



Exhibit 10

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizona Attorneys for Criminal)
Justice, et al.)
) CV-17-01422-PHX-SPL
Plaintiffs,)
vs.) Phoenix, Arizona
) September 22, 2022
Doug Ducey, et al.,) 9:08 a.m.
)
Defendants.)
)
)
)

BEFORE: THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BENCH TRIAL/PRELIMINARY INJUNCTION HEARING

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SUMMARY OF PROCEEDINGS

1		
2	Opening Statement by Ms. Brody	8
3	Opening Statement by Mr. Catlett	19
4	Closing Statement by Mr. Keenan	164
5	Closing Statement by Ms. Sawyer	172
6	Rebuttal Closing Statement by Mr. Lane	179
7		

INDEX

9	WITNESSES	Direct	Cross	Redirect
	Plaintiffs' Witnesses			
10	Richard Burr	39	56	
	Rhonda E. Neff	75	98	111
11	Rich Robertson	113	126	
	John A. Canby	130	150	161
12				
13				
14				

E X H I B I T S

16	<u>Exhibit No.</u>	<u>Description</u>	<u>Admitted</u>
17	100	APAAC Letter	28
	101	Apache County Attorney Letter	28
18	102	Arizona Coalition Against Domestic Violence Letter	28
	103	Maricopa County Attorney's Office Letter	28
19	104	National Lawyers Guild Letter	28
	105	State Bar Committee Report	28
20	106	1990 Publicity Pamphlet	28
	107	Victims' Rights Implementation Act	28
21	108	1989 Rules of Criminal Procedure	28
	109	Bearup v. Ryan No. 16-cv-3357-SPL (D.Ariz. 1/20/17)	28
22	110	Chappell v. Ryan No. 15-cv-478-SPL (D.Ariz. 7/21/15)	28
23			
24			
25			

P R O C E E D I N G S

1
2 THE CLERK: We are on the record in CV17-1422, Arizona
3 Attorneys for Criminal Justice versus Doug Ducey, before the
4 court for a bench trial.

5 Counsel, please state your appearances.

6 MR. LANE: Morning, Your Honor. David Lane, Kathy
7 Brody and Jared Keenan on behalf of plaintiffs.

8 THE COURT: Good morning to all of you.

9 MR. CATLETT: Good morning, Your Honor. My name is
10 Mike Catlett. I am Deputy Solicitor General at the Arizona
11 Attorney General's office. And I am here on behalf of Attorney
12 General Mark Brnovich.

13 I have a bit of a team here with me this morning. At
14 counsel table with me is my colleague Kate Sawyer and my
15 colleague Katlyn Divis.

16 I also have a couple of members of our team in the
17 gallery, Sarah Mancuso and Rachel Anklen, who are staff members
18 at the AG's office and also aspiring law students. And then I
19 have Solicitor General Beau Roysden here with us. He actually
20 has a matter in front of Judge Snow at 9:30, so he will be in
21 and out of the courtroom a bit today.

22 THE COURT: Thank you very much. Good morning to all
23 of you.

24 MR. KING: Good morning, Your Honor. Daniel King on
25 behalf of Maret Vessella.

1 MR CARLTON: Good morning, Your Honor, Tyler Carlton
2 of Fennemore Craig on behalf of Heston Silbert.

3 THE COURT: Good morning to you gentlemen as well.

4 First of all, welcome to our courtroom here. And I'm
5 very pleased that all of you did such a fine job briefing all
6 of the issues that we have in the case. And obviously it's a
7 case that's about five years old now, and today we are set for
8 this preliminary injunction hearing and a bench trial pursuant
9 to Rule 65(a)(2).

10 Plaintiff challenged the constitutionality of Arizona
11 Revised Statute Section 13-4433(b), which is the statute which
12 provides that when a criminal proceeding is ongoing, the
13 defendant, the defendant's attorney, or an agent of the
14 defendant, shall only initiate contact with the victim through
15 the prosecutor's office.

16 The prosecutor's office shall promptly inform the
17 victim of the defendant's request for an interview and shall
18 advise the victim of the victim's right to refuse the
19 interview. The statute was enacted by the Arizona Legislature
20 in 1991.

21 Plaintiffs' operative second amended complaint alleged
22 two counts. Number 1, a violation of the first amendment.
23 Number 2, unconstitutional overbreadth.

24 See document 150, pages 18 through 20.

25 The plaintiff has asked this Court to, number 1,

1 declare the statute -- that the statute violates First
2 Amendment, and, number 2, to enjoin the defendants and those in
3 concert with them from enforcing Arizona Revised Statute
4 13-4433(b).

5 Again, see document 150 at page number 20.

6 The defendants Brnovich and Silbert assert that the
7 statute does not violate the First Amendment.

8 See document number 242.

9 Defendant Vessella takes no position on the
10 constitutionality of the statute, but requests that any
11 injunction be limited to enjoin the chief bar counsel from
12 seeking sanctions solely on the basis that defense counsel
13 contacted a victim without going through the prosecutor's
14 office. And that's in violation of the statute as
15 communications could still violate other statutes or ethical
16 rules.

17 See document number 243.

18 By way of procedural history in the case, and for the
19 record, this case was initially filed the 8th of May of 2017.

20 See document number 1.

21 I dismissed plaintiffs' complaint, first amended
22 complaint, and second amended complaint, for lack of stating.

23 See documents 119, 147, 191, and 210.

24 On appeal, the Ninth Circuit Court of Appeals reversed
25 and remanded this case back to me, which is spelled out in

1 document number 220.

2 The Ninth Circuit held that plaintiffs' alleged
3 injuries were traceable to the defendants based on their
4 enforcement authority.

5 See docket number 220 at pages 3 and 4.

6 The Ninth Circuit Court of Appeals further found that
7 plaintiffs established redressability because the statute
8 prohibits all direct contact with victims, whereas Arizona Rule
9 of Criminal Procedure 39(b)(12)(A), which plaintiffs do not
10 challenge, requires only that the defense communicate requests
11 to interview a victim through the prosecutor.

12 Again, see document 220 at lines -- sorry, Pages 4 and
13 5.

14 The Ninth Circuit did, however, agree that *Younger*
15 abstention is not required.

16 See document 220 at page number 6.

17 And again, as the parties are well aware, the Ninth
18 Circuit Mandate was issued on April the 26th of 2022.

19 Ladies and gentlemen, the lawyers here right now,
20 obviously we don't have a jury, so I handle these preliminary
21 hearing bench trials a little different. But what I would like
22 to do is hear a brief opening statement from both sides.

23 I will give both sides ten minutes, and then after
24 that, I have a lot of questions for the plaintiffs. I have a
25 lot of questions for the defense. Take great notes because you

1 know the issues that I am concerned with, and you can shape
2 your case as you want to plead it to me after I have asked all
3 of those questions.

4 If you have answers, I would love to hear the answers
5 at this point. If you don't, I know I am allowing for some
6 additional briefing of, I believe, 10 or 12 pages after we
7 finish today.

8 So with that, do we have one person on the plaintiff
9 side, or all three of you want to give a brief opening
10 statement to me?

11 MR. LANE: Your Honor, Ms. Brody is going to do the
12 openings for us.

13 THE COURT: Ms. Brody, if you would like, you can
14 approach the lectern. I just ask you to pick one microphone,
15 if you would, please.

16 MS. BRODY: Thank you, Your Honor, is this working?

17 THE COURT: Yes, perfect.

18 MS. BRODY: Okay. And I may switch glasses from time
19 to time, just so I can see you but also see my papers.

20 THE COURT: You know, I refuse to get bifocals also.

21 MS. BRODY: Great minds, as they say.

22 Well, good morning, Your Honor. Thank you very much
23 for the time today. And we do appreciate your opening remarks
24 and level setting or background on the case.

25 And I do have some very brief remarks by way of

1 opening, and my remarks are going to summarize the important
2 facts, Your Honor, that we intend to present to you as
3 testimony as our evidence today.

4 And I will talk a little bit about what we expect the
5 defendants will seek to prove and our position on those facts
6 as well.

7 And so the way that I want to organize this, Your
8 Honor, to talk about the evidence that we are going to present
9 today, is really in four categories.

10 And so the first category, Your Honor, it's really
11 legal rather than factual. But it's important as a preliminary
12 overarching matter, and I think it also responds to the
13 evidence that we expect the defendants to put forth today.

14 And we believe, Your Honor, and the defendants have
15 also stated this, that the issues presented in this case are
16 largely legal issues. They are largely legal in nature.

17 And, of course, as you stated, Your Honor, our claim
18 is that A.R.S. Section 13-4433(b), what we call the victim
19 contact prohibition, is unconstitutional because it violates
20 the free speech rights of criminal defense lawyers and others
21 working on the criminal defense team in violation of the First
22 Amendment.

23 THE COURT: You know, Counsel, every word that
24 everyone says in this courtroom is incredibly important to me.
25 At 56, I no longer write as fast as I used to. If you could

1 slow down just a little bit, that would be very helpful for me.

2 MS. BRODY: You got it, Your Honor. Thank you for
3 that feedback.

4 So really, Your Honor, the statute itself is the first
5 category that I want to touch on briefly. And as Your Honor
6 said, the statute says, and this is a quote, "The defendant's
7 attorney or an agent of the defendant shall only initiate
8 contact with the victim through the prosecutor's office."

9 And the two things that I want to point out to the
10 Court about the statute relate to the evidence that we expect
11 the defendants to present today.

12 So one, the first thing about the statute, Your Honor,
13 is that on its face, it regulates speech. It explicitly
14 regulates how defense lawyers communicate with crime victims.
15 How they are required to, quote, "initiate contact," with crime
16 victims.

17 And we expect the defendants to present evidence, Your
18 Honor, that they claim will show that the statute regulates
19 conduct and not speech. And that evidence from the defendants
20 is undermined by the very words of the statute that we are
21 challenging, which regulates speech on its face.

22 The second thing about the statute, Your Honor, is
23 that on its face, it only regulates the speech of the defense
24 team. It doesn't regulate anybody else. That's facial
25 viewpoint discrimination.

1 The defendants here claim that they will present
2 evidence that the statute furthers certain government
3 interests, and that the statute is consistent with some
4 historical practice of prosecutors representing victims. And
5 those things just don't hold up, Your Honor. They're not true.

6 And our evidence will show that this statute
7 undermines the truth seeking function of the criminal legal
8 system, as well as other important government interests, and
9 also in fact that it harms victims, the people that defendants
10 claim that the law is trying to protect. So that's the first
11 category, Your Honor.

12 The second category of evidence that we expect to
13 present to you today, we are going to present evidence to you,
14 Your Honor, about the types of things that plaintiffs and
15 others working on criminal defense teams wish to communicate
16 with victims about.

17 We are going to tell you about the types of speech
18 that this statute is stopping from happening. And these things
19 are topics that go beyond plaintiffs and other members of the
20 defense team just doing their job. These really go to the
21 heart of their personal beliefs as well.

22 And so in this category of types of things that --
23 types of speech that the statute is stopping from happening,
24 you are going to hear about DIVO or Defense Initiated Victim
25 Outreach in death penalty cases.

1 We have our expert here, Mr. Dick Burr. He is going
2 to testify about DIVO, the philosophy behind that, and its
3 importance in death penalty cases. And so you will hear from
4 him about the topics that defense teams want to talk to victims
5 about through this DIVO process.

6 THE COURT: Counsel, I just need to stop you for just
7 one minute. That raised an issue.

8 Have the parties talked about witnesses' presence in
9 the courtroom?

10 MS. BRODY: Yes, Your Honor, we have discussed that,
11 and the defendants have said that they are going to invoke the
12 Rule. Our intention is that to put Mr. Burr on as our first
13 witness, he's an expert. The remainder of our witnesses are
14 parties to this case.

15 THE COURT: Okay, very well. Thank you. My apologies
16 for interrupting.

17 MS. BRODY: Not at all, not at all. Thank you.

18 So you will hear from Mr. Burr. And you are also
19 going to hear testimony that lawyers and others on the defense
20 team want to talk to victims in advance of trial because the
21 information that victims have can be crucial to understanding
22 the facts of the case.

23 And sometimes being able to get information from a
24 victim about what happened can result in resolution before
25 trial, which stops the victim from having to show up at hearing

1 after hearing after hearing, as the trial date approaches, and
2 also would stop the victim from having to testify at trial at
3 all.

4 And so sometimes, having that information from the
5 victim can, you know, give both sides more information about
6 how the case should resolve properly, and save not only the
7 victim, but the system the expense and burden.

8 And you will hear evidence, Your Honor, that, you
9 know, prosecutors in a case, they don't always know or
10 understand all the facts. And a defense investigation that
11 includes being able to speak to the victim pretrial, can be
12 helpful for the defendant, but for the victim and the system as
13 a whole as well.

14 And then, Your Honor, other things that the defense
15 team wants to talk to victims about, one very important
16 category is mitigation evidence. And so you are going to hear
17 testimony about this as well. That particularly in death
18 penalty cases mitigation evidence is important.

19 And we're going to present evidence that many
20 homicides occur within families. And so when that happens, the
21 statutory crime victims, who are relatives of the deceased
22 person, are also relatives of the defendant.

23 And we are going to present evidence, Your Honor, that
24 capital defense teams in particular are required to explore all
25 information that might help their clients escape the death

1 penalty.

2 And some death penalty cases, as you know, Your Honor,
3 they don't really involve questions of liability. The fact
4 that the defendant did the killing is not at issue in many
5 death penalty cases. And so really, mitigation, and what the
6 penalty is in the case is the most important issue, but really,
7 the only issue.

8 And in particular, in those killings within a family,
9 those family members of the deceased, who are also family
10 members of the defendant, they have this crucial mitigation
11 evidence that would include things like, the defendant's youth,
12 defendant's upbringing, any medical issues, any abuse issues in
13 the family that might have brought the defendant to that day.
14 And so so much information for mitigation can rest with these
15 folks.

16 In addition to that, Your Honor, we are also going to
17 present evidence that defense lawyers and others on the defense
18 team, they want to talk to victims about the process, about the
19 criminal legal process, what to expect in the process. Their
20 only experiences with the process that might help get
21 resolution for everybody involved.

22 And, you know, some defense lawyers have been doing it
23 for a really long time. Some defense lawyers have a really
24 unique perspective on the criminal legal process. Some defense
25 lawyers have spent years as a prosecutor beforehand, so they

1 can offer a differing view that they might want to talk to
2 victims about.

3 And this information about the process from different
4 perspectives, Your Honor, that information can be so helpful
5 for victims. And it's not always provided by others in the
6 system. It's not always provided by the prosecutor in the
7 case.

8 And so this information finally, Your Honor, the final
9 category of information that people might want to talk to
10 victims about, there's also information that victims might want
11 or need to hear from the defense team. The defense team might
12 have access to information that the prosecution or others in
13 the system simply don't have.

14 For instance, information about the defendant, or
15 information about the circumstances of the crime. And that
16 information can be helpful to victims to find solace or
17 closure. And so that's the second category, is things that we
18 want to talk about -- is the second category of evidence.

19 The third category of evidence that we are going to
20 focus on today, Your Honor, relates to the chill on speech that
21 is caused by this statute, that is caused by the victim contact
22 prohibition.

23 So the evidence will show, Your Honor, that the
24 statute stops lawyers and others on the defense team from
25 initiating contact with crime victims. That's what the statute

1 prohibits on its face. So of course it stops them from doing
2 that.

3 The evidence will also show, however, that this law
4 stops even more speech than that. It stops speech beyond the
5 defense team simply initiating contact with crime victims.

6 The evidence will show that plaintiffs in this case
7 and other members of the defense team, they're licensed
8 professionals. They take their obligations as licensed
9 professionals seriously, and they don't want to break the law.
10 They don't want to wreck their reputations. Their work is
11 important to them personally, and for their families.

12 The evidence will also show, Your Honor, that they
13 don't even want to come close to the line, or do anything that
14 could possibly result in allegations against them that they
15 have violated the law.

16 And you will hear testimony about a -- about the
17 atmosphere of threats around victims issues that sort of lead
18 attorneys and others on the defense team to really shy away
19 from any contact with victims.

20 And you will also hear testimony, Your Honor, about
21 ambiguities in the law that can result when lawyers and others
22 working on the defense team, when they encounter these
23 ambiguities in the law, their reactions are to act in an
24 abundance of caution.

25 And so the evidence is going to show that the criminal

1 defense team must be cautious, even when victims initiate
2 contact with them, because they don't want to be accused of any
3 wrongdoing. And so even in those circumstances, members of the
4 defense team are anxious and cautious about engaging in speech
5 with crime victims.

6 And then finally, Your Honor, the fourth category of
7 information that our presentation is going to focus on is, we
8 are going to present some information related to the
9 government's purported interest underlying this law.

10 And of course the main purported interest that the
11 government has put forth here is protecting victims from
12 retraumatization in the criminal legal system, and we agree
13 that that is a legitimate government interest of course.

14 But you are also going to hear evidence, Your Honor,
15 that the law doesn't protect crime victims against
16 retraumatization.

17 In fact, the evidence will show that contact with the
18 defense team in advance of trial can be helpful for victims.
19 It can help them get information sooner.

20 It can help them get more information, and that
21 information about whatever it is that they are wondering about,
22 that they are needing, that can help them understand the
23 process better.

24 And it can help reach a resolution, not just for the
25 victim, but for the entire system in a less traumatizing and

1 less burdensome way.

2 It could help the case resolve before trial, which
3 saves the victim from retraumatization, saves the victim from
4 having to attend hearing after hearing, from having to testify.
5 And the evidence will also show that the system, the legal
6 system, is better off if the defense team can speak with crime
7 victims.

8 Our system is an adversary system, of course, but it
9 is a truth seeking system. That's why we have trials. But the
10 evidence will show that preventing communication between a
11 crime victim and the defense team undermines that truth seeking
12 function.

13 And in the end, Your Honor, the evidence will show
14 that the government's asserted interest are simply not enough
15 to justify this law.

16 The defendants have scant evidence, if any really,
17 that this law furthers any legitimate government interest. And
18 the defendants are required to support whatever interests they
19 put forth with actual evidence. That's the law. And so there
20 is no such evidence, Your Honor.

21 So again, and in conclusion, the evidence that we
22 present today will demonstrate that these important interests
23 at stake for the defendant, for victims, for the system as a
24 whole, but of course the First Amendment rights of the
25 plaintiffs and others on the defense team, all of those

1 interests are damaged by this victim contact prohibition, and
2 that the law is unconstitutional and violates the First
3 Amendment.

4 Thank you, Your Honor.

5 THE COURT: Counsel, thank you so much for your words.
6 Defense, do you have an opening statement?

7 MR. CATLETT: Yes, Your Honor.

8 THE COURT: Come on up, please.

9 MR. CATLETT: Thank you, Judge. As the Attorney
10 General indicated in the prehearing statement, we believe that
11 most of the testimony and evidence to be presented today is
12 irrelevant. And I don't say that to be pejorative, and I think
13 actually plaintiffs largely agree with that proposition.

14 And it's irrelevant because the issues in front of
15 Your Honor are purely legal. Plaintiffs assert a facial
16 challenge to the statute at issue. And so therefore, as Your
17 Honor well knows, plaintiffs are required to show that the
18 statute is unconstitutional in all circumstances.

19 The experience of individual plaintiffs is irrelevant
20 to that determination, and so their testimony about how those
21 experiences may have impacted them in individual cases, we
22 believe, is irrelevant.

23 Nothing in the Court's ruling on the facial
24 constitutionality of the statute will prevent plaintiffs from
25 claiming that the statute is invalid as applied to them in

1 specific cases.

2 There are really only two issues for purposes of
3 whether the statute is unconstitutional and for purposes of
4 plaintiffs' facial challenge.

5 The first issue is, what is the correct legal statute
6 for determining whether the statute violates the First
7 Amendment on its face?

8 And the second question is, does the statute satisfy
9 that standard?

10 So turning to the first question. What is the correct
11 standard for the Court to apply in determining whether this
12 particular statute violates the First Amendment on its face?

13 First, plaintiffs have severely boxed themselves in in
14 this case, and they did so by trying to avoid issues with
15 Article III standing and with abstention.

16 And in order to avoid issues with those doctrines,
17 they said, this is not about the clients that we represent in
18 state court. And it's not about positions that we want to take
19 in furtherance of the rights or interests of those defendants.
20 This is about our own First Amendment rights, and only about
21 our First Amendment rights, and about speech that we want to
22 engage in purely as lawyers in order to do our jobs better.

23 What does -- so it's important then to sort of view
24 the issues through the prism of that particular theory that
25 plaintiffs have presented in the way that they have limited it.

1 So the question is, what does the statute do vis-a-vis
2 plaintiffs? Not vis-a-vis their clients that they represent in
3 state court or the arguments they might want to make in
4 furtherance of their clients' rights. What does it do
5 vis-a-vis the plaintiffs?

6 You have plaintiff attorneys and you have one
7 plaintiff private investigator. And what the statute does is
8 it governs how they conduct discovery or obtain information
9 during ongoing criminal proceedings.

10 It governs the professional conduct of lawyers and
11 investigators. And we know that it governs the professional
12 conduct of lawyers and investigators, because in order to
13 generate Article III standing, they brought in Colonel Heston
14 Silbert, who is the head of DPS and oversees private
15 investigator professional conduct matters.

16 And they brought in Maret Vessella, who is the chief
17 bar counsel for the State Bar of Arizona. That's pretty good
18 proof that as to plaintiffs, the primary purpose of the statute
19 is to govern their professional conduct. That's why the Ninth
20 Circuit held that there's Article III standing in this case and
21 remanded back to this court.

22 Like any other number of regulations, though, of
23 attorney conduct, the statute may have an incidental effect
24 on speech. The United States Supreme Court has repeatedly said
25 that statutes regulating professional conduct may incidentally

1 impact speech, but that doesn't create a constitutional issue.

2 They said that in the *Gentile* case. They have said it
3 in cases involving lawyer advertising, which doesn't even
4 involve courtroom proceedings, which I think are more at the
5 core of how attorneys conduct themselves as members of the bar.

6 The Court has said that state bars and state
7 governments may regulate attorney advertising. I think that's
8 closer, much closer to speech than what Your Honor has in front
9 of you in this case. And yet the Supreme Court said, that's
10 professional conduct, and even though that may incidentally
11 impact speech, we are going to apply a rational basis standard.

12 So this -- and you can see, this particular regulation
13 is like any number of regulations that states and state bars
14 and state supreme courts enact in order to govern attorney
15 conduct.

16 For example, there are limitations on contacting other
17 represented parties including represented victims and
18 represented codefendants. An attorney for a criminal defendant
19 cannot reach out and make direct contact with a victim who is
20 represented by an attorney, without first seeking permission to
21 do so from that attorney.

22 And a criminal defense lawyer representing a criminal
23 defendant cannot reach out to a represented codefendant without
24 going through the codefendant's attorney.

25 It's no different than limitations on pre- and

1 post-trial jury contact. It is no different than limitations
2 on ex parte contact with the court or the court staff. It is
3 no different than limitations on the number or length of
4 discovery requests and court filings.

5 It's no different than limitations on making public
6 statements that could taint the jury pool. And it's no
7 different than limitations on lawyer advertising. The
8 arguments that plaintiffs are making in this case, you could
9 make the same arguments about all of those restrictions on how
10 lawyers conduct themselves during ongoing court proceedings.

11 So because the statute at issue primarily regulates
12 conduct, it's subject to rational basis review. Even if the
13 Court determines that the statute primarily regulates speech,
14 it merely regulates the manner of speech. It regulates how a
15 conversation is initiated, not what is contained in the
16 conversation.

17 There's no content preference contained in the
18 statute. And the message desired to be conveyed is completely
19 irrelevant to whether the requirement to make contact through
20 the prosecutor is triggered or not.

21 The statute applies, regardless of what the message is
22 to be conveyed, and therefore, it is a content-neutral time,
23 place, and manner restriction on speech, and at most, it's
24 subject to intermediate scrutiny.

25 The second question that Your Honor will need to

1 answer in this case is whether the statute satisfies the legal
2 standard. The Attorney General thinks it clearly does. And
3 the statute -- it does so because the statute serves at least
4 four compelling state interests.

5 First, it implements and protects multiple
6 constitutional rights found in the Arizona Constitution and in
7 the Victim's Bill of Rights.

8 Second, it regulates professional conduct of lawyers
9 and their agents. It's well established that the states are
10 permitted to do so, and that they have a compelling interest in
11 regulating attorney conduct, and the conduct of attorneys'
12 agents, particularly during ongoing criminal court proceedings,
13 which is the only time when this statute applies.

14 Third, the statute protects against retraumatization.
15 Plaintiffs' own expert will support that you need to be
16 extremely careful when you approach victims because there's a
17 high risk of retraumatization.

18 This statute merely protects situation where attorney
19 makes direct -- defense attorney makes direct contact, and
20 that triggers retraumatization in the victim.

21 And fourth, it levels the playing field at least
22 somewhat, between victims who have the means and wherewithal to
23 retain counsel, and therefore are not subject to direct
24 contact, and those who can't or don't have the means or
25 wherewithal to obtain counsel.

1 The statute also leaves open ample channels of
2 communication. First, it only applies when formal proceedings
3 are ongoing, and it applies to a narrow set of individuals.

4 Second, it only applies to counsel and agents retained
5 by the defendant.

6 Third, it does not restrict a victim from unilaterally
7 reaching out to defense or defense counsel. It does not
8 prohibit a state court from lifting the restriction in
9 individual cases.

10 You will hear witnesses today tell Your Honor that
11 they have made requests to state courts to allow them to make
12 direct contact, even though the statute requires that that be
13 through the prosecutor.

14 The plaintiffs in this case admitted over and over
15 again in deposition testimony that they have asked state courts
16 permission to make direct contact with crime victims, and that
17 sometimes that request is granted, and sometimes it's not. And
18 when it's not, they have a right to challenge those rulings on
19 appellate review.

20 Plaintiffs cannot identify a more narrow way to serve
21 each and all of the four compelling interests that are -- at
22 least four compelling interests that are served by the statute.
23 And so we think even if strict scrutiny applies, that the
24 statute would be facially constitutional.

25 Finally, this Court has applied the restriction that

1 is contained in 13-3344(b) on several occasions on federal
2 habeas review, concluding that the contact regulation is both
3 reasonable and non-burdensome.

