

Exhibit A

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22 UNITED STATES DISTRICT COURT
23 DISTRICT OF ARIZONA

24 Arizona Attorneys for Criminal Justice;
25 et al.,

26 Plaintiffs,

27 vs.

28 Mark Brnovich, in his official capacity as
Attorney General of the State of Arizona;
et al.,

Defendants.

) No. 2:17-cv-01422-SPL

)

)

) **PLAINTIFFS' RENEWED MOTION**
) **FOR PRELIMINARY INJUNCTION**

)

) **HEARING REQUESTED**

)

)

) (Assigned to Hon. Steven P. Logan)

)

)

1 Plaintiffs move the Court to issue a preliminary injunction enjoining Defendants
2 and their agents from enforcing Arizona Revised Statutes (“A.R.S.”) § 13-4433(B), the
3 Victim-Contact Prohibition. Fed. R. Civ. P. 65. The Victim-Contact Prohibition violates
4 the free-speech rights of Plaintiffs—criminal-defense lawyers and others working on
5 behalf of criminal defendants—by prohibiting them from initiating contact with crime
6 victims except through the defendant’s litigation adversary, the prosecutor.

7 The Victim-Contact Prohibition imposes an overbroad content and viewpoint-
8 based prior restraint on Plaintiffs’ speech because it forbids them from communicating
9 with the intended target of their speech and does so based on their identity as members of
10 the criminal-defense team. *See Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir.
11 2009) (“Viewpoint discrimination occurs when the government prohibits speech by
12 particular speakers, thereby suppressing a particular view about a subject.”) (cleaned up);
13 *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 894 (9th Cir. 2007) (“ordinance
14 that vests unbridled discretion in the licensor” is prior restraint on speech). The Victim-
15 Contact Prohibition has no counterpart in federal law or any other state’s law, and
16 Defendants will not be able to meet the required burden for justifying such a restriction
17 on Plaintiffs’ speech.

18 Plaintiffs first filed this lawsuit in May 2017, and the parties have spent the last
19 five years litigating Defendants’ myriad jurisdictional and procedural defenses, up to the
20 U.S. Supreme Court. Those defenses have now all failed, and no further obstacle prevents
21 this Court from ruling on the merits of Plaintiffs’ First Amendment claims. Plaintiffs are
22 entitled to preliminary relief because the Victim-Contact Prohibition unconstitutionally
23 restricts and chills their speech every day it remains in effect, and they are likely to
24 succeed on the merits of their claims. Plaintiffs therefore renew their motion for
25 preliminary injunctive relief and request that the Court promptly hold a hearing for the
26 parties to present argument and evidence on this motion. *See Doc. 11* (Plaintiffs’ Motion
27 for Preliminary Injunction, filed May 20, 2017).

28

INTRODUCTION

1
2 “[A]ttorneys and other trial participants do not lose their constitutional rights at the
3 courthouse door.” *Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 595 (9th Cir. 1985); *see also*
4 *Freedman & Starwood, Prior Restraints on Freedom of Expression by Defendants and*
5 *Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607, 614-18
6 (1977). Plaintiffs seek declaratory and injunctive relief to halt the Victim-Contact
7 Prohibition’s ongoing violation of their speech rights in violation of the First
8 Amendment.

9 Plaintiff Arizona Attorneys for Criminal Justice (“AACJ”) is a statewide not-for-
10 profit membership organization of criminal-defense lawyers, law students, and associated
11 professionals dedicated to protecting the rights of the accused in the courts and in the
12 legislature, promoting excellence in the practice of criminal law through education,
13 training, and mutual assistance, and fostering public awareness of citizens’ rights, the
14 criminal-justice system, and the role of the defense lawyer. AACJ’s membership includes
15 defense lawyers and others working on behalf of criminal defendants, including those
16 accused of all manner of petty and serious offenses. The individual Plaintiffs are
17 criminal-defense lawyers and an investigator. The Victim-Contact Prohibition directly
18 infringes and chills the free-speech rights of the individual Plaintiffs and AACJ’s
19 members.

20 Plaintiffs wish to speak with crime victims, minor victims’ legal guardians, and
21 the surviving family members of homicide victims. Yet the Prohibition restricts that
22 speech, going far beyond what is necessary to protect victims’ rights. Under the statute,
23 criminal-defense lawyers and others working with them may not speak to statutory crime
24 victims without first obtaining permission through the prosecutor. But prosecutors are
25 under no duty to accurately convey a defense attorney’s message to a victim. And
26 prosecutors must also inform the victim of their right to refuse an interview. In practice,
27 victims who learn from the prosecutor that the defense team wants to speak with them
28 rarely agree to do so.

1 Fear of professional discipline and other sanctions has deterred Plaintiffs from
 2 speaking to crime victims on any topic, whether as part of the investigatory function of
 3 their work, on other matters of interest to victims, or on matters of great public concern
 4 like imposition of the death penalty. The result has been unnecessary infringement on
 5 Plaintiffs' free-speech rights, harmful withholding of information from crime victims,
 6 and interference in the truth-seeking function of the criminal legal system. The Court
 7 should preliminarily enjoin the Victim-Contact Prohibition because it continues to violate
 8 Plaintiffs' free-speech rights every day it remains in effect.

9 BACKGROUND

10 I. Background on the Victim-Contact Prohibition

11 In 1990, Arizona voters approved Proposition 104, the Victims' Bill of Rights
 12 ("VBR"), as an amendment to the state Constitution. The VBR grants crime victims the
 13 right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation,
 14 harassment, or abuse, throughout the criminal justice process." Ariz. Const. art. 2,
 15 § 2.1(A)(1). The VBR also provides a crime victim with the right "[t]o refuse an
 16 interview, deposition, or other discovery request by the defendant, the defendant's
 17 attorney, or other person acting on behalf of the defendant." Ariz. Const. art. 2,
 18 § 2.1(A)(5).

19 In 1991, Arizona enacted the Crime-Victims' Rights Implementation Act. Among
 20 the enactments was the Victim-Contact Prohibition, which reads:

21 The defendant, the defendant's attorney or an agent of the defendant shall
 22 only initiate contact with the victim through the prosecutor's office. The
 23 prosecutor's office shall promptly inform the victim of the defendant's
 24 request for an interview and shall advise the victim of the victim's right to
 refuse the interview.¹

25 A.R.S. § 13-4433(B). Under the Prohibition, members of the defense team may not
 26 contact "a person against whom a criminal offense has been committed," as well as the

27 ¹ The current statute is not substantively different from its original enactment or interim
 28 amendments. This lawsuit does not challenge the statute's prohibition against a defendant
 contacting the victim.

1 person's parent or legal guardian if the person is a minor child, and "the person's spouse,
2 parent, child, grandparent or sibling, any other person related to the person by
3 consanguinity or affinity to the second degree or any other lawful representative of the
4 person" if the person has been killed or incapacitated. A.R.S. §§ 13-4401(19), 13-
5 4433(G). The Prohibition's enactment drastically changed the practice of criminal
6 defense in Arizona.²

7 In 1997, A.R.S. § 13-4433 was amended to allow a prosecutor to refuse to forward
8 correspondence from the defense team to victims and their families, further limiting the
9 speech of defense lawyers and the defense team. That provision reads:

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

13 A.R.S. § 13-4433(C). As a result, the Victim-Contact Prohibition, in conjunction with
14 § 13-4433(C), operates to prohibit defense lawyers and defense teams from contacting
15 crime victims or their family members without the consent of the prosecutor, the defense
16 team's litigation adversary.

17 No other state but Arizona prohibits criminal-defense teams from initiating contact
18 with crime victims or restricts their speech like the Victim-Contact Prohibition.³

19 **II. The Victim-Contact Prohibition's impact on Plaintiffs' speech**

20 Plaintiffs are lawyers and investigators who defend individuals accused of crimes
21 ranging from petty offenses to capital murder. As a result, the Victim-Contact Prohibition
22 restricts Plaintiffs' communications with victims on a variety of topics for a variety of
23 purposes.⁴ For example, speaking with a victim in a burglary case can be part of the

24 ² See Exh. J at 22-23 ("Well, it was kind of a watershed event for those of us who
25 practiced criminal law because it changed the way we were able to do our job."), 26, 28.

26 ³ See *id.* at 18, 44.

27 ⁴ Exh. E at 22 ("I think if I could exercise my First Amendment right to talk to victims
28 that one of the results might be a benefit to my client. It might also be a benefit [to] the
victim. . . . It might be a benefit to me, too."), 69 ("[Y]ou can speak on your own behalf
in the course of the interview. I mean, that's not the overall purpose, but it certainly
happens. And sometimes victims will ask you questions that you are sure to make a

1 routine investigatory function of the defense team. Contacting a victim can also help
2 Plaintiffs assess the victim's credibility,⁵ which can be gleaned from initial
3 communications even if those include only a refusal to submit to questioning. At times,
4 Plaintiffs' speech can be aimed at "advancing the representation of [their] client and also
5 aiding the victim."⁶ For instance, sometimes victims seek information on a topic or want
6 closure on an issue where the defense team can assist.⁷ Sometimes, the defense team can
7 help provide information to the victim about what to expect from the criminal legal
8 process.⁸ At other times, Plaintiffs' speech would involve advocating to a murder
9 victim's family members that the death penalty is immoral and that a sentence of death
10 should be actively opposed.⁹ The blanket prohibition on initial communications from
11

12 personal choice about whether you answer or not."); Exh. I at 40 ("I believe it violates
13 my First Amendment rights to contact a victim in any case, and it prevents me from
14 doing my job to the best of my abilities."); Exh. J at 77 ("The purpose of the contact with
15 the victim would primarily be to assist my client. It could have collateral benefit for
me.").

16 ⁵ Exh. J at 95.

17 ⁶ Exh. E at 89. *See also id.* at 93-94 ("I believe the fully informed victims who are fully
18 informed about the process are less likely to pursue the death penalty when they
19 understand what it means for their interests."); Exh. I at 32 ("I would like to contact the
20 victim in both of those cases and talk to that person. There may be things that I may be
21 able to provide that no one else can provide. Could it advance my client's case? Sure. But
it also may advance their ability for closure, their ability to know what the other side of
the case is, and give them a complete picture of the case, which I think lends itself to
justice for everyone."), 33-34.

22 ⁷ Exh. K at 58 ("I felt like it's appropriate to reach out to the victim for closure on an
issue that might make their life better.").

23 ⁸ Exh. E at 89 (testifying that that the purpose for contacting a victim in a capital case
24 "can be often the victim, the statutory victim, . . . is not somebody who actually
25 witnessed the crime or anything like that. It's somebody related. In that context, they
often have mitigation evidence that might lessen the penalty for our client. That's often
26 one of the goals. But another goal is to offer to provide information to people who are
27 embarking on a long journey and what that means for them and what they can expect,
. . . oftentimes what information about the crime they may want to know I can offer to
answer some of their questions."); Exh. I at 62-63.

28 ⁹ Exh. E at 92 (If the victim no longer wanted to pursue the death penalty, "that would be
a benefit, I believe, for both the victim and my client.").

1 defense counsel to crime victims restricts and censors Plaintiffs from speaking with
2 victims directly and with nuance on all these topics, among others.¹⁰ The Victim-Contact
3 Prohibition also prevents defense counsel from using their interpersonal skills to establish
4 rapport with crime victims, which can lead a victim to agree to a discussion, interview, or
5 questioning.¹¹

6 Moreover, because the prosecutor has no obligation to accurately relay the defense
7 team's message to victims, the Prohibition makes the prosecutor both the conduit for
8 speech and the arbiter of whether the communication is actually delivered as intended.
9 A.R.S. § 13-4433(C). In practice, the prosecution, through the victim's advocate, uses a
10 standard form letter to communicate interview requests to victims, which does not reflect
11 the defense team's intended speech.¹² No matter what message the defense attorney
12 wants to convey, and even if a defense attorney writes a letter to the victim, the
13 prosecution sends the form letter.¹³ In some cases, even when requested by the defense
14 team, prosecutors do not even send the form letter to victims.¹⁴

15 The Victim-Contact Prohibition thus also has the effect of allowing the
16 prosecution to effectively bar **all** communication between defense counsel and crime
17 victims. *See* Stellisa Scott, *Beyond the Victims' Bill of Rights: The Shield Becomes a*
18 *Sword*, 36 Ariz. L. Rev. 249, 262 (1994) ("concerns that prosecutors are utilizing the
19

20 ¹⁰ *Id.* at 87 ("[I]f we can contact directly crime victims, I think it would be our obligation
21 to attempt to do so."); *see also* Exh. K at 18-19 (defense teams may want to contact a
22 victim without alerting their litigation adversary).

23 ¹¹ *See* Exh. G at 40 (victims sometime wish to speak with the defense team); Exh. H at
24 41; Exh. I at 28-29; Exh. J at 42-43 (same); Exh. K at 38 (same), 42-43 ("I developed a
25 personality that where people feel comfortable around me. So I think I'm pretty good at
26 blending being an attorney with being a person, too. And so I feel like I have unique
27 attributes that would allow me to talk to victims and not do any harm."), 44, 53-55, 64-
28 65; Exh. L at 43-44.

¹² Exh. A at 84; Exh. C at 13, 20.

¹³ Exh. A at 87, 91; Exh. E at 39 ("My standard practice has been to write a letter with a
request for an interview that **explains why I want to talk to the victim** and contains a
signature line for agreeing or not wanting to talk to me.") (emphasis added).

¹⁴ Exh. C at 54, 57, 74-75.

1 exclusive access provided by Section 13-4433 to improperly interfere with a victim’s
2 decision to grant a defense interview remain viable”). Because the prosecutor is the
3 gatekeeper for communications between defense counsel and crime victims, the result is
4 that almost no victims or family members are willing to speak with Plaintiffs after the
5 prosecution counsels them.¹⁵ See A.R.S. § 13-4433(B) (“The prosecutor’s office shall
6 promptly inform the victim of the defendant’s request for an interview and **shall advise**
7 **the victim of the victim’s right to refuse the interview.**”) (emphasis added). Defense
8 teams have no way of knowing how the prosecutor conveyed the defense team’s request
9 to speak with the victim, or whether the request was conveyed at all.¹⁶

10 In addition, the precise contours of the Victim-Contact Prohibition are not always
11 clear. For instance, prosecutors have taken the position that the Prohibition requires the
12 prosecutor’s consent to initiate contact with victims even when the victims are
13 represented separately by their own lawyers.¹⁷ Other times, in the case of a homicide,
14 there could be many statutory victims, and their identities are not always obvious.¹⁸

15 Especially given the uncertainties about the Prohibition’s reach, Plaintiffs
16 rightfully fear that they will suffer sanctions if they violate the Prohibition and are chilled
17 from speech beyond what the Prohibition restricts.¹⁹ Since the Victim-Contact
18 Prohibition was enacted, several criminal-defense lawyers have been referred to the State
19

20 ¹⁵ Exh. J at 43 (“I’ve never been given access to a child accuser or an adult accuser, for
21 that matter, upon request.”), 45.

22 ¹⁶ Exh. E at 40, 41-43 (expressing belief that prosecutor’s office failed to notify victim of
23 defense team’s request to speak); Exh. G at 44 (same); Exh. J at 30-34, 46 (same); *see*
24 *also* Exh. H at 36-41 (describing case).

25 ¹⁷ See Exh. G at 82-83.

26 ¹⁸ Exh. K at 60-61.

