No._____

In the Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ARIZONA, ET AL.,
Petitioners,

v.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General
MICHAEL S. CATLETT
Deputy Solicitor General
Counsel of Record
KATE B. SAWYER
Assistant Solicitor General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
michael.catlett@azag.gov

Counsel for Petitioner Mark Brnovich

Additional counsel listed in signature block

QUESTION PRESENTED

In 1990, Arizona voters amended the Arizona Constitution to include the Victims' Bill of Rights. *See* Ariz. Const. art. II, §2.1. Arizona then passed the Victims' Rights Implementation Act, providing, in part, that a "defendant, the defendant's attorney or an agent of the defendant shall only initiate contact with the victim through the prosecutor's office." Ariz. Rev. Stat. §13-4433(B) (the "Statute"). Decades later, Respondents (a membership organization, criminal-defense attorneys, and an investigator) allege that the Statute violates their own First Amendment rights, not the rights of their clients, and seek injunctive and declaratory relief preventing enforcement of the Statute in state court criminal proceedings.

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court held that federal courts are prohibited from enjoining ongoing state criminal proceedings. The Court later applied "*Younger* abstention" where a federal claim is derivative of a claim that could be litigated in ongoing state proceedings. The circuits have split, however, on the standard to be used when applying *Younger* abstention to such derivative claims. Below, the Ninth Circuit rejected *Younger* abstention because "the plaintiffs' interests are not 'so intertwined' with those of their clients in state court proceedings that 'interference with the state court proceeding is inevitable.'"

Does *Younger* apply when a federal claim is derivative of a claim that could be brought in ongoing state court proceedings or does *Younger* also require inevitable direct interference with state judicial proceedings?

PARTIES TO THE PROCEEDINGS

Petitioners Mark Brnovich, in his official capacity as Attorney General of the State of Arizona, and Colonel Heston Silbert, in his official capacity as Director of the Arizona Department of Public Safety, were defendants in the district court and appellees in the court of appeals.

Respondents Arizona Attorneys for Criminal Justice, Christopher Dupont, Rich Robertson, Richard L. Lougee, Richard D. Randall, Jeffrey A. Kirchler, and John Canby were plaintiffs in the district court and appellants in the court of appeals.

Respondent Maret Vessella, Chief Bar Counsel of the State Bar of Arizona, was a defendant in the district court and appellee in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (D. Ariz.):

- *Arizona Attorneys for Criminal Justice, et al., v. Ducey, et al.*, No. 2:17-cv-01422-SPL (Feb. 27, 2020) (order granting motion to dismiss)
- *Arizona Attorneys for Criminal Justice, et al., v. Ducey, et al.*, No. 2:17-cv-01422-SPL (June 9, 2020) (order granting motion for reconsideration)

United States Court of Appeals (9th Cir.):

- *Arizona Attorneys for Criminal Justice, et al., v. Brnovich, et al.*, No. 20-16293 (Aug. 24, 2021) (opinion reversing judgments of the district court)

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (continued)

STATUTES

TABLE OF AUTHORITIES (continued)

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is not published in the Federal Reporter but is available at 2021 WL 3743888. App.1–6. The district court's order on reconsideration is reported at 465 F.Supp.3d 978. App.7–25. The district court's final dismissal order is reported at 441 F.Supp.3d 817. App.28–48.

JURISDICTION

The Ninth Circuit issued its opinion on August 24, 2021. App.1–6. Petitioners' timely petition for panel and en banc rehearing was denied on October 12, 2021. App.51–52. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The relevant provisions (U.S. Const. amend. I; Ariz. Rev. Stat. §13-4401(9), (19); Ariz. Rev. Stat. §13-4433; and Arizona Rule of Criminal Procedure 39(b)(12)) are reproduced in the appendix to this petition. App.53–58.

INTRODUCTION

Respondents (a membership organization, criminal-defense attorneys, and an investigator) seek to have a federal court issue injunctive and declaratory relief preventing Arizona's Attorney General and the director of Arizona's Department of Public Safety from "enforcing" state law applicable during ongoing criminal prosecutions in state court. Specifically, Respondents claim that an Arizona statute regulating how crime victims may be contacted during active criminal proceedings violates *their* First Amendment rights, and they seek declaratory and injunctive relief from a federal court allowing them, on behalf of their clients, unfettered access to crime victims during active state criminal prosecutions.

But allowing Respondents to proceed with their claims would violate well-established principles of equitable restraint and respect for state interests. For centuries, courts have recognized that equitable relief is not available where there is an adequate remedy at law. *See* Joseph Story, Commentaries on Equity Jurisprudence, 104-5 (1st ed., 1836) (citing English, Federal and State cases); *see also Hepburn & Dundas' Heirs & Ex'rs v. Dunlop & Co.*, 14 U.S. (1 Wheat.) 179, 203 n.d (1816) ("A specific performance will not be decreed where the parties have an adequate remedy at law."). For nearly as long, the Court has recognized the principle of comity between federal and state courts "that is essential to 'Our Federalism.'" *Fair Assessment in Real Estate Ass'n. v. McNary*, 454 U.S. 100, 103 (1981).

These principles of comity and restraint received their "fullest articulation," *id.* at 111–12, in *Younger*

v. Harris, 401 U.S. 37, 41 (1971), when the Court held that traditional principles of comity and equitable restraint bar federal courts from enjoining pending state criminal prosecutions. In *Samuels v. Mackell*—issued the same day as *Younger*—the Court held that "the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate." 401 U.S. 66, 69 (1971); *see also Younger*, 401 U.S. at 41 n.2. The Court later set forth the following three conditions for *Younger* abstention: "*first*, do [the proceedings at issue] constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 434, 432 (1982). If all three conditions apply, unless "exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings." *Id.* at 437.

As to the first condition, the lower courts are split on what it means for there to be an "ongoing state judicial proceeding." In *Hicks v. Miranda*, this Court held that *Younger* abstention applies even where a federal claimant is not a party to ongoing state proceedings in the technical sense so long as the federal claimant has interests that are "intertwined" with parties to ongoing state proceedings. 422 U.S. 332, 348–49 (1975). Six days later, the Court reiterated that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of

them." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975).

The Ninth Circuit adheres to a strict approach to *Hicks* and *Doran*, requiring "a party whose interest is so intertwined with those of the state court party that direct interference with the state court proceeding is inevitable." *Green v. City of Tucson*, 255 F.3d 1086, 1100 (9th Cir. 2001) (en banc), *overruled in part on other grounds by Gilbertson v. Albright*, 381 F.3d 965, 976–78 (9th Cir. 2004) (en banc).

This case fits squarely within the constraints of when a federal court must abstain under *Younger*. Yet the Ninth Circuit sanctioned the continuation of Respondents' claims in federal court by using its "inevitable direct interference" test to reject Petitioners' abstention request. *See* App.6.

The Ninth Circuit's approach diverges from at least five other circuits that do not require "inevitable direct interference," and instead apply *Younger* to non-parties where the federal-court plaintiff's claim is "derivative" of the state-court defendant, finding the interests of the parties to be "intertwined" in such circumstances. *See, e.g.*, *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1253 (8th Cir. 2012); *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App'x 630, 635 (6th Cir. 2005); *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1230 (10th Cir. 2004); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003); *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 53 (4th Cir. 1989).

The question presented here implicates weighty considerations of state sovereignty and respect for

state court criminal proceedings. *See Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 237–38 (1984). The Ninth Circuit's "inevitable direct interference" test allows creative counsel to characterize their clients' constitutional claims as their own, and file in federal court, hoping to obtain injunctive relief impacting ongoing state court proceedings. In the guise of bringing a constitutional claim in their own name, counsel can now access federal court to challenge state court page limitations, discovery limitations, evidentiary rulings, limitations on argument, and any number of other state court rules or decisions. Under principles of federalism, equity, and comity, *Younger* should not be so easy to avoid. *See Kowalski v. Tesmer*, 543 U.S. 125, 133 n.4 (2004) (lamenting "[t]he mischief that resulted from allowing the attorneys to circumvent *Younger*").

STATEMENT

A. Arizona's Protections For Crime Victims

Arizona has a long history of protecting the rights of crime victims. In 1990, Arizona voters passed Proposition 104, the Victims' Bill of Rights ("VBR"). *See* Ariz. Const. art. II, §2.1. The VBR was enacted "to provide crime victims with 'basic rights of respect, protection, participation and healing of their ordeals.'" *Champlin v. Sargeant*, 965 P.2d 763, 767, ¶20 (Ariz. 1998) (quoting 1991 Ariz. Sess. Laws ch. 229, §2 (1st Reg. Sess.)). This includes the right to be present and to be informed of proceedings, the right to be heard at certain proceedings, the right to refuse an interview, the right to obtain prompt restitution, and the right to be informed of one's rights as a crime victim. Ariz. Const. art. II, §2.1(A)(3)–(5), (8), (12); *see also* 18 U.S.C. §3771(a) (listing

similar victims' rights including "[t]he right to be reasonably protected from the accused" and "to be treated with fairness and with respect for the victim's dignity and privacy"). The impetus behind this constitutional amendment was that "[f]or too long victims of crime have been second-class citizens." Dkt. 19-9 at ER1770.[1]

After the voters adopted the VBR, the Arizona Legislature enacted the Victims' Rights Implementation Act (the "Act"). 1991 Ariz. Sess. Laws ch. 229, codified at Ariz. Rev. Stat. ("A.R.S.") §§13-4401 et seq. The legislative intent was to "[e]nact laws that define, implement, preserve and protect the rights guaranteed to crime victims by [the VBR]" and "[e]nsure that [the VBR] is fully and fairly implemented and that all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeals." 1991 Ariz. Sess. Laws ch. 229 §2.

As relevant here, the Act added A.R.S. §13-4433(B) (the "Statute"), which, with minor amendment, now provides,

> The defendant, the defendant's attorney or an agent 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.

The Act also includes a provision, unchallenged

---

[1] Unless otherwise noted, docket citations reference the excerpts of record filed in the Ninth Circuit, No. 20-16293.

here, that the "victim shall not be compelled to submit to an interview on any matter . . . that is conducted by the defendant, the defendant's attorney or an agent of the defendant" unless the victim consents to the interview. A.R.S. §13-4433(A) (1991 Ariz. Sess. Laws ch. 229). The Statute ensures that victims can decide whether to speak with the defendant or the defendant's attorney in the pre-trial setting. *See Champlin*, 965 P.2d at 767, ¶23 (noting "any person accorded 'victim' status under [the VBR] may nevertheless waive the protections by voluntarily consenting to a pretrial interview at the request of the defendant or his attorney"). The Statute thus extends the same procedural protections provided in Model Rule 4.2, governing attorney contact with represented individuals, to victims. *See, e.g.*, Ariz. R. of Pro. Conduct r. 4.2.

Protection for crime victims is also provided in the Arizona Rules of Criminal Procedure. "Even before the constitutional amendment that added the VBR," the Arizona Supreme Court "had adopted Rule 39, Ariz. R. Crim. P., 'to preserve and protect a victim's rights to justice and due process.'" *State v. Nichols*, 233 P.3d 1148, 1150, ¶7 (Ariz. Ct. App. 2010) (quoting Ariz. R. Crim. P. 39(b), effective Aug. 1, 1989). In 1992, the Arizona Supreme Court amended Rule 39 to address the newly enacted VBR. Dkt. 19-9 at ER1896–98. Among other things, the Court added what is now Rule 39(b)(12), which, in relevant part, provides that

> a victim has and is entitled to assert . . . the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf, and . . . the

> defense must communicate requests to interview a victim to the prosecutor, not the victim[.]

Ariz. R. Crim. P. 39(b)(12).

The Rule contains similar procedural protections to the Statute—that defendants or their defense team must seek pretrial contact with the victim through the prosecutor. *See id*.

Neither the Statute nor the Rule apply outside of ongoing criminal proceedings. Arizona law defines "defendant" for purposes of the Statute as "a person or entity that is formally charged by complaint, indictment or information of committing a criminal offense." A.R.S. §13-4401(9). Thus, a defendant, the defendant's attorney, or an agent of the defendant is only limited in contacting victims once state court criminal proceedings have been initiated. On the other hand, Respondents themselves are not subject to any restriction on contacting crime victims until they are retained by a "defendant" who is formally charged with a criminal offense. And Respondents admit that they only pursue victim contact in those ongoing proceedings to further the representation of their clients. *See* Dkt. 19-6 at ER1139.