4 And while I acknowledge the Court did not have First
5 Amendment challenge in front of it in those cases, we think
6 that the Court's instincts were correct. That it is a
7 reasonable regulation on attorney conduct, and that it's
8 non-burdensome. Therefore, we would ask that Your Honor grant
9 judgment in favor of the defendants and deny the plaintiffs'
10 request for declaratory judgment or injunctive relief.

11 THE COURT: Counsel, thank you very much for your
12 words. Before I ask the parties questions, I have the exhibit
13 list here. And I'm pretty sure both sides have met and
14 conferred about these exhibits.

15 The plaintiffs' list, I have form letter to victims.
16 Is there any objection from the defense?

17 MR. CATLETT: No, Your Honor.

18 THE COURT: They are received.

19 MR. LANE: We will stipulate to all defense exhibits
20 that we --

21 THE COURT: Just one second, please. I'm sorry,
22 counsel, what was that?

23 MR. LANE: We will stipulate to the admission of any
24 unobjected to exhibits from the defense as well.

25 THE COURT: Do you have any? I have 100 through 112.

1 Do you have any objections to any of those?

2 MR. LANE: I believe we do not. I think the ones we
3 objected to were the declarations, and we objected to them
4 under the hearsay rule. I am not sure what those were
5 numbered.

6 MS. BRODY: I believe those were removed from the
7 defendants' list; is that correct?

8 THE COURT: Okay. Do you have a copy of the defense
9 exhibit list?

10 MR. CATLETT: Yes, Your Honor.

11 THE COURT: Can you just walk over to plaintiffs and
12 show it to them and find out what they object to.

13 MR. CATLETT: It was Exhibits 111 and 112, and we did
14 not withdraw them. And I believe the objection to those -- to
15 111 and 112, at least at the time of the prehearing state --

16 THE COURT: First of all, if you are talking, the
17 court reporter has to type it up. If you are talking to
18 opposing counsel, you need to move away from the microphone.
19 So you guys, go meet and confer about the issue, and then we
20 will talk about it on the record. If you other lawyers need to
21 stand with them, go ahead.

22 (Discussions held between counsel.)

23 MR. LANE: We were objecting to 111 and 112 on the
24 grounds that they are hearsay, Your Honor. They are
25 declarations. We object to those. We have no objection to

1 their other exhibits.

2 THE COURT: Okay. Without objection, Exhibits 100
3 through 110 will be received into evidence.

4 (Exhibit Numbers 100 through 110 are admitted.)

5 THE COURT: And what I need all the lawyers to do, if
6 you use the ELMO, or you use your laptops to show me an
7 exhibit, what I want you to do is just tell me what it is.

8 Also, we have nine lawyers here, so I need you all,
9 when you start talking, to tell me who you are so the record
10 reflects who's speaking.

11 And at the time that the defense offers the
12 declaration of Amy Bocks and the declarations spelled out in
13 112, we will address those objections specifically.

14 At this point, I have some questions for the parties
15 before we go into the substance of why we are here today. And
16 again, when you answer the question, I know there are a lot of
17 you here, let me know who you are, and you can answer from
18 counsel table. I will just ask you to pull a microphone over
19 so you can make sure that we have a record of what's being
20 said.

21 All right. This is for the plaintiffs. Are you
22 seeking to enjoin the enforcement of Arizona Revised Statute
23 13-4433(b) in its entirety, or only against attorneys and
24 agents of the defendants.

25 MR. LANE: Your Honor, David Lane. We are seeking

1 only to enjoin its enforcement against attorneys and their
2 agents.

3 THE COURT: Okay. The second question I have.
4 Constitutionally, what's the difference between the statute at
5 issue here, and restrictions against lawyers contacting
6 represented parties?

7 I will ask the question again. Constitutionally,
8 what's the difference between the statute at issue here, and
9 the restrictions against lawyers contacting represented
10 parties.

11 MR. KEENAN: Your Honor, Jared Keenan on behalf of the
12 plaintiffs. Your Honor, the difference -- and it sort of
13 strikes at the heart of this statute, is the rules and
14 regulations on attorney conduct, including the prohibition on
15 reaching out directly to represented parties, is different than
16 this statute. Because this statute doesn't regulate attorneys
17 generally. It specifically and only represents one type of
18 attorney, criminal defense attorneys and those working for
19 defense team. So that, Your Honor, is the difference between
20 a -- constitutionally, between this statute and any other
21 general regulation of attorney conduct.

22 MR. LANE: David Lane. I add that, Your Honor, that
23 the examples given by the state about how this is no different
24 than regulating discovery, this is no different than not
25 talking to represented parties, all of those things are

1 designed to enhance the reliability and the integrity of the
2 system. Reaching out to a represented party undermines the
3 integrity of the system, because you are doing an end run
4 around a lawyer.

5 This statute that we are seeking to hold
6 unconstitutional has nothing to do with the integrity or the
7 reliability of the entire system. This simply skews the
8 system. So that is a very, very important distinction between
9 the two.

10 THE COURT: Even though prosecutors don't represent
11 victims, isn't it true that victims are much more likely to
12 share the prosecution's goals than the defense's?

13 MR. LANE: Most often that is absolutely true, Your
14 Honor.

15 THE COURT: My last question for the plaintiffs. Does
16 it matter that the defense team's ability to speak to the
17 victim is unrestricted if the victim consents?

18 I will ask you again. Does it matter that the defense
19 team's ability to speak to the victim is unrestricted if the
20 victim consents?

21 MR. LANE: Judge, in every case where the victim
22 consents to have a conversation with the defense team, it
23 doesn't matter that they are unrestricted. But that would be
24 true even if the statute was unconstitutional.

25 What you are going to hear is testimony from our

1 experts -- not experts, but our witnesses and parties, that
2 will say, if a victim says, "I don't want to talk to you," the
3 response is, "Have a nice day." They walk away.

4 If a victim decides to talk to a defense investigator,
5 they have unrestricted freedom to do so. So that's the whole
6 concept of free speech. You can say what you want to say to
7 whom you want to say it and engage in a conversation with
8 anyone. And if they want to put restrictions on it, they can.
9 If they don't want to, they don't have to. That's the nature
10 of free speech.

11 MS. BRODY: Your Honor, if I may add one point to
12 that? Kathy Brody. And this just goes back to one of the
13 categories that I was talking about in opening, Your Honor.

14 It may be true that that communication can happen once
15 the victim consents under the plain language of the statute,
16 but one very important part of the evidence that you're going
17 to hear today, Your Honor, is that the statute chills more
18 speech than what is just prohibited by that statute, beyond
19 what is prohibited.

20 THE COURT: Thank you, plaintiffs.

21 I have a few questions for the defendants at this
22 point. First question is, besides special ethical rules for
23 prosecutors, do you know of any other regulations that have
24 been held to regulate professional conduct rather than speech
25 that explicitly apply to only some members of that profession?

1 That's a very long question. I will ask it again.
2 Besides special ethical rules for prosecutors, do you know of
3 any other regulations that have been held to regulate
4 professional conduct rather than speech that explicitly apply
5 to only some members of that profession?

6 MR. CATLETT: Your Honor, Mike Catlett.

7 THE COURT: Sir, I'm sorry. We're in federal court.
8 We stand up.

9 MR. CATLETT: Sorry, Your Honor. I do think there are
10 restrictions on discovery and how particular parties in
11 particular types of cases obtain information during discovery.

12 You see that, I think, in the civil side with respect
13 to information that -- for example, in tort cases, that
14 particular sides of the case may want to obtain information
15 from a victim of a tort, and may want to obtain, for example,
16 an independent medical examination. There are rules and
17 regulations that govern how someone goes about doing that.
18 So -- and the state doesn't see this as any different than
19 those types of regulations. Information can be exchanged
20 between the victim and the criminal defense attorney. All that
21 needs to happen is a request needs to be made through the
22 prosecutor. The prosecutor is required to present that request
23 to the victim. If the victim consents, then there can be
24 information flow between the victim and the criminal defense
25 attorneys. And we don't think that arrangement is any

1 different than some of the other discovery-type arrangements
2 you see in other types of cases.

3 THE COURT: Thank you very much.

4 Is there any justification for the statute that isn't
5 based on an assumption that the content of defense attorney's
6 speech towards a victim will be more harmful than the content
7 of a prosecutor's speech towards a victim.

8 I will ask it again. Is there any justification for
9 the statute that isn't based on an assumption that the content
10 of a defense attorney's speech toward a victim will be more
11 harmful than the content of a prosecutor's speech towards a
12 victim?

13 MR. CATLETT: Yes, Your Honor. As I stated during
14 my -- Mike Catlett again. As I stated during my presentation
15 on opening, one of the compelling interests that the statute
16 serves is it implements various rights that are contained in
17 the Arizona's Victim's Bill of Rights.

18 So, for example, a victim has a right to refuse an
19 interview during the criminal court proceedings. That right
20 doesn't turn on whether the criminal -- that right does not
21 turn on how the criminal defense lawyer might comport
22 themselves during that interview. And I think they have the
23 same -- the victim has the same right vis-a-vis the
24 prosecution.

25 This particular regulation furthers that interest

1 because, and I think you'll hear some testimony today about
2 this, we certainly designated some deposition testimony about
3 it.

4 Several of the plaintiffs have testified that if they
5 get the injunction they are requesting from the Court in this
6 case, and they approach victims to contact them or interview
7 them, they do not plan on informing the victim that they have
8 that right to refuse the interview. And so this statute, we
9 think, furthers that right.

10 The form letters that, at least the Attorney General's
11 Office sends to victims upon request by a criminal defense
12 attorney inform the victim of that right. And so we think
13 that's an important part of the statute, and it's an important
14 interest that's in the Victim's Bill of Rights that is
15 furthered by this particular regulation.

16 THE COURT: Is contact by the defense necessarily more
17 harmful to victims than contact by the prosecutor or anyone
18 else involved in the legal system?

19 That's the first part of the question.

20 And what evidence is there that contact by the defense
21 team specifically is harmful to the victims?

22 MR. CATLETT: Your Honor, I don't think contact by a
23 defense attorney is necessarily and in all cases more harmful
24 than contact by anyone else that's involved in the system.

25 But what I do think is -- and there is some evidence

1 of this, and it is contained in our deposition designations.
2 Paul Ahler from the Attorney General's Office talked a little
3 bit about this in his deposition, and another representative of
4 the AG's Office named Amy Bocks talks about this in her
5 deposition.

6 We do think that the risk of retraumatization is
7 higher when someone who is directly connected with the
8 individual that perpetrated a crime and caused the person to
9 become a victim, we do think the risk is higher that
10 retraumatization is likely to occur in those cases.

11 I am not here to tell you that on balance criminal
12 defense attorneys are unprofessional, or that they will go
13 around trying to retraumatize people.

14 But I think it's a matter of just human nature, that
15 if someone that is directly connected with the person that has
16 caused you to become a victim makes contact with you, the risk
17 is higher that that is going to result in retraumatization or
18 revictimization.

19 There's evidence in the record of that reality. And I
20 think the Arizona Legislature, it's not unreasonable or
21 irrational for the Arizona Legislature to come to that
22 conclusion in enacting this regulation.

23 THE COURT: Ordinarily in the time, place, or manner
24 analysis, courts consider whether there are alternative
25 channels for the same speaker to communicate the same message

1 to the same audience but in a different time, place, or manner.

2 So why should I consider the fact that the statute
3 allows other speakers to communicate with victims as an
4 alternative channel for communication, and is there any
5 precedent for doing so, that you know of?

6 MR. CATLETT: Again, Mike Catlett. Your Honor, we
7 think that's one minor part of the analysis of whether there
8 are alternative open channels to communication. That's not
9 really even the core of our argument.

10 The core of our argument is that really this only
11 applies in ongoing formal proceedings. So it doesn't apply if
12 there's not an actual case that's pending.

13 THE COURT: I am just curious what the position of the
14 defense happens to be on that issue.

15 MR. CATLETT: On the issue of alternative open
16 channels of communication?

17 THE COURT: Correct.

18 MR. CATLETT: We think the statute leaves open
19 multiple additional avenues, including the criminal -- I'm
20 sorry -- the victim reaching directly out to the defense. The
21 victim consenting. Someone that is not connected to the
22 defense team making contact.

23 And so we think that there are alternative channels of
24 communication sufficient to satisfy intermediate scrutiny, if
25 that's the test Your Honor thinks applies.

1 THE COURT: Why are prohibitions against harassment
2 and unprofessional conduct insufficient to protect the state's
3 interest in ensuring victim's rights?

4 MR. CATLETT: Again, Your Honor, Mike Catlett.
5 Because we don't think that those adequately serve the
6 compelling interest of the state that we have identified.

7 Retraumatization can occur, even if the defense
8 attorney is not harassing the victim. Just requiring the
9 victim to go and get an order of protection if a criminal
10 defense attorney or their agent is harassing the defendant
11 doesn't adequately serve all of the rights contained in the
12 Victim's Bill of Rights, including the right to refuse an
13 interview in the first place, which I was discussing earlier.

14 And so we don't think that those are sufficient to
15 serve all of the state's compelling interests. Obviously that
16 might help serve an interest in not having victims be harassed,
17 but we think that there are more interests here than just that
18 narrow concern.

19 THE COURT: Why is a victim's rights under the Arizona
20 Constitution to refuse an interview with the defense team
21 insufficient to protect the state's interest?

22 MR. CATLETT: Your Honor, as -- Mike Catlett again.

23 As I attempted to explain earlier, just the right
24 existing in the constitution we don't think is sufficient. We
25 think victims need to know that that right exists, and

1 therefore, that they can exercise it.

2 And we think that that is more likely to occur if
3 contact is happening through the prosecution and therefore, the
4 prosecution, at that point in time, has an opportunity to fully
5 apprise the victim of his or her rights, and therefore, allow
6 the victim, with that full knowledge, to decide whether to make
7 contact with criminal defense attorneys or not.

8 THE COURT: What's the defense position as to
9 plaintiffs' overbreadth count?

10 MR. CATLETT: Your Honor, we think it fails for many
11 of the same reasons that the direct First Amendment violation
12 fails. We don't think that this statute chills speech in the
13 way that plaintiffs are claiming.

14 Again, mostly for the same reasons, that the statute
15 leaves alternative channels for communication. This really
16 isn't largely a regulation on speech. It's a regulation on
17 conduct and how information is obtained during ongoing criminal
18 proceedings, and therefore, we don't think that there's any
19 overbreadth issue with the statute at all.

20 THE COURT: Thank you very much.

21 Plaintiff, please call your first witness.

22 MR. LANE: Thank you, Your Honor.

23 THE COURT: You are very welcome.

24 MR. LANE: We call Richard Burr.

25 THE COURT: Mr. Burr, if you will walk up to the front

1 of the courtroom and raise your right hand to be sworn, please.

2 **RICHARD BURR, PLAINTIFFS' WITNESS, SWORN**

3 THE COURT: Mr. Burr, please be careful walking up the
4 stairs. I see you negotiated them properly. We have had
5 people fall up the stairs, and we've had to take breaks because
6 of that.

7 So good morning to you. And do you have some water up
8 there and cups?

9 THE WITNESS: I do.

10 THE COURT: Very well. Sir, when you sit down, if you
11 can adjust the microphone and speak directly into it so all of
12 the lawyers can hear you.

13 Counsel, it's your witness. Go ahead.

14 MR. LANE: Thank you very much, Your Honor.

15 THE COURT: You're welcome.

16 DIRECT EXAMINATION

17 BY MR. LANE:

18 Q. Good morning, Mr. Burr. Mr. Burr, can you state your name
19 and spell your name for the record, please?

20 A. Yes. I'm Richard Burr, R-I-C-H-A-R-D. B-U-R-R.

21 Q. Mr. Burr, can you tell us what you do for a living?

22 A. I'm an attorney.

23 Q. And where are you licensed?

24 A. In Texas.

25 Q. Where do you reside?

1 A. I live in east Texas, about 80 miles north of Houston.

2 Q. All right. Have you ever lived in the State of Arizona?

3 A. No, I haven't.

4 Q. Have you ever been subject to the statute that we are
5 discussing here in court today?

6 A. No.

7 Q. All right. Can you tell the court a little bit about your
8 background in context of being an attorney. What kind of law
9 do you practice? Where do you practice it?

10 A. I first became an attorney in 1976. Excuse me.

11 In 1979 I started doing capital defense work in the
12 southeastern United States. By 1981, I devoted my entire
13 practice to capital defense work, and that's what I've done
14 ever since.

15 Q. All right. Can you tell the Court what kinds of capital
16 cases you have taken? Federal? State? What states? What
17 federal courts?

18 A. Both. I have done work in both state and federal cases. I
19 was for -- in 1995, I was appointed as the capital defense
20 counsel for Timothy McVey in the Oklahoma City bombing case.
21 And I represented Mr. McVey through direct appeal. Came back
22 into his case for successor habeas proceedings just before he
23 was executed in 2001.

24 I've had several other appointments in federal capital
25 cases. Between 1997 and 2014, I was a member of a project

1 called The Federal Death Penalty Resource Council, funded
2 through the Administrative Office of the Courts to provide
3 consultation and assistance to capital defense teams in federal
4 capital prosecutions.

5 So I have had a number of exposures to federal capital
6 cases. At the same time, I've always had state cases in a
7 variety of states, mostly in the southeastern United States,
8 but some in the west, and since I have been in Texas, all in
9 Texas.

10 Q. Have you been deemed learned counsel by federal courts in
11 the United States?

12 A. Yes, yes.

13 Q. Do you have any idea as to how many times you have been
14 deemed learned counsel on capital cases?

15 A. Well, that's a term of art used in the federal statute for
16 appointing counsel in federal capital cases. I have been --
17 you know, in the McVey case, I was the learned counsel, so to
18 speak.

19 I have been learned counsel in about six other federal
20 capital cases, none of which went to trial, none of which have
21 the death penalty authorized.

22 Q. Okay. Mr. Burr, you have been practicing law since what
23 did you say?

24 A. 1976.

25 Q. Are you familiar with the statute that is the subject of

1 this litigation?

2 A. Yes.

3 Q. And how did you become familiar with that?

4 A. I first learned about it in a seminar that I taught in here
5 probably in the late '90s or early 2000s. I have done a number
6 of presentations in capital defense seminars over the country
7 through the years.

8 And I was speaking in particular about defense
9 initiated victim outreach to a seminar here in Phoenix, I think
10 it was. It may have been in Tucson. I am not sure. But a
11 number of years ago, at least 20 years ago, I first learned
12 about the statute then.

13 Q. Okay. Now, you've raised the issue of defense initiated
14 victim outreach, also known as DIVO. Will you explain to the
15 Court exactly what DIVO is, how it developed, and what it is
16 all about?

17 A. Sure. It began, Your Honor, in connection with the McVey
18 case, the Oklahoma City bombing lead defendant. We felt like
19 we had to figure out a way to have contact and outreach with
20 the victims, because there were so many. It was just
21 overwhelming.

22 We began working with a pioneer in the field of
23 restorative justice, a professor at Eastern Mennonite
24 University named Howard Zehr, Z-E-H-R. And he, and a graduate
25 student of his, helped us develop a way of reaching out to

1 survivors in that case.

2 Now, there were too many for us to reach out to, so we
3 focused on the 39 people whom the government noticed as victim
4 impact witnesses.

5 We sent letters to each of them explaining who we
6 were, expressing our deepest sympathy for what had happened to
7 their loved ones, and offered to speak with them, if they
8 wanted to speak with us.

9 We also said that a person who was working with us
10 would be in contact with them, if it was easier to talk with
11 somebody not a lawyer on the case. That was Dr. Zehr's
12 graduate student. A few people talked with us, not many.

13 And then the case went to trial. And about a year
14 after the trial, a number of the survivors of the people killed
15 in the case contacted us and wanted to meet with us.

16 And like I said, about a year we met in Oklahoma City
17 with 25 survivors, spent a day talking with them and them with
18 us. And we all learned a lot about what had happened and what
19 they needed and what we might have provided had we been more
20 adept at what we were doing.

21 From that point forward, we began to develop, in a
22 fairly systematic way, a practice for defense teams to making
23 outreach with survivors. And it involves a number of
24 principles that are really important that guide the work.

25 The first is to recognize there is a chance of

1 retraumatization, for the reason that the defendants' counsel
2 has mentioned, and that is, we are connected to the person that
3 they believe killed their loved one. And that's frightening.

4 So we thought that the best way to reach out would be
5 for there to be a liaison, a person who was not a part of the
6 defense team, but who was engaged by the defense team, to make
7 outreach, and to in a sense become representatives of the
8 victims to the defense team. That was the first step.

9 The second thing that evolved was to realize that all
10 we could do was to make an offer to survivors. I will say
11 "survivors" because it's always capital cases that I work in,
12 to make an offer to survivors.

13 If they wanted to talk to us, we would be happy to
14 talk to them about anything they wanted to related to the case.
15 And it was always on their terms. However they wanted to do
16 it, if they wanted to ask questions of us or make comments to
17 us through the liaison, that was fine, or if they wanted to
18 meet with us directly, we would arrange that. It was totally
19 up to them.

20 And the communication was totally initiated by them
21 and guided by them. We tried to respond -- the next component
22 is, if they did engage and they asked questions, we tried to
23 answer them, as best we could. If we couldn't, because of our,
24 you know, defense needs of the client, we would explain why we
25 couldn't answer them.

1 And throughout the process, it was totally guided by
2 survivors and their interests and their concerns.

3 If they raised questions about whether the case could
4 be -- a trial could be avoided, we would say, yes, there is a
5 way to do that. And we would talk with them about that. But
6 we did not ask them for that. We did not say, "Would you come
7 to the position of not supporting the death penalty?" We never
8 do that. Some people come to that position themselves, some
9 survivors.

10 Some survivors realize it's a protracted process and
11 they'd like it to be over. And that often, you know, leads to
12 pleas that will take their interests into account, and plea
13 agreements that explicitly account for their interests. That's
14 how the process has unfolded and evolved and how we teach it
15 and guide it.

16 Q. Let me ask, the -- it's called Defense Initiated Victim
17 Outreach, do you go through prosecutors' offices and get
18 permission before the defense team initiates this victim
19 outreach?

20 A. No. We let prosecutors know, because we don't want
21 prosecutors to be blindsided. We want -- if we make contact,
22 and a survivor says, you know, I got contacted by these people,
23 what should we do, we want them to know in advance that that
24 might happen. And to the extent they are willing, we sit down
25 and talk with them about the process that we engage in and why

1 we do it.

2 So -- but we don't ask their permission. That's
3 critical because the outreach is from us to survivors. And no
4 matter how honest and forthright prosecutors are, the fact that
5 it comes through a prosecutor suggests to survivors that they
6 shouldn't talk with us. That's been the practical reality.

7 Even if prosecutors try to be utterly neutral about
8 it, that happens. So we don't do it in a vacuum. We do it
9 openly. But we do not ask for permission.

10 Q. In your experience, since the DIVO process really began to
11 be developed, can you give us an estimate of what percentage
12 victims in capital cases, their families, avail themselves of
13 DIVO's offer to communicate with them?

14 A. I know mostly about federal cases, because I was involved
15 in that project for 17 years. And that was where we really
16 developed the basic process. And in the federal cases,
17 growing -- you know, increasingly, defense counsel do engage in
18 the process of outreach. And I would say, of the cases in
19 which defense teams make outreach, probably 25 percent, maybe
20 30, maybe a third of the cases survivors get engaged and want
21 to have contact. It's many more than I thought it would be
22 when we started this, and there's some reasons I have come to
23 understand for that, but --

24 Q. What are those reasons?

25 A. Well, it comes from a very fundamental principle of

1 restorative justice. Restorative justice understands a crime
2 as part of a three-part process. There's the offender, there's
3 the victim, and there's the community.

4 And when a crime is committed, an offender creates an
5 obligation to the victim of the crime, or the survivor in a
6 murder. The community has obligations, and the community has
7 obligations both to victims and the defendant.

8 And the obligation between the defendant, or an
9 offender, and a victim or survivor, arises because the very act
10 of committing a crime creates a relationship. Involuntary and
11 awful. But there is a relationship between the person who
12 committed the crime and the victim of it, or the survivor of
13 it.

14 And that relationship is there no matter what anybody
15 does. It can be ignored, or it can be acted on. The
16 relationship is between the offender and the survivor in a
17 capital case.

18 And I have come to understand that it is that very
19 relationship which drives, often drives survivors to want to
20 have some information about the offender. And in a number of
21 cases, has led ultimately, after a plea agreement, to meetings
22 between defendants and survivors, where, you know, there was a
23 mediator kind of facilitating the meeting.

24 But it offers some ability for survivors to come to
25 some real peace about the relationship. The relationship is

1 not going to keep haunting them, because they are going to
2 understand, as much as could be understood, about what
3 happened, why it happened, how it happened, and how could it
4 have been avoided.

5 Those are the kinds of questions that keep haunting
6 people and are, you know, the subject of nightmares and daytime
7 thoughts, intrusive thoughts. So that relation -- you know,
8 positively working on that relationship is of immense value to
9 survivors in murder cases.

10 Q. Have you got any standards or policies through DIVO
11 about -- you do your initial outreach, and I think you said you
12 send a letter to victims? What if you hear nothing back from a
13 victim, what is next step?

14 A. There are actually two letters that we've resolved to
15 sending. One comes from the lawyer on the defense team, one
16 comes from the person we come to call the victim outreach
17 specialist, that liaison person.

18 The lawyer describes in general, you know, what the
19 invitation is and introduces the liaison. The liaison says,
20 here's what I can do, if you are interested. You know, I
21 can -- we can talk. We can talk by phone. We can meet. I can
22 help you understand -- you know, if you have questions you want
23 to ask the defense team, I can help you get answers to them.

24 If there's no response at all, then the liaison gives
25 a phone call. And if that person says no, that's it. We make

1 it clear that the invitation is always there. It's always
2 open.

3 If they want to engage, they are totally free to. We
4 will always engage with them, if they choose to. But there's
5 nothing pushy. There's nothing -- it's not a -- I don't see it
6 as an investigative step, which is why we call it "outreach."

7 Investigation involves interrogating people, you know,
8 trying to get information from them. This is not that kind of
9 process at all.