27 ¹⁹ Exh. A at 49-51, 63, 65-66, 80-81; Exh. E at 57 (“I believe that the aggressiveness with
28 which that office has pursued the issue puts us all on notice that we’d better be careful in
that area. And so in that terms, it feels like a threat, yes.”), 79-81 (describing prosecution
argument for broader application of Victim-Contact Prohibition that was rejected by a
court); Exh. G at 46-48, 75 (describing speech chilled beyond what the Prohibition
covers), 68-69, 86-87, 91-92, 118-119; Exh. I at 55-56; Exh. J at 68, 89; Exh. K at 27;
Exh. L at 54.

1 Bar for professional discipline in connection with alleged violations of the law, and some
2 have been disciplined.

3 As explained in more detail below, the Victim-Contact Prohibition
4 unconstitutionally restricts and chills Plaintiffs' speech and they are entitled to
5 preliminary relief to stop any further violation of their First Amendment rights. *See*
6 *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995) ("There are circumstances in
7 which we will accord speech by attorneys on public issues and matters of legal
8 representation the strongest protection our Constitution has to offer.") (citing *Gentile v.*
9 *State Bar of Nev.*, 501 U.S. 103 (1991), and *In re Primus*, 436 U.S. 412 (1978)).

10 ARGUMENT

11 Ordinarily, "[a] plaintiff seeking a preliminary injunction must establish that he is
12 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence
13 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
14 in the public interest." *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).
15 A preliminary injunction is also appropriate when a plaintiff raises serious questions
16 going to the merits and the balance of hardships tips sharply in the plaintiff's favor. *All.*
17 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). For preliminary
18 injunctions "in the First Amendment context, the moving party bears the initial burden of
19 making a colorable claim that its First Amendment rights have been infringed, or are
20 threatened with infringement, at which point the burden shifts to the government to
21 justify the restriction on speech." *Cal. Chamber of Com. v. Council for Educ. & Rsch. on*
22 *Toxics*, 29 F.4th 468, 478 (9th Cir. 2022). Plaintiffs are entitled to a preliminary
23 injunction because the Victim-Contact Prohibition infringes their First Amendment
24 rights, and Defendants cannot justify the restriction on Plaintiffs' speech.

1 **I. Plaintiffs are likely to succeed on the merits of their claims that the Victim-**
2 **Contact Prohibition violates the First Amendment.**

3 “[B]lanket rules restricting speech of defense attorneys should not be accepted
4 without careful First Amendment scrutiny.” *Gentile*, 501 U.S. at 1056 (plurality opinion
5 of Kennedy, J.). The Victim-Contact Prohibition cannot withstand that scrutiny.

6 **A. Plaintiffs’ speech directed toward crime victims is protected by the**
7 **First Amendment.**

8 “Being a member of a regulated profession does not . . . result in a surrender of
9 First Amendment rights.” *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002); *see also*
10 *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (“the rights of free speech and a free press
11 are not confined to any field of human interest”). “Speech is not unprotected merely
12 because it is uttered by ‘professionals.’” *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*,
13 138 S. Ct. 2361, 2371-72 (2018) (“*NIFLA*”); *see also Otto v. City of Boca Raton*, 981
14 F.3d 854, 862-63 (11th Cir. 2020). Like other professionals, attorneys have the right to
15 speak freely subject only to the government regulating with “narrow specificity.” *NAACP*
16 *v. Button*, 371 U.S. 415, 433 (1963); *see also Conant*, 309 F.3d at 637; *Bank of Hope v.*
17 *Miye Chon*, 938 F.3d 389, 392 (3d Cir. 2019).

18 The Victim-Contact Prohibition strikes at core First Amendment interests of
19 lawyers and others working on behalf of criminal defendants. An integral component of
20 the practice of law is unfettered case investigation, which includes speaking to witnesses.
21 The ability to investigate is crucial to effective advocacy and representation, particularly
22 in criminal cases. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) (“[C]ounsel
23 has a duty to make reasonable investigations or to make a reasonable decision that makes
24 particular investigations unnecessary.”). Attorneys must be able to speak frankly and
25 openly to witnesses, who necessarily include victims.

26 Moreover, the Supreme Court has said that the American Bar Association
27 Standards for Criminal Justice are “guides to determining what is reasonable” in criminal
28 cases, *id.* at 688, and the ABA Standards require that defense counsel in death-penalty
cases “must conduct in-person, face-to-face, one-on-one interviews with . . . witnesses

1 . . . who would support a sentence less than death.” ABA Guidelines for the Appointment
2 and Performance of Counsel in Death Penalty Cases 10.11(C) (2008). The Supreme
3 Court has, specifically, stated that investigations in death-penalty cases “should comprise
4 efforts to discover **all reasonably available** mitigating evidence and evidence to rebut
5 any aggravating evidence that may be introduced by the prosecutor.” *Wiggins v. Smith*,
6 539 U.S. 510, 524 (2003) (quoting earlier version of ABA Guidelines; emphasis in
7 *Wiggins*). In capital cases where the criminal defendant and murder victim are family
8 members, the Victim-Contact Prohibition prevents the defense team from contacting the
9 defendant’s own family members, who often have key information that could save the
10 defendant’s life.

11 The Victim-Contact Prohibition also bars defense counsel from engaging in other
12 types of communications with victims that might spare the defendant’s life. Victim-
13 impact testimony is admissible in death-penalty cases and can be critically important.
14 *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Trying to persuade victims’ families not
15 to press for the death penalty is an essential aspect of defense counsel’s job in
16 representing a defendant on trial for his or her life. *See* ABA Guidelines for the
17 Appointment and Performance of Counsel in Death Penalty Cases 10.11(C) (2008). The
18 First Amendment protects these important communications. *See Gentile*, 501 U.S. at
19 1057 (“The First Amendment does not permit suppression of speech because of its power
20 to command assent.”) (plurality opinion of Kennedy, J.).

21 Indeed, such communications about the death penalty from the defense team to
22 families of victims are political speech. “[S]peech concerning public affairs is more than
23 self-expression; it is the essence of self-government.” *Burson v. Freeman*, 504 U.S. 191,
24 196 (1992) (citation omitted). “[S]peech is of public concern when it can be fairly
25 considered as relating to any matter of political, social, or other concern to the
26 community, or when it is a subject of general interest and of value and concern to the
27 public[.]” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up). No doubt, speech
28 regarding the death penalty, particularly speech opposing the death penalty, touches on a

1 matter of great public concern. Defense attorneys’ direct appeals to the families of
 2 murder victims in which the death penalty is sought, therefore, “occupies the highest rung
 3 of the hierarchy of First Amendment values, and is entitled to special protection.” *Id.* at
 4 452 (citation omitted); *see also FCC v. League of Women Voters*, 468 U.S. 364, 381
 5 (1984) (“[E]xpression on public issues has always rested on the highest rung of the
 6 hierarchy of First Amendment values[.]”) (cleaned up); *In re Primus*, 436 U.S. at 422,
 7 432 (“actions . . . undertaken to express personal political beliefs and to advance . . .
 8 civil-liberties objectives” “must withstand the exacting scrutiny applicable to limitations
 9 on core First Amendment rights”) (cleaned up).

10 **B. The Victim-Contact Prohibition is an overbroad, viewpoint-based**
 11 **prior restraint on speech.**

12 **1. The Victim-Contact Prohibition is a prior restraint on Plaintiffs’**
 13 **speech.**

14 Prior restraints are “administrative and judicial orders **forbidding** certain
 15 communications when issued in advance of the time that such communications are to
 16 occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer,
 17 Nimmer on Freedom of Speech § 4.03, at 4-14 (1984)) (emphasis in *Alexander*). For
 18 instance, a “licensing scheme[] requiring speech to be submitted to an administrative
 19 censor for prepublication review” is a prior restraint. *Id.* at 553 n.2.

20 The Victim-Contact Prohibition is a textbook prior restraint, “the most serious and
 21 the least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*,
 22 427 U.S. 539, 559 (1976). Because the prosecutor has no obligation to convey the
 23 defense team’s message in the form in which it was delivered, *see* A.R.S. § 13-4433(C),
 24 like other prior restraints, the Victim-Contact Prohibition “vests unbridled discretion in
 25 [prosecutors] over whether to permit or deny expressive activity.” *City of Lakewood*, 486
 26 U.S. at 755; *Moonin v. Tice*, 868 F.3d 853, 867 (9th Cir. 2017) (“pre-clearance regime”
 27 vested “unbounded discretion” in official to decide whether communications were
 28 “appropriate”); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (prior
 restraint “may not delegate overly broad licensing discretion to a government official”).

1 The statute explicitly permits prosecutors to act as gatekeepers and decide whether and
2 how Plaintiffs’ messages reach their intended audience. A.R.S. § 13-4433(C).

3 **2. The Victim-Contact Prohibition is a content and viewpoint-**
4 **based restriction on Plaintiffs’ speech.**

5 A restriction is content based if it draws distinctions “based on the message a
6 speaker conveys.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Even “subtle”
7 distinctions that define regulated expression “by its function or purpose . . . are
8 distinctions based on the message a speaker conveys, and therefore, are subject to strict
9 scrutiny.” 135 S. Ct. at 2227; accord Cass R. Sunstein, *Democracy and the Problem of*
10 *Free Speech* 169 (1993) (“When government regulates content, there is a large risk that
11 the restriction really stems from something illegitimate: an effort to foreclose a
12 controversial viewpoint, to stop people from being offended by certain topics and views,
13 or to prevent people from being persuaded by what others have to say.”); see also *Texas*
14 *v. Johnson*, 491 U.S. 397, 412 (1989) (“the emotive impact of speech on its audience is
15 not a secondary effect unrelated to the content of the expression itself”) (internal
16 quotations omitted). The Victim-Contact Prohibition is content based for at least three
17 reasons.

18 First, the form letters that prosecutors send to victims when Plaintiffs request to
19 speak with them compel Plaintiffs to “speak a particular message” through the form
20 letters, imposing “a content-based regulation of speech.” *NIFLA*, 138 S. Ct. at 2371. Like
21 the notices held unconstitutional in *NIFLA*, the prosecutors’ form letters “provide a
22 government-drafted script” which is a content-based restriction on Plaintiffs’ speech that
23 “alters the content” of their speech. *Id.* (citing *Riley v. Nat’l Fed’n of the Blind*, 487 U. S.
24 781, 795 (1988)).

25 Second, the Victim-Contact Prohibition unconstitutionally restricts
26 communications based on the identity of the speaker—namely defense attorneys and
27 others on the defense team. *Cf. State v. Lee*, 245 P.3d 919, 923 ¶ 10 (Ariz. Ct. App. 2011)
28 (The “plain language” of the VBR’s provision granting victims the right to refuse

1 interviews with and discovery by the defense team “limits the scope of a victim’s right
2 only by the identity of the person requesting the interview—the defendant or the
3 defendant’s representative—and the identity of the person to whom the request is
4 directed—a crime victim.”). “[S]peech restrictions based on the identity of the speaker
5 are all too often simply a means to control content[.]” *Reed*, 135 S. Ct. at 2230 (citations
6 omitted); *see also Wollschlaeger v. Governor*, 848 F.3d 1293, 1307 (11th Cir. 2017)
7 (holding that state statute prohibiting doctors from inquiring and recording whether their
8 patients were gun owners was a viewpoint- and content-based restriction on First
9 Amendment protected speech because the statute applied “only to the speech of doctors
10 and medical professionals”).²⁰ Numerous cases support the principle that the government
11 may not favor certain speakers, with which it agrees, over other speakers, whose opinions
12 and messages are not aligned with its goals. *See, e.g., Rosenberger v. Rector & Visitors of*
13 *Univ. of Va.*, 515 U.S. 819, 828 (1995) (“In the realm of private speech or expression,
14 government regulation may not favor one speaker over another.”); *Turner Broadcasting*
15 *Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (“[S]peaker-based laws demand strict
16 scrutiny when they reflect the Government’s preference for the substance of what the
17 favored speakers have to say (or aversion to what the disfavored speakers have to say).”);
18 *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1972) (“[G]overnment may not grant
19 the use of a forum to people whose views it finds acceptable, but deny use to those
20 wishing to express less favored or more controversial views.”); *Hoye v. City of Oakland*,
21 653 F.3d 835, 849 (9th Cir. 2011) (“[G]overnment may not favor speakers on one side of
22 a public debate[.]”).

23
24
25 ²⁰ *See* Exh. E at 55 (“I think it applies to me as a criminal defense lawyer on the case. In
26 other words, like if my neighbor, for instance, was a victim of a crime. I read it in the
27 paper. I think I could go ask him about it as long as I wasn’t involved in the case in any
28 way as a lawyer.”), 100 (“I think it does [restrict speech based on the content of the
speech] because the content is in the context. The content is the criminal case itself. In
other words, you can’t talk about your case basically.”).

1 The Victim-Contact Prohibition clearly is designed to place a government-favored
2 speaker, the prosecutor who is litigating a criminal case on behalf of the state, in a better
3 position than the defense team, the prosecutor’s litigation adversary. Indeed, the Victim-
4 Contact Prohibition not only favors prosecutors over defense teams by allowing
5 prosecutors to speak when defense lawyers may not; it also makes prosecutors the
6 arbiters of whether the defense team’s message will be conveyed accurately or at all to
7 the intended recipients, the victims. Such viewpoint discrimination aimed at suppressing
8 speech that the government would rather not happen is not permitted by the First
9 Amendment. *See Reed*, 135 S. Ct. at 2227.