B. Plaintiffs' Challenge To The Statute

In May 2017, approximately twenty-five years after the initial adoption of the Statute, Plaintiffs (a membership organization, criminal-defense attorneys, and an investigator) filed this lawsuit in the district court challenging the constitutionality of the Statute. Dkt. 19-9 at ER1949–64. Plaintiffs brought a facial First Amendment challenge, *on their own behalf*, to the Statute, though not to the Rule.

Dkt. 19-9 at ER1960–63. Plaintiffs asked for a declaration that the Statute violates *their* First Amendment rights, as well as injunctive relief enjoining Defendants "from enforcing" the Statute. Dkt. 19-9 at ER1963. Plaintiffs initially named only Arizona Attorney General Mark Brnovich ("AG Brnovich") as a defendant. Dkt. 19-9 at ER1954.[2]

C. District Court Proceedings

AG Brnovich moved to dismiss, arguing that (1) the suit was barred under the *Younger* abstention doctrine, (2) Plaintiffs lacked standing, and (3) Plaintiffs failed to join necessary parties under Federal Rule of Civil Procedure 19. Dkt. 19-9 at ER1728–48. The district court agreed, dismissing Plaintiffs' claims, but addressing only AG Brnovich's standing argument. Dkt. 19-1 at ER45–57. The court held that while it believed that "Plaintiffs ha[d] sufficiently alleged an injury-in-fact for Article III standing," Plaintiffs "fail[ed] to offer plausible allegations from which the Court c[ould] conclude that their injury [wa]s traceable to the actions of the Attorney General or the ambit of his enforcement authority," and "that it [was] not likely, much less plausible, that an injunction against him would redress their alleged injury." Dkt. 19-1 at ER49–50, 53. Thus, the court dismissed the action, but gave Plaintiffs leave to amend and "seek redress against an appropriate defendant." Dkt. 19-1 at ER54.

Plaintiffs tried again, amending their complaint, but failing to name any new defendants. Dkt. 19-4

---

[2] Plaintiffs also initially named Governor Doug Ducey as a defendant, but the parties agreed to dismissal without prejudice. Order, *Ariz. Attorneys for Criminal Justice v. Ducey*, No. 17-cv-01422, Dkt. 21 (D. Ariz. May 30, 2017).

at ER683–704. Plaintiffs' new complaint merely repackaged the arguments previously advanced in their papers as "new" allegations. AG Brnovich filed another motion to dismiss, arguing the same grounds for dismissal, Dkt. 19-4 at ER670–81, and the district court *again* granted the motion, noting that the amended complaint, like the original complaint, failed to make sufficient allegations to meet Article III's traceability and redressability requirements. Dkt. 19-1 at ER36–43. The district court again did not address AG Brnovich's *Younger* argument.

Plaintiffs persisted, filing a second amended complaint. Dkt. 19-3 at ER554–75. This time, Plaintiffs added as defendants the State Bar of Arizona, its Chief Bar Counsel, Maret Vessella, and the director of the Arizona Department of Public Safety ("DPS"), Colonel Frank Milstead, who was later replaced by the new director of DPS, Colonel Heston Silbert ("Director Silbert").[3] Again, AG Brnovich, this time accompanied by Director Silbert (together, "State Defendants"), moved to dismiss. Dkt. 19-2 at ER312–27. In addition to AG Brnovich's previous arguments, State Defendants also brought a *factual* challenge to standing based on Plaintiffs' deposition admissions that "they will continue complying with [Rule 39] (i.e., will *not* initiate contact with a victim directly) until the Rule is also declared unconstitutional or compliance is otherwise excused by a court." Dkt. 19-2 at ER317. The third

[3] Defendant Milstead filed a notice of substitution in the latter stages of this case, substituting Director Silbert as a defendant. *See* Notice of Substitution of Def., *Ariz. Attorneys for Criminal Justice v. Ducey*, No. 17-cv-01422, Dkt. 203 (D. Ariz. Mar. 31, 2020). This petition will refer to Director Silbert as the operative defendant.

motion to dismiss also repeated the prior argument that the case must be dismissed based on *Younger* abstention. Dkt. 19-2 at ER321–24.

After full briefing on the third motion to dismiss, the court issued its order dismissing the case against AG Brnovich, finding that it did "not need to consider a factual challenge to the Second Amended Complaint because the Second Amended Complaint still fail[ed] to meet the traceability requirement for purposes of Article III standing under a facial challenge[.]" App.35. But as to Director Silbert, the district court denied the motion to dismiss, failing to recognize that Director Silbert had joined AG Brnovich's factual challenge to standing. *See* App.46.

Director Silbert filed a motion for reconsideration, Dkt. 19-2 at ER212–30, which the district court granted, dismissing Director Silbert from the action. The district court found that under the *factual* attack, Plaintiffs failed the redressability prong of Article III standing, and that "[w]ithout the Rule in front of it, the Court cannot afford complete relief to Plaintiffs[.]" App.19. The district court also rejected standing because "even if the Court enters the requested relief, declaring the statute (or the Rule which was not challenged) unconstitutional . . . state Judges are still free to sanction attorneys for violating those provisions." App.19–20.

Having dismissed the action due to lack of standing, the district court never addressed the State Defendants' argument that the case should be dismissed under the *Younger* abstention doctrine.[4]

---

[4] The district court denied co-defendant Maret Vessella's *Younger* argument without substantial analysis. App. 45–46.

D. Ninth Circuit Proceedings

Plaintiffs appealed to the Ninth Circuit. After full briefing and oral argument, the Ninth Circuit reversed the district court's decision in a terse, six-page memorandum opinion. App.1–6.

In its short standing analysis, the Ninth Circuit held that "plaintiffs ha[d] established causation and traceability as to each defendant." App.4. The court further held that the redressability requirement was met notwithstanding Rule 39's continued effect on Plaintiffs' conduct. App.5 (reasoning that the Statute is "broader" than the Rule).

In an even shorter analysis, the Ninth Circuit dedicated one paragraph to State Defendants' argument that the action must also be dismissed under *Younger* abstention. App.6. The court concluded that *Younger* abstention was not required because "the presence of an ongoing state proceeding . . . [wa]s not satisfied." App.6. Citing to *Green v. City of Tucson*, the Ninth Circuit reasoned that "because the plaintiffs in this case assert their own First Amendment rights in this proceeding, not their clients' rights, the plaintiffs' interests are not 'so intertwined' with those of their clients in state court proceedings that 'interference with the state court proceeding is inevitable.'" App.6.

Defendants petitioned the Ninth Circuit for panel rehearing and rehearing en banc, but the Ninth Circuit denied the requests without opinion. App.51–52.

REASONS FOR GRANTING THE PETITION

This Court's review is needed to answer a question that strikes at the heart of a State's sovereign authority to conduct state criminal proceedings without federal judicial interference. Federal courts of appeals have reached inconsistent holdings on the test to be applied to determine under *Younger* whether there is an "ongoing state judicial proceeding" when the federal parties are not named parties in the state court proceeding. While the Ninth Circuit applies an "inevitable direct interference" test, other courts of appeals ask only whether a federal plaintiff's claims are derivative of a state court party's claim, without requiring direct interference. Furthermore, the Ninth Circuit's test conflicts with this Court's precedents on the proper approach to respecting state sovereignty.

This Court should grant review to resolve the important issues presented by this case and to resolve the conflict in authority they have engendered. And as this case demonstrates, those issues are of particular importance when counsel for state court defendants attempt to characterize derivative constitutional claims as their own to avoid an available state court forum in violation of long-standing abstention and equity principles.

I. This Court Should Grant Review To Decide The Correct Test To Determine When There Is An "Ongoing State Judicial Proceeding" For *Younger* Abstention.

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger*, 401

U.S. at 43. The Court has explained that there are two primary reasons for "this longstanding public policy against federal court interference with state court proceedings." *Id.* The first is that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43–44. The second is "a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44. The Court in *Younger*, therefore, refused to adjudicate the plaintiff's constitutional claim because "a proceeding was already pending in the state court, affording [plaintiff] an opportunity to raise his constitutional claims," thus creating what is now known as *Younger* abstention. *Id.* at 49.

The same day the Court decided *Younger*, it also decided "whether under ordinary circumstances the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate." *Samuels*, 401 U.S. at 69. The Court held in *Samuels* that declaratory relief is equally inappropriate because such relief ordinarily "will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid." *Id.* at 72.

A tad more than a decade later, while extending *Younger* to state bar disciplinary proceedings, the Court distilled three inquiries for the application of *Younger*: "*first*, do [the proceedings at issue] constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state

interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Middlesex Cnty.,* 457 U.S. at 432. If all three conditions exist, then in the absence of extraordinary circumstances, a federal court must abstain. *Id.* at 437.

But here, the Ninth Circuit declined to abstain under *Younger*, reasoning that there was no "ongoing state proceeding" because the federal "plaintiffs' interests are not 'so intertwined' with those of their clients in state court proceedings that 'interference with the state court proceeding is inevitable." App.6. That conclusion perpetuates a split with the other Circuits that require only that the federal plaintiffs' interests be "derivative" of the parties in the state court action.

A. The Court Has Provided Limited Guidance On Abstention Under *Younger* When The Federal Plaintiff Is Not A Named Party In The Related State Court Proceeding.

Soon after *Younger* issued, the Court confronted the scope of the first condition—ongoing state judicial proceedings—when a federal plaintiff is not the named party to a related state proceeding but asserts injury derivative of the state court litigants.

In *Hicks v. Miranda*, the plaintiffs, owners of a movie theater, filed an action in federal court seeking a declaration that California's obscenity law was unconstitutional under the First Amendment. 422 U.S. at 337–38. Before they did so, however, local authorities had charged two of their theater employees in state court with several misdemeanor obscenity violations. *Id.* at 335. A three-judge

district court panel rejected the federal defendants' *Younger* abstention request because "no criminal charges were pending in the state court against [plaintiffs]." *Id.* at 340. The Court, however, disagreed and reversed, holding that dismissal under *Younger* was indeed required because "[Plaintiffs] had a substantial stake in the state proceedings" and "their interests and those of their employees were intertwined." *Id.* at 348–49. The Court concluded that "[p]lainly, the same comity considerations apply where the interference is sought by some, such as appellees, not parties to the state case." *Id.* at 349 (cleaned up). The Court also explained that it has never held "that for *Younger v. Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed." *Id.*

Just six days later, the Court decided *Doran*, in which the operators of three bars brought a federal lawsuit to enjoin enforcement of a town ordinance prohibiting topless dancing. 422 U.S. at 924. The day after plaintiffs filed the federal complaint, one of the plaintiffs resumed its presentation of topless dancing and was served with state criminal summonses. *Id.* at 925. Based on the existence of criminal proceedings against one of the plaintiffs, defendants argued *Younger* abstention should apply as to all three. But the Court concluded that abstention was only warranted in regard to the claims of the federal plaintiff involved in the state criminal proceedings. The Court rejected application of *Younger* to the other two federal plaintiffs, reasoning that "while [they] are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management." *Id.*

at 928–29. Nevertheless, the Court confirmed that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them." *Id.* at 928.

But that is the extent of the Court's guidance on the application of *Younger* to federal plaintiffs who are not named parties to any pending state proceeding. As a result, the courts of appeals have split over the standard to be applied and, specifically, whether direct interference is required.

B. The Courts Of Appeals Have Applied Diverging Standards When Determining Whether There Are Ongoing Judicial Proceedings.

When confronted with the question of whether ongoing judicial proceedings exist for the purposes of *Younger* abstention, the Second, Fourth, Sixth, Eighth, and Tenth Circuits all apply a similar test.

The Eighth Circuit, for example, analyzes whether the claims of the federal plaintiff are derivative of claims or injuries pending in state court, without requiring that direct interference is inevitable. In *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245 (8th Cir. 2012) ("*TACM*"), a church and two of its members brought a federal action against Arkansas officials, challenging the removal of children from the custody of church members under the First and Fourth Amendments. The plaintiffs sought "an order declaring the policies and practices of the Defendant's . . . unconstitutional, void and unenforceable." *See* Compl., *TACM*, No. 09-4031, Dkt. 1 at 47 (W.D. Ark. Apr. 9, 2009), 2009 WL

5057332. They also sought "a preliminary and permanent injunction enjoining and restraining the Defendant's . . . from taking custody of children" unless certain conditions were met. *See id.* On defendants' motion for judgment on the pleadings, the district court concluded that *Younger* abstention applied to the individual church members' claims and that the church lacked standing. *TACM*, 664 F.3d at 1248.

