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12
13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15
16 Arizona Attorneys for Criminal Justice;
17 Christopher Dupont; Rich Robertson;
Richard L. Lougee; Richard D. Randall;
18 Jeffrey A. Kirchler; John Canby,

19 Plaintiffs,

20 v.

21 Doug Ducey, in his official capacity as
22 Governor of the State of Arizona; Mark
Brnovich, in his official capacity as
23 Attorney General of the State of Arizona,

24 Defendants.

No.:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. This action challenges the constitutionality of Arizona Revised Statutes
3 (“A.R.S.”) § 13-4433(B), which prohibits a criminal defendant’s attorney and others
4 working on a criminal defendant’s defense team from initiating contact with the victim of
5 the crime, including second-degree relatives of a crime victim who is killed or
6 incapacitated, except through the office of the prosecutor who is prosecuting the
7 defendant.

8 2. Because A.R.S. § 13-4433(B) prohibits and restricts speech by criminal-
9 defense lawyers, defense investigators, and others working on the defense team by
10 limiting to whom they may speak, with whom they may communicate, and how, the
11 statute implicates the free-speech rights protected by the First Amendment to the United
12 States Constitution.

13 3. In particular, A.R.S. § 13-4433(B) is an unlawful content-based and
14 overbroad prior restraint on the speech of criminal-defense lawyers and others on the
15 defense team that inhibits and outlaws speech fully protected by the First Amendment.
16 Plaintiffs bring this action to have A.R.S. § 13-4433(B) declared unconstitutional, and its
17 enforcement enjoined.

18 4. A.R.S. § 13-4433(B) is part of the statutory scheme that the Arizona
19 legislature enacted to protect the rights of crime victims as part of legislative efforts to
20 implement the Arizona Constitution’s Victims’ Bill of Rights, Ariz. Const. art. 2, § 2.1.

21 5. However, A.R.S. § 13-4433(B) goes beyond the protections afforded to
22 crime victims in the Victims’ Bill of Rights and is not appropriately tailored to the state’s
23 legitimate purpose of protecting a victim’s right to “be treated with fairness, respect, and
24 dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal
25 justice process.” Ariz. Const. art. 2, § 2.1(A)(1).

1 6. For criminal-defense lawyers and others working on the defense team,
2 attempting to contact victims and their family members is a crucial part of the effective
3 representation of the defendant. It is an essential part of pre-trial investigation regarding
4 culpability, other possible perpetrators, and potential mitigation evidence for sentencing
5 purposes. Likewise, contact with victims and their family members can be crucial for
6 post-conviction work on behalf of a defendant, including when investigating claims of
7 actual innocence. All criminal-defense attorneys, but particularly capital-defense teams,
8 have constitutional obligations to their clients to fully investigate possible defenses to
9 culpability and to seek out information that could mitigate a sentence, including sparing
10 the defendant from the death penalty.

11 7. Speech directed at crime victims is not only important for its implications
12 for attorneys representing the criminally accused and their ethical and constitutional
13 duties; it is also of grave public importance because of the crime victim's role in the
14 political campaign to abolish the death penalty, whether through active or passive means.
15 Victims are often the most important advocates for a sentence less than death, which is a
16 topic with significant political importance in modern America.

17 8. Moreover, past experiences in Arizona, and current practice in other states,
18 show that crime victims and their family members do not always wish to shut off contact
19 from the defense team; in fact, sometimes they welcome such contact. Rather than
20 allowing these potentially helpful and desirable discussions between the victim, the
21 victim's family, and the defense team, A.R.S. § 13-4433(B) places the defendant's
22 litigation adversary – the prosecutor – in the middle and shuts them down before they can
23 happen.

24 9. Criminal-defense lawyers and investigators have been subjected to
25 professional discipline and criminal charges for alleged violations of A.R.S. § 13-
26 4433(B), and these adverse actions against members of the criminal-defense community

1 have chilled constitutionally protected speech and hindered the ability of criminal-
2 defense teams to effectively represent criminal defendants and vindicate the rights
3 afforded them in the criminal-justice process.

4 10. Plaintiffs include an association of criminal-defense professionals,
5 criminal-defense lawyers, and investigators. Plaintiffs (including members of the
6 organizational Plaintiff Arizona Attorneys for Criminal Justice) work on behalf of
7 criminal defendants in trial and post-conviction cases, in all types of criminal matters,
8 including capital and non-capital murder cases, sex cases, and cases with claims of
9 innocence. A.R.S. § 13-4433(B) directly infringes the free-speech rights of Plaintiffs
10 because Plaintiffs are chilled from attempting to speak to victims and, if they do
11 undertake the risk of attempting to contact a crime victim, such speech may subject them
12 to professional discipline or criminal prosecution for violating the law.

