ATTORNEY SPEECH ISN'T FREE: WHY AACJ'S CHALLENGE TO ARIZONA'S VICTIMS' BILL OF RIGHTS FAILS

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In 1990, Arizona voters passed the Victims' Bill of Rights. Codified as Article II, § 2.1 of the Arizona Constitution, the bill created 12 enumerated rights designed to safeguard crime victims' right to fair treatment and to ensure meaningful participation in the criminal-justice process. Among those rights is that codified in A.R.S. § 13-4433(B), which requires a defendant or the defendant's attorney to initiate contact with a victim through the prosecutor's office. Early challenges to the statute on due process grounds to the provision failed.[1] *Now a new challenge,* Arizona Attorneys for Criminal Justice v. Ducey, *pits victims' rights not against defendants' due process rights—but against defense attorneys' First Amendment rights.*

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1. Previous challenges to the statute include *State v. Warner*, 812 P.2d 1079 (Ariz. Ct. App. 1990) (holding that Article II, § 2.1 of the Arizona Constitution, permitting victims to refuse pretrial interviews, was a procedural right and did not affect a defendant's right to confront and cross-examine witnesses at trial); *State ex rel. Romley v. Superior Court of Maricopa Cty.*, 836 P.2d 445, 449 (Ariz. Ct. App. 1992) (holding that due process rights are superior when conflicting with a victim's state constitutional rights); and *S.A. v. Superior Court of Maricopa Cty.*, 831 P.2d 1297, 1299 (Ariz. Ct. App. 1992) (holding that as long as a victim testifies in court, a defendant's due process rights are preserved where the victim refuses a defense interview).

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INTRODUCTION

> "The innocent victims of crime have frequently been overlooked by our criminal justice system, and their pleas of justice have gone unheeded, and their wounds—personal, emotional, and financial—have gone unattended."[2]
>
> —President Ronald Reagan

Every year, more than five million Americans become victims of violent crimes such as rape, robbery, and assault.[3] Tragically, many crime victims describe their post-crime involvement in the criminal justice system as a "re-victimization."[4] Indeed, victims need support and comfort to recover from the trauma inflicted upon them. However, when victims participate in criminal proceedings they are often forced to relive the original trauma, endure attacks on their credibility, and foray into a process they may not completely understand. As a result, victims of crime can feel they have no control.[5]

Over the last three decades, states including Arizona have responded to this problem by enacting victims' rights laws to balance the unique needs of victims with

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2. Reagan Library, *President Reagan at the Signing Ceremony for Executive Order 12360 on April 23, 1982*, YOUTUBE (Apr. 26, 2017), https://www.youtube.com/watch?v=wV_B4mkhXEU.

3. JENNIFER L. TRUMAN & LYNN LANGTON, CRIMINAL VICTIMIZATION 2014, at 2 tbl.1 (2015), https://www.bjs.gov/content/pub/pdf/cv14.pdf.

4. Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159–60 (2003).

5. *Id.*

the due process rights of criminal defendants.[6] In May 2017, Arizona Attorneys for Criminal Justice ("AACJ") filed suit in the Arizona District Court against Governor Doug Ducey and Arizona Attorney General Mark Brnovich challenging the constitutionality of one provision of the Arizona Victims' Bill of Rights Law.[7] That provision, Arizona Revised Statutes § 13-4433(B), states that defendants, and by extension their attorneys, shall only attempt to contact victims through the prosecutor's office, that the prosecutor's office shall inform victims of defendant requests, and that the prosecutor's office shall advise victims of their right to refuse an interview.

The plaintiffs allege that the statute violates defense attorneys' free speech rights. Specifically, the plaintiffs claim the statute is a content-based restriction on speech protected by the First Amendment, that it is not narrowly tailored to achieve a compelling government interest, and that it is statutorily overbroad.[8] Additionally, AACJ filed a motion for preliminary injunction asking the court to enjoin the defendants from enforcing § 13-4433(B).

At the heart of this litigation lies something more than defense attorneys' free speech rights—it is an attempt to repeal the death penalty.[9] AACJ seeks to allow defense counsel to "discuss . . . why the death penalty is not the best option" and "why . . . life imprisonment may better achieve the ends [victims] seek."[10] AACJ acknowledges that this may include discussions about "vengeance . . . the impact on the victim's family . . . as well as the politics and morality of the death penalty."[11] AACJ seeks to allow criminal defense attorneys to "lobb[y] for the passive repeal of the death penalty," hoping that in convincing victims to oppose the death penalty, fewer prosecutors will seek it, which will lead the legislature to abolish the death-penalty statute.[12]

This Note argues that AACJ's free speech challenge should ultimately fail. Attorneys acting in their professional capacities are not afforded the same First Amendment speech protection as laypersons, therefore regulations on such speech need only satisfy intermediate scrutiny.[13] Further, this Note contends that § 13-4433(B) is justified on four alternative grounds: it passes the *O'Brien* test,[14] it

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6. California was the first state to afford victims state constitutional rights in 1981. OFFICE FOR VICTIMS OF CRIME, DEP'T OF JUSTICE, 2013 NCVRW RESOURCE GUIDE 4 (Apr. 2013), https://www.ncjrs.gov/ovc_archives/ncvrw/2013/pdf/2013ResourceGuide-Full.pdf. Rhode Island was the second in 1986, with Florida and Michigan following in 1988, and Texas and Washington in 1989. *Id.* at 5, 6.

7. Complaint at 2, Arizona Attorneys for Criminal Justice v. Ducey, No. 2:17-cv-01422-SPL (D. Ariz. May 8, 2017) [hereinafter *AACJ v. Ducey*, Complaint]. Arizona Attorney General Mark Brnovich was later dismissed without prejudice as a defendant for lack of redressability. *AACJ v. Ducey*, (No. 2:17-cv-01422-SPL) (D. Ariz. Mar. 30, 2018) (order granting in part Attorney General Mark Brnovich's Motion to Dismiss).

8. *AACJ v. Ducey*, Complaint at 4.