10 Third, the Victim-Contact Prohibition is content based because it cannot be
11 “justified without reference to the content of the regulated speech,” and it was “adopted
12 by the government because of disagreement with the message the speech conveys.” *Id.*
13 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (cleaned up). Plaintiffs
14 seek to initiate communications with crime victims as part of their efforts to vindicate the
15 constitutional rights of the criminal defendants they represent. Such speech could include
16 discussing the facts of the alleged crime, investigating possible defenses, determining
17 whether the government conducted a fair and adequate investigation into the alleged
18 crime, discussing the background and characteristics of the defendant, and, in capital
19 cases, discussing the moral and legal implications of a death sentence. Of course, all this
20 speech—generally concerning the crime and the defendant—is aimed at ensuring that the
21 criminal defendant is treated fairly by the criminal legal system, including receiving a fair
22 trial and receiving a fair and appropriate sentence, and sometimes securing dismissal of
23 charges or acquittal after trial. These aims may often be at odds with those of a
24 prosecutor, who represents the state and may have as goals securing a conviction and
25 imposing a harsh sentence on the defendant. Thus, the Victim-Contact Prohibition
26 impermissibly regulates speech based on the government’s disagreement with the
27 message the speech conveys, that is, a message that undermines the state’s goals in
28 convicting and sentencing the defendant. *Id.*

1 **C. The Victim-Contact Prohibition is subject to strict scrutiny.**

2 “[P]rior restraints on speech are presumptively unconstitutional and subject to
3 strict scrutiny.” *Bank of Hope*, 938 F.3d at 394; *Bantam Books, Inc. v. Sullivan*, 372 U.S.
4 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a
5 heavy presumption against its constitutional validity.”); *accord New York Times Co. v.*
6 *United States*, 403 U.S. 713, 714 (1971) (per curiam); *see also Long Beach Area Peace*
7 *Network v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir. 2009). Likewise, content-
8 based regulations on speech are “presumptively invalid,” *R.A.V. v. St. Paul*, 505 U.S.
9 377, 382 (1992), and must elicit “the most exacting scrutiny.” *Johnson*, 491 U.S. at 412;
10 *Reed*, 135 S. Ct. at 2227, 2230 (“[L]aws favoring some speakers over others demand
11 strict scrutiny when the legislature’s speaker preference reflects a content preference.”).
12 The Supreme Court has consistently “applied strict scrutiny to content-based laws that
13 regulate the noncommercial speech of lawyers.” *NIFLA*, 138 S. Ct. at 2374.²¹

14 **D. Defendants cannot establish that the Victim-Contact Prohibition meets**
15 **strict scrutiny.**

16 To survive strict scrutiny, Defendants must “prove that the restriction furthers a
17 compelling interest and is narrowly tailored to achieve that interest.” *Reed*, 135 S. Ct. at
18 2231; *accord Johnson*, 491 U.S. at 412. The restriction must be “actually necessary” to
19 achieve the government interest. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729,
20 2738 (2011). “There must be a direct causal link between the restriction imposed and the

21
22 ²¹ *NIFLA* noted two circumstances in which professional speech might receive lesser,
23 intermediate scrutiny, neither of which applies here. 138 S. Ct. at 2372-74. The Victim-
24 Contact Prohibition does not regulate “purely factual and uncontroversial information
25 about the terms under which services will be available.” *Id.* at 2372 (cleaned up). Nor is it
26 merely a “regulation[] of professional conduct that incidentally burden[s] speech.” *Id.* at
27 2373. Instead, like the regulation in *NIFLA*, the Victim-Contact Prohibition directly
28 regulates the speech of Plaintiffs based on their identity, here as members of the defense
team. Even a speech regulation subject to intermediate scrutiny, however, must be
“narrowly tailored to serve a significant governmental interest.” *City of Austin v. Reagan*
Nat’l Advert. of Austin, LLC, 142 S. Ct. 1464, 1475 (2022). The Victim-Contact
Prohibition could not survive even that lesser scrutiny.

1 injury to be prevented.” *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012)
2 (plurality).

3 The VBR and its implementing legislation were adopted “to provide crime victims
4 with basic rights of respect, protection, participation and healing of their ordeals.”
5 *Champlin v. Sargeant*, 965 P.2d 763, 767 ¶ 20 (Ariz. 1998) (quoting 1991 Ariz. Sess.
6 Laws, ch. 229, § 2(2) (1st Reg. Sess.)) (internal quotation marks omitted). Thus, the VBR
7 broadly recognizes that victims are entitled “[t]o be treated with fairness, respect, and
8 dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal
9 justice process.” Ariz. Const. art. 2, § 2.1(A)(1). To the extent that such interests justify
10 restricting Plaintiffs’ speech at all, the Victim-Contact Prohibition restricts far more
11 speech than what the First Amendment allows.

12 **1. The Victim-Contact Prohibition is not narrowly tailored to the**
13 **state’s interest.**

14 The Victim-Contact Prohibition is not narrowly tailored to Arizona’s stated
15 interest in ensuring that crime victims are “treated with fairness, respect, and dignity” and
16 that they are spared from “intimidation, harassment, or abuse, throughout the criminal
17 justice process.” Ariz. Const. art. 2, § 2.1(A)(1). The statute does not spare crime victims
18 from all communications about the crime; for instance, prosecutors and the media may
19 still seek to communicate with victims without limitation. It is contact with the criminal
20 legal system in general, not the defense team specifically, that can be harmful to crime
21 victims, and contact from the defense team poses no greater risk of traumatization to the
22 victim than contact from the prosecutor’s office.²² And prosecutors are required by the
23 law to inform a victim when the defense team requests an interview. A.R.S. § 13-
24 4433(B). The law simply prevents Plaintiffs and others working on behalf of criminal
25 defendants from themselves initiating contact with crime victims, no matter how
26 receptive crime victims might be to such communications.

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²² Exh. A at 33, 34; Exh. C at 66, 72-73; Exh. D at 65-66; Exh. F at 24-25.

1 Moreover, for those victims who are not entirely aligned with the prosecution, the
2 Prohibition does not shield them from “intimidation, harassment or abuse,” but instead
3 forces all initial defense-team contact with victims to go through the prosecutor, with
4 whom victims may substantively disagree. *See State v. Murtagh*, 169 P.3d 602, 615
5 (Alaska 2007) (“[I]t is also true that some victims . . . feel harassed by the demands made
6 on them by law enforcement personnel.”). Those victims who are not aligned with the
7 prosecution are thus forced to interact with prosecutors, which hardly protects defense-
8 oriented victims.²³

9 Likewise, the Prohibition’s proscription is not limited to speech that is
10 disrespectful, intimidating, harassing, or abusive.²⁴ Rather, it restricts *all* attempts by
11 Plaintiffs to contact crime victims. This distinction is crucial for Plaintiffs who have no
12 intention whatsoever to treat victims disrespectfully or abusively, or to intimidate or
13 harass them. In fact, Plaintiffs wish to “win over” a victim so that they may have a
14 respectful rapport during the litigation process. The defense team often treats crime
15 victims with more respect than the prosecution (who see crime victims simply as
16 witnesses and advocate for prosecution rather than advocating for the victims).²⁵ The
17 defense team has no incentive to harass, or otherwise re-traumatize, victims (and their
18 families) because doing so does nothing to help the defense team; and, in capital cases,
19 doing so significantly harms the efforts of the defense team.²⁶ The Prohibition
20 nevertheless prevents the defense team from speaking with crime victims at all, even if
21 they plan to do so with fairness, respect, and dignity, which would ostensibly advance the
22 government interest expressed in the VBR. *See Champlin*, 965 P.2d at 767 ¶ 20
23 (“[N]othing in the Victims’ Bill of Rights . . . supports the argument that victims have a
24 blanket right to be shielded from all contact with defendants or their attorneys until the

25 ²³ Exh. B at 41; Exh. C at 67; Exh. D at 40-41.

26 ²⁴ *See* Exh. E at 82 (“There was stories being told around the time they were trying to
27 enact this that defense attorneys were abusing victims in interviews. In my experience,
28 that wasn’t the case.”).

²⁵ Exh. D at 29-30, 65-66.

²⁶ Exh. B at 31; Exh. D at 48-49, 86-87.

1 time of trial.”). Thus, the blanket ban on Plaintiffs’ respectful, dignified, and fair speech
2 aimed at victims shows that the Victim-Contact Prohibition is not narrowly tailored.

3 **2. Other regulations already adequately address the state’s**
4 **interest.**

5 While protecting crime victims from intimidation, harassment, and abuse is a
6 worthy goal, the Victim-Contact Prohibition is not necessary to achieve that goal as
7 demonstrated by other measures currently in place that sufficiently achieve this objective.
8 Indeed, harassment and intimidation are unlawful in Arizona. *See* A.R.S. § 13-2921
9 (defining the crime of harassment). And defense lawyers and investigators are subject to
10 professional discipline for inappropriate conduct toward victims. *See* Ariz. R. Prof’l
11 Conduct (“ER”) 4.4(a) (lawyers may not “use means that have no substantial purpose
12 other than to embarrass, delay, or burden any other person”); A.R.S. § 32-2457 (grounds
13 for disciplinary action against private investigators); *see also* ER 5.5 (lawyer must make
14 reasonable efforts to ensure that nonlawyers employed by or associated with the lawyer
15 act consistently with lawyer’s professional obligations; lawyer can be responsible for
16 conduct of employed or associated nonlawyers whose conduct would violate professional
17 obligations).²⁷

18 There is, however, nothing inherently intimidating, harassing, or abusive when a
19 defense lawyer or investigator initiates contact with a crime victim or family member.
20 And, like any other person, the victim may simply say, “No thank you. I do not wish to
21 talk with you about this incident.” Declining to speak with members of the defense team
22 should easily and promptly end the encounter. In fact, the Arizona Constitution already
23 recognizes the right of crime victims to exercise this power by “refus[ing] an interview
24 . . . request by the defendant, the defendant’s attorney, or other person acting on behalf of
25 the defendant.” Ariz. Const. art. 2, § 2.1(a)(5). If Plaintiffs persist despite the request of a
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²⁷ Exh. B at 35.

1 crime victim or family member, criminal or professional sanctions may be imposed upon
2 the offending Plaintiff.²⁸

3 Given that a victim may simply decline a request to speak with the defense team,
4 the Victim-Contact Prohibition seems to assume that criminal-defense lawyers and others
5 working at their direction will not abide by ethical standards. Such an assumption puts
6 our very system of justice at risk:

7 If our adversary system is to function according to design, we must assume that an
8 attorney will observe his responsibilities to the legal system, as well as to his
9 client. [It is] difficult to conceive of any circumstances that would justify a court's
10 limiting the attorney's opportunity to serve his client because of fear that he may
11 disserve the system by violating accepted ethical standards.

12 *Geders v. United States*, 425 U.S. 80, 93 (1976) (Marshall, J., concurring).

13 Indeed, neither the federal system nor any other state in the country restricts the
14 defense team's communications with victims the way that Arizona does. For instance, the
15 federal government recognizes in the Federal Crime Victim's Rights Act of 2004 that
16 crime victims have "[t]he right to be treated with fairness and with respect for the
17 victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). But the federal scheme does not
18 prohibit the defense team from initiating contact with victims, and in fact, defense-
19 initiated victim outreach is common in federal cases. Likewise, other states also
20 recognize the rights of crime victims to be free from harassment and intimidation. *E.g.*,
21 Colo. Rev. Stat. Ann. § 24-4.1-302.5(1)(a); N.J. Stat. Ann. § 52:4B-36(c); S.C. Const. art.
22 I, § 24(A)(1); Utah Const. art. I, § 28(1)(a). But no other state addresses this interest by
23 requiring the defense team to initiate contact with crime victims through the prosecutor.
24 That Arizona has gone beyond all other jurisdictions in its stated attempt to address this

25 ²⁸ Even if a brief polite encounter with a member of the defense team should be deemed
26 upsetting by a crime victim or family member, speech cannot be punished because it may
27 have an adverse emotional impact on the audience. *Hustler Magazine v. Falwell*, 485
28 U.S. 46, 55 (1988). There is no "outrageousness" or "dignity" standard that would allow
speech to be punished. *Id.*; *Boos v. Barry*, 485 U.S. 312, 322 (1987).

1 common concern shows that the Prohibition is not “actually necessary” or narrowly
2 tailored to achieve the interest. *Brown*, 131 S. Ct. at 2738; *see Boos v. Barry*, 485 U.S.
3 312, 329 (1987) (law is not narrowly tailored when “a less restrictive alternative is
4 readily available”).

5 **3. The Victim-Contact Prohibition threatens other important state**
6 **interests.**

7 The Victim-Contact Prohibition also fails scrutiny because it threatens another
8 widely recognized compelling government interest in First Amendment litigation: the
9 administration of justice. “[I]t would be difficult to single out any aspect of government
10 of higher concern and importance to the people than the manner in which criminal trials
11 are conducted[.]” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980); *see*
12 *also Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978). The Prohibition
13 impedes the administration of justice in several ways.

14 First, the Supreme Court has recognized that “[t]here can be no fair trial unless the
15 accused receives the services of an effective and independent advocate.” *Polk Cnty. v.*
16 *Dodson*, 454 U.S. 312, 321-22 (1981). The Victim-Contact Prohibition substantially
17 impedes the effective assistance of counsel for the criminally accused by preventing
18 defense counsel from fulfilling their constitutionally mandated duty, which implicates
19 due process and the right to counsel, among other rights.²⁹ *E.g., Porter v. McCollum*, 130
20 S. Ct. 447, 453 (2009) (per curiam) (finding that an attorney’s failure to interview
21 witnesses in preparation for penalty phase of capital murder trial constituted ineffective
22 assistance of counsel); Ariz. Const. art. II, §§ 4, 24. As noted above, the Supreme Court
23 has acknowledged the ABA Standards for the adequate and proper representation of
24 defendants as “guides to determining what is reasonable” in criminal defense. *Wiggins*,
25 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688). The ABA Guidelines provide that
26 “defense counsel must independently investigate the circumstances of the crime, and all
27 evidence . . . purporting to inculcate the client,” including interviewing “witnesses having
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²⁹ Exh. B at 15, 27-28, 34-35, 40, 41; Exh. B-1 at 3; Exh. D at 40-41, 48-50.

1 purported knowledge of events surrounding the alleged offense itself,” and in capital
2 cases, the victim’s family. *See* ABA Guidelines for the Appointment and Performance of
3 Counsel in Death Penalty Cases Introduction, 10.7(2)(a)(1), 10.11, 10.7, Commentary
4 2(a)(4) (2003). And without an adequate investigation, criminal-defense lawyers are
5 prevented from “present[ing] all the reasonable and well-grounded arguments necessary
6 for proper resolution of the case.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545
7 (2001).

8 The Victim-Contact Prohibition also creates ethical problems for prosecutors, who
9 have no legitimate stake in preventing crime victims from speaking with defense counsel
10 because “[p]rosecutors have a special duty to seek justice, not merely to convict.”
11 *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (cleaned up); *see also* ER 3.8 cmt. 1
12 (“A prosecutor has the responsibility of a minister of justice and not simply that of an
13 advocate.”).

14 [P]rosecutorial control of victims’ rights provides fertile ground for ethical
15 conflicts of interest. It is a mistake to define the state and victims as
16 nonadversaries simply because both are harmed by the criminal act and
17 share an interest in punishment. Adversariness exists when prosecutors
18 violate victims’ rights. Moreover, the public prosecutor is obligated to the
19 public interest.

20 Douglas E. Beloof, *The Third Wave of Crime Victim’s Rights: Standing, Remedy, and*
21 *Review*, 2005 B.Y.U. L. Rev. 255, 337 (2005). By allowing prosecutors to control access
22 to crime victims, the Prohibition wrongly assumes that prosecutors and victims will
23 always be aligned and that victims will always benefit from this overly paternalistic
24 scheme. *See P.M. v. Gould*, 136 P.3d 223, 228 ¶ 21 (Ariz. Ct. App. 2006) (“[T]he real
25 issue in this dispute is not between the victim and the defendant, but between the victim
26 and the state.”); Ariz. R. Crim. P. 39(c)(3) (“In any event of any conflict of interest
27 between the state . . . and the wishes of the victim the prosecutor shall have the
28 responsibility to direct the victim to the appropriate legal referral, legal assistance, or
legal aid agency.”).

1 The Victim-Contact Prohibition also impedes the administration of justice by
2 undermining the truth-seeking function of the legal system and thus “threaten[ing] severe
3 impairment of the judicial function.” *Velazquez*, 531 U.S. at 545-46; *see United States v.*
4 *Cook*, 608 F.2d 1175, 1180 (9th Cir. 1979) (“As a general rule, a witness belongs neither
5 to the government nor to the defense. Both sides have the right to interview witnesses
6 before trial. Exceptions to this rule are justifiable only under the clearest and most
7 compelling circumstances.”) (citations and quotation marks omitted), *overruled on other*
8 *grounds by Luce v. United States*, 469 U.S. 38, 1 (1984). Especially because the great
9 majority of criminal cases are resolved through plea agreements before trial, barring the
10 defense from accessing the victim keeps potentially crucial and exculpatory information
11 from the defense and prevents a full and fair investigation into the crime.

