right to refuse the
8 interview." Finally, nothing in this Order shall be construed to enjoin
9 enforcement of any other provision of Arizona law, including a crime
10 victim's right to refuse an interview, deposition or other discovery
11 request pursuant to Article II, § 2.1(A)(5) of the Arizona Constitution
12 and the requirement under Arizona Rule of Criminal Procedure
13 39(b)(12) that the defense must communicate a request to interview a
14 victim to the prosecutor rather than the victim.

15 This footnote in and of itself indicates why the Petition should not be
16 granted.

17 CONCLUSION

18 Apart from everything else, the proposed amendment sought by the
19 Petition—the removal of subsections (A) and (B) from Ariz. R. Crim. P.
20 39(b)(12)—is simply without merit. The right of crime victims in Arizona to refuse
21 interviews is a right of Constitutional dimension. Ariz. Const. art. II, § 2.1(A)(5). It
22 is likely to be a right that a crime victim, faced with a direct request for an
23 immediate interview from a defendant's attorney or agent, is unaware of.
24 Subsections (A) and (B) of the Rule, enacted pursuant to another Constitutional
25 provision, Ariz. Const. art. II, § 2.1(D), is absolutely necessary to preserve and
protect that right. After all, Ariz. Const. art. II, § 2.1(A)(11) provides victims with

1 the additional right “To have all rules governing criminal procedure . . . protect
2 victims’ rights,” which is what Rule 39(b)(12)(A) and (B) does. Furthermore,
3 victims have a constitutional right to be treated with fairness, respect, and dignity,
4 and to be free from intimidation, harassment, or abuse, throughout the criminal
5 justice process (Ariz. Const. art. II, § 2.1(A)(1)), and unfettered access by the
6 defense to “robust” direct communications with victims beyond initial contact will
7 violate these rights as well.
8
9

10 For the reasons set forth herein, AVCV respectfully requests that the Court
11 deny the Petition.

12 Respectfully submitted May 1, 2023.

13
14 ARIZONA VOICE FOR CRIME VICTIMS

15 BY: /s/ Colleen Clase
16 Colleen Clase

17 BY: /s/ Thomas E. Lordan
18 Thomas E. Lordan