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SUPREME COURT OF ARIZONA

In the matter of:) Arizona Supreme Court
) No. R-22-0045
Petition to Amend Arizona Rule of)
Criminal Procedure 39(b)(12)) REPLY IN SUPPORT OF PETITION
) TO AMEND ARIZONA RULE OF
) CRIMINAL PROCEDURE 39(b)(12)
)
_____)

The Court should act quickly to amend Arizona Rule of Criminal Procedure 39(b)(12)(A) and (B) as requested in AACJ’s Petition because its restrictions on communications between criminal-defense lawyers and crime victims violate their free-speech rights under the U.S. and Arizona Constitutions. U.S. Const. amend. I; Ariz. Const. art. 2, § 6.

In *AACJ v. Brnovich*, the District Court found unconstitutional under the First Amendment A.R.S. § 13-4433(B), Rule 39(b)(12)'s analogue statute.¹ The District Court's legal reasoning regarding the statute applies equally to the similar restrictions in Rule 39(b)(12).² In short, like the unconstitutional statute, Rule 39(b)(12) is a speaker- and content-based restriction on speech that violates fundamental free-speech principles without adequate justification.

AACJ's Petition to this Court did not "misrepresent" or "obfuscate" anything about the federal court litigation, as some Comments claim.³ The complete court record – the District Court proceedings from May 2017 through

¹ *AACJ et al. v. Brnovich et al.*, No. CV-17-01422-PHX-SPL (Nov. 2, 2022). See also **Exh. 9** (District Court docket for *AACJ v. Brnovich*). All of the commenters opposing AACJ's Petition in this forum participated in the federal court proceedings. Arizona Voice for Crime Victims ("AVCV") sought to intervene as a defendant in the District Court, along with several individual crime victims (Doc. 35), and also filed amicus curiae briefs in the U.S. Supreme Court during the previous appeal proceedings and in the Ninth Circuit in the Attorney General's currently pending appeal. Arizona Prosecuting Attorneys' Advisory Council ("APAAC") filed an amicus curiae brief in the District Court (Doc. 38). Mr. Udelman filed an amicus curiae brief in the District Court on behalf of several organizations (Doc. 41). The Maricopa County Attorney's Office ("MCAO") filed an amicus curiae brief in the currently pending Ninth Circuit appeal.

² AACJ does not claim that the District Court ruled on the constitutionality of Rule 39(b)(12).

³ AVCV Comment at 2, 6. In fact, despite their authors' participation in the federal proceedings, some of the Comments appear to misunderstand those proceedings and what the District Court concluded. *E.g.*, AVCV Comment 4 (**incorrectly stating**, "[A]ll that can be said [of the District Court's orders] is that while criminal defense attorneys have a First Amendment right to 'initiate contact' with crime victims, **their right stops there.**").

2022, the Ninth Circuit proceedings in 2020 and 2021, the proceedings in the U.S. Supreme Court in 2021 and 2022, and the Attorney General’s current appeal to the Ninth Circuit – is publicly available.⁴ The documents from the federal litigation that are most relevant to the Petition are already before this Court as exhibits submitted with the Petition and with some Comments.⁵ And with this Reply, AACJ is including the District Court docket and the complete transcript of the trial on the merits before Judge Logan on September 22, 2022.⁶

As the trial transcript demonstrates, AACJ and the other plaintiffs in the federal litigation presented substantial evidence about the types of communications they wish to have with crime victims and how requiring prosecutors to act as the

⁴ No defendant has sought a stay of the District Court’s orders in any court, and this Court should not delay a decision on AACJ’s Petition while the current appeal is pending at the Ninth Circuit. The median time for the disposition of an appeal at the Ninth Circuit is more than one year. *See* U.S. Court of Appeals - Judicial Caseload Profile, https://cdn.ca9.uscourts.gov/datastore/general/2022/Ninth_Circuit_Judicial_Caseload_Profile_June2022.pdf. And Rule 39(b)(12) continues to violate the free-speech rights of criminal-defense team members and crime victims each day that it remains in effect. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *see Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009); *Jacobsen v. U.S. Postal Serv.*, 812 F.2d 1151, 1154 (9th Cir. 1987). *See also* AVCV Comment at 11 n.2 (acknowledging that the pending appeal “does not affect this Comment”).