12 **4. The Victim-Contact Prohibition does not leave open ample**
13 **alternatives for speech.**

14 The Victim-Contact Prohibition fails First Amendment scrutiny also because it
15 does not leave open ample alternative channels of communication. “The First
16 Amendment protects the right of every citizen to reach the minds of willing listeners and
17 to do so there must be opportunity to win their attention.” *Heffron v. Int’l Soc. for*
18 *Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (citation and internal quotation
19 marks omitted). The Supreme Court has long held that “one is not to have the exercise of
20 his liberty of expression in appropriate places abridged on the plea that it may be
21 exercised in some other place.” *Schneider v. New Jersey*, 308 U.S. 147, 151-52 (1939).
22 “[E]ven regulations that do not foreclose an entire medium of expression, but merely shift
23 the time, place, or manner of its use, must leave open ample alternative channels for
24 communication.” *City of LaDue v. Gilleo*, 512 U.S. 43, 56 (1994) (citation and internal
25 quotation marks omitted).

26 “An alternative is not ample if the speaker is not permitted to reach the intended
27 audience.” *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990)
28 (citation and internal quotation marks omitted). The Victim-Contact Prohibition prevents

1 Plaintiffs from reaching their one intended audience: crime victims and their families. For
2 example, in a death-penalty case, during the penalty phase, there are perhaps no more
3 important witnesses than the victim’s family members. While not specifically permitted
4 to ask the jury to impose the death penalty, the victim’s family can telegraph to a jury its
5 support for a death sentence or can provide testimony that speaks out against the
6 inhumanity of the death penalty. Victims’ family members’ testimony holds great weight
7 with juries, yet the Prohibition prevents Plaintiffs from contacting them directly. When a
8 person’s loved one has died, the tone and content of the message is important to gaining
9 the person’s trust or convincing the person to take a stand against the death penalty.
10 There is no way that this message can be conveyed by a go-between, particularly when
11 that messenger is tasked with ensuring that a death sentence is imposed. Allowing
12 Plaintiffs to contact victims through prosecutors is thus not a viable alternative channel of
13 communication.

14 **5. The Victim-Contact Prohibition is unconstitutionally overbroad.**

15 The Victim-Contact Prohibition also reaches beyond what the government might
16 permissibly regulate—for example, harassment—and prohibits protected speech. It is
17 thus impermissibly overboard.

18 In a First Amendment challenge, “a law may be invalidated as overbroad if ‘a
19 substantial number of its applications are unconstitutional, judged in relation to the
20 statute’s plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 473 (2010)
21 (citation and internal quotation marks omitted); *see also Grayned v. City of Rockford*, 408
22 U.S. 104, 114-15 (1972) (“The crucial question, then, is whether the ordinance sweeps
23 within its prohibitions what may not be punished under the First and Fourteenth
24 Amendments.”). “[T]he first step in overbreadth analysis is to construe the challenged
25 statute; it is impossible to determine whether a statute reaches too far without first
26 knowing what the statute covers.” *Stevens*, 559 U.S. at 474 (quoting *United States v.*
27 *Williams*, 553 U.S. 285, 293 (2008)).
28

1 The Victim-Contact Prohibition creates a prohibition of substantial overbreadth.
2 However large the number of situations in which the Prohibition could apply to speech
3 and conduct that the government might be allowed to restrict (like harassment), those
4 situations are dwarfed by others where protected speech is also prohibited. The
5 Prohibition is not limited to harassment but instead prohibits **any** attempt by defense
6 counsel to communicate with a crime victim. It also “has a substantial deterrent effect on
7 protected expression,” but no Arizona court has limited its scope to allow protected
8 speech, and its language makes clear that it applies to all speech initiated by the defense
9 team to crime victims, regardless of context, location, or tone. *See Fratiello v. Mancuso*,
10 653 F. Supp. 775, 791 (D.R.I. 1987) (statute overbroad that “has neither been afforded a
11 narrowing construction by the state courts sufficient to limit its application to unprotected
12 expression nor is the provision readily susceptible to such an interpretation”).

13 Because the Victim-Contact Prohibition prohibits respectful, polite speech
14 directed at crime victims, including speech on topics of grave public concern, it is
15 substantially overbroad and invalid. *Stevens*, 559 U.S. at 481-82.

16 **II. The Victim-Contact Prohibition is causing Plaintiffs ongoing irreparable**
17 **harm.**

18 “The loss of First Amendment freedoms, for even minimal periods of time,
19 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976);
20 *see Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009); *Jacobsen v.*
21 *U.S. Postal Serv.*, 812 F.2d 1151, 1154 (9th Cir. 1987). As discussed above, the Victim-
22 Contact Prohibition violates the First Amendment because it is a content-based and
23 overbroad prior restraint on speech that is not narrowly tailored to a compelling
24 government interest and does not leave open ample alternatives for Plaintiffs’ speech.
25 Thus, Plaintiffs suffer ongoing, irreparable harm each day without an injunction. *See Doe*
26 *v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (“A colorable First Amendment claim is
27 irreparable injury sufficient to merit the grant of relief[.]”) (cleaned up).

28

1 **III. The balance of equities favors enjoining the Victim-Contact Prohibition.**

2 “[The balance of equities generally favors the constitutionally-protected freedom
3 of expression[.]” *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (cleaned up and
4 citation omitted). Any hardship to Defendants from an injunction preventing their
5 enforcement of a likely unconstitutional law cannot outweigh the substantial and ongoing
6 infringement of Plaintiffs’ free-speech rights and the chill on their speech from the fear of
7 sanctions. *See Doe*, 772 F.3d at 583 (balance of equities favors granting preliminary
8 injunction when free speech rights are chilled by fear of sanctions). Simply put, without
9 an injunction, Plaintiffs’ First Amendment rights will continue to be violated on an
10 ongoing basis. The balance of equities favors an injunction.

11 **IV. Preliminary relief serves the public interest.**

12 The Ninth Circuit has “consistently recognized the significant public interest in
13 upholding free speech principles, as the ongoing enforcement of the potentially
14 unconstitutional regulations would infringe not only the free expression interests of
15 plaintiffs, but also the interests of other people subjected to the same restrictions.” *Klein*,
16 584 F.3d at 1208 (cleaned up). The Victim-Contact Prohibition violates the free-speech
17 rights of the individual Plaintiffs, hundreds of AACJ members, and every other criminal-
18 defense lawyer and defense team member in Arizona. Moreover, as Plaintiffs’ evidence
19 will show, because the right to hear and the right to speak are two sides of the same coin,
20 the Victim-Contact Prohibition restricts the First Amendment rights of crime victims,
21 who have corresponding rights to associate with and receive communications from the
22 defense team unimpeded by the prosecutor. *See Ams. for Prosperity Found. v. Bonta*, 141
23 S. Ct. 2373, 2389 (2021) (overbroad disclosure requirement that created the “risk of a
24 chilling effect on association” was facially unconstitutional); *Conant*, 309 F.3d at 643 (“It
25 is well established that the right to hear—the right to receive information—is no less
26 protected by the First Amendment than the right to speak.”); *see also Lamont v.*
27 *Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). (“It would be a
28

1 barren marketplace of ideas that had only sellers and no buyers.”). Immediate relief thus
2 clearly serves the public interest.

3 **CONCLUSION**

4 The Court should enter a preliminary injunction enjoining Defendants, their
5 officers, agents, servants, employees, and attorneys, and those persons in active concert
6 or participation with them from enforcing the prohibition in A.R.S. § 13-4433(B) that
7 restricts defense lawyers and others working on the defense team from initiating contact
8 with the victim except through the prosecutor’s office.

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11
12 SUBMITTED June 24, 2022.

13 MITCHELL | STEIN | CAREY | CHAPMAN

14 By: /s/ Kathleen Brody

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2022, 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/ Peggy McClellan

Exhibit B

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15
 16 UNITED STATES DISTRICT COURT
 17 DISTRICT OF ARIZONA

18 Arizona Attorneys for Criminal Justice;
 19 et al.,

20 Plaintiffs,

21 v.

22 Mark Brnovich; et al.,

23 Defendants.

No. CV-17-01422-PHX-SPL

**DEFENDANTS ATTORNEY
 GENERAL MARK BRNOVICH’S
 AND HESTON SILBERT’S JOINT
 RESPONSE IN OPPOSITION TO
 PLAINTIFFS’ RENEWED MOTION
 FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

1
2 Five years after this litigation began, Plaintiffs, who are criminal-defense attorneys
3 and agents of criminal-defense attorneys, ask the Court to preliminarily enjoin an Arizona
4 statute protecting victims that has been on the books since 1991. This delay is inexplicable
5 and, standing alone, fatal to Plaintiffs' position that equity demands an immediate halt to
6 the law's further application. It is not as if Plaintiffs were not subject to the challenged
7 statute until recently—Arizona Attorneys for Criminal Justice has existed for the entirety
8 of the three decades that the challenged statute has existed and many of the individual
9 Plaintiffs have practiced criminal law in Arizona both before and after the statute's
10 inception. Yet, despite being subject to the statute's limitations for decades, Plaintiffs
11 apparently first discovered it was causing them irreparable harm in 2017. Plaintiffs' multi-
12 decade delay dooms their renewed request for injunctive relief.

13 To make matters worse, the Court has already denied Plaintiffs' request for a
14 preliminary injunction. Doc. 119. Despite appealing some of the Court's other rulings,
15 they did not appeal the denial of their preliminary injunction request, further undercutting
16 their current claim that the statute at issue is causing them irreparable harm. The Court need
17 only affirm the prior denial and need not address the merits.

18 To the extent the Court were to reach the merits, Plaintiffs cannot sustain a First
19 Amendment claim, much less a successful one. Plaintiffs bring a facial challenge, on their
20 own behalf, to a statute that merely regulates the practice of law in Arizona and extends the
21 traditional represented-person contact rule to crime victims where criminal court
22 proceedings have commenced in connection with the crime perpetrated against the victim.
23 *Compare* A.R.S. § 13-4433(B), *with, e.g.*, Model Rule of Prof'l Conduct ("Model Rule")
24 4.2 (governing attorney contact with represented persons), and Ariz. Ethical Rule ("E.R.")
25 4.2 (same). The State's reasonable decision to extend the no-contact restriction during
26 ongoing criminal proceedings to victims does not violate the First Amendment. Due to
27 their special status as members of the bar, agents of the judicial system, and participants
28 before the courts, Plaintiffs have constrained First Amendment rights, resulting in

1 deferential judicial review of provisions like A.R.S. § 13-4433(B) that relate only to their
2 professional conduct representing parties within the core contours of ongoing judicial
3 proceedings. And even if Plaintiffs could bring a full-fledged First Amendment challenge
4 here, their challenge would fail because the challenged statute is at most a reasonable and
5 constitutionally acceptable time, place, and manner regulation.

6 The Court should deny Plaintiffs' Renewed Motion for Preliminary Injunction.

7 **FACTUAL AND PROCEDURAL BACKGROUND**

8 Victims of crime in Arizona have robust rights, well beyond those of a mere witness.
9 The challenged statute is part of a comprehensive scheme to define, implement, preserve,
10 and protect the constitutional rights of victims of crime in Arizona. This comprehensive
11 scheme of victims' rights protection derives from the national victims' rights movement
12 that began in the 1980s and was a joint creation of the Arizona voters, the Legislature, the
13 state courts, and the State Bar. The particular provision at issue directs that a criminal
14 defendant, defendant's attorney, or agent of the defendant shall "initiate contact with the
15 victim through the prosecutor's office," and "[t]he prosecutor's office shall promptly inform
16 the victim of the defendant's request" A.R.S. § 13-4433(B). In addition, there is a
17 separate, unchallenged Rule of Criminal Procedure that likewise directs that "the defense
18 must communicate requests to interview a victim to the prosecutor, not the victim." Rule
19 39(b)(12). These provisions apply only during the course of ongoing judicial proceedings,
20 and with judicial oversight by judges presiding over the pending proceedings.

21 **I. History Of Challenged Statute, Related Victims' Rights Efforts, And Separate** 22 **Rule Of Criminal Procedure**

23 The efforts of the Arizona voters, the Legislature, the state courts, and the State Bar
24 to preserve and protect crime victims' rights, of which the challenged statute is a part, are
25 now into their fifth decade. The modern victims' rights movement gained national
26 prominence in the 1980s, when the President's Task Force on Victims of Crime issued a
27 landmark report stating that "[t]he innocent victims of crime have been overlooked, their
28 pleas for justice have gone unheeded, and their wounds—personal, emotional, and

1 financial—have gone unattended.”¹ Among other actions, Congress responded to public
2 concern by passing the Victim’s Rights and Restitution Act of 1990, which restated the right
3 of victims to restitution and added a right to confer with the government’s attorney in the
4 case. *Cellini, supra* note 1, at 854.²

5 The advance of victims’ rights in Arizona paralleled federal efforts. The earliest
6 steps toward empowering victims occurred in the state courts. In 1984, the Arizona
7 Supreme Court recognized the right of a crime victim to have a supportive person or case
8 worker present during a case-related interview. *Murphy v. Superior Ct., In & For Cnty. of*
9 *Maricopa*, 142 Ariz. 273, 278–79 (1984). And it was the state courts that first began the
10 process of extending no-contact rules to crime victims. In 1989, the Arizona Supreme Court
11 considered adopting a Rule of Criminal Procedure relating to victims’ rights, recognizing
12 “[t]he growing perception that victims of crimes are encountering serious problems with
13 the criminal justice system.” Exhibit A at 4.³ The court adopted the first version of Rule
14 of Criminal Procedure 39 later that year, which included provisions such as the victim’s
15 right “to refuse to be interviewed and to refuse to submit to a deposition by a defendant
16 acting *pro se*” or if the “defendant is to be personally present at such interview or
17 deposition.” Exhibit I at 223. The rule also provided that “[t]he prosecutor shall have the
18 responsibility to inform the victim of the rights provided by this rule and by law, and to
19 provide the victim with notices and information to which the victim is entitled by rule or by
20 law.” *Id.*

21 _____
22 ¹ President’s Task Force on Victims of Crime, Final Report ii (1982) (“Final Report”),
23 available at <https://www.ovc.gov/publications/presdntstskforcrprt/87299.pdf>. The
24 movement’s origins can be traced back even further. Sue Anna Moss Cellini, Note, *The*
25 *Proposed Victims’ Rights Amendment to the Constitution of the United States*, 14 Ariz. J.
26 of Int’l & Comp. L. 839, 853 (1997) (“‘women’s rights’ efforts [beginning in the 1960s] to
27 protect rape victims were central to the beginning of the movement”).

28 ² These rights were consistent with historical relations between victims and the justice
system. At the time of the framing and passage of the Bill of Rights, it was commonplace
for the victim to function as the prosecutor, not simply a passive witness. Douglas E. Beloof
& Paul G. Cassell, *The Victim’s Right to Attend the Trial: The Reascendant National*
Consensus, 9 Lewis & Clark L. Rev. 481, 484–85 (2005). And this practice continued as
“‘a significant element of the state criminal justice system throughout the nineteenth
century.’” *Id.* at 487.

³ Citations are to the continuous page numbering of the exhibit packet.

