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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

John Doe, Plaintiff, vs. Travis Paul Grant, *et al*., Defendants.	Case No. CV2021-090059 **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** (Assigned to Hon. Tracy Westerhausen)

I. PRELIMINARY COMMENTS

Let's recap—when a person is arrested by the Maricopa County Sheriff's Office, their name, mugshot, and details of their arrest are published by MCSO on its website. That point is entirely undisputed.

Defendant Travis Grant owns and operates several websites that "scrape" (copy) and republish this arrest information *verbatim*. Travis's websites include records from MCSO and from 44 other states. Travis's websites earn money from one source—they display "Google Ads" alongside arrest records. These ads are created by *third parties*, not Travis, and they promote products/services sold by third parties, not Travis. Aside from displaying third party Google Ads, Travis's websites do not sell any products or services.

The question here is thus very simple—if a person gathers information posted on the Internet by a third party (like arrest records published by MCSO), and if that person *republishes* the information on a completely passive website which sells no products or services, and which happens to earn money by displaying Google Ads, is that sufficient to create personal jurisdiction over the website owner in Arizona?

Normally, the answer to this question would be extremely easy, because multiple cases have already answered it. In short, simply displaying information on a passive website about an Arizona resident is *never*, standing alone, sufficient to create personal jurisdiction here. That much is clear, as the many cases cited by Defendants explain.

But things get a little more complicated due to the Mugshot Act's new "nexus" clause, A.R.S. § 44–7902(A). This provision was plainly intended to create personal jurisdiction in cases where it would otherwise not exist. In their Motion to Dismiss, Defendants argue this law is blatantly unconstitutional for the simplest reason—because a state cannot expand its personal jurisdiction *beyond* the limits of federal law. Because that is exactly what the nexus clause does, the law is facially unconstitutional and it cannot support personal jurisdiction here.

Somewhat incredibly, even though nearly *half* of Defendants' Motion to Dismiss was devoted to explaining (in detail) why A.R.S. § 44–7902(A) is unconstitutional, Plaintiff never even attempts to rebut this argument in his response. Instead, Plaintiff dismissively suggests: "this Court need not address Defendants' spurious constitutional arguments, *as there are other reasonable interpretations of A.R.S. §44–7902(A) that pose no constitutional question*." Opp. at 3:16–18 (emphasis added).

But after suggesting there are "other reasonable interpretations" of the nexus clause that somehow "pose no constitutional question", Plaintiff never explains what those *other* interpretations are. Indeed, Plaintiff presents no substantive response at all to the detailed constitutional argument in Defendants' motion. Instead, Plaintiff tries to dodge the issue by arguing personal jurisdiction can be found under existing/traditional minimum contacts standards (i.e., *without* relying on the Mugshot Act's nexus clause).

Under these circumstances—where the Complaint clearly invokes personal jurisdiction under A.R.S. § 44–7902(A), and where Defendants have challenged the law as unconstitutional but Plaintiff has offered *no substantive response* to that challenge, the Court should deem the matter conceded. As a result, the Court should find the nexus clause unconstitutional for the reasons explained in Defendants' motion.