On appeal, the Eighth Circuit concluded that "the district court should have dismissed not only the individual Plaintiffs, but also TACM, based on *Younger* abstention." *Id.* The court first observed that "[t]he fact that TACM itself was not a party to any of the state-court proceedings does not preclude the application of *Younger* abstention in federal court." *Id.* at 1251. *Younger* abstention still "applies to TACM because it alleges standing based on injuries that are either directly or indirectly derivative of those of the individual plaintiffs." *Id.* at 1253. This was true despite that the church claimed it was asserting its own rights and injuries: "[W]ith respect to TACM's own rights and alleged injuries, not only are TACM's interests generally aligned with those of its members, the church shares a close relationship with its members." *Id.*

Like the Eighth Circuit, the Second, Fourth, Sixth, and Tenth Circuits similarly apply *Younger* to non-parties where the federal-court plaintiff's claim is "derivative" of the state-court defendant, finding the interests of the parties to be "intertwined" in such circumstances. *See, e.g.*, *Citizens for a Strong Ohio v. Marsh*, 123 Fed. App'x 630, 635 (6th Cir. 2005) ("*Younger* abstention may also be appropriate for non-parties to the state action when '[s]uccess on

the merits . . . is entirely derivative' of the rights of the state action parties."); *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1230 (10th Cir. 2004) ("[W]hen in essence only one claim is at stake and the legally distinct party to the federal proceeding is merely an alter ego of a party in state court, *Younger* applies."); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003) (*Younger* applies where the federal-court plaintiff's claim is "entirely derivative of whatever rights that" the state-court defendant may have (internal quotation mark omitted)); *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 53 (4th Cir. 1989) (*Younger* abstention applied because "federal plaintiffs are in a position to raise the constitutional claims that they seek to vindicate in this action by federal injunction as defenses in the pending state proceeding").

By contrast, the Ninth Circuit believes that "*Hicks* and *Doran* circumscribe the quite limited circumstances under which *Younger* may oust a district court of jurisdiction over a case where the plaintiff is not a party to an ongoing state proceeding." *Green*, 255 F.3d at 1100. "Congruence of interests is not enough, nor is identity of counsel." *Id.* Instead, the Ninth Circuit believes *Younger* applies when the federal plaintiff is not a named party to an ongoing state proceeding only when the plaintiff's "interest is so intertwined with those of the state court party that direct interference with the state court proceeding is inevitable." *Id.* And that court has defined an action that would directly interfere as one seeking "to enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings." *Id.* at 1098.

In *Green*, which the Ninth Circuit exclusively relied upon below (*see* App.6), certain residents of an unincorporated town in Arizona brought a federal court challenge to a state statute regarding municipal consent for incorporation. The federal plaintiffs claimed the statute violated the Fourteenth Amendment's Due Process and Equal Protection Clauses, as well as the Guaranty Clause. *Green*, 255 F.3d at 1091. In pre-existing state court litigation, other residents of the same town had brought identical constitutional claims against the same state statute. *See id.* Yet the Ninth Circuit refused *Younger* abstention, resulting in identical constitutional litigation in state and federal court. The Ninth Circuit reasoned that it was insufficient for abstention "[t]hat these individuals share[d] an interest in [the town's] incorporation—even if their interests [we]re 'essentially identical[.]'" *See id.* at 1104. Moreover, the court believed that hearing the case could not "in any way have precluded the state case from being litigated to completion." *Id.*

The Ninth Circuit is therefore an outlier in applying *Younger* when non-parties to a state court action bring a related federal action. While at least five circuits require abstention when the federal claim is "derivative" of the state parties, the Ninth Circuit heightens that standard and requires that "direct interference with the state court proceeding is inevitable." This Court's intervention is needed to resolve the split in authority in the Circuits on this important question that implicates state sovereignty, comity, and equitable restraint.

II. The Ninth Circuit's Strict Approach Is Inconsistent With This Court's Precedent And Proper Respect For State Sovereignty.

A "direct interference" requirement, like that applied by the Ninth Circuit, is inconsistent with the Court's precedent and state sovereignty. Decades before *Younger*, the Court explained that "[i]t is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943); *see also Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (referring to "the rightful independence of state governments which should at all times actuate the federal courts"). Similarly, Article III "does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." *Younger*, 401 U.S. at 52. Thus, federal courts should refrain from interfering with a state's interest in "carrying out the important and necessary task of enforcing" its criminal laws. *Id.* at 51–52.

In *Younger*, the Court rejected a request to enjoin state proceedings altogether. 401 U.S. at 49. But the Court did not stop there. In *Samuels*, the Court extended *Younger* beyond injunctions to declaratory judgments because "declaratory relief alone has virtually the same practical impact as a formal injunction would." 401 U.S. at 72. *Samuels*, for example, involved, in part, a request for a declaratory judgment that "the New York laws under which the grand jury had been drawn violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Id.* at 67. Later, the Court

acknowledged that it has "extended the [abstention] doctrine to all cases in which a federal court is asked to provide some form of discretionary relief." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). This includes damages actions where recovery first requires a determination of the constitutionality of state law that would halt its operation. *Id.* at 719.

Where the three-part test articulated in *Middlesex* is met, requiring more—like direct interference akin to actually stopping state proceedings—is inconsistent with *Samuels* and like precedent. Withholding abstention unless a federal claim will result in halting state proceedings also gives short shrift to state sovereignty. While a declaration regarding the constitutionality of a state statute may not actually halt state proceedings, granting such relief has a domino effect of the type the Court sought to avoid in *Samuels* and *Quackenbush*.

The same is no less true—and the domino effect no less real—when the federal claim is derivative of a claim that could be asserted in ongoing state proceedings. A derivative claim, such as that asserted in this case seeking a declaration that a state statute applicable in virtually every criminal prosecution in Arizona is unconstitutional, is no less disruptive than an injunction actually stopping an ongoing prosecution. Otherwise, "the federal judgment serves no useful purpose as a final determination of rights." *Pub. Serv. Comm. of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952); *see also Samuels*, 401 U.S. at 72. Limiting abstention to cases in which a derivative claim will result in the type of direct interference the Ninth Circuit requires is not adequately protective of state interests.

Allowing derivative claims to easily bypass abstention also encourages creative pleading in federal court. The Court has frowned upon attempts to use a federal forum to short circuit state court proceedings through creative theories of standing. *See Kowalski v. Tesmer*, 543 U.S. 125, 132–33 (2004). The plaintiffs in *Kowalski*, a group of criminal defense attorneys, argued that *Younger* did not apply because they were not parties to ongoing state court proceedings. They argued they had standing based on hypothetical future clients and those clients' inability, through the attorneys, to prosecute future appeals. *Id.* at 127–28. The Court rejected standing, emphasizing the need to avoid encouraging criminal defense attorneys to bypass *Younger* by asserting their own claims in federal court. *Id.* at 133. The Court even lamented "[t]he mischief that resulted from [the lower courts] allowing the attorneys to circumvent *Younger*[.]" *Id.* at 133 n.4.

As demonstrated by this case, the same mischief results from the Ninth Circuit's standard. The "direct interference" test allows parties to avoid *Younger* through creative theories of standing and crafty non-joinder of parties. Under the Ninth Circuit's standard, *Kowalski* would have been decided differently had the attorney plaintiffs merely been clever enough to allege that they were asserting their own First Amendment right to represent indigent defendants who plead guilty. The Court should grant certiorari to prevent the Ninth Circuit's standard from being used to harm the important values underlying *Younger*.

III. Under The Proper Standard, *Younger* Abstention Applies.

By applying the wrong standard, the Ninth Circuit incorrectly held that abstention under *Younger* is not required here. But under the Court's precedents, Respondents' federal claims are directly derivative of the claims of their criminal defendant clients in state court and *Younger* should apply.

To begin, the statute Respondents challenge, A.R.S. §13-4433(B), applies only after Respondents' clients are formally charged with a crime (*i.e.*, only when there is an ongoing state court criminal proceeding). *See* A.R.S. §13-4401(9) (defining "defendant" for purposes of §13-4433 as "a person or entity that is formally charged by complaint, indictment or information of committing a criminal offense"). Respondents themselves are not subject to any restriction on contacting crime victims until they are retained by a "defendant" who is formally charged with a criminal offense. And Respondents only pursue victim contact in those ongoing proceedings to further the representation of their clients. *See* Dkt. 19-6 at ER1139. Because the applicability of the restriction on Respondents is purely contingent upon the restriction on their clients, all of which is contingent upon the institution of formal criminal proceedings against a "defendant," "[Respondents] ha[ve] a substantial stake in the state proceedings" and "their interests and those of their [clients are] intertwined," so *Younger* applies. *Hicks*, 422 U.S. at 348–49.

Moreover, as Petitioners explained to the Ninth Circuit, there are several ways in which Respondents or their clients could raise their First Amendment

challenge to the Statute during ongoing state judicial proceedings. Ans. Br. at 41–44, No. 20-16293, Dkt. 36. Thus, the Ninth Circuit's rejection of abstention here conflicts with the Court's statement that federal courts should "abstain from jurisdiction whenever federal claims have been or *could be* presented in ongoing state judicial proceedings that concern important state interests." *Haw. Housing Auth.*, 467 U.S. at 237–38 (emphasis added); *see also Middlesex Cnty.*, 457 U.S. at 436–37 (applying *Younger* abstention where constitutional claims could be made in state disciplinary proceedings).

The Ninth Circuit's decision also risks impinging upon state sovereignty and federalism by creating a large loophole for criminal defense attorneys to take up the mantle of constitutional challenges in federal court. Counsel, in the guise of bringing a claim on their own behalf, can now challenge state court page limitations, discovery limitations, evidentiary rulings, limitations on argument, or any number of other state court rules or decisions that can be morphed into federal constitutional challenges through creative lawyering. Those challenges will certainly interfere with ongoing state criminal proceedings. *See Kugler v. Helfant*, 421 U.S. 117, 130 (1975) ("'If the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues.'").

Finally, Respondents cannot simultaneously establish Article III standing and avoid abstention. Either Respondents are involved in ongoing criminal proceedings and *Younger* applies, or Respondents are

not involved in any ongoing criminal proceedings and face no threat of enforcement, and thus lack standing. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987) ("In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised."); *see also Kowalski*, 543 U.S. at 133.

Regardless of what term one uses to describe the relationship between Respondents' claims here and those of their clients in ongoing state proceedings—intertwined, dependent, derivative, overlapping—Respondents should not be permitted to avoid *Younger* solely because they are not technically named as parties in ongoing state court proceedings in which they are clearly involved. The Statute here applies only when there are ongoing state proceedings and the sole reason Respondents seek direct victim contact is to further their clients' interests in those proceedings. The Court should grant certiorari to clarify *Younger*'s application.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

January 10, 2022

Respectfully submitted,

MARK BRNOVICH
Attorney General
of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and
Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General
MICHAEL S. CATLETT
Deputy Solicitor General
Counsel of Record
KATE B. SAWYER
Assistant Solicitor
General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
michael.catlett@azag.gov

Counsel for Petitioner
Mark Brnovich

CHARLES A. GRUBE
ERYN M. MCCARTHY
NANCY M. BONNELL
Assistant Attorneys
General
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-8341
charles.grube@azag.gov

Counsel for Petitioner
Heston Silbert

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16293

D.C. No. 2:17-cv-01422-SPL

[Filed: August 24, 2021]

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE; et al.,	)
Plaintiffs-Appellants,	)
v.	)
MARK BRNOVICH, Attorney General, in his official capacity as Attorney General of the State of Arizona; et al.,	)
Defendants-Appellees.	)

MEMORANDUM[*]

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted July 6, 2021
Portland, Oregon

Before: M. MURPHY,[**] PAEZ, and BENNETT, Circuit Judges.