1 Comments to the Arizona Supreme Court supporting Rule 39 starkly show some of
2 the events that prompted the rule. The Apache County Attorney provided an example where
3 a minor victim, who was fourteen at the time of the alleged incident of sexual conduct, was
4 interviewed by a defense attorney. Exhibit B at 17. The defense attorney objected to every
5 support person that was offered to accompany the victim to the interview. After the victim
6 declined to postpone the interview because “the waiting process was very traumatic and it
7 would be too stressful to have to come back,” the prosecutor and defense counsel agreed
8 that the victim’s sister would be interviewed first, and then allowed to be a support person.
9 “At the end of two hours, the victim’s sister was so traumatized by the interview that she
10 was unable to stay as a support person for the victim herself.” The defense then was able
11 to interview the victim without any support person present. *Id.* at 18.

12 Other letters to the court similarly illustrated re-victimization that occurred without
13 procedural protections in place. For example, the Arizona Coalition Against Domestic
14 Violence noted that “[o]ne reason [a victim would not follow through on charges] is that
15 the batterer threatens her with worse violence if she pursues the charge. She is well aware
16 that the system won’t protect her and has no choice but to go along with him.” Exhibit C
17 at 21. The Arizona Prosecuting Attorneys’ Advisory Council noted that “defense attorneys
18 in interviews . . . ask[ing] questions which have no legitimate discovery purpose and are
19 not calculated to lead to relevant information . . . is exactly the type of harassment of which
20 victims and witnesses complained.” Exhibit A at 9. And the Maricopa County Attorney
21 wrote “[s]everal victims and victim advocates testified that the victims have been harassed
22 by defendants who learned of the victim’s whereabouts from the police reports given to
23 them by their attorneys.” Exhibit D at 25.⁴ Even the National Lawyers Guild wrote to the
24 court that “withholding a victim’s current address does not interfere with” confrontation
25 rights because a “defendant is still able to interview or depose a victim during pretrial
26

27 ⁴ Consistent with this, the Final Report, *supra* note 1, at 19, provides: “Victims and
28 witnesses share a common, often justified apprehension that they and members of their
family will be threatened or harassed as a result of their testimony against a violent
criminal.”

1 discovery by contacting the prosecutor.” Exhibit E at 28–29.

2 Separate from the Arizona Supreme Court’s rulemaking efforts, in 1990, the Arizona
3 voters amended the Arizona Constitution through Proposition 104, the Victims’ Bill of
4 Rights (“VBR”). *See* Ariz. Const. art. II, § 2.1. The Legislative Council analysis in favor
5 of the VBR noted that “[f]or too long victims of crime have been second-class citizens.”
6 Exhibit G at 101. Many people, including crime victims, argued in support of the proposed
7 amendment, emphasizing the “pain” victims experienced from having to interact with the
8 criminal justice system, which came on top of the victimization they had already suffered.
9 *Id.* at 102–04. They also emphasized that, through the VBR, victims would no longer be
10 treated as just another “piece[] of evidence.” *Id.* at 103. Consistent with this, the VBR
11 stated that its purpose was “[t]o preserve and protect victims’ rights to justice and due
12 process”; it included the right to be present and to be informed of proceedings, the right to
13 be heard at certain proceedings, the right to refuse an interview, the right to obtain prompt
14 restitution, and the right to be informed of one’s rights as a crime victim. Ariz. Const. art.
15 II § 2.1(A)(3)–(5), (12). Arizona’s VBR has served as a model for several other states.
16 Steven J. Twist & Keelah E.G. Williams, *Twenty-five Years of Victims’ Rights in Arizona*,
17 47 Ariz. St. L.J. 421, 423 n.11 (2015).

18 After the voters adopted the VBR, the Legislature enacted the Victims’ Rights
19 Implementation Act. Exhibit H (1991 Ariz. Sess. Laws ch. 229 (1st Reg. Sess.), codified
20 at A.R.S. §§ 13-4401 to -4437). The legislative intent was to “[e]nact laws that define,
21 implement, preserve and protect the rights guaranteed to crime victims by [the VBR]” and
22 “[e]nsure that [the VBR] is fully and fairly implemented and that all crime victims are
23 provided with basic rights of respect, protection, participation and healing of their ordeals.”
24 *Id.* at 198. The act added A.R.S. § 13-4433(B) (the “Statute”), which, after minor
25 amendment, now provides:

26 The defendant, the defendant’s attorney or an agent of the
27 defendant shall only initiate contact with the victim through the
28 prosecutor’s office. The prosecutor’s office shall promptly
inform the victim of the defendant’s request for an interview

1 and shall advise the victim of the victim's right to refuse the
2 interview.

3 The Statute effectively extends the traditional, represented-person contact rule to victims.
4 See Model Rule 4.2 (attorney contact with represented persons); E.R. 4.2 (same). The
5 Statute applies only to ongoing criminal proceedings. See A.R.S. § 13-4401(9) (defining
6 "Defendant" to apply only after formal charges are filed).

7 In 1992, after passage of the VBR and the related statutory provisions, the Arizona
8 Supreme Court amended Rule 39. One key amendment was to subsection (b)(12), which
9 now reads as follows:

10 [A] victim has and is entitled to assert each of the following
11 rights . . . (12) The right to refuse an interview, deposition, or
12 other discovery request by the defendant, the defendant's
13 attorney, or other person acting on the defendant's behalf, and:
14 (A) the defense must communicate requests to interview a
15 victim to the prosecutor, not the victim. . . .⁵

16 This amendment was proposed by the committee the State Bar established to analyze
17 proposed changes to the Supreme Court's rules. Exhibit F at 52–53.⁶ And the Court and
18 Legislature have reaffirmed the provisions by retaining them through multiple amendments.

19 **II. Procedural History Of This Litigation**

20 Plaintiffs include a membership organization, criminal-defense attorneys, and an
21 investigator. They filed this lawsuit five years ago in May 2017, approximately twenty-six
22 years after the initial adoption of A.R.S. § 13-4433 and Rule 39. Doc. 1 ¶¶ 16–23. Plaintiffs
23 brought a facial First Amendment challenge, on their own behalf only, to A.R.S. § 13-
24 4433(B). Doc. 1 ¶¶ 1, 11, 58; Doc. 150 ¶ 95. Notably, Plaintiffs do not challenge the
25 underlying rights victims have pursuant to the Arizona Constitution or the restrictions in
26 Rule of Criminal Procedure 39.

27 ⁵ This provision was renumbered from 39(b)(10) to 39(b)(11), then to 39(b)(12) in 2018
28 and restyled without material change.

⁶ Some members of the committee opposed the requirement that requests go through the
prosecutor, on the basis that the process would not neutrally inform victims of their rights
in connection to defense requests—no First Amendment concerns were cited. Exhibit F at
56.

1 After initiating this action, Plaintiffs filed a motion asking the Court to preliminarily
2 enjoin the then-twenty-six-year-old A.R.S. § 13-4433(B). Doc. 11. Holding Plaintiffs
3 lacked standing, the Court dismissed the action and denied Plaintiffs’ motion for
4 preliminary injunction. Doc. 119. Plaintiffs then filed two amended complaints, but they
5 never again re-filed their motion for preliminary injunction. *See* Docs. 123, 150. The Court
6 again dismissed both of Plaintiffs’ subsequent amended complaints for lack of standing.
7 Docs. 147, 191, 210. Plaintiffs appealed the Court’s orders dismissing their Second
8 Amended Complaint, but did not appeal the Court’s order denying their request for a
9 preliminary injunction. Doc. 212. Despite the facts that Plaintiffs have not challenged the
10 victim-contact restrictions contained in Rule 39, and that it is state courts, not any of the
11 defendants, that enforce the victim-contact restriction during ongoing criminal proceedings,
12 the Ninth Circuit, in a short, unpublished memorandum decision, reversed dismissal,
13 remanding the action back to this Court. Docs. 220, 220-1.

14 Now, five years after Plaintiffs filed their initial motion for preliminary injunction,
15 and over thirty years since the Statute went into effect, Plaintiffs have renewed their request
16 for a preliminary injunction.

17 **STANDARD OF REVIEW**

18 Plaintiffs seek a mandatory injunction altering the status quo as it has existed for the
19 last thirty years—namely, that the Statute is in effect. “A plaintiff seeking a preliminary
20 injunction must establish that he is likely to succeed on the merits, that he is likely to suffer
21 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
22 favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council,*
23 *Inc.*, 555 U.S. 7, 20 (2008); *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
24 1134–35 (9th Cir. 2011). “A mandatory injunction goes well beyond simply maintaining
25 the status quo pendente lite and is particularly disfavored.” *Stanley v. Univ. of S. Cal.*, 13
26 F.3d 1313, 1320 (9th Cir. 1994) (cleaned up). “When a mandatory preliminary injunction
27 is requested, the district court should deny such relief unless the facts and law clearly favor
28 the moving party.” *Id.* (cleaned up); *see also Tribal Behav. Health LLC v. Reeves*, No. CV-

1 22-00926-PHX-SPL, 2022 WL 2290563, at *3 (D. Ariz. June 24, 2022) (Logan, J.) (request for
2 mandatory injunction subject to heightened scrutiny).

3 ARGUMENT

4 **I. Plaintiffs Cannot Show Likelihood Of Success On The Merits.**

5 **A. The Statute Is A Reasonable Regulation Of The Practice Of Law, Which 6 Is Subject Only To Rational Basis Review.**

7 **1. Plaintiffs’ Conduct In The Practice Of Law Is Subject To 8 Reasonable Regulation.**

8 Plaintiffs’ First Amendment challenge fails because the Statute primarily regulates
9 conduct—the practice of law—and not speech, and thus the Statute need only be reasonable
10 to survive constitutional scrutiny. The U.S. Supreme Court “has upheld regulations of
11 professional conduct that incidentally burden speech.” *Nat’l Inst. of Fam. & Life Advoc.*
12 *v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (“NIFLA”). Thus, “the First Amendment does
13 not prevent restrictions directed at commerce or conduct from imposing incidental burdens
14 on speech.” *Sorrell v. IMS*, 564 U.S. 552, 567 (2011). Subjecting every incidental impact
15 on speech to First Amendment scrutiny “would lead to the absurd result that any
16 government action that had some conceivable speech-inhibiting consequences, such as the
17 arrest of a newscaster for a traffic violation, would require analysis under the First
18 Amendment.” *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O’Connor, J.,
19 concurring).

20 The U.S. Supreme Court has applied the conduct-speech distinction to reject First
21 Amendment challenges to state regulations on the practice of a profession. For example, in
22 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court rejected a First
23 Amendment challenge to a law requiring physicians to obtain informed consent before
24 performing an abortion. 505 U.S. 833, 884 (1992) (joint opinion of O’Connor, Kennedy,
25 and Souter, JJ.), *overruled on other grounds in Dobbs v. Jackson Women’s Health*
26 *Organization*, 142 S. Ct. 2228 (2022). The Court described the law as “a requirement that
27 a doctor give a woman certain information as part of obtaining her consent to an abortion.”
28 *See id.* Although the state law actually compelled Pennsylvania physicians to engage in

1 speech with their patients, the joint opinion for the Court rejected the plaintiffs’ First
2 Amendment challenge outright. *See id.* The Court concluded that state law regulated
3 speech only “as part of the practice of medicine, subject to reasonable licensing and
4 regulation by the State.” *Id.*

5 The Supreme Court has similarly held that the practice of law is subject to reasonable
6 licensing and regulation by the State, even where such regulations impose incidental
7 burdens on speech. As jurists from Justice Cardozo to Chief Justice Rehnquist have noted,
8 “[m]embership in the bar is a privilege burdened with conditions.” *Gentile v. State Bar*
9 *of Nevada*, 501 U.S. 1030, 1066 (1991) (Rehnquist, C.J., delivering opinion of the Court)
10 (quoting *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917)).⁷ A state “has an extremely important
11 interest in maintaining and assuring the professional conduct of the attorneys it licenses,”
12 and “[s]tates traditionally have exercised extensive control over the professional conduct of
13 attorneys.” *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 434
14 (1982); *In re Primus*, 436 U.S. 412, 422 (1978) (“The States enjoy broad power to regulate
15 ‘the practice of professions within their boundaries,’ and ‘the interest of the States in
16 regulating lawyers is especially great[.]’” (brackets omitted) (quoting *Goldfarb v. Va. State*
17 *Bar*, 421 U.S. 773, 792 (1975)). Similarly, the Ninth Circuit has rejected claims “that an
18 individual has a First Amendment right to practice law in any way of his choosing, free
19 even of rationally-based regulation,” because such a “broadly formulated First Amendment
20 argument . . . would, if successful, greatly undermine the power of states to regulate bar
21 membership, when this power has been repeatedly recognized and upheld by the courts.”
22 *Russell v. Hug*, 275 F.3d 812, 822 (9th Cir. 2002). Thus, “the speech of lawyers
23
24

25 ⁷ *Gentile* is a split opinion, with Chief Justice Rehnquist writing for the majority on certain
26 issues, and Justice Kennedy on others. Sections I and II of the Chief Justice’s opinion
27 constitute the majority opinion on the question of when and how attorney speech may be
28 limited. Yet Plaintiffs only cite to portions of Justice Kennedy’s analysis that are not for
the majority, failing to engage with the controlling language from Chief Justice Rehnquist
that squarely applies here. *See* Doc. 238 at 10, 11. Similarly, their reliance on pre-*Gentile*
cases, including *Levine v. U.S. District Court for Central District of California*, 764 F.2d
590, 595 (9th Cir. 1985), is misplaced.

1 representing clients in pending cases may be regulated under a less demanding standard.”
2 *Gentile*, 501 U.S. at 1074.

3 At the core of the acceptable limits on attorneys are restrictions on professional
4 conduct during the course of ongoing judicial proceedings when representing parties. “It is
5 unquestionable that in the courtroom itself, during a judicial proceeding, *whatever* right to
6 ‘free speech’ an attorney has is extremely circumscribed.” *Gentile*, 501 U.S. at 1071
7 (emphasis added). On this basis, courts have recognized that attorneys engaged in ongoing
8 litigation have no First Amendment speech rights when speaking within the traditional
9 contours of the judicial proceedings. *See, e.g., Mezibov v. Allen*, 411 F.3d 712, 720 (6th
10 Cir. 2005) (“[I]n filing motions and advocating for his client in court, Mezibov was not
11 engaged in free expression; he was simply doing his job. In that narrow capacity, he
12 voluntarily accepted almost unconditional restraints on his personal speech rights, since his
13 sole raison d’etre was to vindicate his client’s rights.”); *Carroll v. Jaques Admiralty Law*
14 *Firm, P.C.*, 110 F.3d 290, 294 (5th Cir. 1997) (attorney sanctioned for deposition conduct
15 unable to rely on First Amendment to ward off sanction in light of role as “officer of the
16 court”); *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1206–07 & n.28 (11th Cir.
17 1985) (pre-*Gentile* case stating “[s]ince defense counsel had an ethical duty to refrain from
18 discussing the litigation with members of the class . . . the order in no way tread on
19 legitimate communications by counsel” (citing Model Rule 4.2)).⁸

20 2. The Statute Is A Reasonable Regulation Of The Practice Of Law.

21 Here, A.R.S. § 13-4433(B) applies primarily to conduct—the practice of law. Even
22 characterized at a more granular level, the Statute applies primarily to conduct—the act of
23 approaching potential witnesses in the course of defending ongoing criminal proceedings.
24 No matter how the Court might slice it, the Statute regulates litigation conduct. It only
25

26 ⁸ *See also* Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal*
27 *Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *Fordham L. Rev.* 569,
28 569 (1998) (“Rules of evidence and procedure, bans on revealing grand jury testimony,
page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of
speech limitations that are widely accepted as functional necessities in the administration
of justice. . . .”).