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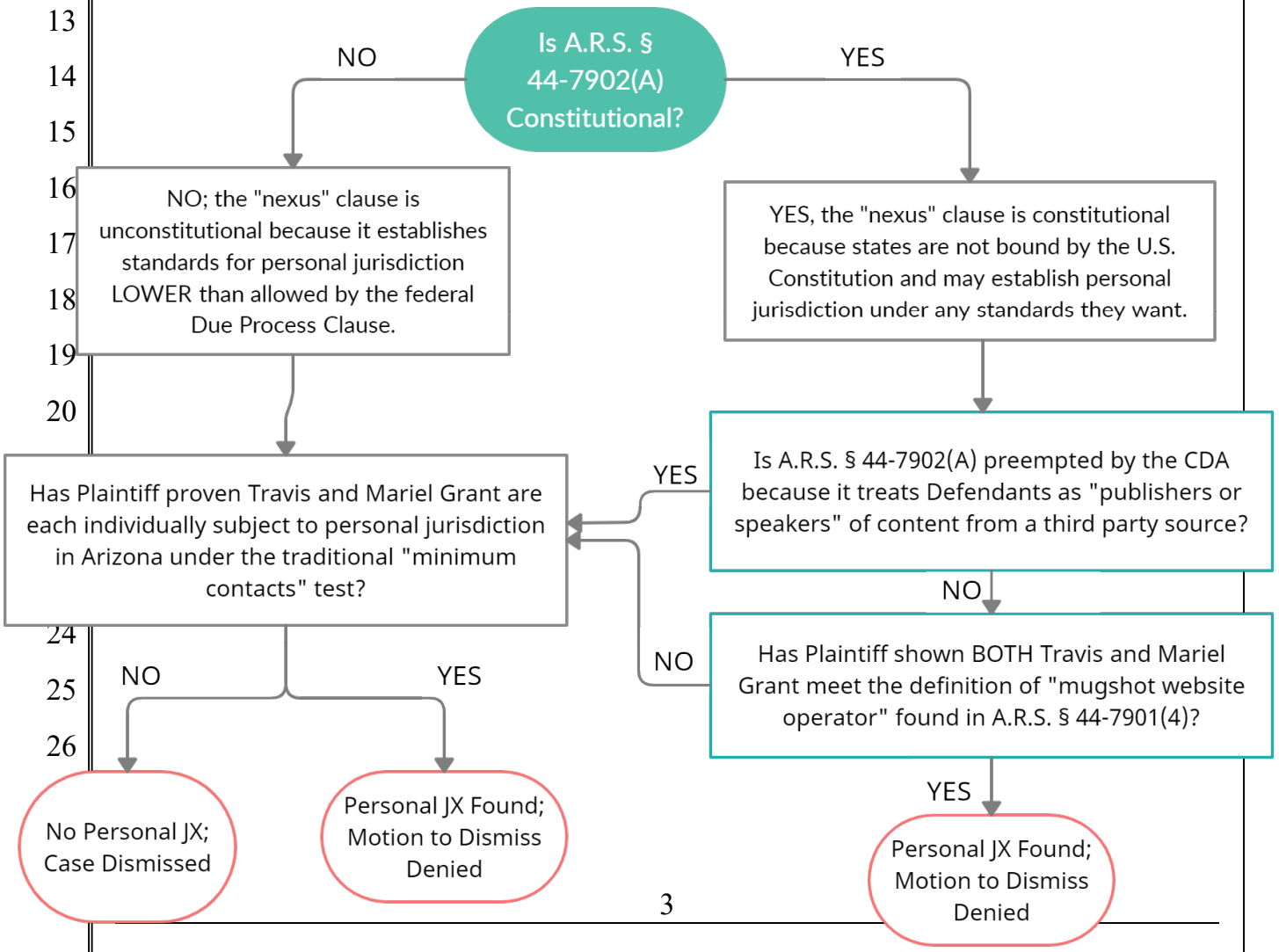
Assuming the Court agrees with that conclusion, it is no longer necessary for the Court to consider the *separate* but related question of whether A.R.S. § 44–7902(A) also conflicts with (and is thus preempted by) the Communications Decency Act. In other words, as illustrated in the flow chart below, in Defendants' Motion to Dismiss, CDA immunity was *only* raised as part of the constitutional challenge to A.R.S. § 44–7902(A).

But Plaintiff appears to have conceded that A.R.S. § 44–7902(A) is unconstitutional (or at least has made no attempt to defend it). As such, it is *not necessary* for the Court to go further and determine whether the nexus clause also conflicts with the CDA. This is so because that issue would only matter if the Court finds the nexus clause IS constitutional (as depicted on the right-hand side of the chart). If the Court finds the clause is *not* constitutional (as depicted by the left side of the chart), then the CDA analysis is no longer necessary or relevant to the question of personal jurisdiction.



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Again, although the CDA may (or may not) be an important part of this case for *other* reasons, it is not relevant to the issue of personal jurisdiction unless the Court finds the Mugshot Act's nexus clause is constitutional. If the Court finds the clause unconstitutional, then it is not necessary to consider the interplay between the CDA and the nexus clause.[1] Instead, the Court need only determine whether personal jurisdiction is proper under Arizona's existing long arm law, Ariz. R. Civ. P. 4.2(a).