9. *Id.* at 11.

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* Pickup v. Brown, 740 F.3d 1208, 1228 (9th Cir. 2014).

14. *See* text accompanying *infra* notes 75–78.

can be narrowed by the court to defeat an overbreadth claim, it is analogous to a permissible licensing system, or it is an appropriate time, place, and manner ("TPM") restriction. The statute is content neutral and should almost certainly survive whichever intermediate scrutiny test the court applies.

Part I provides a brief overview of the history of the national Victims' Rights Movements and Arizona's reaction that created new rights for victims under the Arizona Constitution. Part II evaluates the merits of *AACJ v. Ducey* and shows why First Amendment protection is less robust for speakers acting in their professional capacities and in cases where conduct intermingles with speech. Part II further analogizes § 13-4433(B) to a permissible licensing system and describes why it is an appropriate TPM restriction that survives intermediate scrutiny.

I. THE VICTIMS' RIGHTS MOVEMENT

A. Brief Historical Overview

The Victims' Rights Movement gained national attention more than 30 years ago when President Ronald Reagan declared the first national "Victims' Week" in April 1981.[15] The following year, President Reagan created a Task Force on Victims of Crime, which made more than 60 recommendations to state legislatures, prosecution agencies, the judiciary, and other organizations to better protect victims by creating new rights.[16] The keystone recommendation was to amend the Sixth Amendment of the U.S. Constitution to guarantee that "the victim in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."[17] Although proponents did not succeed in amending the U.S. Constitution, numerous states amended their own constitutions to afford such protections.[18]

B. Victims' Rights in Arizona

Historically, in Arizona a victim's typical role in a criminal prosecution was that of a witness—with no real access to the criminal justice system.[19] But in 1990, Arizona became the sixth state to amend its constitution to guarantee rights for victims.[20] Fifty-seven percent of voters approved Proposition 104, known as the Victims' Bill of Rights.[21]

The Victims' Bill of Rights consists of ten enumerated rights "[t]o preserve and protect victims' rights to justice and due process."[22] These victim rights can be

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15. OFFICE FOR VICTIMS OF CRIME, *supra* note 6, at 3–4.
16. *Id*.
17. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 133 (Dec. 1982), https://ovc.gov/publications/presdntstskforcrprt/87299.pdf.
18. OFFICE FOR VICTIMS OF CRIME, *supra* note 6.
19. Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona's Courts and the Victims' Bill of Rights*, 34 ARIZ. ST. L.J. 531, 533–34 (2002).
20. *Id.* at 534.
21. Thomas B. Dixon, Comment, *Arizona Criminal Procedure After the Victims' Bill of Rights Amendment: Implications of a Victims' Absolute Right to Refuse a Defendant's Discovery Request*, 23 ARIZ. ST. L.J. 831, 831 (1991).
22. ARIZ. CONST. art. II, § 2.1.

grouped into four general categories: (1) protections from harassment and abuse; (2) rights to participate in criminal prosecution; (3) rights to receive restitution; and (4) rights that permit the legislature to act on behalf of victims to preserve these rights.[23]

The Victims' Bill of Rights empowers victims "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant."[24] A *victim* is defined as "a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused."[25]

In 1991, the Arizona legislature passed the Victims' Rights Implementation Act ("the Act") to give effect to the constitutional amendment. The Act is codified in A.R.S. §§ 13-4401–4437. Subsection 13-4433(A)(5) of the Victims' Rights Amendment[26] provides that

> the defendant, the defendant's attorney or another person acting on behalf of the defendant shall only initiate contact with the victim through the prosecutor's office. The prosecutor's office shall promptly inform the victim of the defendant's request for an interview and shall advise the victim of the victim's right to refuse the interview.[27]

The following year, the Arizona Supreme Court amended the Arizona Rules of Criminal Procedure to further protect victims in criminal proceedings and, specifically added the right to refuse a defense interview.[28] Arizona remains the only state that requires defense counsel to obtain permission from the prosecutor's office to interview a victim.[29]

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23. Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421, 424–25 (2015).

24. ARIZ. CONST. art. II, § 2.1(A)(5).

25. *Id.* § 2.1(C).

26. *Id.* § 2.1(A)(5) provides that victims have the right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant."

27. ARIZ. REV. STAT. § 13-4433(b)(12) (2014).

28. Specifically, the Rule states the victim is entitled to the following:

> [T]he right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant, and (A) the defense must communicate requests to interview a victim to the prosecutor, not the victim; (B) a victim's response to such requests must be communicated through the prosecutor; and (C) if there is any comment or evidence at trial regarding the victim's refusal to be interviewed, the court shall instruct the jury that the victim has the right the Arizona Constitution to refuse an interview.

ARIZ. R. CRIM. P. 39(b)(12).

29. Interview with Amy Bocks, Advocate Program Manager, Arizona Attorney General's Office on June 20, 2017 (Tucson, Ariz.); *see also* Stellisa Scott, *Beyond the Victim's Bill of Rights: The Shield Becomes a Sword*, 36 ARIZ. L. REV. 249, 251 (1994).

Critics of the Victims' Bill of Rights feared that allowing victims to refuse a pretrial interview limited pretrial discovery such that it conflicted with a criminal defendant's due process rights.[30] Arizona courts addressed that fear, ultimately deciding in *State v. Warner* that the Victims' Bill of Rights abrogated the portion of Arizona's disclosure statute that related to victim interviews.[31]

Subsequently, the Court of Appeals in *State ex rel. Romley v. Superior Court* held that when a defendant's due process rights conflict with a victim's state constitutional rights, due process is the superior right pursuant to the Supremacy Clause of the U.S. Constitution.[32] However, more recent case law recognizes that the two rights are not mutually exclusive. In *S.A. v. Superior Court*, the Arizona Court of Appeals held that the Victims' Bill of Rights "clearly grants a victim the right to refuse certain discovery requests by the defense, such as interviews and depositions."[33] However, a victim must obey a court order to appear and testify at trial, which affords the defendant the opportunity to cross-examine the victim when the victim is also the accuser.[34] Only then are the defendant's due process rights preserved.[35] Further, the Arizona Supreme Court in *State v. Riggs* held that a defendant has a right to cross-examine witnesses about their refusal to participate in a pretrial interview, provided that the questioning is relevant.[36] These cases provide a framework for balancing the rights of victims with the defendant's due process rights. AACJ's challenge is the first brought not on behalf of a criminal defendant, but on behalf of criminal defense attorneys.