1 applies to ongoing criminal proceedings. *See* A.R.S. § 13-4401(9) (defining “Defendant”
2 to apply only after formal charges are filed). Thus, the Statute is constitutional so long as
3 it is reasonable. *See Casey*, 505 U.S. at 884.

4 Legitimate purpose. The Statute furthers compelling state interests. The Statute
5 furthers the State’s substantial interest in regulating the practice of law, including the pursuit
6 of criminal justice through the proper functioning and administration of the state judicial
7 system. *See Nat’l Ass’n for the Advancement of Multijurisdiction Practice v. Berch*, 773
8 F.3d 1037, 1047 (9th Cir. 2014) (“Arizona is regulating the practice of law, and such
9 regulation is a substantial government interest.”); *Mothershed v. Justices of Supreme Court*,
10 410 F.3d 602, 611 (9th Cir. 2005) (“In order to further its substantial interest in regulating
11 the legal profession, the State of Arizona may institute reasonable time, place, and manner
12 restrictions on Arizonans’ First Amendment right to consult with an attorney.”).

13 The Statute also furthers the extensive set of rights the Arizona Constitution provides
14 to victims of crime, particularly the right to decline a pretrial interview by the defense. Ariz.
15 Const. art. II, § 2.1(A)(5); *J.D. v. Hegyi*, 236 Ariz. 39, 41 ¶ 12 (2014) (victims “have a
16 constitutional right to refuse defense interviews as a result of the voters’ 1990 adoption of
17 the VBR”). As the Arizona Supreme Court has explained, “[a] victim’s right to refuse a
18 pretrial interview . . . stems from ‘the desire to protect a victim’s privacy and minimize
19 contact with the defendant’ prior to trial.” *State v. Riggs*, 189 Ariz. 327, 330 (1997). The
20 right also prevents “unwelcome questioning by the defense before the victim testifies in
21 court,” as “[s]uch contact or questioning by the defense could subject the victim to further
22 trauma.” *Hegyi*, 236 Ariz. at 42 ¶ 16.

23 More broadly, the Statute furthers the goals of the VBR and related implementing
24 legislation, which “were adopted ‘to provide crime victims with basic rights of respect,
25 protection, participation’ and to aid the ‘healing of their ordeals.’” *Id.*; *see also* A.R.S. § 13-
26 4431 (minimizing victim’s contacts); A.R.S. § 13-4434 (victim’s right to privacy). These
27 rights, and the purposes behind them, are undermined when the victim is subjected to
28 unconsented *direct* pre-trial contact by the defense. Such contact necessarily impinges on

1 victims' privacy, subjects victims to potential further trauma, and otherwise interrupts the
2 healing that victims must undergo as a result of their ordeals. *Cf. Hegyi*, 236 Ariz. at 42;
3 *Riggs*, 189 Ariz. at 330. This harmful impact exists regardless of the intent behind the
4 contact or the contents of the contact. If confronted directly by a criminal defense attorney
5 or agent, the victim loses the ability to control their own privacy and independently process
6 the request consistent with their own healing. The nature of the contact alone, and the
7 victim's lack of control, may well cause the victim to relive their trauma and suffer
8 revictimization.⁹ And the lack of control means the victim may not be given time to reflect
9 about whether they want to exercise the right to decline the interview; instead the crime
10 victim would be put on the spot in a way that degrades their rights. These concerns are not
11 hypothetical. The record in this case contains declarations from individuals who suffered
12 unspeakable tragedy and expressed many of the concerns articulated above. *See* Doc. 35-1.

13 Without the Statute, some victims in Arizona may be able to avoid direct contact by
14 defense attorneys but others may not. More specifically, adult victims with the financial
15 means, the physical and mental fortitude, and the legal knowledge to secure legal counsel
16 will do so. These victims would be protected from direct defense contact through operation
17

18 ⁹ Social science research suggests participation in criminal proceedings can retraumatize
19 the victim, particularly "victims of violent crime, who may suffer from psychological
20 trauma as the result of their victimization." Judith Lewis Herman, *The Mental Health of
21 Crime Victims: Impact of Legal Intervention*, 16 J. Traumatic Stress 159, 159 (2003) (noting
22 "involvement in the justice system may compound the original injury"). Many studies of
23 crime victims and the legal system focus on what is termed "secondary victimization," in
24 which "crime victims feel blamed by the justice system or experience other negative societal
25 reactions" resulting from the initial victimization. Jim Parsons & Tiffany Bergin, *The
26 Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traumatic Stress
27 182, 183 (2010). Secondary victimization "has been associated with increased
28 posttraumatic stress symptoms and other physical and mental distress" and can result from
"interaction with the criminal justice system – through contact with law enforcement,
defense attorneys, prosecutors, judges and other legal system personnel and processes."
*Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization"
in the Criminal Justice System*, National Crime Victim Law Institute Victim Law Bulletin
1, 1 (March 2013). In a 1999 study, 81% of participating mental health professionals who
treated rape survivors "believed that contact with the legal system is psychologically
detrimental." Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims:
Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14 Violence
& Victims 261, 267 (1999). Thus, a uniform procedure by which crime victims are
contacted ensures they are treated with respect and sensitivity during an already traumatic
period of time.

1 of Arizona Rule 4.2. But most victims would be unable to secure legal counsel. For these
2 victims—namely, indigent victims and those suffering physical and mental disabilities in
3 the wake of the crime who may be unaware of their legal rights—no protection would be
4 provided. For example, a child who is the victim of abuse, a rape victim who is too
5 traumatized to secure counsel, or a burglary victim who lacks the means to afford counsel
6 would all be left unprotected. It is not unreasonable for the State to eliminate this system
7 of haves and have nots by appointing prosecutors as the conduit for unrepresented victims.

8 Historical practice. The Statute is consistent with the traditional role of prosecutors
9 and restrictions on contacting represented parties. Selecting prosecutors as the default
10 conduit for requests to speak with crime victims (in the absence of the crime victim retaining
11 separate representation) is consistent with tradition. For decades, prosecutors have
12 represented crime victims in several respects during the course of criminal proceedings.
13 Consider restitution, for example, to which Arizona crime victims are entitled. *E.g.*, Ariz.
14 Const. art. II, § 2.1(A)(8). In pursuing restitution—particularly in potential plea agreements
15 that include restitution—the prosecutor represents the financial and legal interests of the
16 crime victim. Arizona law also recognizes that the prosecutor is empowered to pursue
17 vindication for crime victims when their rights as victims are impinged. *See* A.R.S. § 13-
18 4437(C) (“At the request of the victim, the prosecutor may assert any right to which the
19 victim is entitled.”). Indeed, prosecutors are encouraged to zealously protect the rights of
20 crime victims. *See, e.g.*, Office for Victims of Crime, Attorney General Guidelines for
21 Victim and Witness Assistance 48 (2011 ed., revised May 2012), available at
22 https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf (“Prosecutors
23 are urged to analyze any potential issues related to victims’ rights early in the case in order
24 to be able to assert victims’ rights at the first opportunity.”). Moreover, the role of the
25 governmental prosecutor at the state level is a replacement for the historic practice of private
26 lawyers pursuing criminal justice on behalf of crime victims.¹⁰ Given the historical roots

27 _____
28 ¹⁰ *See, e.g.*, Beloof & Cassell, *supra* note 2, at 484–87 (detailing transition from reliance
on private prosecutors as “dominant form of prosecution” in America to development of
“office of the public prosecutor”).

1 of the prosecutor's office as substitution for private crime victim attorneys and the victim
2 interests that prosecutors still represent during pending proceedings (e.g., restitution and
3 enforcement of victim's rights), selecting prosecutors to serve as the attorney-conduit for
4 otherwise unrepresented victims is immensely reasonable.

5 The Statute also falls squarely within the traditional contours of regulations on
6 ongoing litigation—interactions between attorneys representing parties to a pending
7 criminal action, and crime victims, who have interests in and rights relating to the ongoing
8 action. The Statute (and Rule 39) is a straightforward application of a traditional ethical
9 regulation that protects the justice system and pending judicial proceedings. The Statute
10 and Rule 39 both provide victims a standard aspect of represented status—the procedural
11 right to be contacted through an attorney during the course of ongoing criminal proceedings
12 related to the crime that was perpetrated against them. This status is commonplace in both
13 criminal and civil proceedings throughout the country. *See, e.g.,* Model Rule 4.2. In
14 Arizona, application of this rule goes so far as to limit *ex parte* contact with certain former
15 employees of a represented party. *See Lang v. Superior Ct., In & For Cnty. of Maricopa,*
16 170 Ariz. 602, 607 (App. 1992).

17 Narrowly tailored scope. The Statute is also narrowly tailored. Members of the
18 bar (and their agents) are subject to the Statute only when they enter the traditional litigation
19 realm by being engaged to represent a party in ongoing criminal proceedings in their special
20 status as officers of the court system. *See* A.R.S. § 13-4401(9) (defining “Defendant” to
21 apply only after formal charges are filed). Moreover, the rule does not bar speech. There
22 is no limitation on defense attorneys or agents talking to victims if the victim initiates
23 contact, or once the victim consents to a conversation. Nor does the rule prohibit any subject
24 matter from being discussed once contact has been properly initiated (though attorneys must
25 always comply with extant ethical rules). And Plaintiffs will receive material information
26 relating to the crime victim as part of the pre-trial disclosure process (including under
27 *Brady*), and retain all Sixth Amendment confrontation rights in connection with the pending
28 proceedings.

1 The Statute also leaves open ample alternative channels for communication. Indeed,
2 if Plaintiffs wish to contact victims in cases where they are not representing a defendant (or
3 working on behalf of an attorney who does represent a defendant), they do not fall under
4 A.R.S. § 13-4433(B). This is particularly clear in the context of contacting family members
5 of homicide victims. Plaintiffs are free to contact those family members and speak about
6 the death penalty (just as any other member of society is) without any limitations imposed
7 by A.R.S. § 13-4433(B) in all cases except those where they represent a defendant. Further,
8 the Statute says nothing about Plaintiffs' contact with the general public or those not
9 connected to the pending proceedings—Plaintiffs are free to speak to the public generally
10 regarding all possible subject matters, subject to compliance with other traditional ethical
11 canons. Even during ongoing judicial proceedings, the messages that Plaintiffs purport to
12 want to disseminate (e.g., on the merits of the death penalty) are available for dissemination
13 by like-minded persons and entities, so long as those persons are not engaged by or acting
14 on the behalf of defendants.

15 **B. The Statute Is A Constitutional Time, Place, And Manner Restriction.**

16 Even if the Court concludes that the Statute regulates speech, and not professional
17 conduct, and is therefore subject to traditional First Amendment review, Plaintiffs have
18 failed to establish a First Amendment violation because the Plaintiffs cannot demonstrate
19 that A.R.S. § 13-4433(B) is anything but a reasonable time, place, and manner regulation.
20 Plaintiffs have presented only a facial challenge to the Statute and therefore in order to
21 prevail must establish that the provision is “unconstitutional in every conceivable
22 application,” or “seek[s] to prohibit such a broad range of protected conduct that [it is]
23 unconstitutionally overbroad.” *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827
24 F.3d 1192, 1197 (9th Cir. 2016). Plaintiffs cannot do so.

25 **1. The Statute Is Content Neutral.**

26 The Statute's application does not differentiate based on the content or subject matter
27 of speech. “A regulation is content based if, ‘on its face,’ it ‘draws distinctions based on
28 the message a speaker conveys’”; “defines regulated speech by a particular subject matter”;

1 or “discriminates between viewpoints.” *Lone Star*, 827 F.3d at 1198 (quoting *Reed v. Town*
2 *of Gilbert*, 576 U.S. 155, 163 (2015)). The extension of the represented-person contact rule
3 to crime victims in connection with ongoing proceedings draws no distinction based on the
4 content or subject matter of any message or speech—the contact rule is divorced from
5 message or content. Contact rules apply uniformly to direct communications of any kind
6 on any topic and from any viewpoint during the course of ongoing judicial proceedings
7 relating to the crime perpetrated against the victim. Plaintiffs admit that, in practice, the
8 Statute is applied “no matter what reason the Plaintiff has to speak to a victim, or what the
9 Plaintiff wants to say[.]” Doc. 150 at 11 ¶ 55. The neutrality of the rule is made plain when
10 it is considered in the context of the overall scheme of rules that apply in the course of
11 pending litigation. Rule 4.2 governs attorney contact with represented persons and manners
12 in which such contact may be conducted. And there are many other regulations on attorney
13 speech, which together apply to represented persons, non-represented persons, and the
14 court. The Statute simply extends represented-person status (as set forth in Model Rule
15 4.2) to all victims and designates the prosecutor as the default conduit for initiation of
16 contact.

17 Plaintiffs argue that the Statute is not content neutral because it applies only to the
18 criminal defense team. But courts have found rules to be content neutral even when they
19 apply to certain individuals and not others. In *Ward v. Rock Against Racism*, the Supreme
20 Court explained that “[a] regulation that serves purposes unrelated to the content of
21 expression is deemed neutral, even if it has an incidental effect on some speakers or
22 messages but not others.” 491 U.S. 781, 791 (1989). And in *McCullen v. Coakley*, the
23 Court held that a state-enforced buffer zone around abortion clinics did not apply to
24 employees of clinics engaged in the course of their duties. 573 U.S. 464, 472 (2014).
25 Nonetheless, citing *Ward*, the *McCullen* Court found the regulation to be content neutral.
26 “[A] facially neutral law does not become content based simply because it may
27 disproportionately affect speech on certain topics. On the contrary, ‘[a] regulation that
28 serves purposes unrelated to the content of expression is deemed neutral, even if it has an

1 incidental effect on some speakers or messages but not others.” *Id.* at 480. As the Court
2 explained:

3 The Act would be content based if it required “enforcement
4 authorities” to “examine the content of the message that is
5 conveyed to determine whether” a violation has occurred. But
6 it does not. Whether petitioners violate the Act “depends” not
7 “on what they say,” but simply on where they say it. Indeed,
8 petitioners can violate the Act merely by standing in a buffer
9 zone, without displaying a sign or uttering a word.

10 *Id.* at 479–80 (citations omitted). The same is true here, particularly when A.R.S. § 13-
11 4433(B) is considered within the overall represented-person contact scheme, which is
12 plainly content neutral.¹¹

13 Plaintiffs argue that the cover letter that prosecutorial agencies send to victims
14 notifying them of a request for contact from defense counsel is compelled speech. Plaintiffs
15 fail to explain, though, how anyone receiving a prosecutor’s letter notifying a victim of a
16 contact request from defense counsel could possibly think that the letter is actually speech
17 from defense counsel. Not only is that notion counter to common sense, but it is not
18 supported by any evidence in the record. And a form letter from a prosecutor notifying a
19 victim of a request for contact is nothing like the pro-abortion signs that California
20 attempted to require crisis pregnancy centers to hang on their own property and
21 advertisements. Thus, Plaintiffs’ reliance on *NIFLA*, 138 S. Ct. at 2371–74, is severely
22 misplaced.