10 Q. Have you ever been contacted by anyone who claims that the
11 mere receipt of a letter or two, or a phone call from someone
12 connected with DIVO, has retraumatized them?

13 A. I have not had direct knowledge of that. I have heard in
14 very rare instances that survivors have said that.

15 The truth is, I think that any contact with a survivor
16 of murder about the murder can be retraumatizing, because that
17 trauma is ever present. It doesn't go away. It can -- over
18 time, people learn to live with it and learn, you know, gain
19 some equilibrium in their lives and learn to live with that
20 loss in a way that can be okay.

21 But in the first few months and years, any incident,
22 any hearing, trials, are retraumatizing, because it brings up
23 the day that this happened. And that is a retraumatization.
24 So it is subject to happening any time anybody contacts
25 survivors about a murder.

1 Q. Including prosecutors?

2 A. Absolutely.

3 Q. Including police?

4 A. Yes.

5 Q. Including lawyers questioning witnesses in court?

6 A. Yes.

7 Q. Do you think or do you have any empirical knowledge of
8 whether simply being contacted by a defense representative is
9 any more or less traumatic than being contacted by a police
10 officer or a prosecutor?

11 A. I don't know. I mean, I don't know whether it is or not.
12 In my own experience and -- and I count as my experience all
13 the people I've helped over the years and worked with in this
14 effort, I don't think that our contact is any more traumatizing
15 than contact from the prosecution side of the case.

16 But one reason we decided that it was best to use an
17 intermediary, a liaison, is because it could be more
18 frightening to have direct contact with the team that is
19 representing this person in court.

20 The liaison, though they are engaged by the defense
21 team, they know nothing about the defendant. They know nothing
22 about the crime, other than what's in the public record. And
23 that's intentional.

24 Because we do not want the liaison to become in any
25 sense an advocate for the defense. We want them to be neutral

1 about the defense. You can stay neutral if you don't know
2 anything about it. Their job is to focus on the needs and
3 interests and concerns of survivors.

4 Q. You describe -- what is the defense team's interest in
5 doing this? I mean, you are sending a neutral party in to talk
6 to victims. I am understanding -- you tell me if I am wrong.

7 This neutral party has no agenda. They are simply
8 there to get -- to offer themselves as a conduit between
9 defense team and victims, is that --

10 A. Yes, sir.

11 Q. Why would the defense team do that?

12 A. We do it because we understand the relationship is between
13 survivors and our client, or is the person that survivors
14 believe are responsible for the death of their loved one.

15 And we are in the middle of that relationship. And we
16 can ignore it, and for many years we have ignored it. It goes
17 untended to. What we have learned if we tend to it, in a
18 respectful and compassionate way, it can change the fundamental
19 dynamics of a case.

20 Survivors can become the people who want cases to be
21 resolved in a certain way. When their interests are accounted
22 for, the criminal justice system can actually serve their
23 interests and collaterally it serves our client's interest.

24 In capital cases, it's never a good idea to go to
25 trial. If you go to trial, you can get convicted and sentenced

1 to death. If you don't go to trial, it's because you work out
2 a plea. And the plea never involves a death sentence.

3 So we have the interest in avoiding trial. We have an
4 interest -- we have understood that if we tend to that
5 relationship between our client and survivors, then that itself
6 can change the dynamics of a case and can make retribution look
7 different and be less harsh.

8 I mean, it's serendipity, you know, it is an odd thing
9 to not seek something that you want. It's kind of -- in zen
10 there are these things called koans that make no sense if you
11 look at them with your logical, rational mind. They are
12 contradictory.

13 But in the existence of human beings, if we tend to
14 relationships, the relationship itself can change everything
15 else. And we have come to understand that. And it can change
16 it for the collateral benefit of our clients, as well as for
17 the well being of survivors.

18 Q. So is it fair to say that no DIVO representative is there
19 to push an agenda, to try to convince anyone not to seek the
20 death penalty, or any particular result in any particular case?

21 A. Yes. If we do what you just said, we are -- 99 times out
22 of 100 we will push people away. And the effort to respect and
23 tend to that relationship will be impossible.

24 Q. Has any bar complaint or other sanction been threatened by
25 prosecutors to your knowledge, outside of the State of Arizona,

1 for a work of a DIVO?

2 A. No, not that I am aware of. I mean, occasionally questions
3 arise. Oftentimes, as Your Honor knows, capital defendants are
4 indigent, and there has to be money provided by the court for
5 defense services.

6 And one of the defense services that we have to ask
7 courts to provide money for is the victim liaison, the victim
8 outreach specialist. So courts do know about it.

9 Occasionally questions come up, and prosecutors may
10 object to something about a contact. And to my knowledge,
11 every time that's come up, if there's been a hearing, it has
12 been resolved by, you know, the incident being unpacked and
13 people come to understand what happened.

14 Q. Do federal courts fund defense services, including DIVO?

15 A. Yes.

16 Q. And they do that knowing that this is what it is? They are
17 not just writing a blank check for the defense?

18 A. Absolutely.

19 Q. You have to explain to a federal judge what DIVO involves,
20 and federal judges then sign off and pay for the DIVO?

21 A. Yes. It is very important to us that everybody understand
22 what we are doing, that we be as transparent as possible.

23 Q. Will you talk a little bit about how you believe, or if you
24 believe, that the work that you are describing enhances the
25 integrity and truth seeking function of the criminal justice

1 system?

2 A. You know, I have come to understand that the truth seeking
3 function of the criminal justice system involves something more
4 than what happens at a trial. Survivors in capital cases
5 especially, sometimes want cases to go to trial because they
6 think they are going to get all their answers to all of their
7 questions. And invariably they are disappointed, because they
8 don't. They don't have to hear from defendants at trial. No
9 defendant ever has to testify, and often they do not. So they
10 are hearing from prosecution witnesses and from defense
11 witnesses, but not the defendant. And to survivors, the truth
12 does not come out.

13 So to the extent that the truth involves, back to the
14 restorative justice model, the defendant having obligations to
15 the victim and to the community, the truth can only be served
16 if a defendant can speak.

17 And in our adversarial system of justice, the
18 defendant cannot speak without paying a penalty for it.
19 Defendant can speak if a case can be resolved to the
20 satisfaction of everybody, and then allow speech.

21 So I think the bigger truth can be served by a case
22 that embraces survivors, or victims, and brings -- everybody
23 then starts working on those relationships, and that is the way
24 in which the arch of justice can move towards restoring people
25 to the best position they can be in.

1 THE COURT: I'm sorry, Mr. Lane, before you ask your
2 next question, we are going to go ahead and take our morning
3 recess.

4 Court will be in recess until 10:45. It's very warm
5 outside of the courtroom, so I will allow the parties to stay
6 in the courtroom. You can't come north of the lectern here.
7 And just remember, all of the microphones are on, and you can
8 hear whatever you say in chambers. So make sure you walk away
9 from the table, and the room is monitored by the U.S. Marshals
10 by way of these cameras.

11 Court is in recess until 10:45.

12 (Recess taken at 10:30 a.m.; resumes at 10:46 a.m.)

13 THE COURT: This court will come to order. All
14 parties present when the court last closed are present again.

15 Mr. Burr, you are still under oath.

16 Mr. Lane, please continue with your examination.

17 MR. LANE: Thank you very much. Just finishing up,
18 Your Honor.

19 THE COURT: Thank you so much.

20 BY MR. LANE:

21 Q. Last question-ish, Mr. Burr. Lawyers never say "last
22 question" because it's never true.

23 THE COURT: Does the "ish" change that?

24 MR. LANE: Yes, it does. Last question-ish.

25 THE COURT: Students back there, remember this, okay?

1 MR. LANE: It's a term of art.

2 BY MR. LANE:

3 Q. Do you believe that the DIVO process involves conduct or
4 speech?

5 A. I think it involves speech, in a rather pure sense. It is
6 an invitation to survivors to speak and to be heard, and in the
7 process, of course, there's speech from those making the
8 invitation. So it is all about communication.

9 MR. LANE: Thank you, sir. I have no further
10 questions.

11 THE COURT: Is there any cross-examination,
12 Mr. Catlett?

13 MR. CATLETT: Yes, Your Honor.

14 THE COURT: Come on up, please.

15 CROSS-EXAMINATION

16 BY MR. CATLETT:

17 Q. Morning, Mr. Burr.

18 A. Good morning.

19 Q. Thank you for being here this morning. We've not had an
20 opportunity to meet. My name is Mike Catlett, and I represent
21 the Arizona Attorney General in this matter.

22 A. It's nice to meet you.

23 Q. You testified earlier a bit about the Oklahoma City
24 bombing; do you remember that?

25 A. Oh, yes.

1 Q. And how many victims, would you say, were created as a
2 result of that tragic incident?

3 A. Well, there were 168 people killed, and all of those people
4 had family members. You know, just the direct survivors,
5 family members of those folks numbered close to a thousand.

6 There were also many people injured who did not get
7 killed, and there were studies done of Oklahoma City that said
8 about 50,000 people in Oklahoma City experienced symptoms of
9 PTSD after the bombing, so it was enormous.

10 Q. And how many victims, direct or indirect, did you say you
11 reached out to?

12 A. We focused on the 30 -- well, there were 39 people noticed
13 by the government as victim impact witnesses. Now, some of
14 those people were firefighters, police officers, medical
15 examiner's office personnel. Most of them though, of the 39,
16 probably 30 to 33 or 34 were family members. We focused on
17 those folks.

18 Q. And you were not subject to a victim contact regulation in
19 that case, correct?

20 A. No.

21 Q. You testified that not many agreed to speak with you,
22 correct?

23 A. That's correct.

24 Q. Do you recall the expert report that you provided for
25 Mr. Lane in this case?

1 A. Yes.

2 Q. Am I correct that was a two-and-a-half-page letter to
3 Mr. Lane?

4 A. Yes.

5 Q. And you had not discussed the issues in the case with any
6 of the individual plaintiffs prior to issuing your report,
7 correct?

8 A. I had not. I had only talked with Mr. Lane. And I think
9 I -- I think I have seen the initial pleadings.

10 Q. And so at the time you issued your report and sat for your
11 deposition, you did not know whether any of the plaintiffs in
12 this case actually utilized defense initiated victim outreach,
13 correct?

14 A. I did not know that in fact. I knew that in capital cases
15 we have been teaching these principles for many, many years,
16 and I knew that a number of capital defense lawyers from
17 Arizona had been a part of those seminars. In fact, there was
18 one in Tucson focused on that.

19 So I am assuming that people, were they able to do it
20 in capital cases, at least in federal cases, and I know in some
21 of the federal cases people did employ it.

22 Q. But you didn't know whether any of the particular
23 defendants in this case utilized that?

24 A. I did not.

25 Q. And you offered two opinions in this case, correct?

1 A. I don't know if I can parse the opinions in number, but --

2 Q. That's fine. But one of the things you've testified to, or
3 one opinion you gave, is that defense initiated victim outreach
4 needs to be done in a particular way, correct?

5 A. Yes.

6 Q. And the second opinion you have offered is that when
7 defense initiated victim outreach is done, and family members
8 choose to engage with the defense team, the results are, from
9 what have you seen, often very helpful, correct?

10 A. Yes, if they choose to engage.

11 Q. And those two opinions are based on your personal
12 experience with DIVO, correct?

13 A. Yes, both in my own practice in my own cases, and in
14 consulting with other defense lawyers and victim outreach
15 specialists, and the ongoing work in their cases.

16 Q. So let's first talk a little bit about that experience.
17 You are a member of the Texas bar?

18 A. Yes.

19 Q. You are currently only a member of the Texas bar?

20 A. Currently, yes. I have been a member of three other bars,
21 but having had no contact with those states in many years, I
22 resigned from them so I didn't have to keep paying dues.

23 Q. And you have never been a member of the Arizona bar,
24 correct?

25 A. Have not.

1 Q. Your primary experience as a lawyer is defending or
2 consulting on capital cases?

3 A. Yes, for the last 41 years, I guess -- actually, yeah, 43
4 years.

5 Q. You have never served as a prosecutor?

6 A. I have not.

7 Q. You have never represented a victim of a crime?

8 A. No.

9 Q. Including in Arizona?

10 A. Including in Arizona.

11 Q. You have no experience outside of capital cases in
12 defending criminal cases, do you?

13 A. That's correct.

14 Q. You have no experience defending any criminal cases in
15 Arizona, correct?

16 A. Not directly, that's true.

17 Q. Including capital cases?

18 A. Including capital cases. I have consulted on some capital
19 cases here, but I have not been counsel.

20 Q. And so you have no experience outside of capital cases, in
21 terms of reaching out to victims and survivors, correct?

22 A. That's correct.

23 Q. And you don't know in what percentage of criminal
24 prosecutions in Arizona are capital cases, do you?

25 A. I don't.

1 Q. You have never been subject to terms A.R.S. Section
2 13-4433(b), have you?

3 A. No.

4 Q. You have never made a request for victim contact under that
5 statute, right?

6 A. No.

7 Q. You can't tell the Court what percentage of cases in
8 Arizona that survivors of crime agree to DIVO, can you?

9 A. I cannot.

10 Q. You have never been subject to the terms of Arizona Rule of
11 Criminal Procedure 39, have you?

12 A. No.

13 Q. You have never made a request to an Arizona State Court
14 Judge to be excused from Section 13-4433(b), have you?

15 A. No.

16 Q. You don't know whether DIVO is used by anyone in Arizona,
17 do you?

18 A. I don't know.

19 Q. There are only probably 15 or 20 people around the country
20 who have made a practice of utilizing DIVO, correct?

21 A. Well, there are 15 or 20 -- probably a few more than that
22 by now who are victim outreach specialists, you know, who are
23 not -- some of them are lawyers, but for the most part they are
24 not lawyers.

25 They come from a variety of backgrounds, but they all

1 have had intense training on how to go about reaching out to
2 survivors in capital cases. There may be a few more than that
3 now, but there are people who have been trained in virtually
4 every state in the country, or at least every region in the
5 country.

6 Q. I appreciate that, and we will get to that intense training
7 in a second.

8 What percentage of noncapital criminal cases in
9 Arizona attempt to use DIVO, do you know?

10 A. I have no idea.

11 Q. And I believe you just testified about this, but DIVO
12 involves an individual that is called a DIVO specialist,
13 correct?

14 A. Yes.

15 Q. And DIVO specialists have specialized -- and I think the
16 term you just used is intense -- training in reaching out to
17 crime victims or survivors, correct?

18 A. Yes.

19 Q. You are not a DIVO specialist, correct?

20 A. I am not. I have helped train them. I have observed the
21 trainings, and I have, you know, been a faculty in trainings,
22 but I am not a victim outreach specialist myself.

23 Q. Do you know how many individuals located in Arizona are
24 trained as DIVO specialists?

25 A. There is one person I can think of immediately whom I have

1 known for many years. There may be others that I just don't
2 know -- or don't remember.

3 Q. But sitting here this morning, you are only aware of one
4 trained DIVO specialist in Arizona?

5 A. That's the only person I can recall, but I am 73 years old
6 and my memory is fairly poor. You will learn one of these
7 days.

8 Q. I fear I am quickly approaching.

9 I want to talk first a little bit about the first
10 opinion we discussed, which is that there's a particular way
11 that victim contact should happen. DIVO is not an
12 investigatory tool, correct?

13 A. That's correct.

14 Q. And I think you testified earlier, that's largely because
15 investigation involves interrogating someone, correct?

16 A. It involves trying to get information from people that will
17 help the defense, or will help the prosecution if you are a
18 prosecution investigator. So it is -- it's pushy, you know.
19 It's pushy. And it's trying to extract information.

20 This process is offering a bridge of communication, if
21 desired, and there's nothing pushy about it.

22 Q. Investigation is pushy, correct?

23 A. Generally, yes.

24 Q. So in other words, DIVO is not used by the defense to
25 uncover facts that are helpful to the defense, correct?

1 A. That's correct. Incidentally, facts helpful to the defense
2 often come out, but it's because people offer them. And now,
3 you know, in cases in which -- Ms. Brody mentioned that a
4 number of capital cases in Arizona involve murders within
5 families.

6 Those cases obviously have to have some investigation
7 done with respect to other family members. Particularly if,
8 you know, they experienced the event where people were
9 murdered. That's done by investigators.

10 Q. But uncovering helpful evidence is not the primary purpose
11 of DIVO, correct?

12 A. No, it's not. It can happen, but it's not the purpose.

13 Q. And creating mitigating evidence for the criminal defendant
14 is not the primary purpose of DIVO, correct?

15 A. That's correct. Again, it can happen, and -- I didn't say
16 this before, but it's probably worth mentioning in response to
17 your question.

18 If there is engagement with survivors, we talk with
19 our clients about that. We let them know what's going on.
20 Because they are in that relationship, in some form they are in
21 it.

22 And particularly -- I mean, for the clients about whom
23 there is no question about guilt, part of what can happen with
24 engagement with survivors is our clients can come to recognize
25 the obligations they have to survivors.

1 And that can change their approach to their own cases,
2 and it can change the approach of the defense to the case. And
3 in a large sense, can become mitigating.

4 Q. I want to make sure that I have a clean answer for the
5 record.

6 The primary purpose of DIVO is not to create
7 mitigating evidence for the criminal defendant, correct?

8 A. That's correct.

9 Q. And the primary purpose of DIVO is not to turn survivors
10 into folks who are going to be opposed to the death penalty,
11 correct?

12 A. That's correct.

13 Q. And so you are not offering an opinion in this case as to
14 investigatory contact with crime victims, correct?

15 A. That's correct. I am not offering an opinion about that.

16 Q. You referenced the intensive training that a DIVO
17 specialist undergoes. How much training are we talking about,
18 and what is the nature of that training? If you can explain to
19 the Court, please.

20 A. Typically it's a five-day training, and it involves both,
21 you know, lectures or presentations, and practical exercises.
22 There are lectures and presentations about trauma. Trauma that
23 survivors of murder suffer.

24 There is often presentations by survivors of murder,
25 either who have been engaged in victim outreach in the cases

1 that they were involved in, or who were not but wish they had
2 been.

3 There are exercises, many exercises throughout the
4 period about how to talk with people. You know, you role play.
5 People serve as survivors. People serve as victim outreach
6 folks and have conversations. So that's what the process looks
7 like.

8 The faculty involved observe all the students, and at
9 the end of it, they recommend who among the students they
10 are -- should go on and start doing the work. Not everybody is
11 chosen. And when they do engage in a case, they do it under
12 the mentorship of a very experienced outreach specialist.

13 Q. Thank you. DIVO specialists are trained to make contact
14 with victims or survivors in a particular way, correct?

15 A. Yes.

16 Q. And the training involved to be a specialist has to do with
17 a lot of training about trauma as a victim or survivor of
18 homicide, correct?

19 A. That's correct.

20 Q. And the training involves how to reach out to victims or
21 survivors of trauma, keeping in mind the experiences those
22 people have had, and how to do that compassionately and
23 respectfully so as to not impose additional trauma, correct?

24 A. That's correct.

25 Q. And DIVO principles are developed to try to avoid

1 retraumatization to the extent possible, correct?

2 A. Yes.

3 Q. Is that a yes?

4 A. Yes.

5 Q. And this is not training that you received as a criminal
6 defense lawyer, correct?

7 A. That's correct.

8 Q. And some people are suited to make contact with victims and
9 others are not, correct?

10 A. That's correct.

11 Q. And that includes some people that take the training. You
12 mentioned that some are cut from that process, correct?

13 A. Yes.

14 Q. And you are not suited, correct?

15 A. I am not. The reason is, it's very important for a victim
16 outreach specialist to be focused on survivors, on victims.
17 And I have been a lawyer for, I don't know, 46 years, and I am
18 an advocate to my core.

19 And I did try. In one Texas case I tried to serve as
20 a victim outreach person. And the survivor talked with me.
21 She was very gracious.

22 And I started mitigating my client -- or not my
23 client, but the client in the case to her. And she was
24 gracious, but, you know, it sort of set off -- cut off the
25 conversation. So I don't trust myself to do it because I

1 can't. It is an important lesson I learned.

2 Q. And you can't do it because you have been a criminal
3 defense attorney for 46 years?

4 A. I can't not mitigate my client. That's what I have done
5 all these years, and it is in my DNA.

6 Q. I think you testified at your deposition that you didn't
7 think you did very well with that victim, correct?

8 A. I did very poorly.

9 Q. Because you found yourself what you teach people not to do,
10 which was to advocate with her on your client's behalf,
11 correct?

12 A. Exactly. I mean, in my defense, I knew a lot about the
13 client. It was a case that I had been involved in from the
14 time I was with the NCCPA legal defense fund for years. I have
15 never been counsel, but I had filed an amicus brief in the
16 Supreme Court in his case. You know, I knew his case deeply.
17 And when you know a case deeply as a lawyer, your DNA causes
18 you to advocate.

19 Q. And it's important not to get the roles of emissary and
20 advocate mixed up, correct?

21 A. Absolutely.

22 Q. And it's important to keep the specialist separate from the
23 defense team so that they don't get tainted by the advocacy
24 that is inherent in the defense team, correct?

25 A. Yes.

1 Q. And so the specialist is intentionally kept separate from
2 the rest of the defense team, right?

3 A. Yes. The only time the specialist would meet with the
4 defense team is when there's a discussion about the survivors
5 and what's going on, you know, with the outreach process.

6 Q. And the specialist doesn't know what the theories of the
7 defense are, right?

8 A. No.

9 Q. And the DIVO specialist doesn't know much about the
10 defendant at all, right?

11 A. That's correct, none other than, you know, what's available
12 in the public sources.

13 Q. Switching gears a bit. If a victim or survivor chooses to
14 engage in DIVO, it can often be beneficial to the victim or
15 survivor, that's one thing that you said in this case, correct?

16 A. Yes.

17 Q. But you have no opinion about whether contact by a DIVO
18 expert in instances when a victim chooses not to engage is
19 helpful to the victim, right?

20 A. I don't know. That's correct. I assume it's not, unless
21 people change their mind and do decide to engage, but, no, if
22 there's no engagement, I know nothing about what's happening
23 with them.

24 Q. Right. And so DIVO only occurs if a victim or survivor
25 chooses to engage with a DIVO specialist, right?

1 A. That's correct.

2 Q. And that's an important part of the process, right?

3 A. It is a very important part of the process. It is guided
4 by survivors from the beginning. Initiated -- the invitation
5 is made by us, but from that point on, it's guided by
6 survivors.

7 Q. And when a crime victim is represented by counsel, the DIVO
8 specialist also deals directly with the crime victim's counsel,
9 correct?

10 A. Yes.

11 Q. And when the crime victim is not represented by counsel,
12 the DIVO specialist lets the prosecutor know that he or she is
13 making contact with the victim, correct?

14 A. Yes.

15 Q. Is that a yes?

16 A. Yes.

17 Q. And that's the approach that's respectful of prosecutors,
18 correct?

19 A. Yes.

20 Q. And you have always had an abiding concern about defense
21 teams making contact with victims or survivors in capital
22 cases, correct?

23 A. Well, I have since we started this effort. Before the
24 McVey case, I was -- you know, I occasionally made contact with
25 survivors in my cases, but not systematically, and it was

1 always to get their help.

2 Q. So your experience in interaction with survivors and
3 victims after the Timothy McVey case has created an abiding
4 concern with you about defense teams making contact with
5 victims or survivors in capital cases, correct?

6 A. Yes.

7 Q. And because if it's done incorrectly, it could result in
8 additional trauma, correct?

9 A. It could result in additional trauma and could actually
10 increase the antagonism within the trial -- you know, the
11 proceedings.

12 Q. I think you have testified to this this morning, but DIVO
13 can also be beneficial to the defense, correct?

14 A. Yes.

15 Q. And if a DIVO specialist obtains exculpatory evidence from
16 a victim or survivor, you have decided that the specialist will
17 say to the defense team, "I have learned something that may be
18 exculpatory, but I can't tell you what it is because they have
19 asked it to be confidential," correct?

20 A. If that happens, yes.

21 Q. And the defense team then may ask the specialist to talk
22 with the victim some more and see if over time they may be
23 willing to have the exculpatory information disclosed, correct?

24 A. Yes.

25 Q. And one of the core principles of DIVO that cannot be

1 deviated from is that the defense, unless there's some
2 invitation by a survivor, should not be advocating with the
3 survivor for a particular outcome, correct?

4 A. That's correct. And even if there is an invitation, what
5 the outreach specialist or the defense team, if they are
6 involved directly, needs to do is to provide information and to
7 provide examples from other cases about what things might look
8 like. For example, plea agreements that could take interest of
9 survivors into account. What that might look like.

10 Q. The defense should not be trying to turn the survivor into
11 a defense tool, correct?

12 A. Absolutely.

13 Q. And it's important not to do that, because you don't want
14 to disrespect or retraumatize survivors, correct?

15 A. That's correct.

16 Q. And it's important not to do that because survivors will
17 get angry and cut off any contact and become stronger advocates
18 for the death penalty than they might have been otherwise,
19 correct?

20 A. Yes.

21 Q. And another reason you don't do that is because you don't
22 want to disrespect or retraumatize survivors, correct?

23 A. Yes.

24 Q. And another reason you don't do it is because you don't
25 want to increase people's suffering, correct?

1 A. Yes.

2 Q. And you can't know until you make initial contact with
3 somebody if it's going to be traumatizing, correct?

4 A. We know that any time a survivor is contacted about what
5 happened, it's potentially retraumatizing, whoever does that.
6 So we design our contact to try to be compassionate and kind
7 and very open-handed and offering. And we think that's the
8 best way to go about it, to minimize the retraumatization.

9 We know that it will happen, simply by virtue of
10 bringing up the subject.

11 Q. So you can't say that no victim has been retraumatized as
12 a result of DIVO, can you?

13 A. No, I can't say that.

14 Q. In fact, you know of one case in Lubbock, Texas where there
15 was an initial victim contact by letter, and the victim
16 outreach specialist learned from the prosecutor's office that
17 the contact was traumatizing, correct?

18 A. Yes.

19 Q. And if a crime victim or family member of a crime victim
20 proactively contacts defense team members in Arizona, nothing
21 in Section 13-4433 prevents interactions between a DIVO
22 specialist and the crime victim or family member, correct?