II. DISCUSSION

a. Plaintiff Has Failed To Establish Personal Jurisdiction Over Mariel

In a rare moment of consensus, both sides agree on a few core principles. First, Plaintiff bears the burden of establishing personal jurisdiction. Second, personal jurisdiction must be established by *evidence*, not unsupported allegations in a Complaint or arguments of counsel. And third, personal jurisdiction must be established as to each defendant individually. Applying those simple standards, there is no question Plaintiff has failed to establish personal jurisdiction as to Mariel Grant.

Once again, the facts relating to Mariel are undisputed: Mariel denies having any role whatsoever in operating any of the websites in question. She is a stay at home mother of two small children and she does not operate any websites. Furthermore, Mariel's husband, Travis, avows that HE operates the websites. Aside from unsupported arguments of counsel, Plaintiff offers no evidence to refute those points.

Instead, Plaintiff's entire jurisdictional theory (as it relates to Mariel) is premised on a single, largely collateral, fact: Mariel's name is listed as the "manager" of Gainesville Console Doctor, LLC ("GCD"), a company which is NOT a party to this action. Plaintiff apparently suspects that because GCD's name appears in the Terms of Service of at least one of the websites, that necessarily means GCD is liable for all content appearing on the websites, and because Mariel is listed as the manager of GCD, that fact, standing alone, makes Mariel subject to personal jurisdiction in Arizona.

[1] To avoid any doubt, Defendants are NOT suggesting Plaintiff's claims are not barred by the CDA, only that the question of CDA immunity need not be resolved or even considered at this point IF the nexus clause is found to be unconstitutional.

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These arguments are plainly insufficient to establish personal jurisdiction over Mariel. For one thing, GCD is not a party to this action, and Plaintiff has made no attempt to allege, much less prove, that GCD would be properly subject to personal jurisdiction here. As such, it simply makes no sense for Plaintiff to argue that Mariel Grant is somehow *derivatively* subject to personal jurisdiction here vis-à-vis her role as GCD's manager, when Plaintiff is not seeking to establish personal jurisdiction over GCD.

Second and more importantly, Plaintiff's legal theory—that the manager of an LLC is always *automatically* subject to personal jurisdiction anywhere the LLC might be sued—is simply dead wrong as a matter of law. Like other corporations/partnerships, LLCs are distinct legal entities which exist independently from their members/managers. As such, the mere fact that an LLC *might* be subject to jurisdiction in a state does not mean the LLC's members or managers are also automatically subject to jurisdiction:

> Personal jurisdiction over a limited liability company does not automatically extend to its members. Membership in a business entity is not sufficient in and of itself to confer personal jurisdiction. Instead, the members must have the requisite minimum contacts with the forum state *independently of the limited liability company*.

Mountain Funding, LLC v. Blackwater Crossing, LLC, 2006 WL 1582403, *2 (W.D. 2006) (emphasis added) (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Lasalle Bank N.A. v. Mobile Hotel Props., LLC*, 274 F.Supp.2d 1293, 1300 (S.D.Ala. 2003)).

That same standard applies to Florida-resident LLCs like GCD. For example, *Clement v. Lipson*, 999 So.2d 1072 (Fla.App. 2008) involved fraud and related claims brought against the former managers of a Florida-resident LLC that allegedly sold illegal timeshares. The LLC's managers (who did not reside in Florida) moved to dismiss for lack of personal jurisdiction, and they supported their motion with affidavits denying that they had any personal role in the LLC's allegedly unlawful conduct. Because the plaintiff had no evidence to refute the managers' denials, the court held the managers were not subject to personal jurisdiction in Florida, even assuming the Florida-resident LLC itself was guilty of unlawful conduct and was subject to jurisdiction in Florida.

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Countless other Florida cases have applied the same rule: the "acts of [a] corporate employee performed in corporate capacity do not form the basis for jurisdiction over corporate employee in [their] individual capacity." *Doe v. Thompson*, 620 So. 2d 1004, 1006 (Fla. 1993) (holding Texas-resident President and CEO of company that owned a convenience store in Florida was not individually subject to personal jurisdiction in Florida; "While Southland Corporation, which operates businesses in Florida, could be haled into court because of its minimum contacts, its chief executive officer is not by virtue of his position subject to personal jurisdiction.") (citing *Estabrook v. Wetmore*, 129 N.H. 520, 529 A.2d 956 (1987)); *Eller v. Allen*, 623 So. 2d 545, 547 (Fla. Dist. Ct. App. 1993) (nonresident corporate officers were not subject to personal jurisdiction in Florida for allegedly negligent acts committed in their role as corporate officers).