Plaintiffs—individual criminal defense attorneys, a criminal defense investigator, and an organizational plaintiff, Arizona Attorneys for Criminal Justice ("AACJ") (collectively "Plaintiffs")—appeal the district court's dismissal of their lawsuit for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). Plaintiffs' lawsuit, filed pursuant to 42 U.S.C. § 1983, challenges on First Amendment grounds Arizona Revised Statutes § 13-4433(B), which prohibits criminal defense lawyers and investigators from contacting victims. Plaintiffs sued Mark Brnovich (the Arizona Attorney General), Maret Vessella (Chief Bar Counsel of the State Bar of Arizona), and Heston Silbert (Director of the Arizona Department of Public Safety) (collectively "Defendants"), all of whom, at some level, have responsibility for enforcing § 13-4433(B) or the Arizona Rules of Professional Conduct.

On appeal, all Defendants defend the district court's standing ruling. Brnovich and Silbert further argue that the district court should have abstained from

---

[**] The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

hearing this case under *Younger v. Harris*, 401 U.S. 37 (1971). We review de novo whether the requirements of standing are met and whether abstention under *Younger* is required. *Canatella v. California*, 304 F.3d 843, 850, 852 (9th Cir. 2002).[1] We conclude that plaintiffs have standing against all three defendants and reverse. We further conclude that the district court did not err in declining to abstain under *Younger*.

1. Standing has three elements: injury in fact, a causal connection between the relevant conduct and that injury, and that it is likely the court can redress that injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "Where, as here, a case is at the pleading stage, the plaintiff must clearly . . . allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks and citation omitted). Defendants assert both facial and factual attacks on Plaintiffs' standing.

First, Plaintiffs have sufficiently alleged an injury in fact as to each defendant. On appeal, Brnovich and Silbert did not challenge the injury in fact element. As for Vessella, Plaintiffs have alleged that they self-censor due to fear of professional discipline. *See Wolfson v. Brammer*, 616 F.3d 1045, 1059 (9th Cir. 2010) ("Self-censorship is a constitutionally recognized injury."). Plaintiffs also have alleged a credible threat of enforcement, because Vessella has authority to discipline attorneys for violations of § 13-4433(B), Vessella has included a violation of § 13-4433(B) as part of the basis for seeking professional discipline

[1] We have jurisdiction under 28 U.S.C. § 1291.

against attorneys in the past, and Plaintiffs seek to engage in conduct that would violate § 13-4433(B). *See Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (articulating factors used to determine whether plaintiffs have shown they face a credible threat in a pre-enforcement challenge).

Second, plaintiffs have established causation and traceability as to each defendant. For Brnovich, there is "a causal connection between the injury and the conduct complained of," *Lujan*, 504 U.S. at 560, because his office seeks to enforce § 13-4433(B) in proceedings to which he is a party, *see, e.g.*, *Martinez v. Shinn*, No. CV-20-00517-PHX-DJH, 2020 WL 3574594, at *3 (D. Ariz. July 1, 2020), and because his office can refer alleged violations of § 13-4433(B) for disciplinary investigation.[2] Further, an officer who can "actually enforce the law" or direct enforcement by others is a proper defendant, *see Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919–20 (9th Cir. 2004), and Vessella and Silbert have the authority to pursue professional discipline for defense attorneys and investigators who violate § 13-4433(B).

Third, Plaintiffs have established redressability as to each defendant. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to

---

[2] We grant Plaintiffs' motion to take judicial notice (Dkt. 31) of Attorney General Brnovich's amicus brief in a case before the Arizona Supreme Court, in which the Attorney General stated that "as the State's chief legal officer," he "has a manifest interest in ensuring that victims' rights, as enumerated in article II, § 2.1 of the Arizona Constitution, are protected."

himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). Here, the requested relief would stop Defendants from enforcing § 13-4433(B), and thus relieve a discrete injury.

The existence of a similar rule of criminal procedure, Arizona Rule of Criminal Procedure 39(b)(12)(A), does not preclude redressability. Section 13-4433(B) is broader than Rule 39(b)(12)(A), which states that "the defense must communicate requests to interview a victim to the prosecutor, not the victim." Ariz. R. Crim. P. 39(b)(12)(A). In contrast, § 13-4433(B) provides that a defense attorney or investigator "shall only initiate contact with the victim through the prosecutor's office." Because it is possible to contact a victim without requesting to interview them, and thus violate § 13-4433(B) without violating Rule 39(b)(12)(A), enjoining Defendants from enforcing § 13-4433(B) would relieve a discrete injury.

The possibility that state court judges would not follow a federal court judgment declaring § 13-4433(B) unconstitutional also does not foreclose redressability. Plaintiffs have stated that they "self-censor[] for fear of losing their professional licenses," a consequence imposed by Vessella and Silbert. Relief in this lawsuit would address that discrete injury. Relief would also bar Brnovich from relying on § 13-4433(B) to stand in the way of defense attorneys' direct communications with victims in cases prosecuted by his office.

We conclude that Plaintiffs have established standing as to each defendant.[3]

2. We agree with the district court that *Younger* abstention is not required. Critically, the first *Younger* requirement—the presence of an ongoing state proceeding—is not satisfied. *See ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). In contrast to *Dubinka v. Judges of the Superior Court*, 23 F.3d 218 (9th Cir. 1994), the plaintiffs in this case are not parties to any pending proceedings in Arizona state court. And because the plaintiffs in this case assert their own First Amendment rights in this proceeding, not their clients' rights, the plaintiffs' interests are not "so intertwined" with those of their clients in state court proceedings that "interference with the state court proceeding is inevitable." *Green v. City of Tucson*, 255 F.3d 1086, 1100 (9th Cir. 2001) (en banc), *overruled, in part, on other grounds by Gilbertson v. Albright,* 381 F.3d 965, 976–78 (9th Cir. 2004) (en banc). Further, no plaintiffs are currently parties in disciplinary proceedings for violations of § 13-4433(B).

REVERSED and **REMANDED.**

---

[3] Vessella also argues that Plaintiffs do not present a ripe case or controversy. "A ripeness inquiry considers whether 'concrete legal issues, presented in actual cases, not abstractions,' are raised by the complaint," and overlaps considerably with standing. *Canatella*, 304 F.3d at 854 (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947)). In her ripeness argument, Vessella repeats the same arguments used to challenge Plaintiffs' standing. We reject Vessella's ripeness arguments for the same reasons we reject Vessella's arguments concerning standing.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-17-01422-PHX-SPL

[Filed: June 9, 2020]

Arizona Attorneys for Criminal Justice et al,

Plaintiffs,

vs.

Ducey et al,

Defendants.

ORDER

Pending before the Court are Defendant Heston Silbert's ("Silbert") Motion for Reconsideration (Doc. 193) ("Silbert's Motion for Reconsideration"),[1] Silbert's

[1] On March 21, 2020, Colonel Heston Sibert became the newly appointed Director of the Arizona Department of Public Safety ("DPS"), replacing Colonel Frank Milstead ("Milstead"). Milstead was the party who filed the Motion for Reconsideration and Conditional Request for Certification but Sibert substituted as Defendant pursuant to Fed. R. Civ. P. 25(d). For purposes of clarity, the references to Milstead in the background section of this

Conditional Request for Certification for Appellate Review (Doc. 164) ("Silbert's Request for Certification"), Defendant Maret Vessella's ("Vessella") Motion for Reconsideration (Doc. 197) ("Vessella's Motion for Reconsideration"), and Vessella's Conditional Request for Certification for Appellate Review (Doc. 198) ("Vessella's Request for Certification"). All the motions and requests relate to the Court's February 27, 2020 order (the "Order"). All the pending motions are fully briefed. For the reasons that follow, the motions are granted and the requests are denied as moot.[2]

I. Background

On May 8, 2017, Plaintiffs, individual criminal-defense lawyers, investigators, and non-profit organization Arizona Attorneys for Criminal Justice, initiated this action (the "Original Complaint") challenging the constitutionality of Ariz. Rev. Stat. ("A.R.S.") § 13-4433(B), which prohibits criminal defense counsel from initiating contact with a victim. (Doc. 1) On June 26, 2017, the Attorney General of the State of Arizona (the "Attorney General") moved to dismiss the Original Complaint, arguing that the Plaintiffs did not have standing to bring the lawsuit. (Doc. 31) On March 30, 2018, the Court granted the Attorney General's motion to dismiss in part (the

---

Order are not modified to include Silbert but the references in the analysis section are to Silbert.

[2] Because it would not assist in resolution of the instant issues, the Court finds the pending motions are suitable for decision without oral argument. *See* LRCiv. 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

"Dismissal Order"). (Doc. 119) In granting the Attorney General's first motion to dismiss, the Court found that the Plaintiffs failed to "offer plausible allegations from which the Court can conclude that their injury is traceable to the actions of the Attorney General or the ambit of his enforcement authority" or show that the relief requested under the Original Complaint would redress the Plaintiffs' alleged injury. (Doc. 119 at 6–9) Based on the allegations in the Original Complaint, the Court found that the Plaintiffs lacked standing to pursue their claims, but the Court provided the Plaintiffs with leave to amend the Original Complaint by a later deadline. (Doc. 119 at 9–11)

On May 4, 2018, the Plaintiffs filed an amended complaint (the "First Amended Complaint") seeking identical declaratory and injunctive relief that would prevent the Attorney General from enforcing A.R.S. § 13-4433(B). (Doc. 123) On May 25, 2018, the Attorney General filed a motion to dismiss the First Amended Complaint (the "Second Motion to Dismiss"), arguing that the amended pleading still failed to allege facts sufficient to demonstrate that the Plaintiffs had standing to bring their claims. (Doc. 126) On March 15, 2019, the Court granted the Attorney General's second motion to dismiss (the "Second Dismissal Order"). (Doc. 147) In doing so, the Court found that the Plaintiffs still failed to "offer plausible allegations from which the Court can conclude that the Plaintiffs' injury is traceable to the actions of the Attorney General" or show that the relief requested under the First Amended Complaint would redress Plaintiff's alleged injury. (Doc. 147 at 4–7) Based on the allegations in the First Amended Complaint, the Court found that the

Plaintiffs still lacked standing to pursue their claims, but the Court provided the Plaintiffs with a second leave to amend the Original Complaint by a later deadline. (Doc. 147 at 7–8)

On April 26, 2019, Plaintiffs filed another amended complaint (the "Second Amended Complaint") seeking identical declaratory and injunctive relief but adding the State Bar of Arizona ("State Bar"), its Chief Bar Counsel, Maret Vessella ("Vessella"), and the director of the Arizona Department of Public Safety, Colonel Frank Milstead (respectively "DPS" and "Milstead") as defendants. (Doc. 150) On June 20, 2019, the State Bar and Vessella ("State Bar" and "Vessella") filed their Motion to Dismiss the Second Amended Complaint, arguing lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted (Doc. 162 at 1) (the "State Bar's Motion to Dismiss") and the Attorney General and Milstead filed their Joint Motion to Dismiss the Second Amended Complaint, arguing lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to Join a Rule 19 Party (Doc. 164 at 3) (the "Attorney General's Third Motion to Dismiss"). The Court granted the Attorney General's Third Motion to Dismiss only as to the Attorney General, not Milstead, and denied the State Bar's Motion to Dismiss in full. (Doc. 191)

II. Legal Standard

A. Motions for Reconsideration

Reconsideration is disfavored and "appropriate only in rare circumstances." *WildEarth Guardians v. United*

States Dep't of Justice, 283 F.Supp.3d 783, 795 n.11 (D. Ariz. June 21, 2017); *see also Bergdale v. Countrywide Bank FSB*, No. CV-12-8057-PCT-SMM, 2014 WL 12643162, at *2 (D. Ariz. May 23, 2014) ("[Reconsideration] motions should not be used for the purpose of asking a court to rethink what the court had already thought through-rightly or wrongly."). "[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). LRCiv 7.2(g)(1) sets forth the applicable standard for the Court to review both Motions for Reconsideration. Indeed, Federal Rules of Civil Procedure rules 59(e) and 60(b) are not applicable because a judgment was not entered as to either Silbert or Vessella. LRCiv 7.2(g)(1) states that "[t]he Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." LRCiv 7.2(g)(1). More specifically, the motion

> shall point out with specificity the matters that the movant believes were overlooked or misapprehended by the Court, any new matters being brought to the Court's attention for the first time and the reasons they were not presented earlier, and any specific modifications being sought in the Court's Order. No motion for reconsideration of an Order may repeat any oral

> or written argument made by the movant in support of or in opposition to the motion that resulted in the Order. Failure to comply with this subsection may be grounds for denial of the motion.