23 **2. The Statute Is Narrowly Tailored To A Significant Governmental** 24 **Interest.**

25 The Statute is also narrowly tailored. “A speech regulation is narrowly tailored if it
26 ‘promotes a substantial government interest that would be achieved less effectively absent
27 the regulation.’” *Lone Star*, 827 F.3d at 1200–01 (quoting *Ward*, 491 U.S. at 799). “[A]
28 regulation of the time, place, or manner of protected speech must be narrowly tailored . . .
[but] it need not be the least restrictive or least intrusive means of doing so.” *Ward*, 491
U.S. at 798, 800; *see also Berch*, 773 F.3d at 1047 (“A time, place, and manner restriction

¹¹ *Reed v. Town of Gilbert* is inapposite because the regulation at issue there related to the content of signs. 576 U.S. at 159.

1 is narrowly tailored as long as the substantial governmental interest it serves ‘would be
2 achieved less effectively absent the regulation and the regulation achieves its ends without
3 . . . significantly restricting a substantial quantity of speech that does not create the same
4 evils.’”).

5 For reasons already explained, the Statute easily meets the narrowly-tailored test.
6 The Statute furthers several substantial government interests, including in effectively
7 regulating the practice of law, implementing victims’ constitutional right to decline a
8 pretrial interview by the defense, respecting victims’ privacy and healing and avoiding
9 further victim trauma, and eliminating a two-tier system of victim contact based on victim
10 financial means or faculties. *See supra* 11–13. Plaintiffs have not established that the
11 alternative they suggest—allowing the defense team to make direct contact with
12 unrepresented victims subject to ethical restraints on attorney conduct—would as
13 effectively further any of the State’s substantial interests, let alone all of them. Finally, as
14 explained, the Statute is narrowly tailored in that it only applies to counsel (and their agents)
15 representing defendants in ongoing criminal proceedings and otherwise leaves open ample
16 alternative channels of communication. *See supra* 14–15.

17 **C. The Statute Is Not A Prior Restraint.**

18 Just as traditional ethical restraints on lawyers are not prior restraints (e.g., E.R. 4.2),
19 neither is A.R.S. § 13-4433(B). As a reasonable regulation of the conduct of attorneys and
20 their agents during ongoing court proceedings, the Statute is not subject to the heightened
21 standard for prior restraints. *See Zal v. Steppe*, 968 F.2d 924, 928 (9th Cir. 1992) (“Zal
22 argues that the ‘clear and present danger’ standard should guide our analysis because the
23 trial court’s evidentiary orders are ‘prior restraints.’ This argument is contrary to *Gentile*,
24 501 U.S. at 1074, which held that ‘lawyers representing clients in pending cases may be
25 regulated under a less demanding standard than that established for regulation of the press
26 in *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976).”). Plaintiffs’ arguments to the
27 contrary fail.

28 The U.S. Supreme Court has defined prior restraints as “administrative and judicial

1 orders *forbidding* certain communications when issued in advance of the time that such
2 communications are to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see*
3 *also Info. Providers’ Coal. for Def. of the First Amend. v. F.C.C.*, 928 F.2d 866, 877 (9th
4 Cir. 1991) (“The expression ‘prior restraint’ in first amendment law is a term of art. In prior
5 restraint cases, the government typically brings an action to enjoin speech or imposes a
6 requirement of advance approval, censorship or licensing of speech.”). The Statute clearly
7 does not fall within that definition. Plaintiffs’ framing of the victim-contact restriction as a
8 scheme requiring the prosecutor to give “permission” or “consent” to Plaintiffs before they
9 can speak to crime victims is plainly incorrect. *See* Mot. at 3, 5. That is not how the Statute
10 works. When defense counsel relays a request to interview a victim to a prosecutor, A.R.S.
11 § 13-4433(B) requires “[t]he prosecutor’s office [to] promptly inform the victim of the
12 defendant’s request for an interview.” And then it is the victim’s unequivocal right to either
13 accept or deny that request. *See* A.R.S. § 13-4433(A); *see also Frisby v. Schultz*, 487 U.S.
14 474, 485 (1988) (“There simply is no right to force speech into the home of an unwilling
15 listener.”). The Statute does not “vest[] unbridled discretion,” or any discretion, in
16 prosecutors. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 753 (1988).

17 Plaintiffs’ citations (at 12) to cases involving licensing schemes or “pre-clearance
18 regimes” are inapposite. *See City of Lakewood*, 486 U.S. at 753 (considering an ordinance
19 that “vest[ed] the mayor with unbridled discretion over which publishers may place
20 newsracks on public property and where”); *Forsyth Cnty., Ga. v. Nationalist Movement*,
21 505 U.S. 123, 124 (1992) (considering “an . . . ordinance that permit[ted] a government
22 administrator to vary the fee for assembling or parading to reflect the estimated cost of
23 maintaining public order.”); *Moonin v. Tice*, 868 F.3d 853, 867 (9th Cir. 2017) (considering
24 a Nevada Highway Patrol policy under which “only approved messages” of a trooper would
25 “ever reach the public”).

26 Even if, as applied to Plaintiffs, the Statute regulated more than the conduct of
27 attorneys and their agents within the course of litigation (which it does not, *see supra* at
28 8–15), the Statute does not vest discretion with the prosecutor and does not function as a

1 prior restraint.¹²

2 **II. Plaintiffs Have Not Satisfied The Remaining Preliminary Injunction Factors.**

3 Because Plaintiffs are unlikely to succeed on the merits of their claims, the remaining
4 *Winter* elements need not be addressed at all. *See Thalheimer v. City of San Diego*, 645
5 F.3d 1109, 1115 (9th Cir. 2011), *overruled on other grounds by Bd. of Trustees of Glazing*
6 *Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) (district court need
7 consider other *Winter* elements only as to claims that are meritorious). Should the Court
8 disagree, however, the remaining *Winter* elements strongly disfavor the issuance of an
9 injunction.

10 **A. Plaintiffs Cannot Establish A Likelihood Of Irreparable Harm Here.**

11 “To show irreparable harm, ‘a plaintiff must demonstrate immediate threatened
12 injury.’” *Tribal Behav. Health*, 2022 WL 2290563, at *12 (quoting *Caribbean Marine*
13 *Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)). And when Plaintiffs’ make
14 “a somewhat *weaker* showing on the ‘likelihood of success’ factor,” Plaintiffs must make a
15 “particularly strong” showing on another preliminary injunction factor in order to carry their
16 burden. *Id.* at *3 (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.
17 2011)); *see also* Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) (“Perhaps
18 the single most important prerequisite for the issuance of a preliminary injunction is a
19 demonstration that if it is not granted the applicant is likely to suffer irreparable harm before
20 a decision on the merits can be rendered.”). Plaintiffs have not done so here.

21
22 ¹² Ultimately, Plaintiffs’ Motion makes clear in numerous instances that the claims they
23 assert have less to do with Plaintiffs’ First Amendment rights and more to do with the due
24 process rights of their clients in ongoing state criminal proceedings. *See* Mot. at 6
25 (“Plaintiffs’ speech can be aimed at ‘advancing the representation of [their] client[.]’”);
26 Mot. at 10 (“The ability to investigate is crucial to effective advocacy and representation,
27 particularly in criminal cases.”); Mot. at 11 (“The Victim-Contact Prohibition also bars
28 defense counsel from engaging in other types of communications with victims that might
spare the defendant’s life.”). But Plaintiffs have disclaimed any effort to bring claims on
behalf of criminal defendants, so that Plaintiffs could avoid dismissal based on standing and
abstention. Having made that disclaimer, however, Plaintiffs should not be permitted to
turn around and bolster the merits of their First Amendment claims by reference to the due
process interests of criminal defendants. With respect to Plaintiffs, the Statute is a
reasonable regulation on attorney conduct during ongoing criminal proceedings, and thus it
is not in violation of Plaintiffs’ independent First Amendment rights.

1 Despite the importance of showing a likelihood of irreparable harm, Plaintiffs
2 allotted only one short paragraph in their motion to establishing this factor. And in those
3 few sentences, their only argument is that because (in their view) the Statute violates their
4 First Amendment rights, Plaintiffs suffer irreparable harm. Mot. at 25. For all the reasons
5 above, *see supra* 8–19, Defendants have shown that the Statute does not violate Plaintiffs
6 First Amendment rights, negating Plaintiffs’ entire claimed basis of irreparable harm.

7 Beyond that, Plaintiffs fail to address a glaring problem with their request—that is,
8 Plaintiffs filed their challenge to A.R.S. § 13-4433(B) **twenty-six years** after it was enacted
9 in 1991. And they bring this renewed motion for preliminary injunction over thirty years
10 after the Statute took effect. Courts have repeatedly recognized that extensive delay in
11 seeking a preliminary injunction undercuts an attempt to demonstrate irreparable harm. *See*
12 *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (“Plaintiff’s
13 long delay before seeking a preliminary injunction implies a lack of urgency and irreparable
14 harm.”); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (“A
15 delay in seeking a preliminary injunction is a factor to be considered in weighing the
16 propriety of relief. . . . ‘By sleeping on its rights a plaintiff demonstrates the lack of need
17 for speedy action. . . .’”). Many of the individual Plaintiffs here were lawyers in Arizona
18 well before the enactment of the Statute, *see* Doc. 150 ¶¶ 18, 20–23, and could have filed
19 this lawsuit long before now. This lack of urgency demonstrates that the Statute is not
20 significantly harming Plaintiffs’ rights and that the Court should retain the status quo
21 pending a final decision on the merits. *See Schwake v. Ariz. Bd. of Regents*, No. CV-15-
22 00696-PHX-SPL, 2015 WL 11120699, at *1 (D. Ariz. May 26, 2015) (Logan, J.)
23 (“Plaintiff’s delay in requesting the instant TRO thus militates against its issuance.”).

24 Further, the parties have already stipulated to a schedule for filing summary
25 judgment motions *imminently*, so there is no legitimate need for a preliminary injunction
26 during the short period between the preliminary injunction briefing and the summary
27
28

1 judgment briefing.¹³ See Doc. 234 (setting deadlines for summary judgment briefing:
2 August 26 for Plaintiffs’ motion for summary judgment and September 30 for Defendants’
3 response and cross-motion). The two-month difference between this preliminary injunction
4 briefing and the impending summary judgment does not warrant a preliminary injunction—
5 especially considering the delay in bringing this action in the first place. See *Lydo*, 745
6 F.2d at 1213 (“The possibility that adequate compensatory or other corrective relief will be
7 available at a later date, in the ordinary course of litigation, weighs heavily against a claim
8 of irreparable harm.” (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974))).

9 This Court has recognized that “[a] preliminary injunction is ‘an extraordinary and
10 drastic remedy, one that should not be granted unless the movant, by a clear showing, carries
11 the burden of persuasion.’” *Int’l Soc’y for Prot. of Mustangs & Burros v. United States*
12 *Dep’t of Agric.*, No. CV-22-08114-PCT-SPL, 2022 WL 2702534, at *1 (D. Ariz. July 12,
13 2022) (quoting *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) and *Mazurek v.*
14 *Armstrong*, 520 U.S. 968, 972 (1997)). Such a remedy should not be employed when
15 Plaintiffs have waited decades to bring this claim and cannot establish a likelihood of
16 irreparable harm.

17 **B. The Balance Of Equities Does Not Favor An Injunction.**

18 Plaintiffs also ignore the obvious here. While arguing again that it is the alleged
19 constitutional violation that tips the balance in favor of a preliminary injunction, see Mot.
20 at 26, they fail to acknowledge the harm that would occur if a thirty-year old Statute—relied
21 on by prosecutors, investigators, their agencies, the courts, and most importantly crime
22 victims—was suddenly upended, and possibly for only a short time. Given that—at most—
23 there is only a two-month period between the preliminary injunction briefing and the
24 summary judgment briefing, the potential upending of an established Statute for an
25 extraordinarily short two-month time period makes no sense. If this Court were to award
26 Plaintiffs their requested relief, it is entirely possible that agencies and professionals

27 _____
28 ¹³ It is possible that the Court will consider Plaintiffs’ Motion for Preliminary Injunction
at the same time that it considers the forthcoming summary judgment motions—obviating
the need for a preliminary injunction all together.

1 involved with complying with the Statute would have to reformulate decades of practice,
2 only to have the decision potentially reversed two months later. This would create chaos
3 for all involved, and the impact may be felt most by those the Statute is meant to protect.
4 This Court should preserve the status quo during the transitory period between now and
5 when the parties submit their summary judgment briefs.

6 **C. The Public Interest Is Served By Maintaining A.R.S. § 13-4433(B).**

7 Finally, while there is undoubtedly a “significant public interest in upholding free
8 speech principles,” *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009),
9 there is also a public interest in protecting crime victims. The Statute was enacted to
10 preserve victims’ privacy and to avoid subjecting victims to further trauma, *see Hegyi*, 236
11 Ariz. at 42, which are both clearly matters of public importance. Plaintiffs’ Motion neglects
12 to consider the trauma that their requested relief could have on victims—who are non-
13 parties to this proceeding, but who will be significantly (if not exclusively) impacted by this
14 Court’s decision. *See Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 931–32 (9th Cir. 2003)
15 (“The public interest inquiry primarily addresses impact on non-parties rather than parties.
16 . . . [C]ourts of equity should pay particular regard for the public consequences in
17 employing the extraordinary remedy of injunction.”).

18 **CONCLUSION**

19 For the foregoing reasons, Defendants Brnovich and Silbert respectfully request that
20 the Court deny the Plaintiffs’ requested preliminary injunction.
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RESPECTFULLY SUBMITTED this 22nd day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for parties that are registered CM/ECF users will be served by the CM/ECF system pursuant to the notice of electronic Filing.

s/ Michael S. Catlett
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Exhibit C

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10 UNITED STATES DISTRICT COURT

11 DISTRICT OF ARIZONA

12 Arizona Attorneys for Criminal Justice;
13 et al.,

14 Plaintiffs,

15 v.

16 Mark Brnovich; et al.,

17 Defendants.

No. CV-17-01422-PHX-SPL

**RESPONSE IN OPPOSITION TO
DEFENDANT VESSELLA’S RULE
59(e) MOTION TO ALTER OR
AMEND THE JUDGMENT**

18

19 The Court should deny Defendant Vessella’s request for the Court to “alter or
 20 amend the judgment” under Rule 59(e). Vessella has not provided *any* reason (let alone a
 21 valid reason) that the Court should grant the “extraordinary remedy” she has requested.
 22 *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (“[R]econsideration
 23 of a judgment after its entry is an extraordinary remedy which should be used sparingly.”)
 24 (quoting 11 Wright & Miller, Fed. Prac. & Proc. § 2810.1 (2d ed.1995)).

25 “A motion to amend judgment may only be granted where: 1) the motion is
 26 necessary to correct manifest errors of law or fact upon which the judgment is based; 2)
 27 the moving party presents newly discovered or previously unavailable evidence, 3) the
 28 motion is necessary to prevent manifest injustice, or 4) there is an intervening change in

1 controlling law.” *Hiken v. Dep’t of Def.*, 836 F.3d 1037, 1042 (9th Cir. 2016) (cleaned
2 up); *see also McDowell*, 197 F.3d at 1255 (“A motion for reconsideration under Rule
3 59(e) ‘should not be granted, absent highly unusual circumstances, unless the district court
4 is presented with newly discovered evidence, committed *clear error*, or if there is an
5 intervening change in the controlling law.”); *Thompson v. Isagenix Int’l, LLC*, No. CV-
6 18-04599-PHX-SPL, 2020 WL 13469285, at *1 (D. Ariz. Sept. 23, 2020) (same).
7 Vessella does not argue that any of these circumstances are present here. Nor does she
8 argue that some other pressing or unusual circumstance exists warranting the Court’s
9 attention in this unusual manner. That should be enough for the Court to end its inquiry.