13 11. Plaintiffs seek declaratory and injunctive relief against enforcement of
14 A.R.S. § 13-4433(B) on the grounds that: (1) the law is a content-based restriction on
15 constitutionally protected speech not narrowly tailored to a compelling government
16 interest, and (2) the law is overbroad, in violation of the First Amendment to the United
17 States Constitution.

18 JURISDICTION AND VENUE

19 12. This case arises under the United States Constitution and presents a federal
20 question within this Court's jurisdiction under Article III of the Constitution and 28
21 U.S.C. § 1331 and 28 U.S.C. § 1343(3). This action is brought pursuant to 42 U.S.C.
22 § 1983.

23 13. The Court has the authority to grant declaratory relief pursuant to the
24 Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

25 14. The Court has the authority to award costs and attorneys' fees under 42
26 U.S.C. § 1988.

1 is licensed as a private investigator by the Arizona Department of Public Safety and owns
2 R3 Investigations.

3 20. Plaintiff Richard L. Lougee, Jr., is lawyer who has been licensed to practice
4 law in Arizona since 1989. He was first admitted to the practice of law in Connecticut in
5 1977, and was also licensed to practice law in New Mexico, but is currently on inactive
6 status in those states. Mr. Lougee practices in the area of criminal defense, including
7 handling sex crimes and capital defense.

8 21. Plaintiff Richard Randall is a lawyer who has been licensed to practice law
9 in Arizona since 1991. He practices in the area of capital defense and is trial counsel for
10 capital cases in Maricopa County.

11 22. Plaintiff Jeffrey Kirchler is a lawyer who has been licensed to practice law
12 in Arizona since 2002. He practices in the area of capital defense and is trial counsel for
13 capital cases in Maricopa County.

14 23. Plaintiff John A. Canby is a lawyer who has been licensed to practice law
15 in Arizona since 1986. He practices in the area of capital defense and is resource counsel
16 for capital cases in Maricopa County.

17 *Defendants*

18 24. Defendant Doug Ducey is the Governor of Arizona and, as chief executive
19 of the state, is responsible for the enforcement of all laws in Arizona, including A.R.S.
20 § 13-4433(B). Governor Ducey is sued in his official capacity.

21 25. Defendant Mark Brnovich is the Attorney General of Arizona, is the chief
22 legal officer of the state, and has general supervisory authority over county and local
23 prosecutors. Attorney General Brnovich is also responsible for the administration of the
24 victims' rights program, which administers a plan for assisting and monitoring state and
25 local entities that are required to implement and comply with victims' rights laws,

26

1 including A.R.S. §13-4433(B). *See* A.R.S. § 41-191.06. Attorney General Brnovich is
2 sued in his official capacity.

3 **FACTUAL BACKGROUND**

4 *The Statute*

5 26. In 1990, Arizona voters approved Proposition 104, the Victims’ Bill of
6 Rights, as an amendment to the state Constitution. The Victims’ Bill of Rights is codified
7 at Arizona Constitution, Article 2, § 2.1.

8 27. Among the provisions of the Victims’ Bill of Rights is the right of a crime
9 victim “[t]o be treated with fairness, respect, and dignity, and to be free from
10 intimidation, harassment, or abuse, throughout the criminal justice process.” Ariz. Const.
11 art. 2, § 2.1(A)(1).

12 28. Under the Victims’ Bill of Rights, a crime victim also has the right “[t]o
13 refuse an interview, deposition, or other discovery request by the defendant, the
14 defendant’s attorney, or other person acting on behalf of the defendant.” Ariz. Const. art.
15 2, § 2.1(A)(5).

16 29. The Victims’ Bill of Rights also provides that the legislature has “the
17 authority to enact substantive and procedural laws to define, implement, preserve and
18 protect the rights guaranteed to victims” by the constitutional amendment. Ariz. Const.
19 art. 2, § 2.1(D).

20 30. In 1991, the Arizona legislature passed, and the governor signed into law,
21 House Bill 2412, the Crime-Victims’ Rights Implementation Act, which included in its
22 provisions legislation intended to implement the Victims’ Bill of Rights, including an
23 earlier, but substantially similar version of A.R.S. § 13-4433(B).

24 31. The legislative intent for the Crime-Victims’ Rights Implementation Act, as
25 expressed in House Bill 2412, was as follows:

1 The legislature recognizes that many innocent persons suffer economic loss
2 and personal injury or death as a result of criminal acts. It is the intent of
3 the legislature of this state to:

4 1. Enact laws that define, implement, preserve and protect the rights
5 guaranteed to crime victims by article II, section 2.1, Constitution of
6 Arizona.

7 2. Ensure that article II, section 2.1, Constitution of Arizona, is fully and
8 fairly implemented and that all crime victims are provided with basic
9 rights of respect, protection, participation and healing of their ordeals.