LRCiv 7.2(g)(1). Mere disagreement with an order is not a proper ground for a motion for reconsideration under LRCiv 7.2(g)(1). *See, e.g.*, *Ariz. Dram Act Coal. V. Brewer*, 945 F. Supp. 2d 1049, 1078 (D. Ariz. 2013) ("mere disagreement with an order is an insufficient basis for reconsideration."), *reversed and remanded on other grounds*; *Ross v. Arpaio*, 2008 WL 1776502, at *2 (D. Ariz. Apr.15, 2008) (relying on the same principle).

B. FRCP 12(b)(1) and Article III Standing

Federal Rule of Civil Procedure 12(b)(1) "allows litigants to seek the dismissal of an action from federal court for lack of subject matter jurisdiction." *Kinlichee v. United States*, 929 F. Supp. 2d 951, 954 (D. Ariz. 2013) (citing *Tosco Corp. v. Comtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001)). Allegations raised under FRCP 12(b)(1) should be addressed before other reasons for dismissal because if the complaint is dismissed for lack of subject matter jurisdiction, other defenses raised become moot. *Kinlichee*, 929 F. Supp. 2d at 954. A motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1) may attack either the allegations of the complaint as insufficient to confer upon the court subject matter jurisdiction or the existence of subject matter jurisdiction in fact. *Renteria v. United States*, 452 F. Supp. 2d 910, 919 (D. Ariz. 2006) (citing *Thornhill Publ'g Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir.1979));

Edison v. United States, 822 F.3d 510, 517 (9th Cir. 2016). When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Renteria*, 452 F. Supp. 2d at 919 (citing *Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996)). When the motion to dismiss is a factual attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. *Renteria*, 452 F. Supp. 2d at 919 (citing *Thornhill*, 594 F.2d at 733). A plaintiff has the burden of proving that jurisdiction does in fact exist. *Renteria*, 452 F. Supp. 2d at 919 (citing *Thornhill*, 594 F.2d at 733). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Rosenbaum v. Syntex Corp.*, 95 F.3d 922, 926 (9th Cir. 1996).

"To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 133 (2011); *See also Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 597–98 (2007). The doctrine of standing encompasses both constitutional requirements and prudential considerations. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). "The constitutional requirement of standing has three elements: (1) the plaintiff must have suffered an injury-in-fact—that is, a concrete and particularized invasion

of a legally protected interest that is actual or imminent, not conjectural or hypothetical;[3] (2) the injury must be causally connected—that is, fairly traceable—to the challenged action of the defendant and not the result of the independent action of a third party not before the court; and (3) it must be likely and not merely speculative that the injury will be redressed by a favorable decision by the court." *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge*, 454 U.S. at 475–76).

The plaintiff bears the burden of establishing the existence of a justiciable case or controversy, and "'must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). "A plaintiff must establish standing with the 'manner and degree of evidence required at the successive stages of the litigation.'" *Carrico v. City and County of San Francisco*, 656 F.3d 1002, 1006 (9th Cir. 2011) (quoting *Lujan*, 504 U.S. at 561). "[A]t the pleading stage, the plaintiff must clearly. . . allege facts demonstrating each element." *Spokeo, Inc. v. Robins*,

---

[3] "The constitutional component of ripeness overlaps with the 'injury in fact' analysis for Article III standing. Whether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010); *See also LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) (discussing ripeness).

136 S.Ct. 1540, 1547 (2016) (internal quotations omitted).

III. Analysis

Silbert seeks reconsideration of the Order on two grounds: (1) the Court did not address his factual challenge to subject matter jurisdiction, and (2) the Court did not address his 12(b)(6) argument. (Doc. 193 at 2) Vessella seeks reconsideration on one ground under the manifest error standard: the Court committed manifest error when it concluded that Plaintiffs had met all three requirements for purposes of Article III standing. (Doc. 197 at 1, 4) The Court addresses each motion in turn.

A. Sibert's Grounds for Reconsideration

The Court notes that issues of subject matter jurisdiction have been raised three times already by the Attorney General, and more specifically issues of lack of Article III standing. (Docs. 31 at 6–11; 126 at 4–7; 164 at 4–8) The first two previous arguments were facial challenges to subject matter jurisdiction and the Court reviewed the Original Complaint and the First Amended Complaint under the appropriate standard for such challenges. *See Renteria*, 452 F. Supp. 2d at 919. The Attorney General's Third Motion to Dismiss was based on a *factual* challenge to subject matter jurisdiction based on lack of Article III standing and specifically lack of redressability, one of the three requirements for Article III standing. (Doc. 164 at 1–2) The Court found that it did not need to address the factual challenge because the SAC still failed to sufficiently allege Article III standing under a facial

challenge standard. However, Silbert points out that the Court must look at the factual challenge because he joined in the Attorney General's Third Motion to Dismiss and the Court has yet to address such argument. (Doc. 193 at 1–3)

It is true that the Court stated that "[Silbert] did not file any motion to dismiss based on lack of subject matter jurisdiction." (Doc. 191 at 14) This was in error as Silbert joined in the Attorney General's Third Motion to Dismiss. The Court nevertheless addressed issues of Article III standing as to Silbert in the Order. (Doc. 191 at 14) The Court found that the SAC satisfied the requirements for Article III standing under a facial challenge for the claims against Silbert. (Doc. 191 at 14).

The Court now turns to Silbert's factual challenge, which it considers for the first time. Issues of subject matter jurisdiction, which have not been addressed by the Court, can be raised at any time and *sua sponte* by the Court. First, Silbert argues that the SAC fails the redressability prong of Article III standing under a factual challenge mainly because Plaintiffs have not challenged Rule 39(b)(11) of the Arizona Rules of Criminal Procedure.[4] (Doc. 193 at 2) The Court already ruled that "Plaintiffs' failure to challenge Arizona Rules of Criminal Procedure 39(b)(12)(A) is immaterial. Plaintiffs do not allege in their complaint that there is some threat of discipline or judicial sanction for violating Rule 39(b)(12), or that the rule otherwise has

[4] The substance of current rule 39(b)(12) was previously located in Rule 39(b)(11).

a chilling effect on their speech." (Doc. 119 at 10–11) (ruling on the Attorney General's First Motion to Dismiss) The Court finds that a different conclusion is warranted based on the factual challenge brought by Silbert. Silbert argues that deposition testimony of the sole private investigator Plaintiff in this case demonstrates, as a factual matter, that he would still comply with Rule 39(b)(12) even if the Court enjoined the enforcement of A.R.S. 13-4433(B) which nullifies redressability in this case because Plaintiffs have not challenged Rule 39(b)(12). (Docs. 164 at 4–8; 193 at 2–3) The same argument was made by the Attorney General in his Third Motion to Dismiss as applied to the attorneys involved in the case but the Court did not have to address it because it decided the dismissal of the Attorney General based on traceability. Under a factual challenge standard, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. *Renteria*, 452 F. Supp. 2d at 919 (citing *Thornhill*, 594 F.2d at 733). This is the crucial difference with the Court's prior conclusions which were based on a facial challenge and presumed the allegations in the SAC were true.

It is true that the Arizona Supreme Court has held that the Rule is a limitation on a trial judge's authority to compel a witness interview, deposition, or other discovery request made by the defense. *Cf. Champlin v. Sargeant In and For County of Maricopa*, 192 Ariz. 371, 373, *superseded by statute on other grounds*; *Day v Superior Court In and For the County of Maricopa*,

170 Ariz. 215, 217 (Ct. App. 1991) (holding that "the court's authority is limited by the Victim's Bill of Rights"); *State v. Lee*, 238 Ariz. 19, 22 (Ct. App. 2015). (Doc. 119 at 10–11) The Court agrees with Silbert that it cannot grant relief to Plaintiffs because they failed to challenge Rule 39(b)(12). Indeed, the cases cited by Plaintiffs in support of their argument on redressability are inapplicable in this case. Those cases all involved procedural rights, mostly in the context of environmental statutes and in the context of information disclosure under such statutes. Plaintiffs have not offered any reason why such relaxed Article III standing situation should apply in this case. Plaintiffs are not challenging a procedural right: they allege that A.R.S. § 13-4433(B) is an unlawful restraint on their speech in violation of the First Amendment of the United States Constitution. The only case which could be applicable, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011), was premised on extending the Supreme Court decision in *Massachusetts v. EPA*, 549 U.S. 497(2007). However, the Court finds that there is no reason to extend the relaxed standing requirement of *Massachusetts v. EPA* here. Indeed, requiring Plaintiffs to challenge the Rule—which is materially identical to the statute—is not akin to asking a Plaintiff to bring an action against all polluters. There is no practical impossibility for Plaintiffs to also bring an action against the Rule, which has virtually the same effect on their speech, namely a chilling effect preventing them from trying to contact crime victims directly in state court proceedings.

Silbert relies on *Nuclear Info. & Res. Serv. V. Nuclear Regulatory Comm'n*, 457 F.3d 941 (9th Cir.

2006) to argue that if two separate, but materially identical, provisions allegedly injure a Plaintiff, he or she must challenge both provisions. (Doc. 180 at 2) Although it is true the Ninth Circuit states such rule in that case, it did so in *dicta* and a part of its opinion which was not necessary or determinative of the case. Indeed, the Ninth Circuit clearly stated that "[w]e turn first to the injury-in-fact inquiry, which is dispositive of this appeal." *Nuclear Info.*, 457 F.3d at 951. Accordingly, the case failed another part of the Article III standing analysis which the Ninth Circuit considered first. Even though the Court does not find the Ninth Circuit decision binding with regards to its statement about challenging two identical provisions, the Court finds the reasoning persuasive and applicable in this case. Without the Rule in front of it, the Court cannot afford complete relief to Plaintiffs and their claim against Silbert factually fail the redressability prong of Article III standing.

Another important issue to address is Silbert's argument related to state Judges. Indeed, as an additional argument attacking the issue of redressability, Silbert argues that state Judges are necessary parties under Fed. R. Civ. P. 19(b), and they cannot be joined because of their judicial immunity and federalism principles, requiring dismissal of the case with prejudice. (Doc. 164 at 8–9) Although the argument is phrased in terms of Rule 19(b), it is deeply connected with the issue of redressability in this case. Silbert argues that even if the Court enters the requested relief, declaring the statute (or the Rule which was not challenged) unconstitutional and enjoining Vessella and Silbert from enforcing it, state

Judges are still free to sanction attorneys for violating those provisions. The Court is puzzled by this argument at first because there is no question that it has the power to declare a state statute or rule unconstitutional if it violates a provision of the United States Constitution such as the First Amendment. The Court discerns that Silbert's argument is based on the concept that a ruling of the Court on the constitutionality of a state statute would not be considered binding precedent on the courts of the State of Arizona. Indeed, Silbert argues that a decision of the Court would "result in state court [J]udges effectively reviewing federal decisions once those rulings are taken to state court for independent review and implementation." (Doc. 180 at 5, fn.6) The Court agrees that such review directly contravenes the fundamental principle of the Article III hierarchy that "the Court's decisions are only reviewable by superior courts in the Article III hierarchy. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). There is no question that a state court is not a superior court to the Court in the Article III hierarchy. Nevertheless, it is also true that the Arizona Supreme Court has expressed the opinion that the decisions of the District Court

> [are] entitled to respectful consideration, but [they are] not binding on us." *State v. Norflett*, 67 N.J. 268, 337 A.2d 609 (1975); *People v. Bradley*, 1 Cal. 3d 80, 81 Cal. Rptr. 457, 460 P.2d 129 (1969)). Even with respect to federal constitutional issues, the state and lower federal courts occupy comparable positions, a sort of parallelism with each governed by the same reviewing authority the United States Supreme

> Court. *State v. Coleman*, 46 N.J. 16, 214 A.2d 393 (1965), *cert. den.*, 383 U.S. 950 (1966).

State v. Gates, 118 Ariz. 357, 359 (1978).