II. THE MERITS OF *AACJ V. DUCEY*

The First Amendment to the U.S. Constitution provides that the government, including the judiciary, "shall make no law . . . abridging the freedom of speech."[37] Indeed, the First Amendment, applicable to states through the Due Process Clause of the Fourteenth Amendment,[38] protects one of "the most cherished policies of our civilization."[39] First Amendment protection is triggered when a statute or judicial enforcement[40] restricts speech. Despite the First Amendment's absolute terms, the U.S. Supreme Court repeatedly held that freedom of speech is not absolute.[41]

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30. OFFICE FOR VICTIMS OF CRIME, *supra* note 6.
31. 812 P.2d 1079, 1081 (Ariz. Ct. App. 1990).
32. State *ex rel.* Romley v. Superior Court of Maricopa Cty., 836 P.2d 445, 449 (Ariz. Ct. App. 1992).
33. 831 P.2d 1297, 1298 (Ariz. Ct. App. 1992).
34. *Id.* at 1299.
35. *Id.*
36. 942 P.2d 1159, 1163 (Ariz. 1997).
37. U.S. CONST. amend. I.
38. Gitlow v. New York, 268 U.S. 652, 666 (1925).
39. Bridges v. California, 314 U.S. 252, 260 (1941).
40. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948).
41. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (distinguishing between speech and conduct that communicates, holding the latter does not trigger First Amendment protection); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (speech may be

While First Amendment doctrine is vast, this Note is tailored to address the plaintiffs' claims in its motion for preliminary injunction. Those claims are that § 13-4433(B) violates the First Amendment because it is the following: (1) an unconstitutional prior restraint on protected speech;[42] (2) an impermissible viewpoint-based restriction;[43] and (3) not narrowly tailored to achieve a compelling government interest.[44]

A. Prior Restraint on Constitutionally Protected Speech

1. Attorney Speech

The First Amendment protects pure speech, as well as conduct that communicates.[45] Among the most protected types of speech is political speech;[46] restrictions are typically subject to strict scrutiny.[47] However, the First Amendment has limited protections for professional speech. The U.S. Supreme Court held that when attorneys are representing a client, they are not merely people or even merely lawyers but "officer[s] of the court in the most compelling sense."[48] Professional speech is that which is "uttered in the course of professional practice and not merely . . . by a professional."[49] Indeed, the government may regulate the professional speech and conduct of lawyers, who are "key participants in the criminal justice system."[50] Courts consistently recognize that "during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[51] As such, the Supreme Court has upheld limits on attorney speech in several contexts including solicitation,[52] statements to the media,[53] and advertising.[54] Additionally,

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restricted when it is "directed to incit[e]" illegal conduct); Roth v. United States, 354 U.S. 476, 484 (1957) (obscenity is not entitled to First Amendment protection because such expression lacks social importance).

42. Motion for Preliminary Injunction at 7–9, Arizona Attorneys for Criminal Justice v. Ducey, No 2:17-cv-01422-SPL (D. Ariz. May 8, 2017) [hereinafter *AACJ v. Ducey*, Motion for Preliminary Injunction].

43. *Id.* at 12.

44. *Id.* at 15.

45. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (saluting or not saluting the flag is a form of speech that is a "primitive but effective way of communicating ideas").

46. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).

47. See *infra* Section II.C for an overview of the levels of scrutiny.

48. Gentile v. State Bar of Nev., 501 U.S. 1030, 1072 (1991).

49. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 843 (1999).

50. *Gentile*, 501 U.S. at 1074.

51. *Id.* at 1071.

52. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding a ban on in-person solicitation by lawyers).

53. *See Gentile*, 501 U.S. at 1075 (upholding the regulation of an attorney's extra-judicial statements when the statements "are likely to influence the actual outcome of the trial" and they "are likely to prejudice the jury venire").

54. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a rule that prohibited lawyers from sending direct-mail solicitations to accident victims or their families within 30 days).

as a self-regulating profession, the legal profession "carries with it special responsibilities of self-government."[55] As a result, bar membership itself is arguably conditioned upon relinquishing certain First Amendment rights.[56] The Ninth Circuit has held that regulations on professional speech within the confines of a professional relationship are subject only to intermediate scrutiny.[57]

Attorneys—acting within the scope of their duties—simply do not have the robust First Amendment free speech rights that laypersons enjoy. Indeed, attorney speech is often limited in ways that go unchallenged as a matter of free speech. Opening statements,[58] direct examination questions,[59] and procedures for admitting evidence[60] are all subject to restrictions. Attorneys cannot divulge communications between themselves and their client.[61] Attorneys cannot speak to a represented party about the subject of litigation.[62] Attorneys cannot lie about a material fact during representation.[63] Each of these is a constitutional restriction on attorney speech by virtue of the chosen profession.