23 A. Well, I am not a practitioner here, and I don't know the
24 ins and outs of that, but there will be practitioners
25 testifying, so I think that's a question that's better directed

1 to them. I don't know.

2 Q. Thank you for your time this morning, Mr. Burr.

3 MR. CATLETT: Your Honor, I have no further questions.

4 THE COURT: Mr. Lane, do you have any redirect?

5 MR. LANE: No redirect, Your Honor.

6 THE COURT: Subject to recall, plaintiffs?

7 MR. LANE: Can he be excused, Your Honor? He has a
8 plane to catch.

9 THE COURT: Recall, Mr. Catlett?

10 MR. CATLETT: No, Your Honor.

11 THE COURT: Mr. Burr, thank you so much for testifying
12 this morning. You are excused. Please be careful walking down
13 the back stairs there. Have a wonderful weekend coming up,
14 okay?

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Next witness.

17 MR. KEENAN: Your Honor, plaintiffs call Rhonda Neff.

18 MR. LANE: Your Honor, may I walk with Mr. Burr for a
19 moment while this is ongoing?

20 THE COURT: Yes, you may.

21 MR. LANE: Thank you.

22 **RHONDA E. NEFF, PLAINTIFFS' WITNESS, SWORN**

23 THE COURT: Ms. Neff, I think you were in the
24 courtroom. Be careful walking up the back stairs there.
25 Adjust the microphone, speak directly into it. And good

1 morning to you.

2 THE WITNESS: Thank you, Judge -- Your Honor. And
3 good morning to you as well.

4 THE COURT: Thank you.

5 MR. KEENAN: Your Honor, may I grab an exhibit before
6 I begin?

7 THE COURT: No, just let the courtroom deputy know
8 what you need.

9 MR. KEENAN: Sure. I will need Plaintiffs' Exhibit 1.
10 May I approach?

11 THE COURT: Yes. Go ahead.

12 DIRECT EXAMINATION

13 BY MR. KEENAN:

14 Q. Good morning.

15 A. Good morning.

16 Q. Can you introduce yourself? Tell us your name.

17 A. Yes, Rhonda Elaine Neff, R-H-O-N-D-A, E-L-A-I-N-E, N-E-F-F.

18 Q. What is your relationship with Arizona Attorneys for
19 Criminal Justice?

20 A. I have been a member since either late 2012 or early 2013,
21 and I am currently the incoming president of AACJ.

22 Q. When you say AACJ, you are referring to Arizona Attorneys
23 for Criminal Justice, correct?

24 A. Yes.

25 Q. And when does your term as president begin?

1 A. In January during the January board meeting.

2 Q. Are you aware that AACJ is an organizational plaintiff in
3 this lawsuit challenging the constitutionality of A.R.S.
4 13-4433(b?).

5 A. I am.

6 Q. What line of work are you in, Ms. Neff?

7 A. I am a practicing criminal defense attorney. I also have
8 some civil practice in civil forfeiture, and I have represented
9 witnesses and victims in -- primarily related to criminal
10 cases.

11 Q. How long have you worked as a criminal defense attorney in
12 Arizona?

13 A. I was licensed in November of 2012, and I have been
14 practicing criminal defense almost exclusively since then.

15 Q. And how about your work, civil work and work representing
16 victims, how long have you been doing that work?

17 A. Throughout my entire practice as well.

18 Q. So you are barred in Arizona?

19 A. I am.

20 Q. Where did you receive your undergraduate degree?

21 A. The University of Wyoming in 2003.

22 Q. And how about your law degree?

23 A. The Phoenix School of Law in, oh gosh, I have to remember
24 what year I graduated. I believe I graduated in 2012.

25 Q. And have you ever been subject to state bar discipline in

1 Arizona?

2 A. I have not.

3 Q. And have you been subject to any other professional
4 sanctions?

5 A. I have not.

6 Q. Can you tell us what AACJ is?

7 A. Yes. It's an organization made up of several hundred
8 members across the state, primarily practicing in criminal
9 defense or associated to the criminal defense community, that
10 was founded to provide a voice for the defense, both in
11 promoting justice, you know, working with the legislature,
12 working with courts, working on the truth seeking function of
13 the defense side, and just generally representing, for lack of
14 a better word, the criminal defense bar.

15 Q. Are you familiar with A.R.S. 13-4433(b)?

16 A. I am.

17 Q. And what is that statute?

18 A. That is the -- I mean, we refer to it as the victims'
19 rights prohibition or restriction. It is a statute that
20 prohibits defense counsel or anyone connected to a defendant
21 from having any kind of communication with the victim outside
22 of going through the prosecutor's office first.

23 Q. So if I refer to the victim contact prohibition, will you
24 understand that to mean A.R.S. 13-4433(b)?

25 A. Yes.

1 Q. Are members of AACJ affected by the victim contact
2 prohibition?

3 A. Yes.

4 Q. I am going to move on to some of your personal experiences
5 related to -- involvement with the victim contact prohibition.

6 How has the victim contact prohibition affected your
7 practice as a criminal defense attorney?

8 A. As a criminal defense attorney it has quite a bit of
9 impact. As a criminal defense attorney, we get a limited
10 subset of information, and oftentimes, when crimes are being
11 investigated or alleged crimes are being investigated, the
12 investigation is targeted specifically towards one subset of
13 facts.

14 And those of us who have practiced in criminal defense
15 know that there are facts well beyond just that small subset
16 that lead into why something happens or how something happened,
17 or what the circumstances may have been around a particular
18 crime occurring.

19 And those are things that are just not inherently part
20 of a law enforcement investigation or even further
21 investigation through prosecutors' offices.

22 That's our job as defense attorneys to ensure that we
23 have the wide range of facts and circumstances known to be able
24 to best represent our clients, and to ensure that the
25 constitutional rights of our clients have been complied with.

1 Q. So in your experience, has the victim contact prohibition
2 limited your ability to speak directly to crime victims?

3 A. Absolutely. And I think in more than one way. You know, a
4 lot of the crimes we know are related to family relationships
5 or are somehow connected through relationship. And a lot of
6 times the people who have the information that would be
7 relevant to us to put together the larger picture, or to even
8 to understand the broader circumstances of what happened,
9 including things like our client's mental health history or our
10 client's drug and alcohol abuse history or use, things that
11 maybe our defendant is not as able to provide to us, we have a
12 restriction for being able to get that information from the
13 sources who would actually have that information.

14 Q. In your practice, do you ever reach out directly to
15 individual victims in your cases without going through the
16 prosecutor's office?

17 A. Absolutely not.

18 Q. What do you believe would happen if you did reach out
19 directly to a victim without going through the prosecutor's
20 office?

21 A. Well, I know what would happen. If the contact is made by
22 the defense attorney to a victim, that contact is almost always
23 reported into the prosecutor's office, or to a victim advocate,
24 and the attorney ends up either being brought before the court
25 or the state bar or both.

1 Q. Do you have any personal experience with that happening?

2 A. I do.

3 Q. And can you describe that for us?

4 A. Yes. I spent a good portion of my career, I think close to
5 eight and a half years, practicing with largely under the
6 guidance of Michael Kimerer in the firm of Kimerer and Derrick.

7 And Mr. Kimerer, and I both had a case where we were
8 retained by the defendant's wife. The defendant's son was one
9 of the named victims in the case. I was not personally in the
10 initial meeting, but was dragged into the victim's right issue
11 through litigation.

12 But the wife brought the child in during the period of
13 time where we were being retained, so prior to us having any
14 background and facts or information on a case.

15 And when that happened, when the state found out that
16 we had had that initial contact with the victim, Mr. Kimerer,
17 and to some extent me not directly, were reported to the state
18 bar.

19 Q. And in that situation, just to be clear, neither you nor
20 Mr. Kimerer had any idea that this son was a statutory crime
21 victim; is that correct?

22 A. At the time, I -- I mean, I obviously can't testify to what
23 Mr. Kimerer knew. At the time that this was coming about, it
24 was very early in it. I think the defendant had only been
25 arrested for a short period of time.

1 We knew really no facts or information about the case
2 as a whole, up until the point that that meeting happened and
3 they provided us information as to what the arrest was about.

4 Q. And did the state bar undertake some sort of investigation?

5 A. It was summarily dismissed. I believe it was just based on
6 a phone call.

7 Q. But you did receive a phone call from the state bar?

8 A. Mr. Kimerer did. I did not personally speak to the state
9 bar on that.

10 Q. Has a crime victim ever reached out to you in a case in
11 which you were the defense attorney?

12 A. Yes.

13 Q. And how did you respond?

14 A. I take my ethical obligations extremely serious. And I
15 have been contacted many times by crime victims, largely
16 related or in some form of relationship with my clients.

17 My practice has always been to -- well, I guess
18 there's two different scenarios. One, I just get a message
19 from them saying, "Hi, I am a victim in this case. I would
20 like to have some kind of contact with you." And I notify the
21 prosecutor's office. I won't return the phone call.

22 In some cases, I answer the call, not knowing who I am
23 answering the call for, and learn that I am speaking to a
24 victim. In which case I tell them that I am unable to speak
25 with them. That if they would like contact with me, they need

1 to reach out through the prosecutor's office, or they have the
2 ability to get an independent counsel involved.

3 Q. And you go through this process because of concern related
4 to the victim contact prohibition, correct?

5 A. Yes. And actually, can I -- let me qualify that answer.
6 Yes, it's based on the victim's right prohibition clause in the
7 statute. The statutory language itself says that we cannot
8 initiate contact with the victim.

9 My concern as a criminal defense attorney, and in my
10 capacity with AACJ and teaching other criminal defense lawyers
11 as well, is that "initiating" is somewhat a vague term.

12 And so even if the victim initially reaches out to me,
13 I am still initiating that contact back to them if I return a
14 phone call, or if I call them a second time, and I don't want
15 to risk that being considered a violation of the Victim's Bill
16 of Rights, or this particular statutory provision because I
17 have then initiated some form of communication back. If --
18 particularly if there's a withdrawal of consent to speak with
19 me that I am unaware of.

20 Q. So in that scenario, would you -- do you believe that the
21 victim contact prohibition cuts off your speech to a crime
22 victim?

23 A. Yes.

24 Q. In your experience, how are victims informed of their
25 rights under the constitution and the Victim's Bill of Rights,

1 specifically?

2 A. Well, having done work as both a criminal defense attorney
3 and also victim's counsel, they are advised through a victim
4 rights packet that they receive if they elect into being a
5 victim at the time that the crime actually occurs.

6 THE COURT: Sorry, Ms. Neff, there's a lot of
7 information that I am writing down here. If you could slow
8 down, that would be very helpful.

9 THE WITNESS: Certainly, Your Honor.

10 THE COURT: What was the last thing you were saying
11 there.

12 THE WITNESS: So at the time that a crime is committed
13 and a victim is contacted, they are given a victim rights
14 packet, is my understanding, that provides them with notice of
15 their victim's rights.

16 They are also advised at the beginning of every
17 hearing, a victim's rights advisement is now required, or at
18 least is given in the superior courts.

19 They, in my experience, have also gotten letters from
20 a victim advocate's office connected to the prosecutor's
21 office. When I am representing a victim, I go over their
22 victim's rights with them as well.

23 So there are multiple different notifications
24 throughout the process that the victim gets of their rights,
25 including their right to choose whether to be interviewed by

1 the defendant or the defendant's counsel.

2 BY MR. KEENAN:

3 Q. And I believe you mentioned this, if a victim were to call
4 you and you were to pick up the phone, would you also inform
5 them of their rights?

6 A. Yes. I have done that many times, and largely because if a
7 victim is reaching out to me and wanting to have some kind of
8 contact with me, going into what Mr. Burr was talking about in
9 that relationship that exists, me coming out as a defense
10 attorney and just saying, "I'm sorry I can't talk to you," and
11 hanging up the phone, oftentimes makes it appear as though the
12 defendant or the defense attorneys are not interested in what
13 the victim's position is, or what the victim has to say.

14 And so in order to let a victim know that the reason
15 that I am unable to engage in that conversation with them is
16 because of a statutory prohibition, makes it less impactful to
17 the victim in thinking that somehow it is a lack of desire on
18 our part to have that communication.

19 Q. If the victim contact prohibition was not in effect in
20 Arizona, would you reach out directly to crime victims?

21 A. In selective cases, I would. I can't say that I would in
22 every case. I think there are certain cases where it would
23 warrant the communication. And there are other cases where I
24 don't know that any useful information or beneficial
25 information could come. I think it would definitely be a

1 fact-by-fact circumstances, but, yes, I would.

2 Q. Can you tell us other reasons why you would like to speak
3 with crime victims, if you were allowed?

4 A. Certainly. I think there are several reasons. I don't
5 believe that as a defense attorney it's necessarily
6 investigative on my part. I don't have any desire to
7 interrogate a victim or to try to coerce a victim into changing
8 their position or anything else.

9 But oftentimes, when I am representing a defendant in
10 a case, there are gaps in time, gaps in circumstances,
11 information about the nature of their relationship or how they
12 knew each other, that are not part of the investigation as a
13 whole. And those play a very important role in my job as a
14 criminal defense attorney.

15 And quite frankly, that information is not just useful
16 for the criminal defendant. It's oftentimes -- it's useful for
17 me as a defense attorney. I need that information, because
18 part of my job is to advise the defendant of his rights. What
19 the likelihood of success may be at trial. What some of the
20 issues that may come up at trial are. Who some of the
21 witnesses may be. And the impact of trial on a particular
22 witness.

23 And there are times in cases where the information
24 that comes from the victim gives me the opportunity to go back
25 to my client and let them know of the impact of their actions

1 on a particular person, which can result in the case coming to
2 resolution prior to going to trial, because we have those
3 facts, we have that information, we know what that victim's
4 position and testimony may look like.

5 Q. If the victim contact prohibition was, again, not in effect
6 in Arizona, and there was a child victim in one of your cases
7 where you were a criminal defense attorney, would you reach out
8 to that child?

9 A. No. Under no circumstance would I reach out directly to a
10 minor victim, regardless of a victim contact prohibition. Even
11 if that law did not exist on the books, I would only reach out
12 to that minor victim either through the victim's
13 representative, meaning their guardian of some sort, or
14 victim's counsel if they had retained independent counsel.

15 Q. If the victim contact prohibition, again, was not in effect
16 in Arizona, and you reached out to a victim who said they did
17 not want to speak with you, what would you do?

18 A. I would absolutely respect that right. They have a right
19 not to speak with me or be interviewed by me or speak to me in
20 any way.

21 I would thank them for their willingness to answer the
22 call, if that is what it was, and I would just tell them I
23 appreciate it, and that's the end of the conversation that I
24 would have with them.

25 Q. If the -- again, victim contact prohibition was not in

1 effect and you reached out to a victim directly, they told you
2 they did not want to speak with you, but you persisted in
3 continuously contacting them anyway, do you think you would
4 face any negative consequences?

5 A. Absolutely.

6 MR. CATLETT: Your Honor, I am going to object, based
7 on speculation.

8 THE COURT: Sustained. I need some more foundation
9 information about what she specifically knows about that issue.

10 BY MR. KEENAN:

11 Q. Sure. Are you aware of any statutes, other than the victim
12 contact prohibition, that would -- that could play a part in
13 how you interact with crime victims in Arizona?

14 A. Well, yes. There are statutes and criminal rules regarding
15 an obligation not to harass, threaten, coerce victims, not to
16 engage in that type of behavior with them. There are also
17 ethical restrictions against me engaging in that kind of
18 contact.

19 Q. So again, if the victim contact prohibition was not in
20 effect, and you reached out to a victim who told you they did
21 not want to speak with you but you persisted, do you think any
22 of those regulations or laws that you mentioned would cause you
23 to face negative consequences?

24 MR. CATLETT: Your Honor, same objection.

25 THE COURT: Sustained again.

1 Mr. Keenan, I think Mr. Lane is trying to talk to you.
2 Why don't you turn around and visit with them.

3 MR. LANE: Thank you, Your Honor.

4 (Discussion held between Mr. Lane and Mr. Keenan.)

5 BY MR. KEENAN:

6 Q. Other than the victim contact prohibition, are there other
7 either ethical rules or laws that you think would apply to your
8 conduct when interacting with a crime victim?

9 A. Yes, one of which is my ethical obligations in the oath I
10 took as a lawyer as a whole, to uphold the administration of
11 justice and the requirement that I act in a professional
12 manner. And I don't believe that acting -- harassing,
13 threatening, or pushing a victim would be professional action.

14 So I believe, at a very minimum, it would be a
15 violation of my ethical requirements. But I also believe that
16 there are orders put in place during criminal cases that
17 require the victim to be treated with dignity, respect, and
18 those would be violated as well, in which case I would be
19 subject to restrictions from a court or possible contempt
20 proceedings.

21 Q. So you mentioned two issues there. Court orders, which I
22 think you addressed, and ethical obligations. If you were to
23 violate those ethical obligations, what would happen?

24 A. Any number of things could happen based on the
25 egregiousness of the conduct. I could face discipline from the

1 state bar, either informally or formally. I could lose my law
2 license. I could be suspended from the practice of law.

3 There's a whole myriad of things that the state bar
4 has at their disposal to discipline attorneys. It would fall
5 somewhere within that range.

6 Q. In your experience as president of AACJ, and as a criminal
7 defense attorney in Arizona, do defense attorneys generally
8 respect the law and refrain from reaching out directly to
9 victims in their cases?

10 MR. CATLETT: Objection, Your Honor, foundation.

11 THE COURT: Sustained.

12 BY MR. KEENAN:

13 Q. Through your work with AACJ, does that cause you to
14 interact with criminal defense attorneys in Arizona?

15 A. Yes, almost on a daily basis.

16 Q. How do you interact with those criminal defense attorneys
17 through AACJ?

18 A. Well, I mean, in several ways. My involvement with the
19 AACJ has largely been as a board member, so I act as a
20 consultant to other defense attorneys.

21 I am called upon to teach at seminars. I am contacted
22 individually by members, which is one of the member benefits of
23 AACJ. If they have questions on a particular case or have
24 insight that they need.

25 I also act as -- in the capacity of an executive board

1 member as kind of an overseer of the organization as a whole to
2 ensure that our members have a broad base of people that they
3 can reach out to in order to discuss or get input on issues
4 related to criminal justice.

5 As part of that role, I have also served on the Amicus
6 and Rules Committee, assisting in amicus briefs. And between
7 the Arizona Federal Courts, the Ninth Circuit Court of Appeals,
8 and the United States Supreme Court.

9 And I have also served on the legislative committee,
10 both testifying on bills, as well as being part of stakeholder
11 meetings. So I have interacted with the defense community
12 pretty extensively in all of those ways.

13 Q. Throughout all of these interactions, do you have any
14 indication that defense attorneys in Arizona do not respect the
15 law or their ethical obligations?

16 A. My experience has been that they do, and, you know, I would
17 imagine that there are a few, just like there are on the state
18 side or plaintiffs' side or defendant's side in any case, I am
19 sure that there are a few people that maybe don't take their
20 ethical obligations as serious as others. But that has not
21 been my experience in general with the criminal defense bar.

22 Q. Getting back to your experience with the victim contact
23 prohibition, do you routinely ask prosecutors to relay your
24 requests to have contact with victims in your cases?

25 A. I have historically either put in a request in a pleading

1 form to file with the court to say that I would like to
2 interview the victim. I have also done it via email or letter.

3 There are times other times where I don't have a lot
4 of confidence that the information is actually conveyed to a
5 victim.

6 But oftentimes I will, as part of my mitigation packet
7 or deviation letter include specific information that I would
8 want the victim to know or understand about the defendant or
9 the defendant's situation and will include in their request
10 that the prosecutor provide a copy of that to the victim.

11 Q. What makes you unsure whether prosecutors are relaying that
12 information to victims?

13 A. There's no accountability for it. Nobody knows whether the
14 information has been conveyed or whether it hasn't. The
15 defense doesn't ever have the ability to ask a victim during
16 any stage of the proceeding whether that was actually conveyed
17 to them.

18 And in general, I would like to believe that
19 prosecutors abide by their ethical obligations as well in their
20 requirements.

21 But I have had cases where I -- you know, I've
22 represented victims and/or defendants where information comes
23 out later that makes me believe that the victim was not
24 informed of the information we provided, or was not advised of
25 our request to provide contact.

1 Q. Can you tell us about a specific instance where you felt
2 that a victim later -- or sorry. Strike that.

3 Can you tell us about a specific example where you
4 believed a victim was not informed of your request for contact?

5 A. Yeah. I mean, we had a case that was a domestic case. It
6 was a situation where there had been strained relations between
7 the family, and, you know, oftentimes these come up later in
8 post-conviction proceedings, where, you know, a victim will
9 reach out to the defense in some capacity, after they've
10 learned information that's become public in post-conviction
11 proceedings or habeas proceedings, or whatever it may be, where
12 they come out and say, "Hey, if we had known this, it would
13 have made a difference."

14 Q. Have you ever experienced a situation where a victim's
15 testimony at trial, or an evidentiary hearing, differs from
16 what was in a police report?

17 A. Pretty routinely.

18 Q. Have you ever experienced prosecutors making charging
19 decisions in order to expand the number of witnesses who fall
20 under the statutory definition of a crime victim?

21 MR. CATLETT: Objection, foundation.

22 THE COURT: That's sustained.

23 BY MR. KEENAN:

24 Q. Do you have any reason, from your experience, to believe
25 that prosecutors might, in some situations, expand the number

1 of witnesses who fall -- sorry, use charging decisions in order
2 to expand the number of witnesses who fall under the statutory
3 definition of victim?

4 MR. CATLETT: Same objection, Your Honor.

5 THE COURT: That's actually overruled.

6 You may answer.

7 THE WITNESS: I believe -- I believe that in some of
8 my cases who has been considered a victim has been overly
9 expansive for people who have truly been victimized by a
10 particular crime.

11 Can I come out and say that I believe that it was an
12 act in bad faith by the prosecutor? I cannot. But I do
13 believe that there are cases that I have had personally or that
14 I have consulted on where I believe that the victim prohibition
15 has played a role in them making an expansive group of people
16 named as victims.

17 Q. You mention that you represent at times crime victims as
18 part of your practice?

19 A. I do.

20 Q. Does the victim contact prohibition affect your work when
21 you represent crime victims?

22 A. It does in a different way. In the cases where I represent
23 victims, I think -- I guess one thing that's important to point
24 out as it relates to the victim's right prohibition is that the
25 language is very clear that it would prohibit the defendant or

1 anyone on the defense team from having direct contact with a
2 victim without making the request directly through the
3 prosecutor.

4 It does not say "prosecutor and/or victim's
5 representative." So oftentimes, even as victim's counsel, I
6 have to be the one, if I want to talk to the defense that
7 reaches out to them. And then technically under the rules,
8 they would still be required to go through a prosecutor, even
9 before talking to me as a victim's attorney. And so it does
10 impact it from that standpoint.

11 I also think that, you know, crimes affect different
12 victims in different ways. And sometimes the victim has a lot
13 of anger, has a lot of sadness towards a particular defendant.
14 Sometimes they want answers as to what might have been going on
15 in that victim's mind.

16 The ability to have that contact for the victim to be
17 able to get that information from defense is important. But
18 the other part of it that is impacted by it, that I have
19 noticed specifically as victim's counsel, is that there's not
20 really an effort made through victim's attorney or through a
21 victim's advocate to explain to a victim what the benefits of
22 talking to a defendant may be.

23 All of the rights against doing it are oftentimes
24 explained to a victim, but the good things that could come of
25 it, or the important things about restorative justice or even

1 getting answers, the ability to understand more why something
2 happened, that's not necessarily conveyed.

3 And oftentimes, even though there's a victim advocate
4 or there's, in a lot of case a victim's attorney, the victim
5 doesn't know what questions to ask. The victim doesn't know
6 what questions to ask of a prosecutor about contact with the
7 defendant or whether it would be useful.

8 And so the only way -- one of the only ways that they
9 are going to be able to get that information to know that the
10 defendant is even interested in talking to them, is if
11 defendant or somebody on -- not the defendant directly, but
12 somebody -- defense counsel has the ability to actually walk up
13 and ask the question if they are willing to talk.

14 Q. I just have a few more questions here.

15 MR. KEENAN: Could we pull up Exhibit 1 for the
16 witness?

17 THE COURT: You have to use the ELMO or your laptop.
18 You can just put it right on the ELMO there. You can also draw
19 on the screen to the right of you.

20 BY MR. KEENAN:

21 Q. Do you know what this is?

22 A. I do.

23 Q. And what is it?

24 A. This is the standard letter sent out by the Arizona
25 Attorney General's Office to crime victims when a request for

1 interview has been made by a defense attorney.

2 Q. Do you see the portion of the letter where there are lines
3 for a victim to check?

4 A. I do.

5 Q. And it provides two options, correct?

6 A. Yes.

7 Q. Do you think those two options accurately reflect the
8 rights -- or accurately reflect the Victim's Bill of Rights?

9 A. As to the first one of asserting the right to refuse
10 defense discovery request, I think that's consistent with
11 what's in the Victim's Bill of Rights.

12 As to the second of waiving my rights and agreeing to
13 be interviewed or deposed before trial, I think that is, I
14 mean, quite frankly misleading in what it is. They may be
15 waiving the very specific right not to be interviewed, but they
16 are not waiving their rights as a whole, plural, as it's stated
17 in here, of being a crime victim in order to engage in an
18 interview or being deposed prior to trial.

19 Q. Thank you. Do you believe the victim contact prohibition
20 impacts the truth seeking function of the criminal justice
21 system?

22 A. Absolutely.

23 Q. How or why?

24 A. Well, I mean, the truth seeking function of the criminal
25 justice system, it's not intended to be just about prosecutions

1 and criminal convictions and incarceration. It's intended to
2 be about community and stabilization and people in general.

3 And when one side of it is blocked from having access
4 to important information of what actually constitutes truth,
5 but the other side is given unfair access to that, we have no
6 ability going into trial to say that in fact truth has been
7 found at the end of it.

8 There's an unfair advantage that goes into that, but
9 more importantly, the ability of us to represent a criminal
10 defendant rests on our ability to understand facts, engage the
11 importance of particular facts, or the lack of facts that may
12 exist with respect to something.

13 That is -- truth is all inclusive of both sides of
14 what happened and the underlying circumstances around what
15 happened. As I testified before, oftentimes that is not the
16 purpose of the law enforcement investigation, to go get the
17 back history or to get information of the circumstances around
18 it.

