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8 **IN THE SUPREME COURT OF THE**

9 **STATE OF ARIZONA**

10 STATE OF ARIZONA,

11 Appellee,

12 vs.

13 RICHARD ALLEN REED,

14 Appellant.

No. CR-19-0059-PR

Court of Appeals No. 1 CA-CR 17-0620

Maricopa County Superior Court Case
No. CR2015-117844-001

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18 **VICTIM RESPONSE TO JOINT PETITION FOR REVIEW**

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1 **I. SUMMARY OF ARGUMENT AND QUESTION PRESENTED**
2 **FOR REVIEW**

3 If a person is convicted of an offense, “the court shall require the convicted
4 person to make restitution to the ...victim...in the *full amount* of the economic loss
5 as determined by the court....” A.R.S. §13-603(C) (emphasis added). If a crime
6 victim chooses to hire a lawyer to help exercise her rights including the right to
7 establish and collect restitution, she can do so and the State of Arizona need not be
8 required to advance these private attorney fees. *See* A.R.S. §13-4437(A). But this
9 does not by any stretch of the imagination mean that the victim should be punished
10 for making this choice. Petitioners ask this court to make recovery of private
11 attorney fees off limits and in so doing, punish victims who make a choice to spend
12 money on attorney fees incurred as a direct result of and that would not have been
13 incurred but for the crime. They ignore well-settled law on the “full amount”
14 requirement of restitution for economic loss required to make the victim whole. *See*
15 A.R.S. §13-603(C). And they also ignore applicable rules of construction required
16 by A.R.S. §13-4418 and the constitutionally protected right to restitution. Instead,
17 Petitioners insist that the Arizona legislature must have intended to carve out an
18 exception to render an entire category of economic losses off limits despite meeting
19 the test for an award of restitution designed to make the victim whole. As Petitioners
20 would have it, surviving victims will never recover necessary fees to probate an
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1 estate of a homicide victim, to establish a guardianship or a conservatorship to care
2 for an injured or incapacitated victim, or to establish and collect restitution all of
3 which are spent to directly advance victim rights and none of which would have been
4 incurred but for the crime. Petitioners insist victims must always outsource all of
5 these important legal tasks to prosecutors even though the State does not represent
6 them and conflicts often exist. Such an outcome is completely inconsistent with
7 rules of construction and flies in the face of the Victim Bill of Rights (VBR) and its
8 Implementation Act (VRIA). *See* Ariz. Const. Art. II, §2.1(A)(8); 1991 Ariz. Legis.
9 Serv. Ch. 229 (HB 2412).

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13 This court directed the parties and *amicus* to address the following question:

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15 1. Are a victim's private attorney fees recoverable as criminal restitution,
16 particularly considering A.R.S. §13-4437(A), and if so, to what extent?

17 To give full effect to the VBR and its rules of construction, the answer to the
18 primary question above must be an unequivocal "yes." And considering the second
19 part of the question presented, the trial Court has the same discretion to consider
20 attorney fees as it does with all other categories of economic loss. It acts as factfinder
21 to determine what economic losses were supported by a preponderance of the
22 evidence and in the course of this analysis determines whether fees advanced VBR
23 rights or were instead spent to take on the role of an adjunct prosecutor. The Court
24 also conducts, as in any case involving an award of fees, an analysis to determine
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1 whether attorney fees were reasonable. Such considerations are proper for the trier
2 of fact to determine by a preponderance of the evidence. And such considerations
3 were already considered here.
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5 Pursuant to A.R.S. §13-4437(A), victim C.C. has standing to file this brief in
6 support of her request that this Court affirm the criminal restitution order originally
7 entered by the trial court four years ago on September 1, 2017.
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9 **II. FACTS MATERIAL TO CONSIDERATION OF THE ISSUES**