Section 13-4433(B) does not prohibit attorneys from picketing on the street corner on a Saturday morning or speaking at a local town council meeting about the condition of neighborhood roads. Instead, it regulates speech within the confines of the attorney profession and within the confines of a judicial proceeding. As such, a restriction on an attorney's professional speech is subject to intermediate scrutiny. Intermediate scrutiny requires that the restriction be narrowly tailored to achieving a legitimate and significant government interest.[64]

The legitimate and significant government interest § 13-4433(B) serves is clear from the plain language of the Victims' Rights Amendment: "to preserve and protect victims' rights to justice and due process,"[65] something the majority of Arizona voters favored.[66] Indeed, citizens are afforded the right *not* to be a victim,

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55. ARIZ. R. PROF'L CONDUCT, Preamble ¶ 12.
56. *See supra* notes 51–55.
57. *See* Pickup v. Brown, 740 F.3d 1208, 1228 (9th Cir. 2014).
58. *See generally* ARIZ. R. CRIM. P. 19.1.
59. ARIZ. R. EVID. 611(b).
60. *See generally* ARIZ. R. EVID.
61. ARIZ. R. PROF'L CONDUCT 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation . . . .").
62. ARIZ. R. PROF'L CONDUCT 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").
63. ARIZ. R. PROF'L CONDUCT 4.1 ("While representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."). *But see* United States v. Alvarez, 567 U.S. 709 (2012) (holding that the government did not prove sufficient harms because of a person lying about receiving the Congressional Medal of Honor).
64. Hill v. Colorado, 530 U.S. 703, 725 (2000).
65. ARIZ. CONST. art. II, § 2.1.
66. *See* Dixon, *supra* note 21, at 831.

which includes re-victimization at the hands of the criminal justice system.[67] While victims can benefit by participating in the criminal-justice process, participation has also been described as an agonizing experience.[68] Victims must painstakingly relive the crime, often more than once, and undergo attacks on their credibility.[69] They frequently feel out of control because they don't fully comprehend the criminal-justice process.[70] This can compound their original psychological injuries, which can result in re-victimization.[71] The government has a responsibility to protect its citizens from that re-victimization[72] and thus has an important—arguably compelling—interest in regulating defense counsel interviews. That interest is strengthened by the idea that when victims are satisfied with the criminal-justice process, they are more likely to cooperate with law enforcement and prosecutors and report crimes in the future. Section 13-4433(B) is narrowly tailored to achieving those interests because it regulates a victim's contact with a person they view as an adversary and likely as the enemy.

Critics of § 13-4433(B) may try to analogize the instant case to *Legal Services Corp. v. Velasquez*, a government-subsidy case in which the U.S. Supreme Court held that limiting the arguments attorneys could make on behalf of indigent clients in an effort to challenge welfare laws violated the attorney's First Amendment rights.[73] The Court's reasoning focused on the relationship between the attorney and the client, and the fact that the restriction was a "severe impairment of . . . judicial function" that "distort[ed] the legal system by altering the attorneys' traditional role."[74] The restriction prevented attorneys from advancing arguments and theories that are within "the courts' province to consider."[75] However, in this case, the attorney–client relationship that was so critical to the Court's reasoning in *Velasquez* simply does not exist. A victim is not represented by defense counsel, and therefore there is no danger that limits on defense attorneys' speech would result in inadequate representation. Therefore, *Velasquez* is inapplicable to the instant case.

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67. *See generally* Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to Be a Victim*, 11 PEPP. L. REV. 63 (1984).

68. *See The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS OF CRIME, http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization#fn1 (last visited Nov. 25, 2017).

69. Herman, *supra* note 4, at 159–60.

70. *Id.*

71. *See id.*

72. Aynes, *supra* note 67, at 75. Aynes states:

> The concept that the government owes a duty of protection to its citizens is ancient. In a feudal society, the lord would offer military protection to his vassals. The theory of social contract was premised, in part, upon the view that in exchange for surrendering certain natural rights to society, the individual gained certain protections from society.

Id.

73. 531 U.S. 533 (2001).

74. *Id*. at 534.

75. *Id.* at 535.

2. Speech and Conduct Intermingled

The U.S. Supreme Court has held that when speech and non-speech elements are both present, a "sufficiently important governmental interest in regulating the non-speech" can limit First Amendment protection.[76] Such a restriction is justified when it regulates something the government has the right to, it supports an important interest, the regulation itself is unrelated to the freedom of speech, and the restraint is no greater than necessary.[77]

When a defense attorney requests to contact a victim through the prosecutor's office as required by § 13-4433(B), there is arguably non-speech conduct intertwined with speech elements. A defense attorney must engage in the conduct of making a phone call, sending an email, or visiting the prosecutor to request an interview with a victim under § 13-4433(B). That conduct constitutes a pretrial procedure that is unrelated to the content of what the defense attorney intends to discuss with the victim. Other pretrial procedures—such as filing pretrial motions—also intermingle conduct and speech. To file the motion, an attorney must write the motion, serve it to the other party, and file it with the court. That procedure is something the government unquestionably has the right to regulate and it does so in a way that is not contestable on the grounds of free speech.[78] The government also has the right to ensure a victim's state constitutional rights are upheld. As described above, preventing re-victimization and seeking satisfaction with criminal justice system are significant government interests. Arguably, § 13-4433(B) does not seek to regulate speech, but rather to regulate pretrial procedure and protect victims.

3. Statutory Construction

When determining whether a restraint "burdens substantially more speech than necessary,"[79] courts look to the statutory construction to determine if the law is vague or overbroad. A law is vague when ordinary people cannot understand what is prohibited "in a manner that does not encourage arbitrary and discriminatory enforcement."[80] A law that regulates *substantially* more speech than what is permissible under the First Amendment is facially overbroad.[81] While the Supreme Court has declined to define *substantial*, it has held that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . ."[82] Courts are permitted to narrowly construe the statute to avoid invalidating it based on overbreadth.[83]

Section 13-4433(B) could, on its face, be considered overbroad. It prohibits *all* communication with a victim without consent from the prosecuting agency, which may be greater than necessary to prevent her re-victimization. However,

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76. United States v. O'Brien, 391 U.S. 367, 376 (1968).
77. *Id.* at 377.
78. See generally ARIZ. R. CRIM. P. 12–17 for Arizona's pretrial procedures.
79. Hill v. Colorado, 530 U.S. 703, 728 (2000).
80. Kolender v. Lawson, 461 U.S. 352, 357 (1983).
81. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (emphasis added).
82. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).
83. Osborne v. Ohio, 495 U.S. 103, 115 (1990).