19 They are tasked with investigating one particular act.
20 One particular act very often is not inclusive of what the
21 actual truth of the event or event is, and it can come down to
22 it where, you know, the ability to obtain the truth, to
23 investigate the truth, results in resolution, because we have
24 more information to go back to our client and say, listen,
25 here's what we have learned about this entire situation, we

1 need to not retraumatize the victim by going into trial. Or we
2 need to, you know, find a different way to resolve it.

3 It can also come out on the other end where -- you
4 know, we see it all the time, where the police reports are
5 either not accurate, don't provide a full accounting of a
6 story, or don't include any of the information that may be
7 exculpatory or necessary for the criminal defendant to be able
8 to assert his rights or to act on those.

9 Q. Thank you.

10 MR. KEENAN: No further questions, Your Honor.

11 THE COURT: Is there any cross-examination,
12 Mr. Catlett?

13 MR. CATLETT: Yes, Your Honor.

14 THE COURT: Come on up.

15 CROSS-EXAMINATION

16 BY MR. CATLETT:

17 Q. Good morning, Ms. Neff.

18 A. Good morning. How are you?

19 Q. Good. How are you?

20 A. Good.

21 Q. Thank you for being here.

22 When you represent a victim as counsel, no lawyer can
23 reach out to the victim without going through you first,
24 correct?

25 A. I mean, if you read the rule by its plain language, they

1 can't reach out to me. They can't reach out to my victim even
2 through me without going through the prosecutor's office.

3 Q. When you represent a victim as counsel Rule 4.2 applies.

4 Are you aware of Rule 4.2?

5 A. Yes.

6 Q. And that rule applies, correct?

7 A. Yes.

8 Q. And under ER 4.2, if another lawyer wants to speak with a
9 victim that you are representing, regardless of whether it's
10 the prosecution or the defense, that lawyer has to go through
11 you first, correct?

12 A. Yes.

13 Q. And when you're victim's counsel, you explain their rights
14 as victims to them, correct?

15 A. Absolutely.

16 Q. When you serve as counsel to a victim, that impedes the
17 truth seeking function, correct?

18 A. I don't believe it does, no.

19 Q. If a defendant receives a Miranda warning and as a result
20 refuses to speak to prosecutors or the Court, that impedes the
21 truth seeking function, correct?

22 A. No.

23 Q. But when a victim is given the option of whether to speak
24 to defense counsel and chooses not to do that, that impedes the
25 truth seeking function?

1 A. It may or may not, depending on the particular case or the
2 particular circumstances. In some cases, it may. Other cases
3 it may not impede necessarily the truth seeking function as
4 much as understanding the surrounding circumstances and/or
5 mitigation.

6 Q. AACJ was formed in Arizona in 1986, correct?

7 A. That sounds accurate.

8 Q. And AACJ became aware of the Victim's Bill of Rights when
9 it was in progress of being proposed as a constitutional
10 amendment, correct?

11 A. I wasn't practicing back then. I can't tell you. But I
12 would assume so.

13 Q. Are you aware that a corporate representative of AACJ in
14 this case previously testified that AACJ has been aware since
15 the Victim's Bill of Rights was first proposed that it exists?

16 A. I am not aware of that, no.

17 Q. AACJ became aware of A.R.S. Section 13-4433-(b) on or near
18 its inception, correct?

19 A. Again, I wasn't there as part of their board or their
20 executive board back then, but I would assume so.

21 Q. AACJ has no evidence that the Arizona Legislature passed
22 what is now Section 13-4433(b) with the intent of restricting
23 defense attorneys' speech, correct?

24 A. I am sorry. Can you repeat the question?

25 Q. Sure. AACJ has no evidence that the Arizona Legislature

1 passed what is now Section 13-4433(b) with the intent of
2 restricting defense attorneys' speech, correct?

3 A. I can't answer that question. I think it depends on what
4 you define as evidence. But I think the fact that a
5 restriction is put in place is evidence that that was their
6 intent, to stop speech.

7 MR. CATLETT: Your Honor, if I need to access a
8 deposition transcript?

9 THE COURT: Yes, just let us know which one.

10 MR. CATLETT: It's the deposition transcript of Amy
11 Kalman.

12 THE COURT: Come on up.

13 MR. CATLETT: I'm sorry. Amy Kalman on behalf of
14 AACJ.

15 THE COURT: Do you want her to give it to the witness?

16 MR. CATLETT: Yes, that would be great.

17 THE COURT: Have you provided the plaintiffs with a
18 copy.

19 MR. CATLETT: Yes, Your Honor. They have a copy.

20 BY MR. CATLETT:

21 Q. Ms. Neff, are you aware that Ms. Kalman was deposed in this
22 case?

23 A. I was not, but I am not surprised by it.

24 Q. And are you aware that Ms. Kalman was designated as AACJ,
25 as its corporate representative for purpose of the deposition?

1 A. Yes, I believe Ms. Kalman was AACJ president at the time
2 this lawsuit was filed.

3 THE COURT: What's the spelling of the name of the
4 person you keep referencing?

5 MR. CATLETT: It's Amy, A-M-Y. And last name is
6 Kalman, K-A-L-M-A-N.

7 THE COURT: Thank you very much.

8 BY MR. CATLETT:

9 Q. Ms. Neff, do you have any doubt in your mind that
10 Ms. Kalman told the truth when she was deposed in this case?

11 A. I have no reason to believe that she would not. She is a
12 very truthful person.

13 Q. And can you please turn for me to page 16 of Ms. Kalman's
14 deposition transcript?

15 A. Okay.

16 Q. At line 3 on page 16, there's a question and -- I'm sorry.
17 Let's go to line 12.

18 At line 12 on page 16, a question is posed to
19 Ms. Kalman of: Do you have any evidence that the Arizona
20 Legislature passed what is now 13-4433(b) and (c) with the
21 intent of restricting defense attorneys' free speech rights?

22 And her answer was: I have no evidence.

23 Did I read that correctly?

24 A. Yes.

25 Q. Thank you. Members of AACJ have been involved in

1 challenges to provisions of the Victim's Bill of Rights in
2 state court, correct?

3 A. My understanding is yes.

4 Q. And AACJ's members have been involved in challenges to --
5 or I am sorry. Strike that.

6 AACJ believes that its members have sought judicial
7 relief from provisions of the Victim's Rights Implementation
8 Act in state court, correct?

9 A. I am not aware of that specific challenge. Again, I
10 wouldn't be surprised by it, but I don't have any specific
11 knowledge of it.

12 Q. And how about more broadly, just seeking relief from the
13 restriction or the regulation that's contained in 4433?

14 A. Are you referring to AACJ as an organization, or as
15 individual members.

16 Q. Members.

17 A. Yes, I would believe that the members would have been --
18 throughout the time practicing, would have sought some form of
19 relief from those restrictions.

20 Q. And you agree that, if a lawyer in an individual criminal
21 case in Arizona State Court believes that it's imperative to
22 speak with the victim without going through the prosecutor's
23 office, he or she can seek permission to do so from the state
24 court, correct?

25 A. I don't think that the restriction in 4433 actually sets

1 out a remedy of the prosecutor and/or the Court. It just says
2 "prosecutor."

3 I do, however, believe that a defense attorney can
4 always file a motion with the court to take particular action.
5 In my personal experience, the court has been unwilling to
6 interfere in those types of communications absent a victim
7 coming out specifically asking that the restriction be removed.

8 Q. Okay. So a criminal defense lawyer in state court who
9 wants to make direct contact with the victim without going
10 through the prosecutor's office can ask the court for
11 permission to do so, correct?

12 A. I would -- I would assume so, yes.

13 Q. And if the court says no to that request, the defense
14 lawyer can appeal that denial, correct?

15 A. I think it would depend on how the issue was raised and
16 when. But there could be some relief on appeal for it.
17 Whether or not that relief would be subject to direct appeal
18 after conviction, or whether it would be subject to some kind
19 of special action makes a big difference. The harm at that
20 point might -- would have already been done.

21 Q. So they can seek appellate relief from the denial of a
22 request to make direct victim contact, either through direct
23 appeal or by filing a special action, correct?

24 A. If they had a legal basis to do so, yes.

25 Q. AACJ has no evidence that prosecutor's offices regularly

1 fail to pass on requests made pursuant to A.R.S. Section
2 13-4433(b), correct?

3 A. As an organization, I am not aware of any. From individual
4 member standpoints, I don't know that to be true.

5 Q. AACJ is aware of cases where a crime victim consented to
6 contact with a representative of the defense team after being
7 notified by the prosecutor's office of a defense request made
8 under section 13-4433(b), correct?

9 A. I can't answer that question yes from the standpoint that
10 the communication had been conveyed by a prosecutor's office.

11 I can say that we as an organization, and I
12 personally, am aware of cases where victim's contact was
13 allowed, once the victim was asked for that contact. But
14 whether that filtered through the prosecutor's office or not I
15 can't say.

16 Q. Can you turn for me to page 41 of Ms. Kalman's deposition
17 transcript?

18 A. Certainly.

19 Q. And at line 10, the question was posed to Ms. Kalman: Are
20 you aware of any case where a crime victim consented to contact
21 with a representative of the defense after being notified by
22 the prosecutor's office of a defense request pursuant to A.R.S.
23 Section 13-4433(b)?

24 And Ms. Kalman's answer was: AACJ is aware of such
25 cases.

1 Did I read that correctly?

2 A. Yes. And I have no reason to doubt that that's true.

3 Q. And AACJ's members have filed motions challenging the
4 constitutionality of A.R.S. 13-4433(b) in cases where those
5 members represented a criminal defendant in Arizona State
6 Courts, correct?

7 A. I have no specific knowledge of the actual cases being
8 filed, but I would say yes, that's probably accurate.

9 Q. And AACJ's members currently represent defendants in state
10 court criminal proceedings where there are crime victims,
11 correct?

12 A. Yes.

13 Q. And AACJ would not be surprised if the number of such cases
14 is over a thousand, correct?

15 A. A thousand cases where there's victims in defendants'
16 cases?

17 Q. Correct.

18 A. That wouldn't surprise me at all. I think it's probably
19 higher than that.

20 Q. And AACJ's participation in this case relates, at least
21 indirectly, to advancing the rights or interests of criminal
22 defendants in Arizona State Court criminal proceedings,
23 correct?

24 A. Yes, that's part of our mission.

25 Q. And that's part of why AACJ is participating in this case,

1 correct?

2 A. Yes.

3 Q. And in some instances when AACJ's members exercise speech
4 during ongoing criminal court proceedings, they do so mostly
5 for the benefit of their clients, correct?

6 A. I can't say that it's mostly for the benefit of their
7 defendants. I mean, I think inherent in your job as a defense
8 attorney is to look out for and protect the best interest of
9 your client. I think that's any attorney's obligation.

10 However, I can't say that that's mainly the purpose of
11 why it would happen. Again, a lot of times it has to do with
12 gathering the information in order to attempt the ability to --
13 for resolution in a case where otherwise there may not be.

14 Q. And that benefits the client, correct?

15 A. It can benefit all of the parties. I guess that's why I am
16 struggling to answer the question yes or no. Resolution in a
17 case can benefit the defendant certainly. It can also benefit
18 the victims, the state, and defense counsel as a whole. So I
19 think it is to benefit the criminal justice system as a whole.

20 Q. So I think you took issue with my -- the word "mostly," so
21 let me rephrase.

22 In some instances, AACJ's members may want to exercise
23 their speech rights during ongoing criminal court proceedings
24 for the benefit of their clients, correct?

25 A. Yes.

1 Q. And AACJ's understanding is that Arizona Rule of Criminal
2 Procedure 39(b)(11), which I believe has been renumbered to 12,
3 (b)(12) now, bars criminal defense attorneys working on behalf
4 of a client from directly initiating contact with a crime
5 victim in an Arizona State Court criminal case, correct?

6 A. Yes.

7 Q. And earlier you talked about what might happen if the Court
8 issued the injunction that AACJ is seeking, and one thing you
9 said is it wouldn't be your desire to interrogate victims. But
10 that's your choice, correct?

11 A. That's -- I mean, yes, for me personally.

12 Organizationally, I would say I don't -- in my experience
13 dealing with criminal defense attorneys and teaching criminal
14 defense attorneys and consulting with them, I don't think
15 anybody's desire is to, quote, unquote, "interrogate" anybody.

16 Usually our fight is against people even trying to
17 interrogate our own clients, so I don't think our interest is
18 to interrogate anybody. I do think that the truth seeking
19 function and the ability to speak to victims does have, to some
20 extent, an investigatory basis. But I would not say that all
21 investigation equals interrogation.

22 THE COURT: Mr. Catlett, we generally take our noon
23 lunch, but if you only have a handful of questions left, I will
24 allow you to finish.

25 MR. CATLETT: I have a handful-ish, Your Honor.

1 THE COURT: Well, that means we will -- coming from a
2 lawyer, that means we need to take our lunch recess right now.

3 Court is in recess until 1:00. You can leave your
4 work items in here because the back door will be locked. Court
5 is in recess.

6 (Recess taken at 12:02 p.m.; resumes at 1:05 p.m.)

7 THE COURT: This court will come to order. All
8 parties present when the court last closed are present again.

9 Mr. Catlett, you may continue with your
10 cross-examination. And Ms. Neff, you are still under oath.

11 BY MR. CATLETT:

12 Q. Good afternoon, Ms. Neff.

13 A. Good afternoon.

14 Q. Hope you had a good lunch break.

15 We were talking a little bit before the break about
16 what might happen if the victim contact regulation is lifted.
17 And in that circumstance, nothing would prevent AACJ's members
18 from questioning victims, correct?

19 A. Subject to the victim agreeing to it, no.

20 Q. Nothing in the law would prevent a member of AACJ from
21 approaching a minor witness, correct?

22 A. I don't necessarily believe that to be the case. And I
23 can't cite off the top of my head which statutes or rules may
24 apply, but, I mean, generally, you do have to contact minors
25 through a guardian or through a representative adult.

1 Q. But sitting here today, you can't identify any specific
2 statute that might restrict a criminal defense lawyer from
3 reaching out to a minor victim, correct?

4 A. I can't identify it by number, no.

5 Q. Does AACJ know of any attorneys -- any of its members who
6 have been sanctioned solely because of violating the regulation
7 in 13-4433(b)?

8 A. I don't know with any specificity as to the sanctions. I
9 know that members of AACJ have been brought before the state
10 bar for victim's contact violations, or at least I've heard of
11 members being put before the state bar.

12 Q. During direct, you talked a little bit about an issue of
13 not knowing whether a prosecutor has passed along a victim
14 contact request to the victim.

15 If you had concerns about that as defense counsel, one
16 option for you would be to ask the Court to order the
17 prosecution to provide proof that a request was passed along,
18 correct?

19 A. That could be one option and is largely why you see defense
20 attorneys, including myself now, file that as a request on the
21 record, with a specific request in it that the State file a
22 response indicating that they have in fact conveyed it. I have
23 never had a prosecutor file a response to that, however.

24 THE COURT: Ms. Neff, I know the defense counsel has
25 not raised the objection as it relates to being nonresponsive.

1 Can you listen to the question and answer it without a
2 two-minute narrative after your answer?

3 THE WITNESS: Absolutely, Your Honor.

4 BY MR. CATLETT:

5 Q. And with that instruction in mind, Ms. Neff, can you ask
6 the court, as a criminal defendant, to order the prosecution to
7 produce proof that it has passed along a victim contact request
8 if, as a defense lawyer, you are concerned that request has not
9 been passed along?

10 A. Yes.

11 Q. Thank you for your time this afternoon.

12 MR. CATLETT: Your Honor, I have nothing further.

13 THE COURT: That's not a handful-ish. I thought you
14 you had way more than that.

15 Is there any redirect?

16 MR. KEENAN: Yes, Your Honor.

17 THE COURT: Come on up.

18 REDIRECT EXAMINATION

19 BY MR. KEENAN:

20 Q. You testified on cross that there's nothing to prevent
21 defense attorneys from asking a court to require a prosecutor
22 to respond about whether they reached out to a victim related
23 to a criminal defense attorney's request to speak with them; is
24 that right?

25 A. Yes.

1 Q. Have you had experience of courts actually ordering
2 prosecutors to do that?

3 A. No.

4 Q. Based on the plain language of A.R.S. 13-3433B, is there
5 any authority in that statute that allows state court judges to
6 disregard or do away with the requirement that criminal defense
7 attorneys initiate contact with victims without going through
8 the prosecutor's office?

9 A. In that statute, no.

10 Q. Thank you.

11 MR. KEENAN: No further questions.

12 THE COURT: Subject to recall, plaintiff?

13 MR. KEENAN: No, Your Honor.

14 THE COURT: Defense?

15 MR. CATLETT: No, Your Honor.

16 THE COURT: Ms. Neff, thank you so much for coming in
17 this morning and afternoon. You have a wonderful day. Please
18 be careful walking down the steps there.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: You're very welcome.

21 THE WITNESS: And would you like this exhibit put
22 back.

23 THE COURT: No, you can just leave it there. Thank
24 you though.

25 THE WITNESS: Thank you.

1 THE COURT: Next witness, please.

2 MR. LANE: The plaintiffs call Rich Robertson.

3 **RICH ROBERTSON, PLAINTIFFS' WITNESS, SWORN**

4 THE COURT: Mr. Robertson, I know you have been in the
5 courtroom so you know everything I have told the witnesses.
6 Good afternoon to you, and please speak loud enough so we can
7 all hear you.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: You are very welcome.

10 DIRECT EXAMINATION

11 BY MR. LANE:

12 Q. State your name and spell your name for the record.

13 A. Rich Robertson, R-I-C-H, R-O-B-E-R-T-S-O-N.

14 Q. Sir, how are you employed?

15 A. I own R3 Investigations. I am a state licensed private
16 investigator.

17 Q. All right. And how long have you been a private
18 investigator?

19 A. 22 years.

20 Q. Prior to that, what did you do?

21 A. I was a journalist.

22 Q. What kind of a journalist?

23 A. I was a newspaper reporter for 25 years and, then I did
24 television for five years.

25 Q. Were you an investigative reporter?

1 A. I was the head of the investigative team at the Arizona
2 Republic.

3 Q. Okay. So is it fair to say that you have about 50 years of
4 investigation experience?

5 A. Thank you for reminding me.

6 Q. I am with you.

7 Are you familiar with the statute that is in question
8 in this case?

9 A. I am.

10 Q. How long have you -- if you recall, how long have you been
11 living with this statute?

12 A. Well, the entire time I have been a private investigator it
13 has applied to me. So since I started in 2000.

14 Q. So will you describe for the Court, who hires you to do
15 these investigations?

16 A. I am typically hired by the criminal defense bar --
17 attorney.

18 Q. Okay. To do what?

19 A. Fact investigations typically is mostly what we do, is
20 gather the facts the attorneys need to help litigate their
21 case.

22 Q. Are these capital and noncapital?

23 A. All the way through. Misdemeanors to capital, both state
24 and federal.

25 Q. Okay. In context of your job, do you have to become

1 familiar with police reports on every case?

2 A. Absolutely.

3 Q. Have you had experience over the years in investigating a
4 case and finding evidence that is inconsistent with what you
5 see in police reports?

6 A. Practically every case.

7 Q. Okay. Have you ever had occasion to investigate a case
8 where, for example, there was a gunpoint robbery -- just a
9 hypothetical -- gunpoint robbery, one witness, identification
10 case, police reports indicate something like, well, good
11 lighting, victim 100 percent positive this is the guy.

12 And then during the course of your investigation, you
13 find facts that cast serious doubt on what the police reports
14 contain?

15 A. Yes, it happens frequently.

16 Q. Have you had occasion to speak to victims of crimes?

17 A. Yes.

18 Q. Do you have to invoke the statute before you are permitted
19 to speak to victims of crimes?

20 A. I don't know that I am required to, but I do as a matter of
21 practice, because it's -- I want to make sure we're covered.

22 Q. Give me -- for instance, give me a typical example of how
23 it is that you are authorized to go talk to the victim of a
24 crime?

25 A. Well, I won't go -- well, I will talk to crime victims when

1 it's not a state case. We talk to crime victims all the time
2 in federal cases. We talk to victims on cases that have
3 Arizona witnesses that were charged in other states. We talk
4 to --

5 Q. Let me just stop. Arizona witnesses that were charged in
6 other states?

7 A. I'm sorry, on cases that were charged in other states.

8 Q. So if somebody is a defendant in a Texas case and the
9 victims are living in Arizona?

10 A. Correct, or -- yes, that's right.

11 Q. Okay.

12 A. So we can speak to them. And then of course there's the
13 times when the victims will reach out to us as well, to the
14 defense, to initiate the contact and want to talk to somebody.

15 Q. Have you obtained valuable information from victims?

16 A. Frequently.

17 Q. Have you ever had an experience where a victim says, "No, I
18 don't want to have anything to do with you. I don't want to
19 talk to you"?

20 A. Yes, absolutely.

21 Q. How often does that happen?

22 A. I hate to quantify it, but at least half.

23 Q. And what's your response when a victim says, "I don't want
24 to talk to you"?

25 A. Well, I treat it the same way as any other witness. I say,

1 "Thank you. Appreciate it. Here's my card if you change your
2 mind."

3 Q. And then that's it?

4 A. Pretty much, yep.

5 Q. All right. And in your professional career, does the
6 statute hamstring you in your efforts to investigate cases?

7 A. It does.

8 Q. In what way?

9 A. Well, there's incomplete -- inability to get complete
10 facts. So often, obviously the victim is at the core of the
11 case. And when we have to rely on how the victim's version of
12 events is characterized in a police report, we know that those
13 police reports are frequently not accurate or complete. They
14 are told from a point of view.

15 So from an investigative standpoint, you want to get
16 as much information as you possibly can from as many places and
17 sources as you possibly can.

18 Q. Do you find evidence in handling your cases that the police
19 will at times skew the reports?

20 MS. SAWYER: Objection, leading, Your Honor.

21 THE COURT: That's sustained.

22 BY MR. LANE:

23 Q. Do you believe that the police are biased or unbiased in
24 their writing of reports, generally?

25 A. I think a lot of them come from a point of view. "Biased"

1 sounds like a motive. I am not sure that that's always the
2 case. I have certainly seen that.

3 But they do come from a point of view and fairly
4 narrow sometimes. Their case is just enough information to get
5 somebody -- to get probable cause to make an arrest.

6 Q. Have you ever discovered exculpatory evidence for a
7 defendant when you have talked to victims?

8 A. Yes.

9 Q. In your discovery of exculpatory evidence, have you
10 searched police reports and found that that evidence is not
11 mentioned in police reports?

12 A. There's frequently information missing.

13 Q. Can you tell me what kinds of problems you have encountered
14 with, for example, determining who is a victim, who is not a
15 victim, accidentally talking to victims? Has anything like
16 that ever happened to be you?

17 A. Yes, there's kind of two different things. Number one,
18 victims, the definition of victims is broader than just the
19 person who may have been the subject of a criminal act.

20 It depends on the act. It depends on their relatives
21 and whether they are minors and stuff. So the statute defining
22 victims is fairly complicated and two degrees of sanguinity --
23 whatever that word is.

24 It gets -- so we have to sit down frequently and say,
25 wait a minute, is this person covered as a victim, before we

1 initiate -- try to initiate some contact.

2 And the second part of your question had to do with, I
3 think, inadvertent contact, correct?

4 Q. Yes.

5 A. Yes, we will go out and do interviews attempting to find
6 witnesses who may be a neighbor, or a relative, and, you know,
7 knock on the door, and lo and behold the victim answers the
8 door.

9 And we don't always know who the victim is by sight,
10 but, you know, it can lead to some awkward kinds of
11 conversations and memos to file and all kinds of things.

12 Q. Generally speaking, what are your marching orders from
13 defense attorneys vis-a-vis complying with the statute?

14 A. Well, the overarching order is don't violate the statute.
15 There seems to be some interpretation differences. Some
16 attorneys are far more conservative on it than others,
17 particularly in pre-charging kind of situations.

18 Some attorneys, by reading of the statute, we are not
19 representing a defendant in a pre-charging situation, so
20 victims are accessible to us. So we use that window of
21 opportunity, if you will, to interview victims.

22 Some attorneys, however, don't even want to go there,
23 because they just don't want to do anything. Victims are
24 radioactive, frankly.

25 Q. All right. Do you have attorneys that tell you, "Don't

1 even try to talk to victims under any circumstances"?

2 MS. SAWYER: Objection, leading, Your Honor.

3 THE COURT: That's overruled.

4 You may answer.

5 THE WITNESS: Yes, I mean, lots of times it doesn't
6 even have to be said. I know that we don't -- aren't going to
7 interview victims unless it's in compliance with the statute.

8 BY MR. LANE:

9 Q. Now, have you ever heard of any witness or victim of any
10 crime who has shown you or complained later that the mere sight
11 of you showing up or calling has so traumatized them that they
12 have complained about it?

13 A. There probably has been. I can't think of an instance off
14 the top of my head. But I know that -- you know, we interview
15 so many people. I mean, I interview jurors post -- and after
16 trials and jurors like to complain to the county attorneys and
17 the courts about us showing up.

18 I am sure that there's probably been victims that have
19 complained that I don't even know about necessarily.

20 Q. Well, have you ever been on the receiving end of any
21 official complaint that has resulted in some sort of an
22 investigation?

23 A. Not that I am aware of. I have never been investigated for
24 that, to my knowledge.

25 Q. All right. Will you characterize for the Court the

1 response? I mean, you have heard all of the talk about
2 retraumatizing victims. That's one of the cornerstone reasons
3 why this statute allegedly exists, right? You heard all of
4 that?

5 A. Yes.

6 Q. Okay. My question to you is, characterize for the Court,
7 how traumatic is it when you show up and you explained who you
8 are and a victim says, "I don't want to talk to you"?

9 MS. SAWYER: Objection, foundation.

10 MR. LANE: I am asking him what his experience is.
11 That is the foundation.

12 THE COURT: That's not how you asked the question.
13 Sustained.

14 BY MR. LANE:

15 Q. Have you had experience -- you have already said you have
16 had experience where victims don't want to talk to you?

17 A. Correct.

18 Q. All right. Well, what are your observations of the
19 emotional state of those victims after you introduce yourself
20 and explain what you want to do, and they say no?