The Court does not express a view on this statement but notes that the Ninth Circuit has expressed "serious doubts as to the wisdom of this view." *See Yniguez v. State of Arizona*, 939 F.2d 727, 736 (9th Cir. 1991) (noting that such view has gained considerable traction in the academic literature and that although the Supreme Court has not squarely addressed the issue, some individual Justices have stated that principles of federalism require that the state courts be treated as coordinate and coequal with the lower federal courts on matters of federal law) (*citing Steffel v. Thompson*, 415 U.S. 452, 482 n. 3 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125 (1971) (Brennan, J., joined by White and Marshall, JJ., dissenting) (referring only to "the persuasive force" of a decision of a lower federal court on state courts)). The Court finds that it is another reason supporting its conclusion that Plaintiff's claims against Silbert factually fail the redressability requirements for Article III standing.[5]

---

[5] Because the Court finds that Plaintiffs factually failed to satisfy the requirement of redressability for Article III standing and it is dispositive of the claims against Silbert and Vessella based on lack of subject matter jurisdiction, the Court does not address the other arguments raised by the parties. *See Giddings v. Vision House Prod., Inc.*, 584 F.Supp.2d 1222, 1225 (D. Ariz. 2008).

B. Vessella's Grounds for Reconsideration

Defendant Vessella argues that the Court should reconsider its previous rulings on all three requirements for Article III standing because they were in error. (Doc. 197 at 197 at 1–2; 4)

At the outset, the Court notes that Defendant Vessella had joined in the Attorney General and Silbert's argument regarding redressability. (Doc. 162 at 3, fn. 1) This is important because such factual attack on jurisdiction was not addressed by the Court previously and is dispositive of the case. Accordingly, for the same reasons set forth above regarding the claims against Silbert, the Court finds that it lacks the power to afford complete relief to Plaintiffs on their claims against Vessella. Indeed, even if Vessella is enjoined from enforcing the statute, the Rule is still unchallenged and state Judges might still decide to enforce either or both of those provisions. As discussed previously, and equally applicable to the claims against Vessella, the requirement of redressability for purposes of Article III standing is not relaxed in this case because Plaintiffs are not challenging a procedural right, and this is not a case dealing with procedural rights under a federal environmental statute.

Although the Court finds that it does not have subject matter jurisdiction over Plaintiffs' claims against Vessella, it will address one argument raised by Vessella in the Motion for Reconsideration—Arizona's attorney discipline structure. (Doc. 197 at 9–10) Vessella argues that the Court relied on the former disciplinary structure which was repealed and modified in 2010. (Doc. 162 at 5–6; 197 at 9–10)

Vessella further argues that under the new disciplinary structure, the Chief Bar Counsel is not a substantial factor in attorney discipline, including for violating the statute, because the probable cause committee can still file an ethical complaint against an attorney even after the bar counsel dismissed a charge. (Doc. 197 at 10) The Court incorrectly relied on the former disciplinary process in its previous order, the process set forth in *Wolfson v. Brammer*, 616 F.3d 1045 (9th Cir. 2010). The Court addresses this argument solely for the purpose of correcting its previous statement on the relevant attorney disciplinary structure. Having found that the Court lacks subject matter jurisdiction on other grounds, the Court does not reach the issue of whether the current structure itself would prevent the existence of Article III standing for Plaintiff's claims against Vessella if they had met other requirements.

Finally, the Court finds that granting Plaintiffs leave to amend would be futile. Indeed, even if Plaintiffs file a Third Amended Complaint challenging the Arizona Rule of Criminal Procedure in addition to the statute, the issue of redressability would still be an obstacle to their case for the additional reasons set forth in this Order. There is not set of factual allegations that Plaintiffs can conjure up which would meet the constitutional requirements of Article III standing. Plaintiffs have argued that if the Court dismissed the case based on Silbert's and Vessella's arguments, they should be granted leave to amend to address the new arguments because the Court had never ruled on such arguments. (Doc. 16–17) The Court acknowledges this argument, but this is not a case where the SAC is dismissed under a facial challenge

because of the insufficiency of the allegations. Instead, this dismissal is based on a factual impossibility for the Court to exercise jurisdiction over the case. Plaintiffs cannot change the facts which preclude the presence of subject matter jurisdiction. Accordingly, the SAC will be dismissed with prejudice.[6]

IT IS ORDERED:

1. That Silbert's Motion for Reconsideration (Doc. 193) is **granted in full**;

2. That Vessella's Motion for Reconsideration (Doc. 197) is **granted in full**;

3. That the Court's February 27, 2020 Order (Doc. 191) is **vacated in part** consistent with this decision;

4. That Silbert's Conditional Request for Certification for Appellate Review (Doc. 194) and Vessella's Conditional Request for Certification for Appellate Review (Doc. 198) are **denied as moot**;

5. That the SAC (Doc. 150) is **dismissed with prejudice**.

IT IS FURTHER ORDERED that the Clerk of Court shall terminate this action and enter judgment accordingly.

Dated this 9th day of June, 2020.

---

[6] Because the Court found that the SAC must be dismissed with prejudice, the two Requests for Certification are denied as moot.

/s/ Steven P. Logan
Honorable Steven P. Logan
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CV-17-01422-PHX-SPL

[Filed: June 9, 2020]

Arizona Attorneys for Criminal Justice, et al.,	)
Plaintiffs,	)
v.	)
Doug Ducey, et al.,	)
Defendants.	)

JUDGMENT OF DISMISSAL IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed June 9, 2020, Plaintiff to take nothing, and the complaint and action are dismissed with prejudice.

Debra D. Lucas
Acting District Court Executive/Clerk
of Court

June 9, 2020

s/ G. Puraty
By Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-17-01422-PHX-SPL

[Filed: February 27, 2020]

Arizona Attorneys for Criminal Justice et al,	)
Plaintiffs,	)
vs.	)
Ducey et al,	)
Defendants.	)

ORDER

On May 8, 2017, Plaintiffs, individual criminal-defense lawyers, investigators, and non-profit organization Arizona Attorneys for Criminal Justice, initiated this action (the "Original Complaint") challenging the constitutionality of Ariz. Rev. Stat. ("A.R.S.") § 13-4433(B), which prohibits criminal defense counsel from initiating contact with a victim. (Doc. 1) On June 26, 2017, the Attorney General of the State of Arizona (the "Attorney General") moved to dismiss the Original Complaint, arguing that the

Plaintiffs did not have standing to bring the lawsuit. (Doc. 31) On March 30, 2018, the Court granted the Attorney General's motion to dismiss in part (the "Dismissal Order"). (Doc. 119) In granting the Attorney General's first motion to dismiss, the Court found that the Plaintiffs failed to "offer plausible allegations from which the Court can conclude that their injury is traceable to the actions of the Attorney General or the ambit of his enforcement authority" or show that the relief requested under the Original Complaint would redress the Plaintiffs' alleged injury. (Doc. 119 at 6–9) Based on the allegations in the Original Complaint, the Court found that the Plaintiffs lacked standing to pursue their claims, but the Court provided the Plaintiffs with leave to amend the Original Complaint by a later deadline. (Doc. 119 at 9–11)

On May 4, 2018, the Plaintiffs filed an amended complaint (the "First Amended Complaint") seeking identical declaratory and injunctive relief that would prevent the Attorney General from enforcing A.R.S. § 13-4433(B). (Doc. 123) On May 25, 2018, the Attorney General filed a motion to dismiss the First Amended Complaint (the "Second Motion to Dismiss"), arguing that the amended pleading still failed to allege facts sufficient to demonstrate that the Plaintiffs had standing to bring their claims. (Doc. 126) On March 15, 2019, the Court granted the Attorney General's second motion to dismiss (the "Second Dismissal Order"). (Doc. 147) In doing so, the Court found that the Plaintiffs still failed to "offer plausible allegations from which the Court can conclude that the Plaintiffs' injury is traceable to the actions of the Attorney General" or show that the relief requested under the First

Amended Complaint would redress Plaintiff's alleged injury. (Doc. 147 at 4–7) Based on the allegations in the First Amended Complaint, the Court found that the Plaintiffs still lacked standing to pursue their claims, but the Court provided the Plaintiffs with a second leave to amend the Original Complaint by a later deadline. (Doc. 147 at 7–8)

On April 26, 2019, Plaintiffs filed another amended complaint (the "Second Amended Complaint") seeking identical declaratory and injunctive relief but adding the State Bar of Arizona ("State Bar"), its Chief Bar Counsel, Maret Vessella ("Vessella"), and the director of the Arizona Department of Public Safety, Colonel Frank Milstead (respectively "DPS" and "Milstead") as defendants. (Doc. 150) On June 20, 2019, the State Bar and Vessella ("State Bar" and "Vessella") filed their Motion to Dismiss the Second Amended Complaint, arguing lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted (Doc. 162 at 1) (the "State Bar's Motion to Dismiss") and the Attorney General filed its Motion to Dismiss the Second Amended Complaint, arguing lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to Join a Rule 19 Party (Doc. 164 at 3) (the "Attorney General's Third Motion to Dismiss"). Pending before the Court are the State Bar's Motion to Dismiss and the Attorney General's Motion to Dismiss. The Motions were fully briefed. The Court's ruling is as follows.[1]

---

[1] Because it would not assist in resolution of the instant issues, the Court finds the pending motion is suitable for decision without oral

I. Legal Standard

A. FRCP 12(b)(1) and Article III Standing

Federal Rule of Civil Procedure 12(b)(1) "allows litigants to seek the dismissal of an action from federal court for lack of subject matter jurisdiction." *Kinlichee v. United States*, 929 F. Supp. 2d 951, 954 (D. Ariz. 2013) (citing *Tosco Corp. v. Comtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001)). Allegations raised under FRCP 12(b)(1) should be addressed before other reasons for dismissal because if the complaint is dismissed for lack of subject matter jurisdiction, other defenses raised become moot. *Kinlichee*, 929 F. Supp. 2d at 954. A motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1) may attack either the allegations of the complaint as insufficient to confer upon the court subject matter jurisdiction or the existence of subject matter jurisdiction in fact. *Renteria v. United States*, 452 F. Supp. 2d 910, 919 (D. Ariz. 2006) (citing *Thornhill Publ'g Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir.1979)); *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016). When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Renteria*, 452 F. Supp. 2d at 919 (citing *Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996)). When the motion to dismiss is a factual

---

argument. *See* LRCiv. 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. *Renteria*, 452 F. Supp. 2d at 919 (citing *Thornhill*, 594 F.2d at 733). A plaintiff has the burden of proving that jurisdiction does in fact exist. *Renteria*, 452 F. Supp. 2d at 919 (citing *Thornhill*, 594 F.2d at 733). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Rosenbaum v. Syntex Corp.*, 95 F.3d 922, 926 (9th Cir. 1996).

"To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 133 (2011); *See also Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 597–98 (2007). The doctrine of standing encompasses both constitutional requirements and prudential considerations. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). "The constitutional requirement of standing has three elements: (1) the plaintiff must have suffered an injury-in-fact—that is, a concrete and particularized invasion of a legally protected interest that is actual or imminent, not conjectural or hypothetical;[2] (2) the

[2] "The constitutional component of ripeness overlaps with the 'injury in fact' analysis for Article III standing. Whether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010); *See also LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154 (9th Cir. 2000) (discussing ripeness).

injury must be causally connected—that is, fairly traceable—to the challenged action of the defendant and not the result of the independent action of a third party not before the court; and (3) it must be likely and not merely speculative that the injury will be redressed by a favorable decision by the court." *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge*, 454 U.S. at 475–76).

The plaintiff bears the burden of establishing the existence of a justiciable case or controversy, and "'must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). "A plaintiff must establish standing with the 'manner and degree of evidence required at the successive stages of the litigation.'" *Carrico v. City and County of San Francisco*, 656 F.3d 1002, 1006 (9th Cir. 2011) (quoting *Lujan*, 504 U.S. at 561). "[A]t the pleading stage, the plaintiff must clearly. . . allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (internal quotations omitted).