instead of invalidating the whole of § 13-4433(B), courts are permitted to interpret the statute narrowly. While the Arizona Rules of Professional Conduct already prohibit an attorney from engaging in harassment,[84] a court could narrow § 13-4433(B) to require that defense counsel seek the permission of the prosecutor to contact a victim only of a violent crime, serious offense, dangerous offense, or domestic violence—all of which are already defined in the Arizona Criminal Code.[85] Those victims are likely most at risk for re-victimization based on the nature of the offense. A person may be a statutorily defined *victim*, but the significant government interest in preventing re-victimization diminishes when that person is a victim of a less-invasive crime such as misdemeanor theft. In addition, the court could require an individualized judicial determination of the potential effects of contact that defense counsel may have on the victim—analogous to the determination made when a defendant seeks to enforce his Sixth Amendment Confrontation Clause rights.[86]

4. Licensing as a Prior Restraint

A prior restraint is an administrative or judicial order "forbidding certain communications" before they occur.[87] The Supreme Court has stated that "prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights."[88] Any prior restraint on speech comes "bearing a heavy presumption against its constitutional validity," with a high burden on the government to justify the restriction.[89] However, the Court has rejected the idea that prior restraints are unconstitutional per se and "can never be employed."[90]

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84. *See infra* text accompanying note 156.

85. A *violent crime* includes any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument. ARIZ. REV. STAT. § 13-901.03 (2009). *Serious offenses* include the following: (1) first-degree murder; (2) second-degree murder; (3) manslaughter; (4) aggravated assault resulting in serious physical injury or involving the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument; (5) sexual assault, (6) any dangerous crime against children; (7) arson of an occupied structure; (8) armed robbery, (9) first-degree burglary, (10) kidnapping; (11) sexual conduct with a minor under 15 years of age; and (12) child sex trafficking. ARIZ. REV. STAT. § 13-706 (2017). *Dangerous offense* means an offense involving the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person. ARIZ. REV. STAT. § 13-105 (2015). *Domestic violence* means any act that is a dangerous crime against children or if specific domestic or romantic relationships exist. *See* ARIZ. REV. STAT. § 13-3601 (2014).

86. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 848 (1990) (holding that a defendant's Confrontation Clause rights are not absolute and that in "certain narrow circumstances, competing interests . . . . may warrant dispensing with confrontation at trial" because the interest in protecting the emotional well-being of a child sex victim outweighed the defendant's right to face his accuser in court).

87. Alexander v. United States, 509 U.S. 544, 550 (1993).

88. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

89. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

90. *Stuart*, 427 U.S. at 570.

Licensing can be a permissible form of prior restraint provided there is an important reason for the license,[91] there are standards for obtaining the license that reduce discretion from the licensing authority[92] specifically by having "adequate standards to guide the official's decision,"[93] and the licensing decision is subject to "effective judicial review."[94]

While the requirement that defense counsel "shall only initiate contact with the victim through the prosecutor's office"[95] is a prior restraint, it is analogous to a permissible licensing system—defense counsel "applies" to the prosecutor's office, and it grants or denies a "license" to contact a victim. The important reason for the license is the government's interest in protecting victims from re-victimization and encouraging their participation in criminal proceedings.[96]

In addition, standards exist for obtaining the license: (1) the defendant, the defendant's attorney, or an agent of the defendant initiates contact with the prosecutor's office; (2) "[t]he prosecutor's office shall promptly inform the victim of the defendant's request for an interview and shall advise the victim of the victim's right to refuse the interview;"[97] (3) the victim will grant or deny the interview; and (4) if the victim consents to an interview, she sets forth any conditions she chooses.[98] After those steps are completed, the prosecutor informs the defense attorney whether the "license" to contact the victim is granted or denied. The prosecutor is legally obligated under A.R.S. § 13-4433(D) to present the defense counsel's request to the victim and ethically obligated not to misrepresent a victim's wishes to a defense attorney.[99] These constitute adequate standards to guide the decision of the prosecutor's office.

While there not a mechanism for judicial review for the denial of a "license" within § 13-4433(B) itself, such a safeguard does exist within Rule 15.3 of the Arizona Rules of Criminal Procedure,[100] which governs depositions.

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91. Cox v. New Hampshire, 312 U.S. 569 (1941) (only allowing one parade or demonstration at a time to allow for order and proper policing was an important reason for failing to issue a permit).

92. *See, e.g.*, Kunz v. New York, 340 U.S. 290 295 (1951) (the government "cannot vest restraining control over the right to speak . . . in an administrative official where there are no appropriate standards to guide his actions").

93. Thomas v. Chi. Park Dist., 534 U.S. 316, 323 (2002).

94. *Id*.

95. ARIZ. REV. STAT. § 13-4433(B) (2014).

96. *See supra* text accompanying notes 66–72.

97. § 13-4433(B).

98. § 13-4433(D).

99. ARIZ. R. PROF'L CONDUCT 4.1 cmt. 1 ("A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.").

100. The rule provides that

> upon motion of any party or a witness, the court may in its discretion order the examination of any person except the defendant . . . upon oral deposition under the following circumstances: (1) A party shows that the person's testimony is material to the case and that there is a substantial likelihood that the person will not be available at the time of trial, or (2) A

Section 13-4433(B) states that "[t]he defendant, the defendant's attorney or another person acting on behalf of the defendant shall only initiate contact with the victim through the prosecutor's office." However, Rule 15.3 allows a *court* to order a victim to submit to a deposition. In effect, that would permit a defense attorney to interview a victim, during a court-ordered deposition, despite the denial of a "license" to contact the victim sought under § 13-4433(B). There is nothing in § 13-4433(B) that permits a victim to refuse a court order. In addition, § 13-4433(B) does not permit a victim to refuse to appear or testify at pretrial court proceedings[101] or to refuse a subpoena to appear at trial.[102] Therefore, a defense attorney arguably can appeal a licensing decision to the court for judicial review, and the court can order the victim to submit to an interview, testify at pretrial hearings, and appear at trial.