21 A. It can be all over the map. I mean, not just -- the
22 reactions can vary widely. Some of them are very gracious
23 about it. Some of them are angry about it.

24 I don't remember anybody being, you know, overtly
25 traumatized to the point of hyperventilating and falling down

1 or anything like that. I mean, it's not like that.

2 They -- there seems to be, if I can go here. There
3 seems to be a belief that, you know, defendants are evil and
4 anybody helping the defendant is evil also. So you get that
5 kind of reaction at times from people.

6 And part of the skill, if you will, the art of the
7 interview, is to try to show them that that's just not the
8 case.

9 This is -- I am here. I am human being just like you
10 are. We have some questions to ask. You know, I would be
11 happy to ask -- tell you what questions I am going to ask you,
12 and if I ask a question that you don't want to answer, you
13 don't have to answer.

14 I mean, there's just ways of having that conversation
15 with them to find out -- kind of make them comfortable with the
16 situation.

17 But if they are adamant and said, "I don't want you
18 here. I don't want you on my property. I want you to leave."
19 Absolutely, we do that every time.

20 Q. Okay. When you are meeting with witnesses or victims --
21 well not victims, just generally witnesses, do you usually call
22 them on the phone or do you just show up?

23 A. It depends on the circumstances. I mean, every case is a
24 little bit different. We don't have any set rule for how we do
25 that. So it may be reaching out through -- by phone or -- you

1 know, obviously with the victims they had to have already
2 initiated the contact before we were going to talk to them
3 anyways, so that door is already opened. But then we decide
4 whether it is going to be by phone or in person or what have
5 you.

6 Q. Okay. You heard Mr. Burr testify that DIVO is simply a
7 conduit between the defense camp and the victims, right?

8 A. Sure.

9 Q. You heard him say that investigating is a little pushier,
10 right?

11 A. I heard that, yes.

12 Q. Do you agree with that?

13 A. Well, I don't -- I have heard words like interrogation and
14 pushy and that kind of thing. No, I don't agree with that. I
15 mean, obviously you are there to gather information, and you
16 can ask direct questions.

17 But there's no value to an investigator or to the
18 defense team to alienate who -- a person you are interviewing,
19 whether it is a victim or a witness of any kind.

20 So you treat people respectfully, and you are not
21 interrogating them in the sense that -- we have no control over
22 them anyway. Police interrogate people by putting them in an
23 interview room and not letting them leave. That's not what we
24 do.

25 So we have to find a way to make them comfortable,

1 meet them at some point in the middle, and have a conversation
2 about the facts that we are interested in hearing. Letting
3 them tell their story.

4 Q. So when you say, "You are letting them tell their story,"
5 are you saying they are the ones engaged in speaking to you,
6 and you are receiving their speech?

7 A. Yes. I mean, we obviously have to start the conversation,
8 explain everything, why you are there. Let them hear from my
9 words why we want to hear this information. Answer any
10 question they might have. But then at that point, it's shut up
11 and let them tell their story.

12 Q. Okay. So is it a dialogue, you are asking questions, they
13 are giving you answers?

14 A. In both directions. It can go both directions.

15 Q. Okay.

16 Q. Is it fair to say that it's a conversation?

17 A. It is, absolutely.

18 Q. Okay. This is -- is this in your mind just purely speech?
19 You are speaking and they are speaking?

20 MS. SAWYER: Objection, foundation.

21 THE COURT: That's overruled.

22 You may answer.

23 THE WITNESS: Yes. I mean, it's all about words and
24 ideas and information.

25

1 BY MR. LANE:

2 Q. Are you going in with any agenda, trying to change their
3 minds about anything?

4 A. No.

5 Q. Just the facts?

6 A. My job there is to try to gather information. I want to
7 hear a point of view. Every witness comes at a matter from a
8 different point of view, and a victim has a unique point of
9 view that is really important to the overall picture. And so
10 it's important to hear what they have to say, good, bad or
11 indifferent.

12 Q. Have you had occasion where you have learned information
13 from doing an investigation with a witness that causes you to
14 have a conversation with an attorney where then an attorney
15 decides, this guy should take a plea, or this guy should go to
16 trial, based on your investigation?

17 A. Sure. I mean, part of my role is collaborating with the
18 defense team and giving -- so the attorney can give good advice
19 to the defendant. And evaluating the witnesses, evaluating the
20 evidence, is part of what I do to help them do -- and make a
21 determination.

22 What's this going to look like at a trial? How
23 effective is that testimony going to be against you? Is it
24 inconsistent or consistent with what you have told us already
25 up to this point? There's just all kinds of factors that go

1 into it.

2 Q. In your professional opinion, does this enhance the truth
3 seeking function of the criminal justice system?

4 A. It is absolutely the goal.

5 Q. All right.

6 MR. LANE: May I have one moment, Your Honor?

7 THE COURT: Of course you can.

8 MR. LANE: No further questions, Your Honor.

9 THE COURT: Is there any cross-examination,
10 Ms. Sawyer?

11 MS. SAWYER: Yes, Your Honor.

12 THE COURT: Come on up, please.

13 CROSS-EXAMINATION

14 BY MS. SAWYER:

15 Q. Good afternoon, Mr. Robertson.

16 A. Good afternoon.

17 Q. I'm Kate Sawyer. I represent Defendant Brnovich today.

18 THE COURT: I'm sorry, Ms. Sawyer. Can you move the
19 microphone down? Just speak into one of them.

20 MS. SAWYER: Is this a little better?

21 THE COURT: That's perfect. Thank you.

22 BY MS. SAWYER:

23 Q. Mr. Robertson, when you were hired as an investigator by an
24 attorney for a criminal defendant, you work at the direction of
25 the attorney, correct?

1 A. Correct.

2 Q. In all of the cases you have worked on, on behalf of a
3 criminal defendant in Arizona State Court proceedings, you have
4 been working on behalf of that criminal defendant's criminal
5 defense attorney, correct?

6 A. Correct.

7 Q. You are a member of the plaintiff organization AACJ; is
8 that correct?

9 A. I am an associate member because I am a non-attorney.

10 Q. And you don't have any personal knowledge that in the
11 course of any criminal proceeding you have been involved with,
12 as an investigator, that a prosecutor's office has failed to
13 notify a victim of the defense team's request for an interview
14 with the victim, correct?

15 A. It would only be anecdotally. It gets talked about.

16 Q. You don't have --

17 A. I don't have any personal knowledge.

18 Q. You don't have any personal knowledge of that happening; is
19 that correct?

20 A. Correct. Correct.

21 Q. In a case when you are not working on behalf of a criminal
22 defense, there's an ongoing case, is it correct that you have
23 never knowingly initiated contact with a crime victim to
24 discuss their status as a crime victim in that case?

25 A. Can you repeat that?

1 Q. Sure. In a case that's ongoing, when you are not working
2 on behalf of the criminal defense attorney.

3 A. When I am not working on --

4 Q. When you are not working on behalf of others, there's a
5 case, is it correct that you have never knowingly initiated
6 contact with a crime victim to discuss their status as a crime
7 victim in that case?

8 A. Um, I apologize. I am not sure I understand. There's too
9 many double negatives in there.

10 Q. Okay. Sure. Let me try to repeat that for you.

11 Is it correct that you have not contacted victims when
12 you are not working on a case, just to talk about their status
13 as a victim in that case?

14 A. Oh, you mean like go rogue and just go out and start
15 talking to people?

16 Q. Just talking to victims. Have you ever?

17 A. I suspect I have talked to victims. There's lots of
18 victims out there.

19 Q. Have you --

20 THE COURT: Stop, stop, stop.

21 Counsel, when he starts to answer, just let him
22 answer. If you want me to strike what he said, let me know.

23 And also, Mr. Robertson, can you wait for her to
24 finish the question, please.

25 What was the last question again?

1 MS. SAWYER: We will try this one more time.

2 BY MS. SAWYER:

3 Q. Okay. Have you knowingly contacted a victim, you mention
4 that you might have contact. Have you knowingly contacted a
5 victim in a case you are not working on, for the purpose of
6 talking to that victim about their status as a victim in that
7 case?

8 A. I don't believe so.

9 Q. Okay. Crime victims have affirmatively reached out to you
10 as an investigator, in connection with your representation of a
11 criminal defense; is that correct?

12 A. That's correct.

13 Q. And you have been involved in cases where after request has
14 been made through a prosecutor, a victim has consented to
15 contact with a representative of the defense team?

16 A. Yes.

17 Q. Okay. And you are not a DIVO specialist as Mr. Burr talked
18 about earlier; is that correct?

19 A. I am not.

20 MS. SAWYER: I have no further questions, Your Honor.

21 THE COURT: Is there any redirect, Mr. Lane?

22 MR. LANE: No, Your Honor.

23 THE COURT: Subject to recall?

24 MR. LANE: He can be excused from the plaintiffs'
25 perspective, Your Honor.

1 THE COURT: Defense?

2 MS. SAWYER: No, Your Honor.

3 THE COURT: Mr. Robertson, thank you so much for
4 coming in this afternoon. You are excused. Have a nice week.

5 Next witness, please.

6 MS. BRODY: Your Honor, the plaintiffs call John
7 Canby.

8 **JOHN A. CANBY, PLAINTIFFS' WITNESS, SWORN**

9 THE COURT: Mr. Canby, good afternoon to you. Please
10 adjust the microphone. And counsel, you may begin.

11 DIRECT EXAMINATION

12 BY MS. BRODY:

13 Q. Good afternoon, Mr. Canby. Will you please state and spell
14 your name for the record?

15 A. My name is John Adams Canby, J-O-H-N, A-D-A-M-S, C-A-N-B-Y.

16 Q. And you are a plaintiff in this lawsuit challenging the
17 constitutionality of A.R.S. 13-4433(b), correct?

18 A. Yes, I am.

19 Q. And I may refer to that as the victim contact prohibition.
20 You know what I am talking about in that case?

21 A. Yes.

22 Q. And Mr. Canby, you are a lawyer licensed to practice law in
23 Arizona, correct?

24 A. Yes, I am.

25 Q. Are you admitted to practice in any other jurisdiction?

1 A. No, I am only barred in Arizona.

2 Q. Okay. And what year were you first admitted to practice in
3 Arizona?

4 A. 1986.

5 Q. And in those approximately 26 years -- how many years of
6 practice is that? That's almost 40 years of practice?

7 A. I think that's right. Not that good at math, but been a
8 long time.

9 Q. Okay. So in those years of practice, Mr. Canby, have you
10 ever been subject to professional discipline by the State Bar
11 of Arizona?

12 A. No.

13 Q. And have you ever had any other professional sanctions?

14 A. No.

15 Q. Where did you get your undergrad degree?

16 A. Oberlin College.

17 Q. When?

18 A. I graduated from Oberlin College in 1982.

19 Q. Okay. What about law school?

20 A. That would have been 1985. I got a little cheat sheet with
21 just dates on it, if I could refer to it? ASU Law School. I
22 graduated in 1985.

23 Q. Okay. And what did you do -- well, let's -- did you always
24 want to be a lawyer, Mr. Canby?

25 A. I did. I knew I wanted to be a lawyer from a young age. I

1 grew up in a family of lawyers, and law was a frequent
2 dinnertime topic.

3 Q. Okay. So what is your current position right now?

4 A. I am capital resource counsel at the Maricopa County Public
5 Defender's Office.

6 Q. And how long have you been in that job?

7 A. About seven years.

8 Q. And what are your duties, Mr. Canby, as the capital
9 resource counsel at the Maricopa County Public Defender's
10 Office?

11 A. In the Public Defender's Office, we have a capital unit
12 that consists of 10 capital defense teams. Each team has two
13 lawyers, a mitigating specialist, a paralegal, and an
14 investigator. And I am considered the third lawyer on -- for
15 those teams.

16 Those teams each carry two cases at a time. So we
17 have 20 capital cases in our office at any one time. And I am
18 considered the third lawyer on all of those cases.

19 On some other cases, where the lawyers don't quite
20 meet the statutory requirements to do capital cases, I am
21 officially appointed by the court as advisory counsel to those
22 two lawyers. So it is a little more formal in those cases.

23 Q. I see. So there's approximately 10 teams, each team has
24 two cases, and you serve as a lawyer on all of those cases?

25 A. Correct.

1 Q. Okay. And does your job require you to both appear in
2 court in those cases, and work behind the scenes?

3 A. Yeah, I attend all the team meetings that occur for those
4 teams, but I also -- typically I don't -- I am not always in
5 court for every hearing, because I have a lot of cases.
6 Sometimes the hearings are at the same time. But I do try to
7 attend court every time.

8 And I do sometimes make argument in court or take over
9 an issue or maybe file a motion on a particular issue on a
10 case. I am not the lead lawyer though. There's a lead counsel
11 who is primarily responsible for the case.

12 Q. So you would consider yourself to be part of the defense
13 team on all 20 of those cases?

14 A. I do.

15 Q. Okay. And can you just describe sort of how you got this
16 job that you are working in right now?

17 A. Well, I worked at the Legal Defender's Office doing capital
18 defense for 15 years before I took this job at the Public
19 Defender's Office, so I have been doing capital defense for a
20 long time.

21 I am also an instructor at the National College of
22 Voir Dire in Boulder, Colorado. And I teach other lawyers
23 around the country how to pick juries in capital cases. And
24 when the Maricopa County Public Defender's Office created the
25 job I have, and I am the first one, one of the requirements was

1 expertise in jury selection and training in jury selection, and
2 also of course, you know, experience doing capital cases over
3 many years, and I fit those qualifications, so I think that's
4 why I have this job.

5 Q. So you consider yourself an expert in capital defense?

6 A. I do.

7 Q. Would you say that you are the most experienced capital
8 defense lawyer at the Maricopa County Public Defender's Office?

9 A. I think I am, yes.

10 Q. In addition to coordinating with those lawyers within your
11 office, do you have contact with other lawyers outside of the
12 office doing capital defense?

13 A. I do. One of the things I do is I participate in training
14 that's open to all of the capital defense, or actually all
15 defense lawyers in the valley and in the state. And when I do
16 that, I talk about my position, and I offer the opportunity for
17 those people to call me and for advice on cases. And as long
18 as I don't have a conflict or something like that, that's
19 something we offer, and that's considered to be part of my job
20 as well. My office encourages that.

21 Q. So that's -- that puts you in frequent contact with lawyers
22 around the state handling capital defense?

23 A. Yes.

24 Q. So let me just back up a little bit, Mr. Canby, to talk a
25 little bit about your career leading up to your current

1 position.

2 What was your first job out of law school, I think you
3 said in 1985?

4 A. Yeah, from 1985 through '89 I worked for a small criminal
5 defense, Toles and Associates. It was Jeremy Toles' firm, and
6 I was an associate of his.

7 Q. That was in Phoenix area?

8 A. That was in Phoenix. Most of our work was in city court,
9 but we did do some Superior Court work as well.

10 Q. And then you said 1989. What did you start doing in 1989?

11 A. In 1989 I became a Deputy County Attorney in the Pinal
12 County Attorney's Office where I stayed until 1998.

13 Q. What were your duties in the Pinal County Attorney's
14 Office?

15 A. For most of the time, I was the chief of the pretrial unit,
16 which involved really being the charging -- running the
17 charging unit. And the charging unit basically reviews cases
18 that are submitted by police departments and decides whether
19 charges are appropriate, or whether further maybe investigation
20 is required, things like that. So you are working with the
21 police in deciding which charges to file.

22 Q. So you were a prosecutor in charge of the charging
23 decisions in the Pinal County Attorney's Office?

24 A. Yes, and I also prosecuted my own cases in addition to
25 that.

1 Q. Okay. And how long were you a prosecutor?

2 A. I think that was about eight, nine years, something like
3 that.

4 Q. And it sounds like, Mr. Canby, based on the timeline, that
5 actually this law that we're talking about today went into
6 effect at the time that you were working as a prosecutor?

7 A. It did go into effect, and I recall that discussion, you
8 know, discussion about the law and it taking effect.

9 Q. In your experience as a prosecutor at that time, Mr. Canby,
10 were you familiar with defense lawyers who were acting in a
11 harassing manner towards crime victims?

12 A. I was not -- I had not experienced that myself, and I had
13 not seen that. That was not what the Pinal -- the defense
14 attorneys that I was dealing with were doing.

15 Q. Okay. Now after that law changed, Mr. Canby, and when you
16 were a prosecutor, did you ever receive any requests from
17 defense counsel to speak with a crime victim?

18 A. Yes, I received frequent requests.

19 Q. And what did you do when you got those requests?

20 A. I would pass them on. They would typically be in the
21 form of -- often be in the form of a letter with a signature
22 line so that it would be returned to the defense counsel. But
23 other times it might have just been an oral request. You know,
24 if it was a little less serious case, something that's not
25 involving, you know, trauma or something like that. Not all

1 cases involve the same level of trauma.

2 Q. Of course, of course.

3 Now, in those -- do you recall if any of those
4 requests that you passed on from defense lawyers in any of
5 those cases did victims agree to speak with defense lawyers?

6 A. They did. Frequently they did, and frequently they didn't.
7 I mean, it was really probably about half, really.

8 Q. Now, Mr. Canby, you have been here -- you've heard some of
9 the testimony today. I want to ask you, when you were a
10 prosecutor for this eight or so years in the Pinal County
11 Attorney's Office, did you ever have any special training about
12 how to reach out to crime victims?

13 A. No, no training whatsoever.

14 Q. Did you ever have any training about victim traumatization
15 as a prosecutor?

16 A. I don't believe so. I don't recall that.

17 Q. And how to avoid -- any training on how to avoid trauma
18 when talking with crime victims as a prosecutor?

19 A. I don't recall any training along those lines.

20 Q. Okay. After you left the Pinal County Attorney's Office
21 in, I think you said approximately 1999, what did you do then?

22 A. I took a job at the Legal Defender's Office as a criminal
23 defense lawyer.

24 Q. Okay. And what were your duties when you went to the Legal
25 Defender's Office?

1 A. For the first year, I had a general caseload, but by the
2 second year I had a -- I had a capital caseload and was doing
3 exclusively capital cases.

4 Q. Okay. And then in 2016 you came to your current position
5 in the Maricopa County Public Defender's Office?

6 A. Correct, or 2015 perhaps. I am not quite sure.

7 Q. We will fudge the numbers a little. Thank you.

8 Are you familiar with the organizational plaintiff in
9 this case, Arizona Attorneys for Criminal Justice?

10 A. Yes. I am a member and a former president for Arizona
11 Attorneys for Criminal Justice.

12 Q. And were you a board member as well?

13 A. I was a board member for many years. I am not currently a
14 board member.

15 Q. Do you have any other activities of note outside the
16 practice of law that you would like to mention?

17 A. Well, I am a guitar player, and I play in a band locally.
18 So I like to talk about that. I am not sure anybody else wants
19 to hear about that.

20 Q. You never know.

21 Okay. Now, Mr. Canby, aside from your job as a member
22 of the capital defense team, do you have personal views on the
23 death penalty?

24 A. I do. I have both moral and practical objections to the
25 death penalty.

1 Q. Can you explain your moral objections to the death penalty?

2 A. My moral objection is I don't believe the government should
3 be seeking to kill an individual in a situation that is not
4 immediate self-defense or war.

5 Q. And can you explain your practical objections to the death
6 penalty?

7 A. I've -- over the years I have been involved in many death
8 penalty cases, and what I have seen is that everybody is
9 damaged by the case. Nobody benefits. Everybody comes out in
10 worse shape, the lawyers, the victims, the clients, the
11 families, the judges, the jurors. Everybody is traumatized by
12 a capital case.

13 Q. Okay. Now, getting to the statute at issue in this case,
14 Mr. Canby, the victim contact prohibition, this statute has
15 been in effect the entire time you have been a criminal defense
16 lawyer in Arizona, correct?

17 A. Actually, I don't think it was in effect when I worked at
18 Toles and Associates immediately out of law school.

19 Q. Thank you. So I guess since your move to the Legal
20 Defender's office and after that?

21 A. Yes.

22 Q. And as a defense lawyer or as part of a defense team, have
23 you ever directly initiated contact with a statutory crime
24 victim?

25 A. No.

1 Q. To your knowledge, for the defense teams that you have been
2 a part of, has any member of those teams, directly initiated
3 contact with statutory crime victims?

4 A. No. One caveat, outside of the courtroom. Sometimes in a
5 case, you -- there's contact with a victim in the course of the
6 case.

7 Q. Sure. You can run into them in the courtroom, or you could
8 be questioning them?

9 A. Right, for instance, and you don't go through the
10 prosecutor for that.

11 Q. Okay. So if the victim, for instance, is testifying in
12 court, you may have contact with them by questioning them?

13 A. Correct. And you can also -- there's -- I mean, you can
14 sort of indirectly address a victim. You can talk about your
15 client's willingness to plead and things like that in front of
16 the victim. You are not directly addressing them, but
17 certainly they're hearing and you are communicating.

18 Q. So you are talking about communicating in court where you
19 might not be directly addressing the victim, but you are
20 delivering a message that you would like the victim to hear?

21 A. Right, and perhaps I am delivering a message to the judge
22 knowing that the victim is listening.

23 Q. Understood. Would outside of that context, Mr. Canby,
24 would you like to be able to initiate contact with crime
25 victims?

1 A. I would.

2 Q. And can you talk about some of the things that you and
3 other members of the capital defense teams that you are part of
4 would want to talk to statutory crime victims about?

5 A. Well, a couple of things. Obviously, one of the things we
6 are always interested in capital cases is mitigation. And
7 mitigation is really any reason for any individual juror to
8 give a life sentence in a capital case. So it can really
9 involve a pretty wide spectrum of things.

10 Maybe one of the better ways to explain it is, many of
11 our cases involve homicides where liabilities are really not at
12 issue, and often they are inter family cases, a murder within a
13 family.

14 And I could give you, for instance, an example of a
15 client who is accused of killing his abusive father for
16 instance. His brother who grew up in the same home would be
17 covered under the statute.

18 And that's a person who would likely have valuable
19 mitigation that would be beneficial to the client, because that
20 person grew up in the same home. Would know about the abuse.
21 May have been subject to the same abuse. Would know about
22 mental health issues. Would know about the neighborhood.
23 Would know about issues that like, just a wealth of information
24 that other people may not have, and there may not be another
25 person.

1 And that prohibition against talking to people would
2 extend to the mother, too, who would also have a lot of that
3 same information.

4 So one of the things I would like to do is gather
5 information if the victim was willing to talk to me and wanted
6 to, obviously for the benefit of my client. But I would
7 also -- I also have information that I believe could be helpful
8 to a victim based on my experience with these cases.

9 Q. What kind of information is that that you think would be
10 helpful for crime victims to hear?

11 A. Well, you know, I agree with the previous testimony that
12 bringing up a crime like this can be traumatizing to anybody.
13 And what I don't think prosecutors explain to the victims every
14 time is how much that's going to occur over the years, if
15 there's going to actually -- if you are going to pursue a death
16 penalty. So there's going to be many more contacts. And I am
17 not sure that that's explained to victims.

18 And so what I would like to do is offer my perspective
19 and also encourage victims who are considering whether to
20 support a death penalty in a case they are involved in, to talk
21 to other victims who have been through it, and to talk about
22 what their experience was, and maybe get some more information.

23 I think with that information, they would be more
24 likely to make a decision that was more beneficial for their
25 interest, and coincidentally, it would be beneficial for my

1 client's interest, possibly, and mine too. I mean, nobody
2 wants to be in a capital trial. You want to settle these
3 cases.

4 Q. Can you explain a little bit more why the victim's views on
5 the death penalty might be helpful to the client?

6 A. In my experience, the victim's views don't necessarily
7 dictate what the prosecution will do, but it's probably the
8 primary factor.

9 And so often when a victim makes a decision to not --
10 that they don't want a death penalty anymore, that's enough for
11 the state to drop the allegation of death.

12 Q. Okay. So it's a -- the influence on the prosecutor that
13 you are talking about?

14 A. Yes.

15 Q. You mentioned wanting to talk to victims about your
16 personal experience with death penalty cases. Can you just
17 talk a little bit about some of the things that you might want
18 to explain to them if you had the chance?

19 A. Well, I think, first of all, it's just the amount of time
20 involved. I am not sure people realize that death penalty
21 cases, where there's a death penalty return, go on and on and
22 on. They really kind of never end until -- the person dies one
23 way or another. The client dies one way or another.

24 Also, you know, they are dealing with one set of
25 prosecutors. There will be another set of prosecutors if the

1 death penalty stays. There will be another set. They may be
2 comfortable with this set. They may not realize all of the
3 stages that are involved.

4 They may not realize how many times they may have to
5 sit in court and hear facts that are disturbing to them, and I
6 have seen victims run out of court, traumatized during trials
7 because of what they are hearing. And I don't know if they
8 knew that was going to happen.

9 I don't know if they realize -- you know, put that in
10 the calculation of in their decision in whether they were in
11 support of the death penalty or not in the case. I think that
12 information would be helpful. I wouldn't force it on anybody
13 obviously, but if they wanted to hear it, I think it would help
14 everybody.

15 Q. So Mr. Canby, you are talking about information that you
16 have about the criminal legal process. And my question is,
17 don't -- do you agree that folks on the prosecution side to
18 be -- should have access to that information and be able to
19 share it with crime victims?

20 A. I think some prosecutors do, it helps though, and I think
21 they probably do -- good ones, I think do do that, but I don't
22 think necessarily they all do.

23 Q. Okay. What's the basis for your belief that prosecutors
24 aren't sharing that information?

25 A. Well, I mean, just in the context of, for instance, the

1 request for -- to talk to a victim, I have had situations where
2 I could not get back from the prosecutor even whether or not
3 they were -- they had any contact.

4 In other words, did you put forward my request? And
5 then the trial comes up. The victim doesn't show up. We're
6 deciding whether to dismiss the case or whatever, and the judge
7 is asking the prosecutor, "Have you had contact?" And they
8 say, "Haven't had contact for a couple of years."

9 Well, okay, I doubt they passed on my request. But
10 they didn't tell me that.

11 Q. So you are talking about an instance where you have made a
12 request through the prosecutor's office to speak with a crime
13 victim?