10 Counsel for C.C. accepts and adopts the Statement of the Case as set forth in
11 the previous Answering Brief submitted by Appellee State of Arizona and the Facts
12 Material to the Issue Presented in the Appellee State of Arizona's Response to
13 Petition for Review. Most notably, the trial Court below already held a contested
14 restitution hearing considering evidence in support of a restitution award of attorney
15 fees; later Appellant Richard A. Reed agreed to a partial restitution award against
16 him totaling \$3,083.61 and after reviewing time sheets and an attorney affidavit,
17 after considering the evidence, the trial court awarded attorneys fees totaling
18 \$17,909.50. Appellee's Answering Brief at 1-2. The court of appeals upheld the
19 restitution amount and criminal restitution order. Response to Petition for Review
20 at 5.
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26 **III. JURISDICTIONAL STATEMENT**

1 This Court may consider this brief in Response to the Joint Petition for Review
2 because pursuant to A.R.S. §13-4437(A), victims have standing to address a
3 challenge involving denial of rights guaranteed by the VBR and any implementing
4 legislation or court rules. Four years ago, Victim C.C. received a restitution award
5 that was converted into a Criminal Restitution Order pursuant to A.R.S. §13-805(B).
6 Her VBR right to recover “prompt” restitution been neither prompt nor has the case
7 disposition been speedy. Ariz. Const. Art. II, §§2.1(A)(8) & (10). Issues involving
8 the interpretation of the VBR and the VRIA are pure issues of law involving public
9 significance and require input from C.C.
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13 IV. ARGUMENT

14 A. A VICTIM HAS STANDING TO SEEK RELIEF ON THE JOINT 15 PETITION FOR REVIEW BECAUSE PETITIONERS ASK THIS 16 COURT TO INVALIDATE A CRIMINAL RESTITUTION ORDER 17 ENTERED FOUR YEARS AGO

18 The Arizona legislature granted victims standing to “seek an order, to bring a
19 special action or to file a notice of appearance in a trial court or an appellate
20 proceeding, seeking to enforce any right or to challenge an order denying *any* right
21 guaranteed to victims.” A.R.S. §13-4437(A) (emphasis added). The legislature
22 confirmed that the rights enumerated in the VBR belong to the victim and not the
23 State. *Id.* This is particularly important because state does not represent victims and
24 victims are not parties to the criminal case. *See, e.g., State v. Lamberton*, 183 Ariz.
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1 47, 49-50, 899 P.2d 939, 942-43 (1995) (parties to criminal case are defendant and
2 state). Petitioners argue that the criminal restitution order was improper because it
3 included an award of private attorneys fees and instead the State should have worked
4 for C.C. to recover restitution and rendering the fees and costs unnecessary.
5 Standing on this issue is proper because the Petitioners seek relief affecting a
6 victim’s constitutionally enumerated right to “receive prompt restitution from the
7 person or persons convicted of the criminal conduct that caused the victim’s loss or
8 injury.” ARIZ., CONST. art. II, §2.1(A)(8). Also, the victim through her counsel and
9 not the State chose to advance her economic loss issues in the trial court as allowed
10 by A.R.S. §13-4437(E), and C.C. has the same standing through her victim attorney
11 to further these exact same issues in a responsive pleading before this Court.
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16 B. THE “FULL AMOUNT” OF ECONOMIC LOSS MUST INCLUDE
17 ATTORNEY FEES AND ANY OTHER DIRECT ECONOMIC
18 LOSSES THAT WOULD NOT HAVE BEEN INCURRED BUT FOR
19 THE CRIME