Exactly the same rule applies in Arizona; "While acts done by non-resident individuals in the scope of their employment or duties for a foreign corporation may be sufficient to establish *in personam* jurisdiction over their corporate employer, it does not necessarily follow that these same acts will be sufficient to support *in personam* jurisdiction over the non-resident individuals." *Powder Horn Nursery, Inc. v. Soil & Plant Lab., Inc*., 20 Ariz. App. 517, 524, 514 P.2d 270, 277 (App. 1973); *Davis v. Metro Productions, Inc.,* 885 F.2d 515, 520 (9th Cir. 1989) (holding, "a person's mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person.") (emphasis added).

In his response, Plaintiff argues that personal jurisdiction over Mariel is proper under *Macpherson v. Taglione*, 158 Ariz. 309, 762 P.2d 596 (App. 1988) which he characterizes as having a "remarkably similar fact pattern" to this case. No reasonable person would agree with Plaintiff's view.

Macpherson involved fraud claims arising from the sale of coins. The plaintiff alleged the defendants (a Massachusetts corporation and its chairman, Mr. Taglione) sold gold and silver coins accompanied by false certificates which misrepresented the quality of the coins. *See Macpherson*, 158 Ariz. at 310.

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Mr. Taglione moved to dismiss for lack of personal jurisdiction claiming that he was not personally involved in the sale of coins to the plaintiff and thus should not be subject to personal jurisdiction in Arizona. However, Mr. Taglione *did not deny* that he personally signed the allegedly false certificates which accompanied the coins and which formed a substantial part of the alleged fraud. Because Mr. Taglione did not deny his role in that part of the fraud, the Court of Appeals summarily concluded (with virtually no further analysis) that he was subject to personal jurisdiction in Arizona.

Contrary to Plaintiff's assertions, *Macpherson* is nothing like the instant case. Here, Mariel Grant has supplied the Court with an affidavit flatly denying any and all involvement in the conduct at issue in this case. Plaintiff has offered literally no evidence of any kind to refute Mrs. Grant's denials. This case is thus not "remarkably similar" to *Macpherson*; it is different in every material respect.

Indeed, Plaintiff admits that *he does not currently know* whether Mrs. Grant's affidavit is accurate, and thus, "Without discovery, one cannot determine exactly how the Websites are owned and operated, and the role of each Defendant."[2] Response at 20: 4–5. That shocking statement is literally an admission that Plaintiff willfully violated Rule 11 by filing this action and suing individual defendants like Mariel *without* first performing an investigation to determine whether any factual or legal basis existed for the claims asserted against each named Defendant. That violation will be addressed in greater detail in a forthcoming motion.

However, for the purposes of the current matter, the law and the facts are clear and undisputed—Plaintiff has provided no basis to exercise personal jurisdiction over Mariel Grant. Plaintiff has offered *zero* evidence showing any wrongdoing on the part of Mrs. Grant, and his sole legal argument (that LLC managers are automatically subject to jurisdiction anywhere the LLC might be sued), is simply incorrect as a matter of law. Of course, Mariel Grant does not operate any websites, so the Mugshot Act's nexus clause does not apply to her. The Complaint must be dismissed as to Mrs. Grant.

[2] Plaintiff has not moved for jurisdictional discovery. Defendants will oppose any such request.

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b. Plaintiff Has Failed To Establish Personal Jurisdiction Over Travis

Unlike Mariel, Travis Grant has always admitted owning and operating the websites at issue in this case. Thus, the question is whether his conduct—displaying previously-published mugshots of individuals arrested in Arizona on a website that contains tens of millions of similar records from arrests all across the country—is sufficient to subject Travis to personal jurisdiction here.

Defendants' motion cites *extensive* authority for the general and well-settled premise that posting allegedly tortious information on the Internet about an Arizona resident is *not*, standing alone, sufficient to support personal jurisdiction here. Not surprisingly, rather than explaining why these cases should not apply, Plaintiff simply ignores the towering mountain of adverse legal authority. Plaintiff literally never mentions, discusses, or responds to any of these cases.