10 3. Ensure at all stages of the criminal justice process that the duties
11 established by article II, section 2.1, Constitution of Arizona, are fairly
12 apportioned among all law enforcement agencies, prosecution agencies,
13 courts and corrections agencies in this state.

14 4. Ensure that employees of this state and its political subdivisions who
15 engage in the detention, investigation, prosecution and adjudication of
16 crime use reasonable efforts to see that crime victims are accorded the
17 rights established by article II, section 2.1, Constitution of Arizona.

18 32. A.R.S. § 13-4433(B) currently reads:

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

24 33. A.R.S. § 13-4401(19) defines "victim":

25 "Victim" means a person against whom the criminal offense has been
26 committed, including a minor, or if the person is killed or incapacitated, the
person's spouse, parent, child, grandparent or sibling, any other person
related to the person by consanguinity or affinity to the second degree or
any other lawful representative of the person, except if the person or the
person's spouse, parent, child, grandparent, sibling, other person related to
the person by consanguinity or affinity to the second degree or other lawful
representative is in custody for an offense or is the accused.

1 34. Thus, A.R.S. § 13-4433(B) prohibits criminal defense lawyers and others
2 working on the defense team from speaking to the victim of a crime without using the
3 prosecutor's office as a conduit for the communication. When a victim is killed or
4 incapacitated, the defense team may not speak to anyone within two degrees of
5 consanguinity or affinity to the victim without using the prosecutor's office as a conduit.
6 And when a victim is a minor child, the defense team may not speak with the child victim
7 or the child's parents or guardians.

8 35. In addition, A.R.S. § 13-4433 was amended in 1997 to add a provision that
9 allows a prosecutor to refuse to forward correspondence from the defense team to victims
10 and their families, further limiting the speech of defense lawyers and the defense team.
11 That provision, codified at A.R.S. § 13-4433(C), currently reads:

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

15 36. Thus, A.R.S. § 13-4433(B) operates to prohibit defense lawyers and
16 defense teams from contacting crime victims or their family members without the consent
17 of the prosecutor, the defense team's litigation adversary.

18 ***A.R.S. § 13-4433(B) Violates the First Amendment***

19 37. A.R.S. § 13-4433(B) is an unlawful restraint on defense attorneys, their
20 investigators, and others working on behalf of a criminal defendant, precluding them
21 from engaging in constitutionally protected speech. It acts as an unconstitutional
22 licensing requirement and prior restraint on speech because defense lawyers and defense
23 teams must initiate contact with crime victims through the defense's litigation adversary,
24 the prosecutor, and must get permission from the government before engaging in the
25 protected speech.
26

1 38. The attorney members of Arizona Attorneys for Criminal Justice and the
2 individual Plaintiffs are professionally obligated to render effective assistance of counsel
3 to all of their criminally accused clients by the Sixth Amendment.

4 39. In a capital case, the United States Supreme Court deems it imperative that
5 the attorney representing the accused at the very least reach out and attempt to make
6 contact with any and all witnesses in the case.¹

7 40. In a capital case, the defense team’s duty to investigate often includes
8 making overtures to the family of the deceased in an effort to understand whether they
9 desire the death penalty for the perpetrator or would be satisfied with a lesser sentence,
10 such as life imprisonment without parole. Victim impact testimony is often critical to the
11 jury’s determination of the appropriate sentence in a capital case and if defense counsel
12 can persuade the victim’s family not to desire the death penalty, it can literally save the
13 life of a defendant. In addition, prosecutors will sometimes acquiesce to the wishes of the
14 victim’s family and drop their demand for death. A.R.S. § 13-4433(B) prevents the
15 defense team from engaging in these efforts.

16 41. In capital cases where a relative of the defendant is the victim, often the
17 best source of evidence regarding mitigation critical to saving a defendant’s life is found
18 with the defendant’s family, which is also the victim’s family. A.R.S. § 13-4433(B)
19 precludes the Plaintiffs from speaking to those crucial witnesses except by using the
20 prosecutor as an intermediary.

21 42. In non-capital cases, interviewing victims whenever possible is deemed an
22 essential duty of a conscientious criminal-defense attorney as part of efforts to ascertain
23 the facts of the case. A.R.S. § 13-4433(B) prevents the defense team from conducting this
24 type of thorough investigation.

25 _____
26 ¹ See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003).

1 43. In engaging with the family of the victim in a capital case, it is incumbent
2 upon defense counsel to discuss with any willing member of the victim's family why the
3 death penalty is not the best option for the good of the surviving family members and
4 why an option of life imprisonment may better achieve the ends they seek. This
5 discussion frequently includes such wide ranging topics as closure, vengeance,
6 rehabilitation, cost, deterrence, remorse, the impact on the victim's family, the impact of
7 an execution on the defendant's family, as well as the politics and morality of the death
8 penalty. There are innumerable other areas of discussion with victims' families relevant
9 to the death penalty. It is the goal of defense counsel to attempt to change the hearts and
10 minds of victims' families through a quiet, respectful discussion about the appropriate
11 resolution of the case without the death penalty being sought.