10 Vessella has not only failed to present the court with a proper reason to alter or
11 amend the judgment, but she has also asked the Court to go well-beyond the scope of the
12 issues presented to the Court in this litigation. What Vessella effectively asks the Court to
13 do is to provide an interpretation of Arizona Rule of Criminal Procedure 39(b)(12) (“Rule
14 39(b)(12)”—an Arizona court rule which no one argues was challenged in this action. In
15 fact, countless pages of briefing throughout this case were devoted to Defendants’
16 arguments that Plaintiffs’ lacked standing *because Rule 39 was not challenged*. *See, e.g.*,
17 Doc. 164; *see also* Doc. 210 at 9 (“Without the Rule in front of it ... “).

18 In that light, the Court correctly limited the injunction: “Nor shall anything in this
19 Order be construed to enjoin enforcement of any other provision of Arizona law,
20 includingthe requirement under Arizona Rule of Criminal Procedure 39(b)(12) that the
21 defense must communicate a request to interview a victim to the prosecutor rather than the
22 victim.” Doc. 270 at 1 n.1. The Court could do no more than enjoin Defendants from
23 actions connected to A.R.S. § 13-4433(B) because that was the only provision of Arizona
24 law properly before the Court. For Vessella now to ask the Court to provide guidance on
25 Rule 39(b)(12)’s contours is beyond the scope of the issues over which the Court has
26 jurisdiction in this matter.

27 That the Court properly carved out enforcement of Rule 39(b)(12) from the scope
28 of the injunction does not give the Court license to provide an interpretation of that state

1 rule of criminal procedure, just as the Court should not provide an interpretation of “any
2 other provision of Arizona law” not challenged here and thus expressly exempted from
3 the injunction in footnote 1. If Vessella desires additional “clarification” regarding the
4 scope of Rule 39(b)(12), she can seek such clarification in Arizona state court or apply her
5 own interpretation of Rule 39(b)(12) during attorney ethics proceedings, subject to
6 appellate review by the Arizona Supreme Court. It is not even clear that if the Court
7 granted Vessella’s request, that the resulting interpretation would have any material
8 impact in subsequent Arizona attorney discipline proceedings. *See Hancock v. O’Neill*,
9 253 Ariz. 509, 515 ¶25 (2022) (“We hold that under our rules, issue preclusion is not
10 applicable in attorney disciplinary proceedings; only criminal convictions and disciplinary
11 orders from other jurisdictions may be given preclusive effect.”).

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

18 For these reasons, the Court should deny Vessella’s motion to amend or alter the
19 judgment.

1 RESPECTFULLY SUBMITTED this 30th day of November, 2022.

2 MARK BRNOVICH
3 ATTORNEY GENERAL

4
5 By: /s/ Michael S. Catlett
6 Michael S. Catlett (No. 025238)
7 *Deputy Solicitor General*
8 Kate B. Sawyer (No. 034264)
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12 2005 N. Central Avenue
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14 *Attorneys for Defendant Mark Brnovich,*
15 *in his official capacity as Arizona Attorney*
16 *General*
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for parties that are registered CM/ECF users will be served by the CM/ECF system pursuant to the notice of electronic Filing.

s/ Michael S. Catlett
*Attorney for Defendant Mark Brnovich,
in his official capacity as Arizona
Attorney General*

Exhibit D

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6 Attorneys for Defendant Maret Vessella

7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

10 Arizona Attorneys for Criminal Justice, et
al.,

11 Plaintiffs,

12 v.

13 Mark Brnovich, in his official capacity as
Attorney General of the State of Arizona,
14 et al.,

15 Defendants.

No. 2:17-cv-01422-SPL

**REPLY IN SUPPORT OF
DEFENDANT MARET VESSELLA’S
RULE 59(e) MOTION TO ALTER OR
AMEND THE JUDGMENT**

16
17 Defendant Vessella moved to alter or amend the judgment for the sole
18 purpose of clarifying an ambiguity regarding the scope of the Court’s injunction. Vessella
19 is not seeking reconsideration, as the Attorney General seems to believe. Nor has she taken
20 a position on the appropriate outcome, as AACJ asserts. Rather, Vessella simply wants to
21 know whether, and if so to what extent, the judgment enjoined her from investigating
22 and/or disciplining lawyers for violating Arizona Rule of Criminal Procedure 39(b)(12) by
23 communicating a request to interview a victim *to the victim directly* rather than the
24 prosecutor.

25 Because the requested clarification, if granted, will require the Court to alter
26 or amend the judgment’s language, the motion fits within Rule 59(e)’s umbrella. *See*
27 *Birdsong v. Wrotenbery*, 901 F.2d 1270, 1272 (5th Cir. 1990) (motion “falls under the
28 umbrella of Rule 59(e)” where “[i]t would have been impossible for the District Court to

1 have granted Appellant’s Motion to Clarify without altering or amending the language of
2 the judgment in such a way as to specifically exclude [conduct] from the injunction”).
3 Thus, Vessella’s motion is procedurally proper.

4 The responses to Vessella’s motion confirm the judgment is ambiguous and
5 requires clarification. On the one hand, AACJ maintains that Vessella *is* enjoined from
6 investigating and/or disciplining lawyers based on Rule 39(b)(12) violations in all
7 circumstances except where the lawyer requests a formal interview as part of official
8 judicial proceedings. [Doc. 277 at 3–4.] On the other hand, the Attorney General argues
9 the injunction could not have gone even that far because questions involving Rule
10 39(b)(12)’s interpretation were not properly before the Court. [Doc. 278 at 2.] Thus, the
11 Court’s judgment is indeed ambiguous.

12 Again, Vessella takes no position regarding how the Court should resolve
13 this ambiguity. She does not advocate for either position, but rather simply asks the Court
14 to clarify the tension between: (a) the judgment’s footnote [Doc. 270 at 1 n.1], which seems
15 to exempt from the injunction *any* investigation and/or discipline based on Rule 39(b)(12);
16 and (b) the Court’s “directly initiated contact” language [*id.* at 2], the breadth of which
17 suggests the injunction covers investigations/discipline relating to some if not all contact
18 that is prohibited under Rule 39(b)(12).

19 Because Vessella is agnostic with respect to how the Court resolves this
20 ambiguity, AACJ’s response is mistaken when it asserts that Vessella seeks authorization
21 “to violate the First Amendment rights of criminal defense attorneys and their agents by
22 investigating and disciplining them for making a ‘request to interview’ a crime victim.”
23 [Doc. 277 at 2.] Vessella seeks no such authorization. She simply wants to know whether
24 such an investigation and/or discipline would violate the Court’s injunction, or, as the
25 Court’s footnote suggests, whether this conduct is indeed exempted from the injunction.
26 Vessella does not advocate for either outcome. Clarity is her only objective with this
27 motion.
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2022, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing; and served on counsel of record via the Court’s CM/ECF system.

/s/ Ginger Stahly

Exhibit E

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizona Attorneys for Criminal Justice,)
et al.,)

Plaintiffs,)

vs.)

Doug Ducey, et al.,)

Defendants.)

No. CV-17-01422-PHX-SPL

ORDER

15 Before the Court is Defendant Maret Vessella’s Rule 59(e) Motion to Alter or
16 Amend the Judgment (Doc. 274), in which she requests clarification of the permanent
17 injunction entered by this Court. In this case, Plaintiffs challenged the constitutionality of
18 A.R.S. § 13-4433(B), which states in relevant part that a criminal “defendant, the
19 defendant’s attorney, or an agent of the defendant shall initiate contact with the victim
20 through the prosecutor’s office.” On September 22, 2022, the Court held a consolidated
21 Preliminary Injunction Hearing and Bench Trial in this matter pursuant to Rule 65(a)(2)
22 of the Federal Rules of Civil Procedure. (Doc. 247). On November 2, 2022, the Court
23 issued its Findings of Fact and Conclusions of Law (Doc. 269) and an accompanying
24 Order finding in favor of the Plaintiffs and awarding declaratory and injunctive relief
25 (Doc. 270). On the same day, the Clerk of Court entered Judgment in accordance with the
26 Court’s Order. (Doc. 271).

27 In the pending Motion, Defendant Vessella, without taking a position on the
28 proper scope, seeks clarification of the injunction. Specifically, Defendant Vessella

1 highlights a tension in the Court’s Order, which prohibits her from “conducting
2 investigations, pursuing discipline, and imposing discipline solely because a criminal
3 defendant’s attorney or an agent of that attorney directly initiated contact with a statutory
4 crime victim,” while also noting that nothing in the Order should “be construed to enjoin
5 . . . the requirement under Arizona Rule of Criminal Procedure 39(b)(12) that the defense
6 must communicate a request to interview a victim to the prosecutor rather than the
7 victim.” (Doc. 270 at 1 n.1, 2). Because “communicat[ing] a request to interview a
8 victim” to the victim directly (which the Order claims not to enjoin) falls within the scope
9 of “directly initiat[ing] contact with a statutory crime victim” (which the Order does
10 claim to enjoin), the Court agrees with Defendant Vessella that the injunction is
11 ambiguous as to whether Defendants may pursue discipline against attorneys and their
12 agents who communicate a request for an interview to the victim rather than the
13 prosecutor.

14 Plaintiffs do not oppose the Motion for Clarification but advocate that “[t]he Court
15 should not undermine its own ruling to authorize Defendant Vessella . . . to violate the
16 First Amendment rights of criminal defense attorneys and their agents by investigating
17 and disciplining them for making a ‘request to interview’ a crime victim.” (Doc. 277 at
18 2). On prior appeal, the Ninth Circuit noted that “because it is possible to contact a victim
19 without requesting to interview them, and thus violate § 13-4433(B) without violating
20 Rule 39(b)(12)(A), enjoining Defendants from enforcing § 13-4433(B) would relieve a
21 discrete injury.” (Doc. 220-1 at 5). Implicit in that holding is that the Court can enjoin
22 enforcement of § 13-4433(B) without necessarily enjoining enforcement of Rule
23 39(b)(12). Because Plaintiffs challenged the constitutionality only of §13-4433(B) and
24 because the Court therefore declared only § 13-4433(B) unconstitutional, the Court will
25 not enjoin enforcement of Rule 39(b)(12).

26 Defendant Brnovich opposes Defendant Vessella’s Motion. (Doc. 278). First,
27 Defendant Brnovich argues that there are no grounds for Rule 59(e) relief. Not so, as “a
28 motion seeking minor alterations in the judgment is properly one under Rule 59(e).”

1 *Barry v. Bowen*, 825 F.2d 1324, 1328 n.1 (9th Cir. 1987), *overruled on other grounds as*
2 *recognized by Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1462 (9th Cir.
3 1992); *see also Birdsong v. Wrotenbery*, 901 F.2d 1270, 1272 (5th Cir. 1990) (holding
4 that a motion to clarify the scope of an injunction falls under Rule 59(e)). Second,
5 Defendant Brnovich argues that “Vessella effectively asks the Court to . . . provide an
6 interpretation of [Rule 39(b)(12)]—an Arizona court rule which no one argues was
7 challenged in this action.” (Doc. 278 at 2). The Court understands Defendant Brnovich’s
8 concern but is certainly capable of clarifying that the injunction prohibits Defendants
9 from pursuing discipline against attorneys and their agents for violating § 13-4433(B),
10 but not Rule 39(b)(12), without improperly interpreting Rule 39(b)(12).

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

20 **IT IS ORDERED** that Defendant Maret Vessella’s Rule 59(e) Motion to Alter or
21 Amend the Judgment (Doc. 274) is **granted**, and a separate Amended Order will issue.

22 Dated this 7th day of December, 2022.

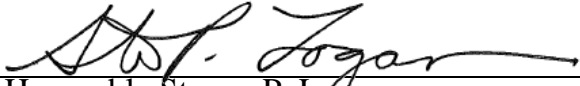
23 
24 Honorable Steven P. Logan
25 United States District Judge
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Exhibit F

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizona Attorneys for Criminal Justice,)
et al.,)

Plaintiffs,)

vs.)

Doug Ducey, et al.,)

Defendants.)

No. CV-17-01422-PHX-SPL

AMENDED ORDER*

15 This matter was tried before the Court on September 22, 2022. Pursuant to the
16 Findings of Fact and Conclusions of Law (Doc. 269) filed November 2, 2022, the Court
17 finds in favor of Plaintiffs. Accordingly,

18 **THE COURT DECLARES** that A.R.S. § 13-4433(B) violates the First
19 Amendment of the United States Constitution.

20 **IT IS ORDERED** that Defendants, their officers, agents, servants, employees,
21 and attorneys, and those persons in active concert or participation with them, are
22 permanently enjoined from enforcing A.R.S. § 13-4433(B) against a criminal defendant’s
23 attorney or an agent of that attorney.¹

24
25 * This Order amends the Court’s November 2, 2022 Order (Doc. 270).

26 ¹ Nothing in this Order shall be construed as enjoining Defendants from enforcing
27 A.R.S. § 13-4433(B) against a criminal defendant or an agent of the criminal defendant
28 who is not the criminal defendant’s attorney or an agent of that attorney. Nor shall
anything in this Order be construed to enjoin A.R.S. § 13-4433(B)’s requirement that
“[t]he prosecutor’s office shall promptly inform the victim of the defendant’s request for
an interview and shall advise the victim of the victim’s right to refuse the interview.”

1 **IT IS FURTHER ORDERED** that Defendant Brnovich, his officers, agents,
2 servants, employees, and attorneys, and those persons in active concert or participation
3 with him, are permanently enjoined from requiring that a criminal defendant’s attorney or
4 an agent of that attorney comply with A.R.S. § 13-4433(B).

5 **IT IS FURTHER ORDERED** that Defendant Brnovich, his officers, agents,
6 servants, employees, and attorneys, and those persons in active concert or participation
7 with him, are permanently enjoined from making referrals for disciplinary investigations
8 or other sanctions against a criminal defendant’s attorney or an agent of that attorney
9 based on an alleged violation of A.R.S. § 13-4433(B).

10 **IT IS FURTHER ORDERED** that Defendants Vessella and Silbert, their
11 officers, agents, servants, employees, and attorneys, and those persons in active concert
12 or participation with them, are permanently enjoined from conducting investigations,
13 pursuing discipline, and imposing discipline against a criminal defendant’s attorney or an
14 agent of that attorney based on an alleged violation of A.R.S. § 13-4433(B).

15 **IT IS FURTHER ORDERED** that in accordance with the Court’s November 23,
16 2022 Order (Doc. 276), the deadline to file a fee petition and bill of costs shall be
17 fourteen (14) days after the Ninth Circuit issues a decision on the appeal.

18 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion for Preliminary Injunction
19 (Doc. 238) is **denied as moot**.

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26 Finally, nothing in this Order shall be construed to enjoin enforcement of any other
27 provision of Arizona law, including a crime victim’s right to refuse an interview,
28 deposition or other discovery request pursuant to Article II, § 2.1(A)(5) of the Arizona
Constitution and the requirement under Arizona Rule of Criminal Procedure 39(b)(12)
that the defense must communicate a request to interview a victim to the prosecutor
rather than the victim.