5. Time, Place, and Manner Restrictions

If a court found the licensing framework inapplicable, it could characterize § 13-4433(B) as a reasonable TPM restriction because it prohibits only a pretrial interview between the defense attorney and the victim. Courts will uphold TPM restrictions if the restrictions are content neutral, achieve a significant government interest, and leave open ample alternate opportunities to communicate the information.[103] The U.S Supreme Court has held that the "principal inquiry" into whether a TPM regulation is content neutral is whether the regulation was adopted because the government disagrees with the message.[104]

Section 13-4433(B) is content neutral because it restricts a defense attorney's speech without regard to the ideas or viewpoint that defense counsel may wish to communicate.[105] The restriction achieves a significant government interest in protecting victims from re-victimization during the criminal-justice process.[106] Finally, the restriction leaves open ample alternate opportunities for the attorney to communicate with the victim. A defense attorney can petition the court to order a victim to submit to a deposition, appear for a pretrial hearing, or appear at trial.[107]

Further, the Arizona Court of Appeals has held that if a victim who is also the accuser appears and testifies at trial and the defendant is afforded the opportunity

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> party shows that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing or at the probable cause phase of the juvenile transfer hearing, and that the person will not cooperate in granting a personal interview, or (3) A witness is incarcerated for failure to give satisfactory security that the witness will appear to testify at a trial or hearing.

ARIZ. R. CRIM. P. 15.3.

101. State *ex rel.* Dean v. City Court of Tucson, 844 P.2d 1165, 1166 (Ariz. Ct. App. 1992).

102. ARIZ. R. CRIM. P. 34.

103. Heffron v. Int'l Soc'y of Krishna Consciousness, 452 U.S. 640, 647–48 (1981) (citing Va. Pharmacy Board v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

104. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

105. *See infra* Section II.B.

106. *See supra* text accompanying notes 66–72.

107. *See supra* text accompanying notes 100–02.

to cross-examine the victim, the defendant's due process rights are preserved.[108] Arguably, a defense attorney's First Amendment free speech rights are not superior to a defendant's Fourteenth Amendment due process rights. By analogy, as long as the victims appear and testify and defense attorneys have the opportunity to convey their message to victims, the attorney's First Amendment rights should be preserved because they have ample alternatives for communication.

6. Forum

For the purposes of First Amendment analysis, the U.S. Supreme Court has identified different forums for speech activities. Traditional public forums—such as parks and street corners—enjoy the most robust free speech protection.[109] Restrictions on speech in these forums must satisfy strict scrutiny.[110] A designated public forum is one in which the government can open—or close—for all free speech activities and restrictions on speech activities must survive intermediate scrutiny.[111] In contrast, the government has almost full control over a limited or non-public forum and can designate it for a specific purpose.[112] As such, speech restrictions in a limited public forum are only required to be reasonable and viewpoint neutral.[113]

In the instant case, an interview between a defense attorney and a victim can take place anywhere the victim chooses. However, what matters is not the spatial location of that interview—the true forum for the interview is a judicial proceeding. The government controls the proceedings and has designated it for a specific purpose: the criminal prosecution of a defendant. As such, the government is unquestionably permitted to control that forum in ways it sees fit to achieve that purpose, and it does so in the 32 rules that comprise the Arizona Rules of Criminal Procedure.[114] Section 13-4433(B) is viewpoint neutral because it does not regulate based upon a viewpoint a defense attorney might express. If it were viewpoint-specific, it would regulate only that speech from a defense attorney that advocated against the death penalty, for example. In addition, § 13-4433(B) is reasonable considering the forum to help encourage the victim participation in the proceedings and protect their constitutional rights within the judicial proceeding.

7. Section 13-4433(B) Is a Permissible Prior Restraint

Attorneys are not laypersons, but officers of the court. As such, their First Amendment protections are circumscribed and restrictions on their professional speech need only meet intermediate scrutiny. Because § 13-4433(B) is narrowly tailored to serve the significant government interests of preventing the re-victimization of victims and encouraging victim participation in criminal

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108. S.A. v. Superior Court of Maricopa Cty., 831 P.2d 1297, 1299 (Ariz. Ct. App. 1992).

109. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. ARIZ. R. CRIM. P. 1.1 (These rules govern procedures in all criminal proceedings in Arizona state courts, unless specifically stated otherwise in a particular rule).

proceedings, it survives intermediate scrutiny and is a permissible restriction. In addition, because § 13-4433(B) unavoidably requires a defense attorney to engage in speech *and* conduct when requesting an interview with a victim, First Amendment protections are less robust. While § 13-4433(B) is arguably overbroad, the court can interpret the statute narrowly to pass constitutional scrutiny. In addition, while § 13-4433(B) is a prior restraint on speech, it is analogous to a licensing system because it requires a defense counsel to obtain permission—a "license"—to contact a victim. Because there are adequate standards for the granting or denial of the license and opportunity for effective judicial review of a denial, it is a permissible licensing system. In addition, it is a reasonable TPM restriction because it is content neutral and restricts only a pretrial interview between a defense attorney and the victim. A defense attorney still has ample alternate opportunities to communicate with a victim during court-ordered depositions, pretrial hearings, and the trial itself, thereby preserving the attorney's free speech. Finally, § 13-4433(B) is a reasonable, viewpoint-neutral restriction that is permissible in light of judicial-proceeding forum, and the government is permitted to regulate that forum as needed. Therefore, § 13-4433(B) is a permissible prior restraint.

