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**IN THE SUPREME COURT  
IN AND FOR THE STATE OF ARIZONA**

In the matter of:

Petition to Amend [Arizona Rule of Criminal Procedure 39\(b\)\(12\)](#)

Arizona Supreme Court  
No. R-22-0045

Pinal County Public Defender  
Comment in Support of Petition to Amend [Ariz. R. Crim. P. 39\(b\)\(12\)](#)

Pursuant to [Rule 28\(e\) of the Arizona Supreme Court Rules](#), the Pinal County Public Defender respectfully submits this comment supporting the adoption of the proposed amendment to [Rule 39\(b\)\(12\) of the Arizona Rules of Criminal Procedure](#). The protections of the [First Amendment of the United States Constitution](#) and [Article 2, Section 6 of the Arizona Constitution](#). This Court should end the discriminatory practice of censoring a subset of lawyers and delete the requirement that all requests for victim interviews from the defense be communicated to the prosecutor.

## **I. Pinal County Public Defender Interest Statement**

The Pinal County Public Defender provides legal defense services to indigent adults and juveniles facing criminal charges and/or mental health commitments when appointed by the Pinal County Superior Court or a Justice Court within Pinal County. Our goal is to provide superior legal representation, safeguard fundamental individual rights, and ensure equal access to the protections afforded by the United States Constitution, the Arizona Constitution, and the laws of Arizona.

Although public defenders aim to safeguard the constitutional rights of their clients, this does not mean that public defenders do not have constitutional rights of their own. Freedom of speech is a core right integral to the identity and practice of all public defenders. Properly exercised, the right to speak freely without government censorship promotes societal interests in truth and fairness. It is with this context that the Pinal County Public Defender recommends the adoption of the proposal outlined in the Petition.

## **II. [Rule 39\(b\)\(12\)](#) is an unconstitutional restriction on speech that harms criminal defense attorneys and alleged victims.**

Criminal defense attorneys do not shed their constitutional rights to freedom of speech because they speak while vindicating their clients' constitutional rights adjacent to criminal proceedings. [Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054, \(1991\)](#) (reaffirming that “disciplinary rules governing the legal profession

cannot punish activity protected by the First Amendment.”) Yet, [Rule 39\(b\)\(12\) of the Arizona Rules of Criminal Procedure](#) discriminates against criminal defense attorneys by banning them from directly asking alleged victims to discuss the facts of a criminal case. Rather than promote the pursuit of truth, this content-based restriction on speech undermines it. *See McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (recognizing that a function of the First Amendment is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail”) (internal citation omitted).

This Court should adopt the proposal as written to ensure that the Rules of Criminal Procedure do not violate either the First Amendment or [Article 2, Section 6 of the Arizona Constitution](#).

“The enduring strength of the First Amendment is that it allows people to speak their minds and express their beliefs without government interference.” *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 275, ¶ 7 (2019). “Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints” and also prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others.” *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (internal citations omitted). “Speech restrictions based on the identity of the speaker are all too often simply a means to control content.” *Id.*

“The dangers associated with content-based regulations of speech” such as the prohibition on criminal defense attorneys in requesting to speak with alleged victims about the facts of a criminal case “poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.” *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2366 (2018) (internal citation omitted). The harm of government censorship is particularly high when it is a criminal defense attorney who is speaking. This is because “the criminal defense bar” “has the professional mission to challenge actions of the State.” *Gentile*, 501 U.S. at 1051.

When criminal defense attorneys ask crime victims to answer questions about the case, they implicitly express views “about the goals of the criminal legal system and its proper functioning.” *Arizona Attorneys for Criminal Justice v. Ducey*, CV-17-01422-PHX-SPL, 2022 WL 16631088, at \*7 (D. Ariz. Nov. 2, 2022) It is no wonder that a federal court has already found that A.R.S § 13-4433(B)—the statutory analog to *Ariz. R. Crim. P. 39(b)(12)*—violates the First Amendment. Criminal defense attorneys and their agents have had their First Amendment right to “initiate contact” with crime victims restored since November 02, 2022, thanks to Judge Logan’s order enjoining the enforcement of A.R.S § 13-4433(B). *Arizona Attorneys for Criminal Justice v. Ducey*, CV-17-01422-PHX-SPL, 2022 WL 16631088, at \*26-27 (D. Ariz. Nov. 2, 2022)

Given Judge Logan’s order and that the United States Supreme Court does not consider “professional speech” to be a subset of speech akin to commercial speech subject to lesser First Amendment protections (*See Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371–72), this Court should end the content-based speech restrictions found in *Ariz. R. Crim. P. 39(b)(12)* by adopting the proposal outlined in the Petition.

### **III. Conclusion**

The requirement that criminal defense attorneys convey requests for a crime victim to submit to an interview is a content-based speech restriction that violates the First Amendment. Such restrictions on speech undermine the ability of the marketplace of ideas to uncover the truth. Nowhere is the truth-seeking function of speech more important than in the context of a criminal proceeding.

Accordingly, the Pinal County Public Defender respectfully recommends that the Court adopt the proposal outlined in the Petition.

Respectfully submitted this 1<sup>st</sup> day of May, 2023

By: /s/ Kate Milewski  
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