20 The Arizona Constitution gives crime victims the right “[t]o receive prompt
21 restitution from the person or persons convicted of the criminal conduct that caused
22 the victim’s loss or injury.” ARIZ. CONST. Art. 2, §2.1(A)(8). On conviction, the
23 court shall order restitution “in the *full amount* of the economic loss as determined
24 by the court and in the manner as determined by the court...” A.R.S. §13-603(C)
25 (emphasis added). Restitution for economic loss is mandatory. *See State v. Lindsley*,
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1 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997). And economic loss means
2 “any loss incurred by a person as a result of the commission of an offense....
3 [including] lost interest, lost earnings and other losses that would not have been
4 incurred but for the offense. Economic loss does not include losses incurred by the
5 convicted person, damages for pain and suffering, punitive damages or
6 consequential damages.” A.R.S. §13-105(16). Restitution is mandatory if a victim
7 proves the following by a preponderance:
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- 9 1. The loss must be economic;
- 10 2. The loss must not have occurred but for the defendant’s conduct, and
- 11 3. The criminal conduct must have directly caused the economic loss.

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15 *See State v. Madrid*, 207 Ariz. 296, 298, 85 P.3d 1054, 1056 (App. 2004) (discussing
16 elements to prove economic loss); *see also State v. Wilkinson*, 202 Ariz. 27, 29, 39
17 P.3d 1131, 1133 (2002) (same); *In re Stephanie B.*, 204 Ariz. 466, 470-71, 65 P.3d
18 114, 117-18 (App. 2003) (confirming burden of proof by a preponderance); *State v.*
19 *Francher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. 1991) (restitution is act of
20 making victim whole and does not require proof beyond a reasonable doubt).
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23 It is by no means a stretch to say that attorney fees spent to further victim
24 rights, probate an estate, or set up a conservatorship can certainly meet the elements
25 above by a preponderance. These expenses are just as awardable as the mileage
26 costs to and from court or doctor visits, health insurance co-pays, insurance
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1 deductibles, future reasonably anticipated medical care costs, property damage to a
2 vehicle, moving expenses, installation costs for a home security system or other
3 economic losses required to restore or make a victim whole. *See, e.g., State v.*
4 *Morris*, 173 Ariz. 14, 17-19, 839 P2d 434, 437-39 (App. 1992) (restitution for
5 economic losses to make a victim whole that reflect “the basic necessities of
6 everyday life, such as shelter, food, medical care... should be the rule, not the
7 exception.”); *State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991)
8 (economic loss includes reasonably anticipated future economic losses that are not
9 confined to “easily measurable damages” such as future medical care and lost
10 wages); *State v. Reynolds*, 171 Ariz. 678, 682, 832 P.2d 695, 699 (App. 1992)
11 (economic loss equaled difference in fair market value of vehicle damage before and
12 after theft); *State v. Brady*, 169 Ariz. 447, 448, 819 P.2d 1033, 1034 (App. 1991)
13 (moving expenses incurred to restore victim equanimity); *State v. Quijada*, 246 Ariz.
14 356, 370, 439 P.3d 815, 829 (App. 2019) (upholding installation cost of a home
15 security system spent by victim in an effort to restore equanimity).