⁵ *See* Petition, Exhs. 2-5; AVCV Comment, Exhs. A-F.

⁶ **Exh. 9** (District Court docket); **Exh. 10** (trial transcript). At the Court’s request, AACJ will submit any other portion of the federal court record that the Court wishes to review.

gatekeeper for those communications harms the free-speech rights of defense-team members. The federal trial likewise contained substantial evidence about how forcing defense lawyers to communicate with victims through prosecutors also harms victims by closing off opportunities for them to ask for and receive important information from the defense.

The federal trial transcript also demonstrates that the defendants in that litigation could not present evidence of a government interest sufficient to justify the speaker-based restriction in A.R.S. § 13-4433(B). In this forum, some Comments suggest that the similar restrictions in Rule 39(b)(12) are justified to protect a victim’s right to refuse an interview or other discovery request from the defense.⁷ But, as one Comment notes, other statutes already exist in Arizona to ensure that crime victims receive repeated advisements of their rights throughout the course of criminal proceedings, including their right to refuse to be interviewed

⁷ The District Court rejected this argument with respect to A.R.S. § 13-4433(B). *See* Exh. 2 at 5 (finding that “[t]he victim’s right to refuse a defense interview, however, remains enforceable beyond a final disposition, except in cases involving a dismissal with prejudice or an acquittal” (citing A.R.S. § 13-4433(H)); *id.* at 38 (finding that “[t]he Statute is not narrowly tailored to protecting victims’ right to refuse an interview by the defense team because it is not ‘actually necessary’ to achieving that goal” (citing *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011)); *id.* at 28 (noting that “[m]ore than a dozen states give victims the right to refuse an interview, deposition or discovery request by the defense,” but “no other jurisdiction limits the defense’s ability to initiate contact with crime victims in the first place”).

by the defense.⁸ And, although other jurisdictions give crime victims the right to refuse the defense’s interview request, no other jurisdiction in the country prophylactically restricts communications between defense counsel and crime victims.⁹ In fact, now that the District Court has enjoined A.R.S. § 13-4433(B), Rule 39(b)(12) is the only law in the country – whether statute, rule, or regulation – that designates the prosecutor as the gatekeeper for communications, on any topic, between the criminal-defense team and crime victims. Given the lack of similar speech restrictions in any jurisdiction, Rule 39(b)(12)’s restrictions cannot be necessary to protect a victim’s right to refuse defense discovery requests.

Nor can the speech restrictions in Rule 39(b)(12) be justified by any other government interest.¹⁰ In fact, the evidence presented in the federal proceedings

⁸ Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies at 6 (citing A.R.S. §§ 13-4408(A)(1), -4438, and -4405).

⁹ AVCV Comment at 10 (quoting District Court order). *See* Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies at 5 (“Despite 30 years of victims’ rights expansion across the county, Arizona stands alone in adopting Court rules and legislation that prohibit defense attorneys from communicating directly with victims.”).

¹⁰ APAAC claims that the rule is permissible as a “procedural rule” for the “management of criminal proceedings,” APAAC Comment at 5, and that “[t]he personal speech rights of defense counsel are not pivotal, implicated, or consequential when it comes to regulating pretrial criminal discovery procedures,” *id.* at 4. These arguments are incorrect as a matter of First Amendment law. *See generally* Pinal County Public Defender Comment (and authorities discussed); *see also, e.g., Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) (“Viewpoint discrimination occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject.”) (cleaned up); *Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 595 (9th Cir. 1985)

shows that restricting communications between the defense team and crime victims actually undermines the truth-seeking function of the criminal-legal system and chills political speech, including speech “about the goals of the criminal legal system and its proper functioning.”¹¹

Moreover, the Comments to the Petition, both in support and in opposition, demonstrate that there is real confusion among agencies and lawyers (and probably crime victims) about the meaning and scope of Rule 39(b)(12) in light of the District Court’s orders enjoining A.R.S. § 13-4433(B).¹² For instance, APAAC appears to agree with AACJ that “interview” in Rule 39(b)(12) pertains only to pretrial interviews governed by Rule 15.3.¹³ AVCV, on the other hand, criticizes

("[A]ttorneys and other trial participants do not lose their constitutional rights at the courthouse door.”).