12 44. Contacting victims and their family members is not only a crucial part of
13 effectively representing a capital defendant, it is also critical to lobbying for the passive
14 repeal of the death penalty. In a number of states, the unofficial repeal of the death
15 penalty has been achieved by criminal-defense attorneys who convince family members
16 of victims in capital crimes to speak out in opposition to the death penalty, thereby
17 pressuring prosecutors and the public to abandon capital prosecution. Ultimately, this can
18 lead to the official, legislative repeal of the death penalty.² Without this important speech
19 on a matter of grave public concern, the political campaign for the passive repeal of the
20 death penalty can be significantly hampered.

21 45. From a free-speech perspective, discussions between the defense team and
22 the victim's family in a capital case are the highest form of protected speech as they

23 ² See Cornell Law School Death Penalty Worldwide International Human Rights Clinic,
24 *Pathways to Abolition of the Death Penalty* (June 2016),
25 <https://www.deathpenaltyworldwide.org/pdf/Pathways%20to%20Abolition%20Death%20Penalty%20Worldwide%202016-07%20FINAL.pdf> (detailing how the passive repeal of
26 the death penalty in the state of Maryland, where no death sentences were imposed for almost a decade, led to the official, legislative abolition of the death penalty in 2013).

1 clearly involve matters of grave public concern and may only be suppressed if the
2 government can show a compelling reason for such suppression.

3 46. In a more routine criminal case, defense lawyers and members of the
4 defense team should be able to approach crime victims to at least attempt to discuss the
5 facts and circumstances of the alleged crime. It is essential for a defense attorney to
6 attempt to ascertain a clear picture of the facts of a case and to determine the credibility
7 of a complaining witness, including whether the victim has accurately perceived the facts
8 and circumstances of the event in question.

9 47. A.R.S. § 13-4433(B) essentially makes it less likely, if not nearly
10 impossible, that defense lawyers and others on defense teams, including Plaintiffs, will be
11 able to speak with the individuals most necessary to interview in any criminal case.
12 Experience has shown that Plaintiffs are most frequently thwarted in their attempts to
13 speak with crime victims and their families when communications must be initiated
14 through the prosecutor.

15 48. Because Plaintiffs have a First Amendment right to attempt to speak with
16 any and all witnesses and other persons connected with a criminal case, including the
17 persons precluded from direct contact by A.R.S. § 13-4433(B), and because Plaintiffs
18 have a right to attempt these interviews unfettered by the compulsion to use a government
19 go-between, A.R.S. § 13-4433(B) violates the First Amendment.

20 49. Moreover, A.R.S. § 13-4433(B) is overbroad because it stops not only
21 speech that would be deemed criminal or unethical, such as harassing, abusive, or
22 threatening speech, but also eliminates all speech of any kind, including that which is
23 afforded the highest protections under the First Amendment.

24 **STATEMENT OF CLAIMS FOR RELIEF**

25 ***Count I: First Amendment***

26 50. Plaintiffs repeat and re-allege the foregoing paragraphs.

1 51. The prohibition against Plaintiffs contacting victims or their families
2 pursuant to A.R.S. § 13-4433(B) is an unlawful restraint on protected speech.

3 52. The members of Arizona Attorneys for Criminal Justice and the individual
4 Plaintiffs seek to engage in speech involving matters of great public concern that goes to
5 the heart of the functioning of the criminal-justice system, such as:

- 6 • In capital murder cases, explaining to victims' families why the death
7 penalty should not be imposed by discussing factors at issue in current
8 public debate, including the possibility of mistaken identity, the public cost
9 of imposing the death penalty, the lack of deterrence resulting from death
10 sentences, the lack of finality for victims because the death penalty extends
11 criminal proceedings by decades, the cruelty of the death penalty, and
12 innumerable other reasons for the victims' families to oppose its
13 imposition;
- 14 • In non-capital cases, the victim's observation of the facts of the alleged
15 criminal incident, the victim's ability to have adequately observed the key
16 circumstances of the incident, and the victim's credibility, all for various
17 purposes related to conducting a thorough investigation, including to
18 prevent and remedy wrongful convictions;
- 19 • Engaging in speech designed to ensure the proper functioning of the
20 criminal-justice system in Arizona as a true and fair adversarial system so
21 that convictions will be reliable and the innocent will not be convicted or
22 will be exonerated.
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Dated this 8th day of May, 2017.

By /s/Kathleen E. Brody
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