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22 In *State v. Patel*, this Court concluded that a legislative pronouncement
23 capping restitution when the criminal act involves a motor vehicle does nothing to
24 advance victims’ rights to restitution and amounts to an impermissible exercise of
25 legislative authority in part because it violates the VBR, Art. II, §2.1(D) and A.R.S.
26 §13-603(C) which pre-dated the VBR. ___ Ariz. ___, ___, ¶15, 486 P.3d 188, 191
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1 (2021). This Court agreed with the Arizona Court of Appeals explaining that “[W]e
2 find it implausible that the electorate intended to only guarantee a victim partial
3 restitution.” *Id.* at ¶17. Petitioners ask this court to guarantee only partial restitution
4 here because C.C. hired private counsel. Petitioner’s analysis of just a few words in
5 A.R.S. §13-4437(A) without regard to other provisions of the VBR and applicable
6 VRIA rules of construction effectively removes an entire category of economic loss
7 leading to only partial restitution awards when private counsel becomes involved on
8 behalf of a victim in a criminal case. Such an outcome should lead to the same
9 conclusion this Court has already cautioned about in *Patel*.
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13 Recovery of victim’s attorney fees which would not have been incurred but
14 for the offense directly resulting from the crime is the rule and not the exception.
15 According to *State v. Slover*, if a private attorney spent time acting as adjunct
16 prosecutor or to poke or prod the state into taking a certain action, then
17 understandably those fees are consequential losses because private counsel and not
18 the prosecutor attempts to act on behalf of the State. 220 Ariz. 239, 243, 224 P.3d
19 1088, 1092 (App. 2009). But this exception does not transform an entire category
20 of economic loss into something unrecoverable; as long as the victim meets her
21 burden, recovery of attorney fees serves the same purpose to make a victim whole
22 as do other categories of economic loss. *Slover*, 220 Ariz. 229, 243, 204 P.3d 1088,
23 1092 (App. 2009). And the trial court already considered and rejected the arguments
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1 advanced by the Joint Petitioners about how victim’s private counsel allegedly acted
2 as a private prosecutor in violation of due process. Joint Petition at 6. The trial court
3 considered and rejected the same factual and legal arguments now advanced before
4 this Court. State’s Response at 3. The trial court did not abuse its discretion and
5 already rejected these factual allegations.
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8 C. BECAUSE THE LEGISLATURE GAVE VICTIMS THE RIGHT TO
9 HIRE PRIVATE COUNSEL, PRIVATE COUNSEL FEES SHOULD
10 BE RECOVERABLE IF THEY MAKE THE VICTIM WHOLE

11 Victim input into the amount and manner of restitution payment is essential
12 to further constitutional and due process rights under the VBR. A.R.S. §13-804(E).
13 To allow victims the “right to present evidence or information and to make an
14 argument to the court,” the legislature granted victims the ability to give input either
15 “personally *or through counsel*, at any proceeding to determine the amount of
16 restitution pursuant to section 13-804.” *See* A.R.S. §13-4437(E) (emphasis added).¹
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21 ¹ The Legislature amended A.R.S. §§13-4437(A) and (E) in 2016 to clarify that
22 victim rights belong to the crime victim and that victims may in fact present
23 evidence, information and argument supporting their restitution requests. In
24 HB2376, the legislature’s declaration of intent clarified that victims have a
25 constitutional right to restitution:

26 It is the intent of the legislature to protect the rights of crime victims,
27 including the right to receive prompt restitution from the person who is
28 convicted of the criminal conduct that caused the victim’s loss or injury.
The legislature finds that *crime victims in this state have constitutional
rights to justice and due process, to be treated with fairness, to*

1 Neither voters nor the legislature contemplated first allowing a victim to choose to
2 hire private counsel to advance VBR rights but later shielding a Defendant from
3 having to pay for this specific category of economic loss simply because a victim
4 decides to hire private counsel rather than outsourcing protection of VBR rights to
5 the State.² See, e.g., *State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 (App.
6 1992) (“The statute mandating recovery for economic loss is quite broad, and we
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11 *restitution* and to have all rules governing criminal procedure protect
12 victims’ rights and to have these rules be subject to amendment or
13 repeal by the legislature to ensure the protection of these rights. The
14 legislature has the constitutional authority to enact substantive and
15 procedural laws to define, implement, preserve and protect the rights
16 guaranteed to victims. Section[] 13-4437, Arizona Revised Statutes, as
17 amended by this act, [is] amended pursuant to these rights and this
18 constitutional grant of authority.

(emphasis added).