¹¹ Exh. 2 at 13; *see id.* at 20 (finding that “as opposed to contributing to the proper functioning of the legal system, there is evidence that the Statute actually detracts from it by inhibiting the defense team’s ability to investigate the relevant facts”).

¹² Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies at 2; MCAO Comment at 2 (“[T]he [District Court’s] holding led to confusion.”); AVCV Comment at 14 (“[P]arts of the [District] Court’s [orders] were ambiguous.”). Since shortly after the District Court’s orders, MCAO has been sending letters to crime victims to notify them about the ruling. *See Exh. 11* (MCAO public records) (informing victims, “[T]he defendant’s attorney and the attorney’s employees are prohibited from asking you to participate in an interview or otherwise interview you. Any request to interview you must still go through the Maricopa County Attorney’s Office.”).

¹³ APAAC Comment at 1 (“The intent and effect of Rule 39(b)(12) . . . is to regulate pretrial discovery procedures; namely interviews, depositions, and other discovery requests of the victim, made by the defendant, the defendant’s attorney, or other person acting on the defendant’s behalf.”).

that interpretation of Rule 39(b)(12) but offers no alternative interpretation.¹⁴

MCAO defines “interview” as a “question and answer session about the facts of a case” but says nothing about that rule’s relationship to Rule 15.¹⁵ And, as noted by the Directors of the Maricopa County Indigent Defense Agencies, defense-team members want to communicate with crime victims about “case-related issues that do not fall squarely within the scope of Rule 15 discovery,” communications that the District Court held are constitutionally protected speech, and in some cases political speech.¹⁶

Meanwhile, in a filing with the District Court, the Chief Bar Counsel stated that she wished to “investigate and seek discipline against defense attorneys who directly ‘request to interview’ a crime victim without going through the prosecutor,”¹⁷ and the District Court clarified that its orders allow the Bar to “pursue investigations or discipline based on an alleged violation of Rule

¹⁴ AVCV Comment at 15 (“The Plaintiffs’ argument at page 3 of their Response that ‘requests to interview a victim’ in Rule 39(b)(12)(A) must refer to formal interviews under Rule 15.3 is similarly unavailing.”).

¹⁵ MCAO Comment at 3.

¹⁶ *See* Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies at 3 (“[S]tatutory victims are not always witnesses to the alleged offense and do not always possess information relevant to prove or disprove elements of the crime but nonetheless have an interest in, for example, what terms the defense is seeking in a plea agreement, whether the defendant has expressed remorse, what the defendant’s motivations were, how the defendant is fairing while incarcerated, and other case-related issues that do not fall squarely within the scope of Rule 15 discovery.”).

¹⁷ Exh. 4 at 1-2.

39(b)(12).”¹⁸ MCAO, the largest prosecuting agency in the state, which regularly submits charges to the State Bar against criminal-defense attorneys, is advising its prosecutors to “notify your chain of command” if they learn that any defense-team members have contacted crime victims in their cases for any reason.¹⁹

In this environment, criminal-defense lawyers and other members of their teams are understandably self-censoring and refraining from constitutionally protected speech, even speech that is plainly not covered by Rule 39(b)(12) and that the District Court held is fully protected by the First Amendment. This Court recently said, “Lawyers are not — nor have they ever been — subject to discipline because of their political views or speech[.]”²⁰ As long as Rule 39(b)(12) remains on the books, however, criminal-defense lawyers and those who work with them cannot fully exercise their constitutionally protected speech rights and are subject

¹⁸ AVCV Comment, Exh. E at 3.

¹⁹ **Exh. 11** (MCAO public records) (“We will vigorously defend the rights of victims! Thanks for your vigilance and please notify your chain of command if Motions reference this Decision are filed in your respective cases or if you are contacted by victims who are contacted by defense attorneys of their staff.”).

²⁰ See Jerod Macdonald-Evoy, *Sanctions for Bogus Election Lawsuits Spurs GOP Proposal to Protect Attorneys from Punishment*, AZ Mirror (Feb. 14, 2023), available at <https://www.azmirror.com/2023/02/14/sanctions-for-bogus-election-lawsuits-spurs-gop-proposal-to-protect-attorneys-from-punishment/>.

to the specter of professional discipline (or worse) if they attempt to do so. The Court should not delay amending Rule 39(b)(12) as requested by AACJ.

RESPECTFULLY SUBMITTED June 1, 2023.

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