B. Viewpoint-Based Regulation

The Supreme Court has held that "[c]ontent-based regulations are presumptively invalid."[115] Content-based regulations are those that distinguish speech based on the content of the message.[116] To determine whether a regulation is content-based or content neutral, courts must consider "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[117] A regulation can also be content-specific by "its function or purpose."[118] Regulations that are content-specific—whether facially, by function, or by purpose—are subject to strict scrutiny, which requires the regulation to be narrowly tailored to achieve a compelling government interest.[119]

In contrast, content-neutral regulations are those that "confer benefits or impose burdens" without consideration of the ideas or views expressed.[120] Content-neutral regulations must be both subject-matter neutral and viewpoint neutral.[121] Regulations that are subject-matter neutral are those that regulate expression without regard for the content of the message; viewpoint-neutral regulations are those that regulate without regard for the viewpoint expressed.[122] A restriction on a particular speaker is not per se viewpoint based[123] and can be permissible when based upon

115. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
116. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 643 (1994).
117. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (Ariz. 2015).
118. *Id.*
119. *Id.* at 2232.
120. *Turner Broad. Sys., Inc.*, 512 U.S. at 643.
121. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59 (1983).
122. *See generally* Boos v. Berry, 485 U.S. 312 (1988).
123. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998) (stating that speaker status distinction is not a viewpoint-based restriction).

the status of the speaker, rather than the speaker's views.[124] Additionally, the U.S. Supreme Court has held that historical and functional distinctions exist between professions, and speech restrictions may depend on the identity of the parties.[125] The Court emphasized that attorneys are distinguished from other professionals because they are trained advocates.[126] Indeed, there are numerous statutes restricting speech based upon a person's professional status that are not challenged on First Amendment grounds.[127] Content-neutral regulations are subject only to intermediate scrutiny.[128]

Section 13-4433(B) is a content-neutral restriction because it is both subject-matter neutral and viewpoint neutral. A defense attorney could seek to discuss with the victim the facts of the crime, whether the victim would want the government to seek the death penalty, the victim's tax returns, her holiday plans, or the weather. Were it content specific, it would require defense attorneys to submit what they planned to discuss with the victim before they were granted permission to speak to the victim. Section 13-4433(B) restricts a defense attorney's speech regardless of the "ideas or views expressed" and therefore is subject-matter neutral.

In addition, § 13-4433(B) is viewpoint neutral because it regulates a defense attorney's speech based on her status as defense counsel, without regard for the point of view expressed. The statute does not prevent defense attorneys from arguing to a victim about whether their client is guilty or innocent or advocating for or against the death penalty. It is a regulation that is based only upon their status. As the Court noted in *Edenfield v. Fane*, there are historical and functional distinctions not only among attorneys and other professionals, but among attorneys themselves.[129] Prosecutors and defense attorneys are functionally different. A statute distinguishing between the two does not render it per se viewpoint based.

The plaintiffs may attempt to analogize to *Hill v. Colorado*[130] and *McCullen v. Coakley*[131] to argue that if speech of *only* defense attorneys is regulated, it is inherently viewpoint specific and not content neutral. In *McCullen*, the U.S. Supreme Court struck down a Massachusetts law that made it unlawful to stand on a public sidewalk within 35 feet of any place—other than a hospital—that performs abortions.[132] While facially the statute did not regulate the content of speech, in effect it prohibited pro-life sidewalk counselors from communicating with patients entering or exiting the clinic.[133] The Court held the law was content neutral but was

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124. *Perry Educ. Ass'n*, 460 U.S. at 49.
125. Edenfield v. Fane, 507 U.S. 761, 774 (1993).
126. *Id*. at 775.
127. *See, e.g.*, ARIZ. REV. STAT. § 32-1997 (2012) (regulating pharmacists promoting generic drug use); *see also* ARIZ. REV. STAT. § 32-2183.01 (regulating advertising of time shares by real estate developers).
128. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 623 (1994).
129. *Edenfield*, 507 U.S. at 774.
130. 530 U.S. 703 (2000).
131. 134 S. Ct. 2518 (2014).
132. *Id*. at 2525.
133. *Id*.

not the least restrictive means to serve a significant government interest.[134] But critical to the analysis in the instant case, the Court in *McCullen* declined to limit its ruling in *Hill.*[135] The plaintiffs in *Hill* challenged a Colorado law that created a 100-foot buffer zone around healthcare facilities.[136] The statute made it a crime to knowingly approach within eight feet of another person without their consent and communicate verbally or with printed material.[137] The Court upheld the law as a content-neutral, TPM restriction.[138] Much of the Court's reasoning focused on the rights of the unwilling listener.[139] The Court recognized the fact that First Amendment rights include the right to attempt to persuade others to change their views and may not be restricted because the message may be offensive to the listener.[140] However, the Court reaffirmed the "unwilling listener's interest in avoiding unwanted communication," and emphasized that the "broader 'right to be let alone' . . . [is] 'the most comprehensive of rights and the right most valued by civilized men.'"[141] Further, the Court emphasized that private citizens retain the power to decide what "oral messages they want to consider."[142]

Section 13-4433(B) is subject-matter neutral because it regulates defense attorney speech without regard for the ideas they wish to express, and it is viewpoint neutral because it regulates defense attorney speech based upon their status, not upon the message they wish to convey. As such, § 13-4433(B) is not a content-based restriction and is subject to intermediate scrutiny. The government has an important interest in preventing the re-victimization of victims and fostering confidence in the criminal justice system among victims, and § 13-4433(B) is substantially related to achieving those interests.[143] In addition, § 13-4433(B) helps preserve an unwilling listener's—in this case, a victim's—right to decide what message to consider. Therefore, it should easily pass intermediate scrutiny.