B. *Younger* Abstention

Younger abstention is a jurisprudential doctrine rooted in overlapping principles of equity, comity, and federalism. *See Steffel v. Thompson*, 415 U.S. 452, 460–73 (1974) (explaining the history and purposes of the doctrine); *Younger v. Harris*, 401 U.S. 37, 43–49 (discussing the jurisprudential background of

abstention); *Gilbertson v. Albright*, 381 F.3d 965, 970–75 (9th Cir.2004) (en banc) (tracing the Supreme Court's application of the doctrine). Abstention from the exercise of federal jurisdiction is the exception, not the rule. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Absent significant countervailing interests, the federal courts are obliged to exercise their jurisdiction. *Id.*; *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959). The Court must abstain under *Younger* if four requirements are met: (1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that Younger disapproves. *Gilbertson*, 381 F.3d at 978; *AmerisourceBergen Corp. v. Roden ("ABC")*, 495 F.3d 1143, 1149 (9th Cir.2007). "Although *Younger* itself involved potential interference with a state criminal case, the Supreme Court has extended the doctrine to federal cases that would interfere with state civil cases and state administrative proceedings." *San Jose Silicon Valley Chamber of Commerce Political Action Comm. V. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008) (citing *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 (1986)). "There is no principled distinction between finality of judgments for purposes of appellate review and finality of state-initiated proceedings for purposes of *Younger* abstention." *Id.* at 1093.

II. Analysis

Both the Attorney General and the State Bar Defendants seek dismissal of the case under FRCP 12(b)(1), although based on slightly different arguments, as well as under FRCP 12(b)(6). The Attorney General also seeks dismissal under FRCP 12(b)(7). The Court addresses issues of subject matter jurisdiction first.

A. The Attorney General's 12(b)(1) Argument

The Court notes that the Attorney General has raised issues of subject matter jurisdiction twice already, and more specifically issues of lack of Article III standing. (Docs. 31 at 6–11; 126 at 4–7) The two previous arguments were facial challenges to subject matter jurisdiction and the Court reviewed the Original Complaint and the First Amended Complaint under the appropriate standard for such challenges. *See Renteria*, 452 F. Supp. 2d at 919. The Attorney General's Third Motion to Dismiss is based on a *factual* challenge to subject matter jurisdiction based on lack of Article III standing and specifically lack of redressability, one of the three requirements for Article III standing. (Doc. 164 at 1–2) However, the Court finds that it does not need to consider a factual challenge to the Second Amended Complaint because the Second Amended Complaint still fails to meet the traceability requirement for purposes of Article III standing under a facial challenge as more fully explained below.

As set forth in both the Dismissal Order and the Second Dismissal Order, the Court already found that Plaintiffs have sufficiently alleged an injury-in-fact for purposes of Article III standing in their case against the Attorney General. (Docs. 119 at 5–6; 147 at 3–4) The Attorney General is not challenging this standing requirement in its Third Motion to Dismiss.

In both the Dismissal Order and the Second Dismissal Order, the Court found that Plaintiffs had failed to offer plausible allegations that would satisfy the traceability requirement for Article III standing. (Docs. 119 at 6–9; 147 at 4–7) The Court notes that the Attorney General is not arguing a lack of traceability in its Third Motion to Dismiss. Because questions of subject matter jurisdiction can be raised by the Court *sua sponte* and at any time, see *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006), the Court now turns to the Second Amended Complaint to determine whether Plaintiffs have met their burden on pleading traceability for their claim against the Attorney General.

The Court finds that Plaintiffs have made very little changes to the section laying out the basis for their claim against the Attorney General from the First Amended Complaint. (Doc. 150 at 10–14) Plaintiffs removed any reference to court sanctions in the Second Amended Complaint, focusing on potential disciplinary proceedings. (Doc. 150 at 10–14) Plaintiffs removed a reference to "seek[ing] sanctions from the court" and "ask[ing] the court to advise the same" in paragraph 62 of the Second Amended Complaint. (Doc. 150 at 12) (compared to paragraph 51 of the First Amended

Complaint which is identical besides the removed language, see Doc. 123 at 11) Plaintiffs also removed a reference to "seek[ing] court sanctions or pursue potential criminal prosecution" and "making the risk of . . . such sanctions much more likely" in paragraph 63 of the Second Amended Complaint. (Doc. 150 at 13) (compared to paragraph 52 of the First Amended Complaint which is identical besides the removed language, see Doc. 123 at 12) Finally, Plaintiffs removed the paragraphs which set forth Plaintiffs' arguments as to why an injunction granted against the Attorney General would be proper. (Doc. 123 at 13, ¶¶ 59–61) Based on those findings, the Court concludes that the Second Amended Complaint still fails to offer plausible allegations from which the Court can conclude that the Plaintiffs' injury is traceable to the actions of the Attorney General. The Court already discussed at length its reasoning regarding traceability in the Second Dismissal Order and it is still fully applicable to the Second Amended Complaint, with the exception of the reasoning related to the imposition or prosecution of criminal charges on page 6 of the Second Dismissal Order. (Doc. 147 at 4–7). The few modifications made in the Second Amended Complaint's section regarding the Attorney General fail to cure the defect related to traceability for purposes of Article III standing. The revised allegations are still not enough to show the necessary causation and traceability between the disciplinary process Plaintiffs are challenging as unconstitutional and the actions, and powers, of the Attorney General.

Accordingly, the Court will grant the Attorney General's Third Motion to Dismiss without leave to

amend because it finds that it would be futile to allow Plaintiffs to amend their complaint for a third time.[3]

B. The State Bar of Arizona's Eleventh Amendment Immunity Argument

The State Bar argues that as an agency of the state of Arizona, it is immune from suit under the Eleventh Amendment to the United States Constitution. (Doc. 162 at 7–9) The Court agrees.

"Under the Eleventh Amendment to the Constitution of the United States, neither a state nor its agencies may be sued in federal court without the state's consent." *Cleveland v. Pinal County Superior Court*, No. CV 12-1942-PHX-DGC (SPL), 2012 U.S. Dist. LEXIS 148494, at *7-8, 2012 WL 4932657 (D. Ariz. Oct. 16, 2012) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). "A state bar operates as the investigative arm of its state supreme court, and thus, is an agency of the state; as an agency of the state, the Eleventh Amendment renders state bars immune from suit in federal court." *Id.* at *8 (citing *Gilchrist v. Arizona Supreme Court*, 10 Fed. Appx. 468, 470 (9th Cir. 2001)); *see also O'Connor v. State of Nev.*, 686 F.2d 749, 750 (9th Cir. 1982). Thus, Plaintiffs' direct claims against the State Bar are

[3] Because the Court finds that Plaintiffs failed to satisfy the second requirement for Article III standing and it is dispositive of the claims against the Attorney General based on lack of subject matter jurisdiction, the Court does not address the other arguments raised in the Attorney General's Second Motion to Dismiss. *See Giddings v. Vision House Prod., Inc.*, 584 F.Supp.2d 1222, 1225 (D. Ariz. 2008).

precluded. Furthermore, Plaintiffs themselves in their response to the State Bar's Motion to Dismiss wrote that they "do not object to dismissing the State Bar *without* prejudice." (Doc. 170 at 2) Plaintiffs do not have the choice as to the type of dismissal. The State Bar of Arizona is immune from suit under the Eleventh Amendment, any amendment to the complaint would be futile, and a dismissal without prejudice is therefore not a possible avenue. Taking these realities into account, no possible set of factual allegations could be pleaded in a proposed Third Amended Complaint that would cure the aforementioned deficiencies. *See In re Apollo Group*, No. CV-10-1735-PHX-JAT, 2011 U.S. Dist. LEXIS 124781, at *66, 2011 WL 5101787 (D. Ariz. Oct. 27, 2011) (quoting *Lopez*, 203 F.3d at 1127) (noting that leave for amend should be granted when dismissing "unless the court determines that the pleading could not possibly be cured by the allegations of other facts"); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 818 (9th Cir. 1988). Accordingly, the Court will grant the State Bar's Motion to Dismiss based on immunity under the Eleventh Amendment and the case against the State Bar of Arizona will be dismissed with prejudice.[4]

---

[4] Similarly to the disposition of the Attorney General's Second Motion to Dismiss in Section II(A). of this Order, because the Eleventh Amendment is dispositive of the State Bar's Motion to Dismiss, the Court does not address the remaining arguments raised by the State Bar in its Motion as they relate to dismissal of the State Bar alone and not Defendant Vessella.

C. Defendant Vessella's Argument that Plaintiffs Lack Article III Standing

Defendant Vessella argues that Plaintiffs' case against her should be dismissed because of lack of subject matter jurisdiction based on Article III standing and failure to state a claim.

At the outset, the Court notes that Defendant Vessella joined in the Attorney General's argument regarding redressability and *Younger* abstention. (Doc. 162 at 3, fn.1) It also notes that Defendant Vessella makes an argument that any prior holding of the Court regarding standing should be disregarded and argued anew because neither the State Bar of Arizona nor Vessella was a party to this case until Plaintiffs made a claim against them in their Second Amended Complaint. (Docs. 162 at 10; 179 at 3–4) With one exception, the Court agrees with that argument as to the newly named Defendants State Bar and Vessella are entitled to their day in court and to be heard: the exception is the Court's finding that Plaintiffs have sufficiently pled an injury-in-fact for purposes of Article III standing and surviving a motion to dismiss. (Docs. 119 at 5–6; 147 at 3–4) The Court's reasoning and findings about injury-in-fact are still applicable and did not depend on the name of the Defendant but instead, on the injury alleged by Plaintiffs, and whether they sufficiently pled the injury under a motion to dismiss standard of review. (Doc. 147 at 4) However, the Article III standing requirements of traceability and redressability are directly dependent on who the defendant is in this case. The Court now turns to the issues of traceability and redressability for purposes of

Article III standing as applied to Plaintiffs' claims against Defendant Vessella.

With regards to the issue of traceability or causation, the Court first notes that Plaintiffs are challenging A.R.S. § 13-4433(B) but not the rules of professional conduct, which are truly the source of any potential sanction they might suffer if they violate the victim contact rules set forth in A.R.S. § 13-4433(B).[5] This is an interesting case where the challenged statute itself does not provide for an enforcement mechanism but might be enforced through other rules which are not challenged by the Plaintiffs. Plaintiffs argue that Arizona Rule of the Supreme Court 42, Ethical Rule ("ER") 8.4 provides that it is professional misconduct for an attorney "to engage in conduct that is prejudicial to the administration of justice." (Doc. 150 at 9, ¶ 40) Plaintiffs add that enforcing A.R.S. § 13-4433(B) would be done under ER 8.4. (Doc. 150 at 9, ¶41-42) Defendant Vessella relies on Section 3531 of Wright and Miller, Federal Practice and Procedure (3d ed. 2019) for her argument that Plaintiffs failed to

---

[5] The Victims' Rights Implementation Act ("VRIA") itself contains no civil or criminal penalties for violations of its provisions, nor provides for a private cause of action to be brought against a violating party. *See Lindsay R. v. Cohen*, 343 P.3d 435, 437 (Ariz. Ct. App. 2015) ("neither the [Victims' Bill of Rights ("VBR")] nor the VRIA gives victims a right to control the proceedings, to plead defenses, or to examine or cross-examine witnesses; the VBR and the VRIA give victims the right to participate and be notified of certain criminal proceedings."); *State ex rel. Montgomery v. Padilla*, 364 P.3d 479, 485 (Ariz. Ct. App. 2015) (the VRIA provides a victim with standing to seek an order in the defendant's trial or appellate proceeding to enforce a right or to challenge an order denying a right) (citing A.R.S. § 13–4437(A)); (Doc. 31 at 9).

establish traceability to her. (Docs. 162 at 14–15; 179 at 8–9)

In this case, there is an additional, non-named party, the Arizona Supreme Court Disciplinary Commission (the "Commission"), which would make the decision to impose sanctions on an attorney for violating the ethical rules promulgated by the Arizona Supreme Court. (Doc. 119 at 7) *See also Wolfson*, 616 F.3d at 1056–57. "The Arizona Chief Bar counsel is charged with overseeing and directing the prosecution of discipline cases involving members of the bar…." (Doc. 119 at 7) *Id.* Plaintiffs have alleged they fear that if they violate A.R.S. § 13-4433(B), the Chief Bar Counsel will investigate them for violations of the ethical rules which might ultimately result in sanctions. (Doc. 150 at 9) This last part would be a decision made by the Arizona Supreme Court Disciplinary Commission. "To plausibly allege that the injury was not the result of the independent action of some third party, the plaintiff must offer facts showing that the government's unlawful conduct is at least a substantial factor motivating the third parties' actions." *Novak v. United States*, 795 F.3d 1012, 1019 (9th Cir. 2015) (quoting *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014)) (internal quotations omitted); *see also Mendia*, 768 F.3d at 1013 ("[s]o long as the plaintiff can make that showing without relying on speculation or guesswork about the third parties' motivations . . ., she has adequately alleged Article III causation.") (citing *Clapper v. Amnesty Int'l USA*, —— U.S. ——, 133 S.Ct. 1138, 1150, 185 L.Ed.2d 264 (2013)) (internal quotations omitted).