14 A. Correct.

15 Q. And in that situation that you are describing, the later
16 court proceedings led you to believe that your request had not
17 been --

18 A. Right. I hear nothing back in response to that. And then
19 at the time of trial, it turns out the prosecutor admits to the
20 judge, "I haven't had any contact with the victim for some
21 time." I can't sometimes get prosecutors to answer that
22 question, "Are you in contact with the victim?" They won't
23 even answer that sometimes.

24 Q. Okay. And so you haven't been able to get that
25 confirmation or accountability that -- about the prosecutors

1 fulfilling that obligation?

2 A. Right, and that's what leads me to believe that it may not
3 occur in every case.

4 Q. Have you ever been on a defense team, Mr. Canby, where you
5 have -- I guess you have described, you have been on a defense
6 team where you have made request to contact crime victims?

7 A. Yes.

8 Q. Okay. And your belief is that the County Attorney's Office
9 regularly does not forward requests to speak with crime
10 victims?

11 MR. CATLETT: Objection, foundation.

12 THE COURT: Calls for speculation. Sustained.

13 BY MS. BRODY:

14 Q. What is your belief about the practices at the Maricopa
15 County Attorney's Office with respect to forwarding requests by
16 the defense team to speak with crime victims?

17 MR. CATLETT: Same objection, Your Honor.

18 THE COURT: Sustained.

19 BY MS. BRODY:

20 Q. Mr. Canby, to your knowledge, have you always complied with
21 13-4433-(b)?

22 A. Yes.

23 Q. Now, beyond not initiating contact with crime victims,
24 which is what is prohibited by the statute, do you believe that
25 your speech is chilled even further by that statute?

1 A. I do, because I think that I and other defense attorneys
2 are overly careful when we get anywhere near these sensitive
3 issues that seem to be -- I think the term was used
4 "radioactive" earlier. I agree with that. There seems to be a
5 large sensitivity and a fair amount of aggressiveness in
6 pursuing those issues by our opponents.

7 Q. Who are you referring to when you talk about your
8 opponents?

9 A. At least the Maricopa County Attorney's Office does not
10 hesitate to take action against lawyers they feel have come
11 even close to violating this provision.

12 Q. Mr. Canby, do you rely on your law license to make a living
13 for yourself and your family?

14 A. That's the way I make my living, and that's the way I
15 provide for my family.

16 Q. Have you ever had any instances, Mr. Canby, where a crime
17 victim has initiated contact with you?

18 A. I have. That's happened several times.

19 Q. Can you talk about an example of a case where that has
20 happened?

21 A. I can think of one where -- this is the Julius Moore case.
22 I represented Julius Moore, and this was a case that took seven
23 years to go to trial. There were two trials, originally a
24 mistrial, and then a second trial.

25 And throughout all of those trials, a brother of

1 somebody who -- of a deceased victim in the case had been
2 attending all hearings, you know, just very -- one of those
3 victims that's involved, plugged in, listening to everything.

4 And one day we're walking down the street with my
5 co-counsel, and he's behind us on the sidewalk and he says,
6 "Hey, I don't know if I can talk to you, but can I have a word
7 with you?" And we said, you know, "You can, as long as you
8 want to talk to us. We can't talk to you, but, you know, if
9 you want to talk to us, yeah." And he says to us --

10 MR. CATLETT: Your Honor, objection, hearsay.

11 THE COURT: I will allow it.

12 Go ahead.

13 THE WITNESS: He says to me, you know, I know that
14 your client is accused of killing my sister, but I just want to
15 tell you, I really appreciate the work you are doing for that
16 young man in there and for the issues you are fighting about.
17 And I just felt that he needed to say that and we needed to
18 hear it.

19 It made us feel much better about defending our client
20 in front of him in court, and we were able to express our
21 condolences to him.

22 BY MS. BRODY:

23 Q. Are there any other instances where you have had direct
24 contact with a crime victim?

25 A. I mentioned earlier that sometimes it happens in court. I

1 had a case, another similar case, took seven years to
2 resolution, without a death penalty.

3 There was a mistrial in the penalty phase of the first
4 trial, and we were getting ready to retry the penalty phase the
5 second time, which is what you have to do under Arizona law.
6 It's not a life sentence in the first time.

7 And my client had been accused of killing a woman who
8 was working in a convenience market, and her husband was
9 very -- another victim who attended everything, came to court
10 all the time, was very plugged in.

11 And we -- Judge Reinstein offered to do a settlement
12 conference in an attempt to settle the case and called us
13 together with the victim, my client, and got us in a conference
14 room, a jury room.

15 And I offered to the victim that my client would
16 answer any questions that he had and would talk to him about
17 anything, absent -- you know, if it got out of bounds, I would
18 stop him, but, you know, within reason, he was available to
19 answer any questions, take care of any concerns, whatever he
20 wanted to ask him.

21 And the victim said, "You know, I'm not gonna do that.
22 I don't really want to talk to him." But three days later he
23 switches his position on the death penalty. We are in jury
24 selection, and I get a plea offer.

25 So we have already summoned 150 jurors in. We are

1 already working on them, and I come in the office in the
2 morning and get this offer. So had that conversation been able
3 to occur many years earlier, I think we would have saved
4 everybody a lot of the trouble, a lot of expense, a lot of
5 heartache, a lot of trauma.

6 Q. Thank you, Mr. Canby.

7 MS. BRODY: I don't have any other questions.

8 THE COURT: Is there any cross-examination?

9 MR. CATLETT: Yes, Your Honor.

10 THE COURT: Come on up, please.

11 CROSS-EXAMINATION

12 BY MR. CATLETT:

13 Q. Good afternoon, Mr. Canby.

14 A. Good afternoon. I am sure as you are aware by now, my name
15 is Mike Catlett, and I represent Attorney General Mark Brnovich
16 in this matter.

17 Did the Maricopa County Attorney's Office take any
18 action against you in the case that you were just referring to
19 in front of Judge Reinstein.

20 A. No.

21 Q. Did the state bar?

22 A. No.

23 Q. And did the Maricopa County Attorney's Office take action
24 against you for the victim contact you had in Mr. Moore's case?

25 A. They didn't, but we were glad that nobody was watching.

1 Q. So the answer is no?

2 A. No.

3 Q. And did the state bar take action against you?

4 A. No.

5 Q. Do you file your victim contact requests with the court?

6 A. Depends on the case.

7 Q. Do you agree with Ms. Neff that that is one way to ensure
8 that the prosecutor's office will pass that request along to
9 the victim?

10 MS. BRODY: Objection, Your Honor. I think that
11 misstates Ms. Neff's testimony. I think her testimony was it
12 did not ensure that it was passed along.

13 THE COURT: It is overruled.

14 You may answer.

15 THE WITNESS: My --

16 THE COURT: Will you ask the question again, please?

17 THE WITNESS: That would help.

18 MR. CATLETT: Sure. Let me leave off the
19 objectionable part.

20 BY MR. CATLETT:

21 Q. Do you agree that that is one way to help ensure that the
22 prosecutor's office is passing along your request for victim
23 contact to the victim?

24 A. I agree that that might accomplish that in some cases.

25 Q. Has the Maricopa County Attorney's Office taken action

1 against you at all for ever violating the regulation at issue
2 in this case?

3 A. No, not the regulation at issue in this case.

4 Q. How about the state bar?

5 A. No, no.

6 Q. You mentioned during direct that you were currently a
7 capital resource counsel at the Maricopa County Public
8 Defender's Office, correct?

9 A. Correct.

10 Q. And you are one of the attorneys working on approximately
11 20 capital cases in your unit?

12 A. Some of them do not have a death penalty alleged yet, but
13 they have been identified as potential capital cases, so not
14 every one is a notice to capital case.

15 Q. Thank you for that clarification.

16 You don't personally do the factual investigation on
17 any of those cases, correct?

18 A. We have investigators that primarily do our fact
19 investigation and our direction.

20 Q. But do you personally do the factual investigation in any
21 of those cases? you don't, right?

22 A. Typically, not. I might on an individual issue basis, if I
23 was the best person to do it.

24 Q. You don't -- sorry, strike that.

25 You have served as counsel to a criminal defendant in

1 over 50 first-degree murder cases?

2 A. Yes.

3 Q. And probably another 150 non-homicide cases?

4 A. At least, yes.

5 Q. You have never represented anyone in their capacity as a
6 crime victim, correct?

7 A. Not in the capacity as a crime victim. I have represented
8 victims of crime certainly.

9 Q. And I think you testified that at one point in your career,
10 you were a prosecutor at the Pinal County Attorney's Office?

11 A. Correct.

12 Q. And you were there for about eight and a half years?

13 A. Yes.

14 Q. That was a yes?

15 A. Yes.

16 Q. And you prosecuted hundreds of criminal cases during that
17 time, correct?

18 A. I did. The way it worked though, I would not typically try
19 the cases. I would handle them up until an offer stage, and if
20 the defense attorney didn't take the offer, the trial unit
21 would take the case to trial.

22 Q. You handled hundreds of criminal cases during that time; is
23 that correct?

24 A. Yes, I did.

25 Q. And during your time at Pinal County, if a criminal defense

1 attorney asked you to request a victim contact, you would do
2 so, correct?

3 A. Yes.

4 Q. And you did so in every case, every single case where that
5 request was made of you, correct?

6 A. I believe so.

7 Q. And in your eight and a half years at the Pinal County
8 Attorney's Office, and in the hundreds of cases that you helped
9 to prosecute or handle, you never overcharged a case in order
10 to increase the pool of victims that would be subject to the
11 regulation at issue in this case, did you?

12 A. I never did.

13 Q. And you have never had reason to believe, during the course
14 of a case, that a prosecutor did not contact a victim pursuant
15 to 13-4433(b) in response to a request from you, correct?

16 A. Well, just the situation I described earlier where the
17 victim was apparently out of contact with the prosecutor.

18 MR. CATLETT: Can we have Mr. Canby's deposition
19 transcript?

20 BY MR. CATLETT:

21 Q. Mr. Canby, do you recall being deposed in this case?

22 A. I do, back in 2017, I believe.

23 Q. And is that your transcript that appears to be in front of
24 you?

25 A. It appears to be, yes.

1 Q. You were placed under oath in connection with that
2 deposition?

3 A. I was.

4 Q. Did you tell the truth?

5 A. I believe I did.

6 Q. If you could turn for me to page 40 of the deposition?

7 A. Yes.

8 Q. At the bottom of page 40 at line 22, there was a question
9 asked of you: So you have never had a reason to believe during
10 the course of a case that a prosecutor did not contact a victim
11 pursuant to 13-4433(b) in response to a request from you?

12 And your answer was: I generally didn't know one way
13 or the other whether they had or not passed on my request.

14 Correct?

15 A. Correct.

16 Q. And you wouldn't say that prosecutors' offices regularly
17 fail to pass on requests pursuant to section 13-4433(b), would
18 you?

19 A. I really don't know the answer to that question.

20 Q. Can you turn for me to page 41?

21 A. Yes.

22 Q. At line 15 of your deposition, you were asked: Do you
23 believe prosecutors' offices regularly fail to pass on requests
24 pursuant to A.R.S. 13-4433-(b)?

25 Do you see that?

1 A. I do.

2 Q. And your answer was: I -- I don't know. I think
3 prosecutor offices, I don't know that they all do that. No, I
4 wouldn't say offices.

5 Did I read that correctly?

6 A. Yes.

7 Q. And during your time at Pinal County Attorney's Office, you
8 were not aware of any attorney who did not comply with the
9 requirement to notify a victim of a defense request to initiate
10 contact under 13-4433(b), correct?

11 A. Correct.

12 Q. You first became aware of the Victim's Bill of Rights in
13 the Arizona Constitution way back when it was passed, correct?

14 A. Correct.

15 Q. And you first became aware of the Victims' Rights
16 Implementation Act about a year later, correct?

17 A. Correct.

18 Q. And that includes the regulation that is at issue in this
19 case, correct?

20 A. Correct.

21 Q. That was in the early '90s?

22 A. I think so.

23 Q. And your participation in this case relates to the rights
24 or interests of the criminal defendants you represent in
25 Arizona State Court, correct?

1 A. Yes, it relates to that, yes.

2 Q. And you have sought permission from the Maricopa County
3 Superior Court to make direct contact with the victim, haven't
4 you?

5 A. I have done that before, yes.

6 Q. And sometimes the answer to that request is yes, and
7 sometimes the answer is no, correct?

8 A. Correct.

9 Q. And if the state trial court rules against your request,
10 you can seek review from a higher state court through a special
11 action, correct?

12 A. Correct.

13 Q. And you comply with Arizona Rule of Criminal Procedure
14 39(b) in cases where you represent a criminal defendant in
15 state court, correct?

16 A. I do.

17 Q. And you plan to continue complying with that rule until the
18 Arizona Supreme Court amends it or a court enjoins it, correct?

19 A. Correct.

20 Q. And the regulation at issue in this case does not prevent a
21 victim from affirmatively reaching out to you in connection
22 with your representation of a criminal defendant, correct?

23 A. Correct.

24 Q. And that has happened, right?

25 A. That has happened, yes.

1 Q. And you have been involved in cases where a victim
2 consented to contact with a representative of the defense after
3 being notified by the prosecutor's office pursuant to section
4 13-4433(b), correct?

5 A. Correct.

6 Q. And you filed papers in Maricopa County Superior Court
7 alleging that Section 13-4433(b) is unconstitutional as applied
8 to a client of yours, correct?

9 A. Yes, I have done that.

10 Q. And you have argued in that case, or those cases, that if
11 you were not allowed to contact the victim, that would violate
12 the criminal defendant's rights to a fair trial and full
13 defense, correct?

14 A. Correct.

15 Q. And you can't speak out during the course of a case if
16 doing so is against the interest of your defense client,
17 correct?

18 A. Correct.

19 Q. So, for example, if you believe that your client in a
20 criminal -- personally believe that your client in a criminal
21 case is guilty, you cannot state as much to the court or the
22 jury without the client's permission, correct?

23 A. That's correct.

24 Q. And your ethical duties would prevent you from publicizing
25 through a blog post or a newspaper editorial a belief that your

1 client is guilty, correct?

2 A. Correct.

3 Q. And in a case where a victim is represented by a private
4 attorney, you are not allowed, without violating the ethical
5 rules, to contact the victim directly, but rather must go
6 through the victim's attorney, correct?

7 A. Correct.

8 Q. So a victim who has not retained counsel is subject to
9 direct defense counsel contact, but a victim who has retained
10 counsel is not subject to direct defense counsel contact; is
11 that correct?

12 A. I think you have to go through the prosecutor.

13 Q. Sorry?

14 A. I think -- I am not sure I understand your question, but --

15 Q. Let me try again. I may have fumbled that. I apologize.

16 So if a victim who has not retained counsel is subject
17 to direct -- a victim who has not retained counsel is subject
18 to direct defense counsel contact, but a victim who has
19 retained counsel is not subject to direct defense contact?

20 A. I disagree.

21 Q. And you disagree because of the regulation that is at issue
22 in this case, correct?

23 A. Correct.

24 Q. You can't insulate yourself as a lawyer from discipline or
25 sanction by having a defense investigator do something you are

1 not permitted to do, correct?

2 A. Correct.

3 Q. You testified on direct that in your experience as a
4 prosecutor, defense lawyers were not making inappropriate
5 contact with victims, correct?

6 A. Correct.

7 Q. By the time you became a prosecutor though, the regulation
8 at issue in this case was already in place, wasn't it?

9 A. Correct.

10 Q. And did I hear you correctly that half of the victims
11 contacted when you were a prosecutor agreed to defense counsel
12 contact?

13 A. Of my cases, that's probably right.

14 Q. And am I correct that you have testified on direct that
15 there are ways for you to convey messages to a victim without
16 running afoul of the regulation at issue here, correct?

17 A. I did testify to that.

18 Q. 13-4433(b) is enjoined and you make direct contact with a
19 victim, you probably would not plan on informing the victim
20 that they have a right to refuse to talk to you, correct?

21 A. Probably not.

22 Q. And if section 13-4433(b) is enjoined, and you decide that
23 you have a very good reason for doing so, you would initiate
24 direct contact with a minor victim at the minor victim's
25 school, correct?

1 A. I don't think so.

2 Q. Can you turn for me to page 96 of your deposition, please?

3 Line 19, you were asked: In the course of initiating
4 direct contact with a minor victim, would you ever initiate
5 that contact at the minor victim's school?

6 And your answer was: I would have to know more. That
7 wouldn't -- that would -- generally the answer would be no,
8 unless there was a very good reason for doing so, which I
9 suppose it could be possible.

10 Did I read that correctly?

11 A. I think so, yes.

12 Q. Thank you.

13 MR. CATLETT: No further questions, Your Honor.

14 THE COURT: Is there any redirect?

15 MS. BRODY: Very briefly, Your Honor.

16 THE COURT: Come on up.

17 REDIRECT EXAMINATION

18 BY MS. BRODY:

19 Q. Mr. Canby, you responded to Mr. Catlett in your testimony
20 just now that your desire to speak with crime victims is
21 related to the rights of your clients when you are representing
22 them as criminal defendants, correct?

23 A. Correct.

24 Q. Does your desire to speak with crime victims also relate to
25 your own rights?

1 A. Yes, it does, it does. I feel that I have valuable
2 information, and also that conveying that information might
3 result in a benefit to me as well.

4 Q. Thank you.

5 MS. BRODY: That's all.

6 THE COURT: Subject to recall, plaintiffs?

7 MS. BRODY: No, Your Honor.

8 THE COURT: Defense?

9 MR. CATLETT: No, Your Honor.

10 THE COURT: Mr. Canby, thank you so much for coming in
11 this afternoon.

12 THE WITNESS: Thank you.

13 THE COURT: I must ask you, what's the name of the
14 band?

15 THE WITNESS: Quinn Jolly the Band.

16 THE COURT: I'm sorry?

17 THE WITNESS: We are actually named after another
18 lawyer who's named Quinn Jolly. He is not in the band, but he
19 has a really nice name, and I asked him if I could name my band
20 after him. So we are Quinn Jolly the Band.

21 THE COURT: Very well.

22 Next witness, please.

23 MR. LANE: Plaintiff rests in their case in chief,
24 Your Honor.

25 THE COURT: Mr. Catlett?

1 MR. CATLETT: Your Honor, defendants don't have any
2 live witnesses to call. We did designate a number of
3 deposition transcript portions. I didn't know how Your Honor
4 wanted to handle that if --

5 THE COURT: Well, everything that you have designated
6 obviously I will have an opportunity to read through all of it,
7 since it is going to be part of the record. But if you would
8 like to highlight some of those areas, I will allow you to do
9 so during the course of your closing or, if you have some ideas
10 as it relates to how you would like to present your case a
11 different way, let me know.

12 MR. CATLETT: No, Your Honor. I think we will just
13 highlight portions that we want to highlight during closing.

14 THE COURT: Okay.

15 MR. CATLETT: So defense rests, unless my co-counsel
16 have anything.

17 MR. KING: Defendant Vessella does not intend to put
18 on any evidence, Your Honor.

19 MR. CARLTON: Nor is defendant Colonel Silbert.

20 THE COURT: Very well. So you all can gather your
21 thoughts as it relates to the Court's questions earlier today.
22 We will be in recess until 2:45. That gives you about 32
23 minutes, and then I will give both sides 30 minutes to present
24 their closings.

25 Court is in recess until 2:45.

1 (Recess taken at 2:13 p.m.; resumes at 2:45 p.m.)

2 THE COURT: This court will come to order. All
3 parties present when the court last closed are present again.

4 Plaintiffs, the Court is prepared for your closing
5 arguments.

6 MR. KEENAN: Thank you.

7 The victim contact prohibition found in A.R.S.
8 13-4433(b) violates the free speech rights of the plaintiffs,
9 criminal defense attorneys, and others working on the criminal
10 defense team, like investigators, by specifically prohibiting
11 them from initiating contact with statutory crime victims
12 except through their litigation adversary, the prosecutor.

13 By doing so, this law, which has no counterpart in
14 either federal or any other state law, clearly targets
15 protected speech and not conduct.

16 In fact, the victim contact prohibition imposes an
17 overbroad content and viewpoint prior restraint on plaintiffs'
18 speech, because it forbids them from communicating with their
19 intended target of their speech, and does so based on their
20 identity as members of the criminal defense team.

21 As the Ninth Circuit noted nearly 40 years ago,
22 attorneys and other trial participants do not lose their
23 constitutional rights at the courthouse door, yet this is
24 precisely what A.R.S. 13-4433(b) does. It strips plaintiffs of
25 their First Amendment Rights, and does so by drawing a

1 distinction based on the message a speaker conveys, which, as
2 the Supreme Court has held, raises significant First Amendment
3 concerns, and subjects this law to strict scrutiny.

4 As we have heard from the witnesses today, Arizona's
5 victim contact prohibition, not only prevents members of the
6 defense team from speaking their intended message to crime
7 victims, but in practice, prevents almost all communication
8 between members of defense team and crime victims in Arizona.

9 The form letters used by defendants do not cure these
10 problems with the victim contact prohibition, but rather
11 compound them by forcing plaintiffs to speak a particular
12 message in the form of a government drafted script -- in the
13 words of the Supreme Court -- thereby imposing a content based
14 restriction on speech in violation of the First Amendment.

15 The problems with this were touched upon by Mrs. Neff
16 in her testimony. The government drafted script that the
17 Attorney General's Office uses and that is in evidence, is
18 clearly different from the defense team's message it wants
19 to -- intends to provide.

20 And those government drafted scripts can also mislead
21 victims on what the Victim's Bill of Rights actually does in
22 Arizona.

23 As we heard from the witnesses today, fear of
24 professional discipline and other sanctions routinely deter
25 plaintiffs from speaking to crime victims on any topic, whether

1 part of the investigatory function of their work, or on matters
2 of interest to victims, or on matters of great public concern,
3 like the imposition of the death penalty.

4 As Mr. Robertson testified, this chill even prevents
5 some attorneys, criminal defense attorneys, from speaking to
6 possible crime victims in the pre-charging stage of a case when
7 the victim's -- sorry -- when the victim contact prohibition
8 isn't even in effect yet.

9 As the Supreme Court explained, speech concerning
10 public affairs, like the death penalty, is more than self
11 expression. It is the essence of self government.

12 Importantly, the Supreme Court also explained that
13 blanket rules restricting speech by defense attorneys should
14 not be accepted without careful First Amendment scrutiny.

15 The victim contact prohibition simply cannot withstand
16 such scrutiny for several reasons. First, as the Ninth Circuit
17 explained, being a member of a regulated profession does not
18 result in the surrender of First Amendment rights.

19 And the defendant's reliance on the recent opinion in
20 *Tingley v. Ferguson* is unavailing, as that case is inapposite
21 to ours. In *Tingley*, the Ninth Circuit was reviewing law that
22 prohibited conversion therapy on children.

23 The Court in *Tingley* described conversion therapy as,
24 quote, "therapeutic practices and psychological interventions
25 that seek to change a person's sexual orientation or gender

1 identity."

2 The court noted that the American Psychological
3 Association, quote, "Has twice conducted a systematic review of
4 the research on conversion therapy and adopted a resolution
5 that conversion therapy puts individuals at a significant risk
6 of harm."

7 Moreover, the court noted that the Washington State
8 Board of Health issued a health impact report on the bill at
9 issue in that case and found that, quote, "Conversion therapy
10 is associated with negative health outcomes such as depression,
11 self stigma, cognitive and emotional distance, emotional
12 distress, and negative self-image."

13 The harms associated with conversion therapy,
14 therefore, are significantly different, in both kind and
15 degree, than any suggested harms imposed by criminal defense
16 attorneys simply initiating contact with victims without going
17 through a prosecutor.

18 The Court in *Tingley* also rejected Mr. Tingley's
19 contention that his treatments, quote, consist entirely of
20 speech and considered conversion therapy conduct, because,
21 quote, the practices of psychotherapy is not different from the
22 practice of other forms of medicine simply because it uses
23 words to treat ailments.

24 Importantly, the Court in *Tingley* also found that
25 health professions differ from other licensed professions, like

1 attorneys for example, because health professions treat other
2 humans, and their treatment can result in physical and
3 psychological harm to their patients. These
4 important distinctions doom Defendants' reliance on *Tingley*.

5 Plaintiffs here are not treating anyone in the same
6 way as the defendant was in *Tingley*. They want to initiate
7 contact to gain information from crime victims, or to provide
8 information to crime victims, all of which is protected by the
9 First Amendment.

10 Here the government's only stated interest in
11 upholding the victim contact prohibition is to effectuate other
12 guarantees of Arizona's Victim Bill of Rights, which include
13 ensuring victims are treated with fairness, respect, and
14 dignity, and are free from intimidation, harassment, or abuse
15 throughout the criminal justice system, as well as a right to
16 refuse defense interviews.

17 But the defendants have failed to explain how allowing
18 the defense team to -- and only members of the defense team --
19 to initiate contact undermines these guarantees in the victims
20 bill of rights.

21 In fact, the victim contact prohibition does not limit
22 its prohibition to harassing or abusive contact by members of
23 the defense team. Rather, it prohibits all contact initiated
24 by the defense.

25 And as we heard from every witness who testified

1 today, plaintiffs will abide by their legal and ethical duties
2 when contacting crime victims should this Court enjoin
3 enforcement of the victim contact prohibition.

4 Indeed, we have heard that it is in the interest of
5 the defense team to initiate contact with victims in as polite
6 a way as possible and still, if a victim simply says they do
7 not want to speak with the defense team, plaintiffs will cease
8 those communications.

9 Importantly, as we heard from some witnesses today,
10 there is nothing inherently traumatizing or harassing about
11 being approached by a criminal defense attorney or an
12 investigator working with the defense.

13 Rather, we heard that contact with a defense team can
14 in fact be quite helpful to crime victims. Moreover, any
15 potential discomfort that a victim might feel stems from being
16 the victim of a crime and from interacting with the criminal
17 justice system generally, including prosecutors.

18 And even if there was a victim who specifically found
19 interacting with the defense team "traumatic," they would still
20 not be required to do so.

21 Again, as we heard from every one of plaintiffs'
22 witnesses, if plaintiffs were told by someone that they did not
23 want to speak with the defense team, that would end the
24 conduct. And if that did not end the conduct, they would
25 almost certainly face other professional and possibly criminal

1 sanctions that exist outside of the victim contact prohibition.