C. "Narrowly Tailored to a Compelling Government Interest"[144]

The highest level of scrutiny a court can apply is strict scrutiny, which requires that the government prove a statute is the least restrictive means of serving a compelling government interest.[145] Strict scrutiny, developed within the context of the Equal Protection Clause of the Fourteenth Amendment, is typically reserved for fundamental-rights analysis.[146] In contrast, the courts apply intermediate scrutiny in cases in which a regulation is content neutral to determine whether it is "narrowly

134. *Id*. at 2540.
135. *Id* at 2518.
136. Hill v. Colorado, 530 U.S. 703 (2000).
137. *Id*.
138. *Id*.
139. *Id*. at 708.
140. *Id*. at 716.
141. *Id.* at 716–17; *see also* Olmstead v. United States, 277 U.S. 438, 478 (1928).
142. Hill v. Colorado, 530 U.S. 703, 734 (2000).
143. *See supra* Section II.A for a more detailed TPM explanation.
144. *AACJ v. Ducey*, Motion for Preliminary Injunction, *supra* note 42, at 12–15.
145. McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014).
146. *See* Roe v. Wade, 410 U.S. 133, 155 (1973).

tailored" to serve a "significant and legitimate" government interest.[147] Intermediate scrutiny traditionally is applied to analyze statutes involving gender, sex, or sexual orientation, and like strict scrutiny, the burden remains on the government.[148] The lowest level of scrutiny, the rational-basis test, shifts the burden to the party challenging the law to prove that the government has no legitimate interest in the statute or that there is no rational link between that interest and the law.[149]

In its Motion for Preliminary Injunction, AACJ asks the court to apply strict scrutiny to § 13-4433(B).[150] However, because § 13-4433(B) is a content-neutral TPM restriction, it is subject only to—and survives—intermediate scrutiny.

Section 13-4433(B) is content neutral because it restricts defense attorney speech without regard for the ideas or viewpoint they may wish to communicate. Defense attorneys may seek to communicate with victims about their whereabouts at the time of a crime, their relationship with a defendant, or their opinion of the defendant's character. The regulation was not drafted to prevent a message in which the government disagreed, because there would be no way for lawmakers to know exactly what defense attorneys wish to communicate in each situation. The legislative intent indicates only a desire to protect victims from re-victimization and to ensure meaningful participation in the criminal-justice process. Further, a defense attorney has ample alternatives for communicating with a victim about any of those topics—or any other relevant topic—during a court-ordered deposition, pretrial hearing, or during the course of the trial.

In addition, preventing the re-victimization of victims and fostering confidence in the criminal justice system are legitimate and significant government interests.[151] Section 13-4433(B) also helps preserve a victim's right to decide what message to consider.[152]

Further, § 13-4433(B) is narrowly tailored to serving those interests. In crafting § 13-4433(B), the intent of the Arizona legislature was clear—"to ensure all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeals."[153] Though prior to the passage of the Victims' Rights Implementation Act victims were not afforded enumerated rights, rules governing attorney speech did exist.[154] Rule 4.4(a) of the Arizona Rules of Professional

147. Hill v. Colorado, 530 U.S. 703, 725 (2000). The Court's analysis relies on *Ward v. Rock Against Racism* which distinguishes between the *narrowly tailored* language required for intermediate scrutiny and *least restrictive or least intrusive* requirement for strict scrutiny. 491 U.S. 781, 798 (1989).

148. United States v. Alvarez, 567 U.S. 709, 717 (2012).

149. *See* United States. v. Carolene Prods., Co., 304 U.S. 144 (1938).

150. *AACJ v. Ducey* Motion for Preliminary Injunction, *supra* note 42, at 12–15.

151. *See supra* text accompanying notes 66–72.

152. *See supra* text accompanying notes 140–42.

153. Victim's Rights Implementation Act, 1991 Ariz. Legis. Serv., Ch. 229 (H.B. 2412) (West).

154. *See supra* notes 57–62.

Conduct,[155] adopted by the Arizona Supreme Court nearly a decade before, affords victims some protection by prohibiting defense attorneys from harassing victims or other third parties. However, as evidenced by the legislative intent behind § 13-4433(B), Arizona lawmakers sought to restrict more speech than was already prohibited by Rule 4.4—they sought to prohibit speech that would threaten the stated purposes of affording protection to victims and "healing [their] ordeals."[156] The statute does not prohibit media or other parties from speaking with victims about their cases, indicating that the legislature recognized the inherent—though possibly unintentional—intimidation that exists due to the adversarial nature of the criminal justice system when a defense attorney speaks with a victim. Indeed, the U.S. Supreme Court has upheld regulation of attorney speech in the commercial context, recognizing the "overtures of an uninvited lawyer may distress the individual . . . simply because of their obtrusiveness and the invasion of the individual's privacy even when no other harm materializes."[157] While commercial speech is not at issue in the instant case, the reasoning of the Court regarding the state's interest in protecting the interests of laypersons from a "professional trained in the art of persuasion"[158] is applicable.

CONCLUSION

The Victims' Rights Movement has been one of the most successful rights movements in modern times[159] with Arizona among the first wave of states to create enumerated rights for victims. The Arizona legislature, with the support of voters, recognized the unique needs of victims and the importance of their participation in the criminal justice system.

The Arizona Victims' Bill of Rights and § 13-4433(B) provide that a defense attorney shall only initiate contact with a victim through the prosecutor's office. While indeed a restriction on a defense attorney's speech, § 13-4433(B) is permissible, and the challenge on First Amendment grounds set forth in *AACJ v. Ducey* should fail. As officers of the court and members of a regulated profession, attorneys simply do not enjoy the same robust First Amendment protections as laypersons. In addition, because § 13-4433(B) necessarily intermingles speech and conduct when attorneys request an interview with a victim, their First Amendment rights are limited. Further, as a content-neutral TPM restriction, § 13-4433(B) need only satisfy only intermediate constitutional scrutiny. Because the statute is

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155. ARIZ. R. PROF'L CONDUCT 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.").

156. Victim's Rights Implementation Act, 1991 Ariz. Legis. Serv., Ch. 229 (H.B. 2412) (West).

157. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465–55 (1978).

158. *Id*. at 465.

159. John W. Gillis & Douglas E. Beloof, *The Next Step for A Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 691 (2002) ("To be successful, any rights movement must mature to the point where the promulgated civil rights are defended by lawyers and ultimately interpreted and enforced in appellate court rulings.").

narrowly tailored to serve the significant—and even compelling—government interests in preventing the re-victimization of victims at the hands of the criminal justice system and encouraging satisfaction and participation in criminal proceedings, § 13-4433(B) ultimately passes constitutional scrutiny.