The Court finds that Defendant Vessella's position and duties of oversight and prosecution of ethical violations would be a substantial factor in the Commission's decisions and actions. There is no doubt that absent an investigation and prosecution of Plaintiffs or other attorneys for a violation of A.R.S. § 13-4433(B) and ER 8.4, the Commission would not sanction an attorney for a violation of ethical rules. This is not to say that every investigation and prosecution by the Chief Bar Counsel and its office necessarily result in sanctions. But the Court finds that Plaintiffs have met their burden to establish traceability between their alleged injury-in-fact and Defendant Vessella as Chief Bar Counsel.

The Court now turns to the last requirement for Article III standing, redressability. On this issue, the Court finds *Wolfson* particularly instructive and ultimately dispositive. In *Wolfson*, the Ninth Circuit, quoting *Lujan*, 504 U.S. at 561–62 (1992), reasoned that "[i]f a plaintiff is an object of the [challenged action] ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Wolfson*, 616 F.3d at 1056 (internal quotations omitted). In this case, Plaintiffs are clearly the object of the statute they challenge and of the actions, or potential actions, of Defendant Vessella. They seek two forms of relief: a declaration that A.R.S. § 13-4433(B) is unconstitutional and injunctive relief against Defendant Vessella to preclude enforcement of violations of the statute through ethical discipline. Defendant Vessella has the power to investigate and prosecute Plaintiffs for ethical violations stemming

from a violation of A.R.S. § 13-4433(B) and ER 8.4 and, if she is enjoined from enforcing the challenged provisions, Plaintiffs will have obtained redress in the form of freedom to engage in certain activities without fear of punishment. Without a possibility of the challenged statute being enforced through disciplinary actions under ER 8.4, the statute will no longer have a chilling effect on speech. Plaintiffs will thus be able to engage in the speech and expressive conduct they desire. The Court notes that ultimately, if the Court issued an injunction, it would be a narrow one: it would not preclude discipline based on violations of other ethical rules or reasons other than contacting a victim without going through the prosecutor's office. There are many possible scenarios where the communications initiated by attorneys might still violate other statutes or ethical rules and an injunction in this case would not preclude the Chief Bar Counsel from undertaking an investigation and a prosecution of such violations. The Chief Bar Counsel would only be enjoined from seeking sanctions *solely* on the basis that defense counsel contacted a victim without going through the prosecutor's office in violation of A.R.S. § 13-4433(B) and ER 8.4. Accordingly, the Court finds that Plaintiffs have met the redressability requirement for Article III standing in their case against Defendant Vessella.

D. Defendant Vessella's Argument that Plaintiffs Failed to State a § 1983 Claim

Defendant Vessella argues that "for the same reasons that Plaintiffs have no Article III case or controversy as to [her], they have failed to state a § 1983 claim against her." (Docs. 162 at 17; 179 at 11)

Because the Court found that Plaintiffs have made a sufficient showing to allege Article III standing for their claims against Defendant Vessella and Defendant Vessella has not offered any other argument as to why Plaintiffs do not have a valid § 1983 claim, the Court finds that Defendant Vessella has failed to make an argument that Plaintiffs have failed to state a claim under § 1983.

E. Defendant Vessella's Argument that *Younger* Requires Abstention

The Court notes that in her joint motion to dismiss with the State Bar Defendant, Defendant Vessella joined in the Attorney General's arguments based on *Younger* abstention. (Doc. 162 at 3, fn.1) Defendant Vessella did not make any argument in addition to the ones of the Attorney General on this issue and accordingly, the Court looks at the Attorney General's arguments in support of the application of the *Younger* doctrine to resolve this argument.

Younger abstention is only proper if the four requirements are met. *San Jose*, 546 F.3d 1087, 1092; *see also Gilbertson*, 381 F.3d at 978. Turning to the first of those requirements, that a state-initiated proceeding is ongoing, the Court finds that Defendant Vessella, relying exclusively on the arguments of the Attorney General, has failed to prove that such proceedings are ongoing. Defendant Vessella has not pointed to any pending disciplinary proceedings against Plaintiffs based on violation of A.R.S. §13-4433(B) and ER 8.4 but instead relied on the fact that Plaintiffs are currently representing some criminal defendants in pending state court proceedings. (Doc. 164 at 10) This

is not enough to meet the first requirement for *Younger* abstention; indeed, if disciplinary proceedings were pending, the Court would likely conclude that the required ongoing state-initiated proceedings were present. *See Canatella v. California*, 404 F.3d 1106, 1110 (9th Cir. 2005) (holding that "California's attorney discipline proceedings are judicial in character for purposes of *Younger* abstention . . . . [s]uch proceedings commenced when the State Bar of California issued the notice of disciplinary charges against Bendel") (internal quotations omitted). The Court finds the fact that Plaintiffs are currently representing criminal defendants in state court and that they might violate A.R.S. § 13-4433(B), which might trigger disciplinary proceedings under ER 8.4, involves too many contingencies to satisfy the state-initiated ongoing proceedings prong of the *Younger* inquiry. Accordingly, because Defendant Vessella, through the arguments of the Attorney General, failed to prove the first prong of the *Younger* doctrine and she is required to prove all four prongs, the Court does not reach the remaining arguments she raised under *Younger* and it will not abstain based on *Younger*.

F. Issues of Standing for Plaintiffs' Claim Against the Director of DPS

Although Defendant Milstead did not file any motion to dismiss based on lack of subject matter jurisdiction, our duty to review the presence or lack thereof still mandates that the Court analyze whether such subject matter jurisdiction is present over the case Plaintiffs made against Milstead.

One of the Plaintiffs, Rich Robertson, is a private investigator who works with criminal-defense attorneys on capital and non-capital cases throughout the State of Arizona and who holds a private investigator license granted by DPS. (Doc. 150 at 5) He is also a member of the Arizona Attorneys for Criminal Justice organization. (Doc. 150 at 5)

For the same reasons that other Plaintiffs have sufficiently pled the three requirements for purposes of Article III standing for their claims against Defendant Vessella, the Court finds that Robertson and the Arizona Attorneys for Criminal Justice have met their burden of proof with regards to their claims against Milstead. The injury-in-fact is similar to the one alleged by the attorneys, namely a self-censorship based on a fear of disciplinary actions; the traceability requirement is also similar because Milstead administers all aspects of private investigator licensing and discipline like the Chief Bar Counsel does for attorneys; and finally, the redressability requirements is again similar because an injunction directed at Milstead and prohibiting enforcement of disciplinary actions based on a violation of A.R.S. § 13-4433(B) by private investigators would redress some of the harm suffered by Plaintiff Robertson and other similarly situated private investigators. Accordingly, the Court has subject matter jurisdiction over Plaintiffs' claim against Milstead.

IT IS ORDERED:

1. That the Attorney General's Third Motion to Dismiss (Doc. 164) is **granted in full** and with prejudice because any amendment would be futile;

2. That the State Bar of Arizona and Defendant Vessella's Motion to Dismiss (Doc. 162) is **granted in part**, only dismissing the State Bar of Arizona with prejudice based on Eleventh Amendment immunity.

IT IS FURTHER ORDERED that the Clerk of Court shall terminate this action with respect to the Attorney General and the State Bar of Arizona defendants and enter judgment accordingly as to those two defendants only.

Dated this 27th day of February, 2020.

/s/ Steven P. Logan
Honorable Steven P. Logan
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CV-17-01422-PHX-SPL

[Filed: February 27, 2020]

Arizona Attorneys for Criminal Justice, et al.,	)
Plaintiffs,	)
v.	)
Doug Ducey, et al.,	)
Defendants.	)

JUDGMENT OF DISMISSAL IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed February 27, 2020, judgment of dismissal is entered. This action is terminated with respect to the Attorney General and the State Bar of Arizona defendants only.

Debra D. Lucas
Acting District Court Executive/Clerk
of Court

February 27, 2020

s/ S. Quinones
By Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16293

D.C. No. 2:17-cv-01422-SPL
District of Arizona, Phoenix

[Filed: October 12, 2021]

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE; et al.,	)
Plaintiffs-Appellants,	)
v.	)
MARK BRNOVICH, Attorney General, in his official capacity as Attorney General of the State of Arizona; et al.,	)
Defendants-Appellees.	)

ORDER

Before: M. MURPHY,[*] PAEZ, and BENNETT, Circuit Judges.

[*] The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

The panel has voted to deny the petition for rehearing filed by Appellant Bronovich on September 7, 2021, and the petition for rehearing filed by Appellant Vessella on September 14, 2021. Judge Paez and Judge Bennett have voted to deny the petitions for rehearing en banc filed by each appellant, and Judge Murphy so recommends.

The full court has been advised of both petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Both petitions for panel rehearing and both petitions for rehearing en banc are DENIED.

APPENDIX G

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ariz. Rev. Stat. § 13-4401(9), (19)

Definitions

In this chapter, unless the context otherwise requires:

[* * *]

9. "Defendant" means a person or entity that is formally charged by complaint, indictment or information of committing a criminal offense.

[* * *]

19. "Victim" means a person against whom the criminal offense has been 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.

Ariz. Rev. Stat. § 13-4433

Victim's right to refuse an interview; applicability

A. Unless the victim consents, the victim shall not be compelled to submit to an interview on any matter, including any charged criminal offense witnessed by the victim and that occurred on the same occasion as the offense against the victim, or filed in the same indictment or information or consolidated for trial, that is conducted by the defendant, the defendant's attorney or an agent of the defendant.

B. The defendant, the defendant's attorney or an agent 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.

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

D. If the victim consents to an interview, the prosecutor's office shall inform the defendant, the defendant's attorney or an agent of the defendant of the time and place the victim has selected for the interview. If the victim wishes to impose other conditions on the interview, the prosecutor's office shall inform the defendant, the defendant's attorney or an agent of the defendant of the conditions. The victim has the right to terminate the interview at any time or to refuse to answer any question during the interview.

The prosecutor has standing at the request of the victim to protect the victim from harassment, intimidation or abuse and, pursuant to that standing, may seek any appropriate protective court order.

E. Unless otherwise directed by the victim, the prosecutor may attend all interviews. If a transcript or tape recording of the interview is made and on request of the prosecutor, the prosecutor shall receive a copy of the transcript or tape recording at the prosecutor's expense.

F. If the defendant or the defendant's attorney comments at trial on the victim's refusal to be interviewed, the court shall instruct the jury that the victim has the right to refuse an interview under the Arizona Constitution.

G. This section applies to the parent or legal guardian of a minor child who exercises victims' rights on behalf of the minor child. Notwithstanding subsection E of this section, the defendant, the defendant's attorney or an agent of the defendant may not interview a minor child who has agreed to an interview, even if the minor child's parent or legal guardian initiates contact with the defendant, the defendant's attorney or an agent of the defendant, unless the prosecutor has actual notice at least five days in advance and the minor child is informed that the prosecutor may be present at the interview.

H. Except in cases involving a dismissal with prejudice or an acquittal, the right of a victim and a victim's representative to refuse an interview, a deposition or any other discovery request related to the criminal case

involving the victim by the defendant, the defendant's attorney or any other person acting on behalf of the defendant remains enforceable beyond a final disposition of the charges. This subsection does not require any other right enumerated in article II, section 2.1, Constitution of Arizona, to remain enforceable beyond a final disposition as prescribed in § 13-4402, subsection A.

Arizona Rule of Criminal Procedure 39(b)(12)

(b) Victims' Rights. These rules must be construed to preserve and protect a victim's rights to justice and due process. Notwithstanding the provisions of any other rule, a victim has and is entitled to assert each of the following rights:

[* * *]

(12) the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf, 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 a victim's refusal to be interviewed, the court must instruct the jury that a victim has the right under the Arizona Constitution to refuse an interview;