2 Moreover, even if the contact -- if contact with
3 members of the defense team did cause discomfort, the First
4 Amendment would still protect that speech.

5 As the Supreme Court explained in *Snyder versus*
6 *Phelps*, even inappropriate, controversial or troubling speech
7 receives First Amendment protection. The victim contact
8 prohibition therefore, does not further a compelling government
9 interest, nor is it narrowly tailored to achieve that interest.

10 As we discussed, it does not spare crime victims from
11 all communications about the crime, as prosecutors and even the
12 media may still initiate contact with crime victims without
13 limitation.

14 It does not prevent only disrespectful or harassing
15 speech, but all speech by plaintiffs. And despite there being
16 other regulations to prevent harassment, like criminal
17 sanctions and Ethical Rule 4.4(a), for example, the victim
18 contact prohibition assumes, without justification, that
19 criminal defense lawyers, and those working with them, will not
20 abide by these other regulations and ethical duties undermining
21 foundational tenets of our system, which presume all attorneys
22 and those working with them will uphold their ethical duties.

23 But there's more. The victim contact prohibition
24 threatens other important state interests, including the
25 administration of justice by first, impeding criminal defense

1 attorneys from providing effective assistance of counsel, which
2 undermines a right to fair trial.

3 Second, by placing prosecutors who have an ethical
4 duty to, quote, "seek justice, not merely conviction," into an
5 ethical quandary by forcing them to limit and often prevent
6 First Amendment protected communication between the defense
7 team and crime victims, despite having no legitimate stake in
8 preventing such communications.

9 And third, as we heard from the witnesses today, the
10 victim contact prohibition undermines the truth seeking
11 function of the criminal justice system.

12 In fact, not only does the plain language of A.R.S.
13 13-4433(b) undermine the truth seeking function of the criminal
14 justice system, but as we heard from witnesses today,
15 prosecutors sometimes apparently use the victim contact
16 prohibition not as a shield to protect crime victims from
17 harassment, but as a sword to specifically undermine the
18 system's truth seeking function by aggressively filing bar
19 charges against defense attorneys, even for inadvertently
20 speaking with crime victims, and worse, by possibly making
21 charging decisions to prevent defense counsel from interviewing
22 witnesses who should arguably not be considered crime victims
23 at all.

24 Finally, because I believe the defendants will likely
25 mention this fact in their closing, that the victim contact

1 prohibition has been on the books since 1991, I would be remiss
2 not to point out that there's absolutely no authority for the
3 proposition that a statute or regulation that otherwise
4 violates the First Amendment is -- somehow passes
5 constitutional muster, simply because it was passed a set
6 number of years ago.

7 Nor is there any authority for the proposition that a
8 First Amendment facial challenge to a law requires evidence of
9 legislative intent to restrict speech. What matters is what
10 the law says and what the law does.

11 The point of the matter here, Your Honor, is that this
12 law is an unconstitutional infringement on plaintiffs' First
13 Amendment Right to free speech. And for all of the reasons
14 discussed in our briefing and here today, plaintiffs ask this
15 Court to enjoin enforcement of A.R.S. 13-4433(b).

16 Thank you.

17 THE COURT: Thank you very much, Mr. Keenan.

18 Mr. Catlett, do you have a closing argument?

19 MR. CATLETT: Your Honor, I am going to allow
20 Ms. Sawyer to give the closing today.

21 THE COURT: Ms. Sawyer, come on up, please.

22 MS. SAWYER: Thank you, Your Honor.

23 THE COURT: You're welcome.

24 MS. SAWYER: I want to briefly summarize three points
25 for the Court today in closing.

1 First, as my co-counsel stated earlier in his opening,
2 the testimony today is irrelevant. This is a facial challenge,
3 and plaintiffs did not show that this statute is
4 unconstitutional in all circumstances.

5 Second, the statute challenged here that is
6 specifically A.R.S. Section 13-4433 Subsection B, has been on
7 the books for over 30 years. Both the legislature and the
8 Arizona Courts through its Rule of Criminal Procedure 39 have
9 continued to affirm the importance of this provision by keeping
10 it as part of the rules that protect crime victims in Arizona.

11 But despite that, plaintiffs brought this challenge in
12 2017, making only one claim, and that is, that this statute
13 violates their own First Amendment rights to free speech.

14 Yet plaintiffs' arguments throughout their filings,
15 throughout their depositions, and their testimony today,
16 highlight plaintiffs' actual arguments, most of which are
17 completely unrelated to the First Amendment.

18 Plaintiffs do not challenge crime victims'
19 constitutional right to refuse to participate in pretrial
20 discovery requests made by the defendant or the defense team,
21 but it seems that many of plaintiffs' arguments go to that
22 point.

23 Similarly, plaintiffs make arguments that appear to go
24 to their ethical duties, but plaintiffs, if they wanted to
25 raise those claims, they should do so in state court, and they

1 certainly have not done so here.

2 And many of plaintiffs' arguments have to do with
3 their criminal defendants clients' rights, and again, those
4 aren't challenged here either.

5 For example, testimony from multiple plaintiffs
6 confirms that obtaining an injunction in this case will further
7 their clients' rights, and many plaintiffs testified that they
8 have not sought to contact crime victims outside of the
9 representation of defendant clients.

10 And some plaintiffs confirmed that they have raised
11 constitutional challenges on behalf of their clients in other
12 cases.

13 One more point is that as my co-counsel explained in
14 opening -- I'm not sure if he did explain this completely, but
15 defendant Brnovich continues to assert that plaintiffs have
16 shoehorned this issue into a First Amendment claim to avoid
17 things such as *Younger* abstention, and Defendant Brnovich
18 reserves that for sake of appeal here.

19 So while what is before the Court is plaintiffs' sole
20 claim that this statute violates plaintiffs' First Amendment
21 rights, their allegations throughout the course of this
22 litigation do not match that claim.

23 Second, even when narrowing in on plaintiffs' actual
24 claim, plaintiffs can't succeed here. And that's what this
25 Court needs to decide, is what is going to be the standard that

1 this is looked at under?

2 At the core, the statute is a regulation of attorney
3 conduct. This statute applies only during the course of
4 ongoing criminal proceedings, and it's comparable to Arizona
5 Rule of Professional Conduct 4.2, which regulates how lawyers
6 must communicate with represented persons.

7 ER4.2 is accepted and understood to regulate conduct
8 within the scope of representation. And for those victims who
9 have the benefit of their own counsel, all parties agree that
10 even without the statute, contact must be initiated through
11 victim's counsel.

12 The Ninth Circuit confirmed just a few weeks ago in
13 *Tingley versus Ferguson*, that under the Supreme Court's
14 decision in *NIFLA*, states may regulate professional conduct
15 even though that conduct incidentally involves speech.

16 The Ninth Circuit noted specifically that as support
17 for that conclusion, the Supreme Court described regulations on
18 professional conduct it had previously upheld, including state
19 rules that limit lawyers' communication with potential clients.

20 So *Tingley's* effect here is not limited the way that
21 plaintiffs' counsel argues that it is.

22 The statute is such a regulation of conduct. It
23 regulates professional conduct, and the Court should conclude
24 that the statute is reasonable related to a legitimate state
25 interest here.

1 But even if the Court concludes that the statute does
2 not regulate speech, plaintiffs' claims still fails -- or if
3 the Court concludes that it does regulate speech, plaintiffs'
4 claims still fail here.

5 If the Court here concludes that the statute regulates
6 speech, at most the statute is a reasonable time, place, and
7 manner regulation. First, it's content neutral. Similar to ER
8 4.2, the statute applies to direct communication from the
9 defense team of any kind on any topic and from any viewpoint
10 during the course of ongoing judicial proceedings.

11 It's narrowly tailored to the state's many significant
12 interests, and I know my co-counsel discussed those in his
13 opening. But those interests include regulating the practice
14 of law, furthering crime victims' constitutional right to
15 refuse an interview with the defense.

16 And we've heard even today that defense counsel won't
17 necessarily have to tell a victim of that right. The statute
18 furthers other goals of the Victim's Bill of Rights, and the
19 implementing statutes.

20 Those statutes were adopted, quote, "To provide crime
21 victims with basic rights of respect, protection, participation
22 and to aid the healing of their ordeals. This includes
23 avoiding victims' suffering from retraumatization caused by any
24 contact from the defense team.

25 And even one of plaintiffs' witnesses testified today

1 that there's a higher risk of that happening from contact with
2 the defense counsel. Further, this statute also levels the
3 playing field for victims that are unable to hire their own
4 counsel. These interests are significant and compelling
5 reasons for the statute.

6 And if the statute is enjoined, it's not going to be
7 DIVO specialists going to be the ones contacting victims, and
8 nothing in other rules protect victims from just the mere
9 contact that can be traumatizing.

10 And lastly, the statute leaves open ample channels for
11 plaintiffs to communicate their messages. Nothing prohibits
12 victims from reaching out, and we have heard that today.

13 Plaintiffs can also contact victims in cases where
14 they aren't working on behalf of the defendant. As testified
15 by plaintiffs' witness today, defense attorney can say things
16 in court that convey their messages.

17 Plaintiffs are free to speak to the public generally,
18 subject to even other traditional ethical rules. And even
19 during ongoing judicial proceedings, the messages that
20 plaintiffs want to disseminate, such as the merits of the death
21 penalty can be disseminated by like-minded persons and
22 entities, as long as those persons are not acting on behalf of
23 the defendant.

24 In closing, this statute is a regulation of attorney
25 conduct. It should be upheld along with many other regulations

1 that are common to the practice of law. Even if the Court
2 considers this to be a regulation of speech, it is no more than
3 a constitutional time, place, and manner regulation.

4 I would like to bring up one more matter for the
5 Court, if I may, before concluding, and that's related to the
6 form of the injunction that plaintiffs have proposed.

7 Can I address that with you now?

8 THE COURT: Yes.

9 MS. SAWYER: Okay. Should the Court be inclined to
10 issue an injunction here, Defendant Brnovich does not agree
11 with the proposed form of injunction that plaintiffs have
12 submitted.

13 Defendant Brnovich asks that if an injunction is
14 issued, that it be limited to enjoining A.R.S. 13-4433(b) as
15 applied only to defendants' attorneys, and those that
16 defendants' attorneys direct or supervise.

17 So as it is written, that limitation would need to be
18 inserted in multiple paragraphs of the proposed injunction.

19 And I have nothing else unless Your Honor has
20 questions.

21 THE COURT: Ms. Sawyer, thank you so much for your
22 comments during your closing.

23 Mr. Keenan, do you have a rebuttal closing?

24 MR. LANE: I'd like to do that, if I may, Your Honor?

25 THE COURT: Mr. Lane, come on up. I know the lectern

1 has gone down a little bit.

2 MR. LANE: I am going to raise the bar here a little
3 bit, Your Honor.

4 THE COURT: It's under the right side.

5 MR. LANE: I can probably do this. I am guessing you
6 can hear me.

7 THE COURT: I can.

8 MR. LANE: Thank you, Your Honor.

9 I am going to respond directly to counsel's points
10 regarding the constitutionality of the statute. They basically
11 argue that the testimony today is irrelevant because it's a
12 facial challenge.

13 Well, it's a facial challenge, but there has to be an
14 evidentiary underpinning for why it's unconstitutional as
15 applied in practice. And the testimony today showed this Court
16 very clearly that it is a regulation on speech. Contrary to
17 what they have argued obsessively from the beginning that this
18 is a regulation of conduct, it is not a regulation of conduct.

19 And in fact, the Ninth Circuit case that they cited
20 about conversion therapy dealt with conduct and regulating
21 psychotherapeutic conduct as applied to juveniles.

22 Because in that case, they were -- the
23 psychotherapists were conducting psychotherapy. They were
24 trying to change the behavior of their subjects. They were
25 trying to use speech and therapy to change someone who they

1 believed was ill.

2 It is similar to the regulation of the practice of
3 medicine. In fact, the Ninth Circuit talked about, it's part
4 of medical regulation and this is bogus therapy that harms
5 people.

6 This, on the other hand, is pure speech. Richard Burr
7 testified that they send a neutral out to reach out to victims
8 of crime, and the neutral says, "Hey, I am here to listen to
9 anything you, the victim, have to say. Tell me what you're
10 interested in and I will convey it back to the defense team."

11 No one is pushing an agenda. No one is trying to get
12 victims of crimes to say or do anything, or change who they are
13 or their sexual orientation or treat them for some
14 psychotherapeutic disease. They are simply talking to them to
15 get information from them, and to convey information to them.
16 There is no more pure form of speech than that.

17 So no, this is not conduct. This is a regulation of
18 pure unadulterated speech. And the U.S. Supreme Court in 2018
19 shot down the notion that speech, while one is engaged in a
20 profession, is somehow applied a different standard than pure
21 speech.

22 There is no such thing as professional speech. The
23 Attorney General's Office is essentially arguing the same thing
24 that was argued in 2018, which is, this is actually
25 professional speech, and so you need to just have a rational

1 basis to deal with it.

2 But the U.S. Supreme Court shot down the notion that
3 there is no such category as professional speech. So this is
4 identified as -- under the same rubric as any other form of
5 speech.

6 They complain that it's only a regulation for lawyers
7 and regulates the practice of law. This Court asked the most
8 probative question early on before we started the testimony
9 today, and that is -- to the Attorney General's office -- this
10 court said: Can you name any other regulations that apply only
11 to one side of the criminal justice equation?

12 Every example they gave this Court during their
13 argument, both in opening and in closing, every single example
14 went straight to the heart of the integrity of the criminal
15 justice system.

16 It's a regulation on speech that I can't engage in an
17 ex parte communication with Your Honor. That's true, it
18 regulates my speech. But they can't do it either, because both
19 parties equally have to participate in the criminal justice
20 system if it is going to function.

21 So it is a rational reason for limiting free speech.
22 I can't engage in ex parte communications with jurors during a
23 trial, nor can they. I have to abide by the rules of attorney
24 regulation when I deal with my clients, so do they. There is
25 no rule that they spoke of that applies only to one side but

1 not the other.

2 And every single one of those rules applies to both
3 sides, because it goes directly to the heart of the integrity
4 of the entire criminal justice system. So not only is there a
5 rational basis for that, there's a compelling state need to
6 regulate the integrity of the criminal justice system.

7 This statute skews the result. Just speaking as --
8 Your Honor talked about -- you're 56 so talk slowly. I am 68,
9 and I have been around the block a few times, I have been a
10 criminal defense attorney for 42 years.

11 I can't tell you how many cases exist, and you know it
12 from just being alive and being on the bench and being in the
13 U.S. Attorney's Office prior to that, you read a police report.
14 Gunpoint robbery. Somebody gets stuck up at gunpoint. You
15 read the police reports. Victim identified perpetrator in a
16 photo array lineup. 100 percent positive. Good lighting.

17 You go out and you talk to the victim. Well, yeah, we
18 were at a bar. It was my birthday. I had five shots of
19 tequila. I left my glasses at home. It was raining. The guy
20 came up behind me. Stuck a gun in my ribs. Took my wallet. I
21 turned around. I am pretty sure that's the guy, but -- you
22 know, I didn't say I was 100 percent positive, but I think it's
23 the guy. That's the kind of stuff you get when you talk to
24 victims.

25 The system is skewed without that information. As a

1 defense attorney, you can't go back to the jail and tell your
2 client, "They've got nothing. This case is going to go away.
3 It is going to get dismissed, or they are going to offer you
4 something that you should take, like time-served maybe."

5 Or, very frequently you go back to the jail and say,
6 "Dude, you are cooked. You better take this deal, because they
7 are going to bury you under the courthouse if you don't. I
8 talked to the victim. This guy is the most persuasive person I
9 have ever met in my entire life. You have no chance."

10 That's what lawyers in 49 states can do. There's only
11 one state in the entire United States of America where they
12 can't do that, and that is right here.

13 Because as a guy I used to work with used to say when
14 he got on his motorcycle and not wear his helmet -- despite the
15 government rule saying you have to wear a helmet. He always
16 used to say, "Lord, protect me from those who wish to protect
17 me."

18 In Arizona, thank you State of Arizona for protecting
19 people from making decisions on their own as to whether they
20 want to talk to defense attorneys and their investigators or
21 not. These are adults we are talking about, and maybe
22 children. But the testimony has been that nobody really is
23 going to go talk to children and undermine the integrity of the
24 parent-child relationship, unless they believe that there's
25 some absolutely overwhelming need to do that.

1 But the point is, your average Arizona crime victim
2 has a right to get any information that the defense wants to
3 give them, and to reject any information that the defense wants
4 to give them. It is their decision. It is not the State's
5 decision. They don't have to go through big brother to get
6 permission to go talk to anyone.

7 Clarence Thomas in the gun case that just came down
8 out of the U.S. Supreme Court talked about how, you know, on
9 the Second Amendment issue, you don't need the government's
10 permission to exercise your constitutional right to carry a
11 gun.

12 He also analogized that, and we filed a supplemental
13 briefing with Your Honor. He analogized that to, just like you
14 don't have to ask the government permission to exercise your
15 rights under the First Amendment. He should have put in a
16 little asterisk saying, "Except in the State of Arizona. You
17 have to ask the government's permission to exercise your rights
18 under the First Amendment."

19 Again, the only state in the country that does this.

20 They talk about how this really is a violation of the
21 client's Sixth Amendment right to the effective assistance of
22 counsel, if it's anything here. And I don't disagree with that
23 at all.

24 I think a bunch of criminal defendants should probably
25 file petitions, habeas petitions in federal court if they are

1 that far down the road, or motions in court saying, "My
2 attorney is being rendered ineffective as counsel by this First
3 Amendment violation."

4 It's the lawyer's First Amendment violation, but it's
5 the client's right to the effective assistance of counsel.
6 That's a separate issue. I think they are right. I think it
7 is a violation of the client's rights, but that's not the issue
8 before the Court.

9 The issue before the Court is the other half of the
10 equation, which is, it's a violation of the attorneys' and the
11 investigators' rights to speak, which may impact a defendant's
12 Sixth Amendment right for the effective assistance of counsel.
13 But that's not the issue before the court.

14 They cry about, oh, well, victims with wherewithal to
15 hire lawyers have an advantage because you have to go through
16 counsel to talk to those victims. And impoverished victims
17 don't have counsel, and so they are at a disadvantage.

18 Well, if the State of Arizona wants to fix that and
19 give everybody who is the victim of a crime a lawyer, they can
20 do that. We don't oppose that. Give everyone who is a victim
21 of a crime a lawyer and you have evened the playing field for
22 rich victims and poor victims, but that's again, not the issue
23 before the Court.

24 They then talk about how this is a reasonable time,
25 place, and manner restriction. Now, to me, when I was in law

1 school, I remember time, place, and manner basically was, you
2 can't have a brass band playing outside of a hospital zone at
3 3:00 in the morning. Makes sense. You can have a brass band
4 playing, just not in that time, not in that place, and not in
5 that manner.

6 This is not a time, place, or manner restriction.
7 This is -- the time of when you can talk to victims isn't on
8 the table. The place where you can talk to victims isn't on
9 the table. It is the manner in which you are talking to the
10 victims which is on the table, I guess, under their logic,
11 which is, you need big brother's permission before you can go
12 talk to victims.

13 But time, place, and manner restrictions have to be
14 content neutral and viewpoint neutral in order to pass muster.
15 You can't say, well, if you are a democrat standing on the
16 street corner at noon, you can't get on your soapbox and yell
17 at the crowd. But if you are a republican, you can. That is
18 certainly a time, place, and manner restriction that would not
19 pass muster because it is not viewpoint neutral.

20 This is also not viewpoint or content neutral. It
21 only applies to the defense message that the defense
22 investigator wants to give, which is, I am a defense
23 investigator, I would love to talk to you about your
24 perceptions about what happened, or I am a DIVO neutral
25 representative, here is what I have to offer you.

1 Those are the viewpoints that are discriminated
2 against under the guise of protecting victims from trauma. But
3 Mr. Burr testified, and the other witnesses also testified, and
4 Your Honor asked this question as well, which is another
5 perfect question in the context of our case.

6 You asked the attorney general, is there any evidence
7 anywhere that when a prosecutor gets on the phone, or shows up
8 at the door of a victim, that's any less traumatic than when
9 the defense attorney does, or when the police do, or when a
10 victim's advocate does, or when your next-door neighbor shows
11 up on your door to talk about the murder that you just
12 experienced?

13 The entire system is traumatic, and there's no denying
14 it, and it's horrific, and it's a terrible thing that every
15 single participant in the entire criminal justice system has to
16 deal with. Defense attorneys have to deal with it. You have
17 to deal with it as a judge, I am sure, more than anyone. You
18 see witnesses from time to time just break down on the witness
19 stand because it is traumatic.

20 Testifying in court is horrific for innumerable
21 numbers of people. And it's an unfortunate byproduct of the
22 system. This reach out by the defense investigator, who has a
23 very vested interest in being polite and obsequious and
24 respectful, is probably less traumatic than a direct
25 examination by a prosecutor asking someone to relive the worst

1 day of their entire life on the witness stand in front of a
2 room full of strangers. Trauma is a horrible thing, but it is
3 an unfortunate byproduct that we cannot avoid in this system.

4 But at least a subpoenaed witness, you know -- I mean,
5 a subpoenaed witness has no alternative. They have to get on
6 the stand and do whatever they are asked to do.

7 If a defense investigator knocks on a victim's door,
8 the victim, if they believe they're about to be traumatized,
9 has a right to say, "I'm sorry, I don't want to talk to you. I
10 never want to see you again. Leave me alone. Have no further
11 communication with me," and slam the door in that
12 investigator's face.

13 Another wonderful question was asked by this Court,
14 aren't there laws on the books already to protect any further
15 harassment of that victim? And the answer is, of course there
16 are. Harassment is against the law. Stalking is against the
17 law. Tampering with witnesses is against the law. Bar
18 complaints result in sanctions. There are innumerable other
19 remedies available to keep the defense bar in check, other than
20 limiting their right to communicate with victims, which is all
21 this statute does. It is an elimination of pure speech.

22 In Colorado where I am from, the Supreme Court wrote
23 an ethical opinion, because what was happening is prosecutors
24 would reach out to victims, as well as the defense, there's no
25 prohibition on either side in talking to victims in Colorado,

1 or any other state, but the prosecutors would tell victims,
2 "Listen, you may get a call from the defense attorney in the
3 case, I am going to tell you, you know, you shouldn't talk to
4 that guy because he is going to screw up this case. If you
5 talk to this defense attorney, you might as well have this case
6 dismissed."

7 And the defense bar was bringing complaints against
8 prosecutors for sending that message to victims, because it is
9 telling them, flat out, you know, don't talk.

10 The Colorado Supreme Court wrote an ethical opinion
11 saying, both sides in the equation are hereby required to
12 affirmatively encourage any and all witnesses to talk to the
13 other side. Because it enhances the truth keeping aspects and
14 the justice seeking mission of our entire system.

15 Skewing it by prejudicing witnesses against one side
16 or the other, results in a skewed system that is not our goal.
17 This entire statute skews the system. It skews the truth
18 seeking function and the justice seeking function, or the
19 entire system. And it's not tolerated in 49 other states.

20 They talk about other avenues of communication exist.
21 Well, yeah, you could, you know, subtly do what Mr. Canby
22 suggested in the open court when the victims are sitting in the
23 audience say, "You know, if somebody would just offer a life
24 sentence here, we'd probably take it."

25 You know, the government doesn't get to decide how a

1 message is delivered. That's not their job. Their job is to
2 prosecute cases.

3 It is up to the person who is sending the message to
4 decide how they want to send it, as long as it is within the
5 law. The Court can limit it as it applies to both sides as a
6 regulatory measure in the profession of the practice of law,
7 but that's not the testimony we've heard.

8 The testimony we've heard is that this is pure
9 unadulterated speech, and it is being limited by the
10 government. They have to show a compelling reason for it.

11 I had a bet with my law partner. I said, "I bet
12 they're going to bring in victims to talk about, you know, the
13 compelling need that they have not to be traumatized." They
14 didn't put on any victims. They didn't put on anybody.

15 There is no one shred of evidence before this Court
16 that victims of crimes suffer severe psychological damage when
17 they have their doorbell rung, or they get a letter in the
18 mail, or their phone rings and it's a defense investigator.

19 There is no compelling reason for this statute, other
20 than to skew the fact finding process and to make the
21 politicians who pass this law look like they are very, very
22 supportive of victims' rights. But in the meantime, it's
23 violative of the First Amendment of the United States
24 Constitution.

25 This Court, and I know your background, you have

1 devoted your entire life and career to preserving, protecting,
2 and defending the Constitution of the United States. And you
3 are never going to get a more clear case of a violation of the
4 First Amendment free speech rights than this case.

5 So I would ask this Court to please right that
6 injunction and eliminate the enforcement of this statute in any
7 way, shape, or form in the future.

8 Thank you, Your Honor.

9 THE COURT: Mr. Lane, I certainly appreciate all of
10 that. I equally appreciate all the papers filed in the case,
11 the questions and the arguments.

12 This Court will take the matter under advisement at
13 this point, but I will give you until the 3rd of October to
14 file simultaneous, supplemental briefs. And they will be
15 limited to no more than 12 pages. If it is more than 12 pages,
16 it will be rejected. There will be -- no further briefing will
17 be permitted after that. And once the supplemental briefing is
18 complete, this Court will issue a ruling in due course.

19 Is there anything else from the plaintiffs?

20 MR. LANE: Your Honor, I had two objections to the
21 declarations that the State was trying to enter into evidence.
22 I don't know that the Court has ever ruled on that. It was a
23 hearsay --

24 THE COURT: They weren't received.

25 MR. LANE: Okay.

1 THE COURT: They weren't received into evidence.

2 MR. LANE: All right. Thank you.

3 THE COURT: Is there anything else from the
4 plaintiffs?

5 MR. LANE: No, Your Honor.

6 THE COURT: Defense?

7 MR. CATLETT: No, Your Honor.

8 THE COURT: Everyone have a wonderful day and great
9 upcoming weekend. Court is adjourned.

10 (Proceedings conclude at 3:26 p.m.)

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C E R T I F I C A T E

I, ELVA CRUZ-LAUER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 26th day of September, 2022.

s/Elva Cruz-Lauer
Elva Cruz-Lauer, RMR, CRR