19 ² The Petitioners are conspicuously silent about what happens if the State chooses
20 not to exercise a particular victim right or if a conflict arises with a particular victim
21 right. According to Ariz. Crim. P. Rule 39(d), “If any conflict arises between the
22 prosecutor and a victim in asserting the victim’s rights, the prosecutor must advise
23 the victim of the right to seek independent legal counsel and provide contact
24 information for the appropriate state or local bar association.” See also *State v.*
25 *Lamberton*, 183 Ariz. 47, 49-50, 899 P.2d 939, 942-43 (1995) (parties to criminal
26 case are state and defendant only). When advancing a VBR right, the state does not
27 even represent the crime victim yet Joint Petitioners insist that victims must proceed
28 without counsel representing their interests or lose their constitutionally protected
right to be made whole in the criminal case. Forcing victims to face such a Hobson’s
choice does indeed create two tiers of justice for crime victims but is neither fair nor
dignified nor does it provide the process that is due crime victims in the VBR. See
Petition at 6; VBR Art. II, §2.1(A) (enumerating a set of rights “[t]o preserve and
protect [*not limit*] victims' rights to justice and due process.”).

1 have allowed restitution for a wide variety of expenses caused by the conduct of
2 persons convicted of crimes.... We believe that customary and reasonable attorney’s
3 fees incurred to close the victim’s estate should be allowed.”); *see also State v.*
4 *Spears*, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996) (awarding fees in probate
5 proceedings). Notwithstanding the parade of horrors suggested by the Petitioners
6 in their Joint Petition for Review, construing the VBR and enabling statutes to
7 protect rights to fairness and due process, victims must have the right to recover the
8 full amount of their economic loss irrespective of what category of losses have been
9 presented to the court for its consideration. *See id.* (affirming award of attorneys
10 fees for probate costs); *State v. Spears*, 184 Ariz. 277, 292 908 P.2d 1062,1077
11 (1996) (“We believe that the family’s ... ‘customary and reasonable attorney’s fees
12 incurred to close the victim’s estate’ are proper restitutionary items.”). In upholding
13 an award of attorney’s fees to further VBR rights, the Arizona Supreme Court in
14 *State v. Leteve*, held that “[b]ecause counsel’s affidavits supported the restitution
15 order, the State met its burden of proving the amount by a preponderance of the
16 evidence.” 237 Ariz. 516, 530-31, 354 P.3d 393, 407-08 (2015).³ This right does
17 not come without limitations. In *State v. Slover*, the Arizona Court of Appeals
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³ The court in *State v. Leteve* acknowledged that the Defendant did not challenge whether attorney’s fees incurred to enforce VBR rights are compensable but nevertheless upheld the fee award. *Id.* at 530, 354 P.3d at 407.

1 rejected an attorney award for private counsel, that “[i]n essence,... acted in the role
2 of an adjunct prosecutor, "prodding" the state to pursue the case and apparently
3 assisting it with the prosecution. 220 Ariz. 229, 243, 204 P.3d 1088, 1092 (App.
4 2009). The Court found that the private attorney fees did not flow directly from the
5 defendant's criminal conduct. *Id.* But courts and the legislature never intended to
6 limit recovery of attorney fees entirely. *Id.* In fact, the court in *Slover* specifically
7 did *not* “[A]ddress whether such fees would be proper restitution items under other
8 factual circumstances, such as when the victim hires an attorney to assert a concrete
9 right under the Victims' Bill of Rights. ...” *Id.* Therefore, in light of the decisions
10 in *Baltzell*, *Spears* and *Leteve*, one point remains clear, courts have wide discretion
11 to evaluate claims for restitution depending on the facts of each case and may award
12 a variety of expenses if proven by a preponderance of the evidence. *See In re*
13 *Stephanie B.*, 204 Ariz. at 470-71, 65 P.3d at 117-18. Here at a contested restitution
14 hearing, the trial court was able to review attorney time sheets and affidavits and
15 considered whether the limitations spelled out in *Slover* should limit an award of
16 fees to the victim C.C.; after reviewing the evidence and determining
17 reasonableness, it issued its fee award of \$17,909.50. *See State’s Resp. to Petition*
18 *for Review at 3.* The trial court did not abuse its discretion and the Court of Appeals
19 correctly upheld the award:
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1 The fees awarded as restitution here were incurred because of Reed's
2 crime, after he committed that crime but before the restitution hearing.
3 Accordingly, they had a nexus to the crime, and followed and flowed
4 factually and temporally from Reed's crime. The superior court,
5 therefore, could conclude that they flowed "directly from the
6 defendant's criminal conduct, without the intervention of additional
7 causative factors."

8 *State v. Reed*, 250 Ariz. 599, 603-04, 483 P.3d 221, 225-26 (App. 2020)
9 (*citations omitted*). The Court of Appeals correctly found no abuse of the trial
10 court's discretion to award fees as a direct result of the crime.

11 Victim C.C. agrees that the position advanced by Petitioners will create a two-
12 tier system of justices for crime victims. *See* Petition at 6. But the Petitioners
13 propose such a two-tier system of justice if this Court were to disregard the holding
14 in *Patel* and limit recovery of economic losses incurred by victims who are forced
15 to hire private counsel to further their VBR rights, or pay for probate, guardianship
16 or conservatorship fees without also holding the criminal defendant accountable to
17 pay the cost for this category of economic loss. If the direct economic losses would
18 not have been incurred but for the crime and were a direct result of the crime, *Patel*
19 instructs us that the Defendant should pay for this economic loss. ___ Ariz. ___,
20 ___, ¶15, 486 P.3d 188, 191 (2021). As long as the victim faces economic losses
21 meeting the test spelled out in *State v. Madrid*, 207 Ariz. at 298, 85 P.3d at 1056 and
22 its progeny, it should make no difference whether the costs they must face came
23 from a doctor, a pharmacist, an accountant or a lawyer.
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1 D. AT CONTESTED RESTITUTION HEARINGS, COURTS
2 ALREADY CONSIDER ISSUES ABOUT REASONABLENESS OF
3 FEES AND CONSEQUENTIAL LOSS

4 Courts must construe VBR provisions in a manner that protects victims'
5 rights, specifically fairness, justice, and due process and any dispute about legislative
6 language or interpretation of statutes must be construed to advance and not limit a
7 victim's right to be heard. *See* A.R.S. §13-4418. This means that a trial court does
8 not have a license to ignore any and all attorney's fees as an appropriate category of
9 economic loss pursuant to A.R.S. §13-603(C). Instead, the appropriate
10 considerations and guardrails for the trial court are whether sufficient evidence exists
11 to show by a preponderance that fees have been incurred to further VBR rights and
12 whether the fees are reasonable. The trial court has ample discretion to evaluate and
13 rule on these considerations and its decision need not be disturbed on appeal absent
14 an abuse of discretion. The trial court did just that here after holding a restitution
15 hearing and considering C.C.'s evidence and affidavits at a contested restitution
16 hearing. C.C. made a decision to employ private counsel after it became clear that
17 Reed decided to malign her character, harass her and treat her with an utter lack of
18 dignity and respect as a crime victim who was forced by no choice of her own into
19 the criminal justice system. State's Resp. to Petition for Review at 9. Respectfully,
20 victims must have the right to be heard in whatever manner and procedure they deem
21 appropriate whether they choose to ask the State or private counsel to help further
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1 their VBR rights. If they choose private counsel, the costs and fees to further rights
2 occasioned by the criminal conduct are recoverable as economic loss subject to the
3 same analysis as any other claim for economic loss. Such analysis has already
4 occurred below and the trial court made the correct decision four years ago. Its
5 decision has been correctly upheld by the Court of Appeals and should again be
6 upheld by this Court.
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9 **V. CONCLUSION**

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11 For the foregoing reasons, C.C. requests that this Court affirm the Court of
12 Appeals decision and the criminal restitution order entered on September 1, 2017.
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14 Respectfully submitted September 14th, 2021.

15 ARIZONA CRIME VICTIM RIGHTS LAW GROUP

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17 By: /s/ Randall Udelman
18 Randall Udelman
19 Victim Rights Attorney
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