Instead, Plaintiff cites generic (and extremely old) authority like *Cybersell, Inc. v. Cybersell, Inc*., 130 F.3d 414 (9th Cir. 1997) which is particularly odd given that *Cybersell* strongly supports a finding that Travis Grant is *not* subject to personal jurisdiction here. In addition, Plaintiff offers grandiose-sounding flowery rhetoric such as: "Defendants' Websites are far from 'passive' websites and target agencies (such as MCSO), individuals and states. Defendants also avail themselves by financially benefiting from the state's public records law and other political subdivisions of the state's agencies." Response at 5:19–23.

For all this bluster, Plaintiff simply ignores the actual facts—Travis's websites are *entirely 100% passive* for personal jurisdiction purposes. Consider these facts:

- Travis does not sell anything on his websites;
- Travis does not charge anything to users who want to view content on his websites (i.e., there is no "subscription fee" required to use the site);
- Travis does not allow users to create accounts or post comments;
- Travis has submitted an unrebutted affidavit avowing that the websites' SOLE source of revenue is from Google's AdSense program.

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- Travis does not have any "paying customers" in Arizona and he does not earn any revenue from Arizona (except as may indirectly occur if someone in Arizona happens to pay Google to display an ad on one of Travis's sites, although Travis would have no role whatsoever in causing that transaction).

Under these facts, this case is simply nothing like the authority cited by Plaintiff, such as *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), in which a non-resident defendant was found to be subject to jurisdiction in another state *by virtue of conducting business in that state*. As explained in his affidavit, Travis conducts NO business in Arizona. Rather, Travis simply compiles and displays information that was *already published on the Internet* by law enforcement agencies in Arizona.

In this way, Travis's conduct is indistinguishable from the facts described in *Dobrowolski v. Intelius, Inc.*, 2017 WL 3720170 (N.D.Ill. 2017) (cited in Defendants' Motion to Dismiss but ignored by Plaintiff). Travis's conduct is also closely analogous to the situation in *Kruska v. Perverted Justice Found. Inc*., 2009 WL 249432 (D.Ariz. 2009) (another case cited in Defendants' motion and simply ignored by Plaintiff).

The facts of *Kruska* should sound familiar, albeit much worse than this matter. In *Kruska*, the defendant (a resident of California) created and ran a website "to alert the public as to Plaintiff's status as a registered sex offender and to her related activities." *Kruska*, 2009 WL 249432, *1. As part of that effort, the defendant registered a website using the plaintiff's full name—www.jankruska.com—which was hosted on a GoDaddy server in Arizona. *See id*. Defendant allegedly used this website "to threaten, intimidate, and harass Plaintiff …." *Id*. The District Court found none of these actions were sufficient to support personal jurisdiction over the defendant in Arizona:

> Plaintiff does not contend that any business is conducted on the websites by Defendant Ochoa. Rather, the websites are used for correspondence and directing supporters to threaten, intimidate, and harass Plaintiff and individuals with whom she deals. Such a website that is largely passive in nature does not support personal jurisdiction over Defendant Ochoa.

Kruska, 2009 WL 249432, *4.

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The same is true here. The simple fact is that Travis's websites contain an archive of *millions* of arrest records from nearly every state in the country. Travis sells literally *nothing* on his site; he *passively* displays information which was previously published online by other sources, and yes, some percentage of that content relates to people arrested in Arizona (who may or may not actually be residents of Arizona; the fact that someone is arrested in Arizona does not necessarily mean that person is an resident of this state). The fact that one page out of tens of millions of pages contains Plaintiff's mugshot is simply insufficient as a matter of law to create personal jurisdiction here.

Given the undisputed facts, Plaintiff has failed to show that Travis Grant is subject to personal jurisdiction here. For that reason, the Complaint should be dismissed as to Travis.

c. Plaintiff Fundamentally Misunderstands the CDA

As noted above, one of the primary arguments in Defendant's motion was that the Mugshot Act's nexus clause is unconstitutional. As part of that argument, the motion also argued that *assuming* the nexus clause somehow passed constitutional muster, it would still conflict with, and thus be preempted by, a different federal law—the CDA.

As noted above, Plaintiff has offered no substantive response to the first point. Nowhere in his response does he attempt to explain how the State of Arizona may enact a law such as the nexus clause to expand its personal jurisdiction *beyond* the limits of the federal due process clause. That really isn't surprising given how groundless that argument would be.

Because Plaintiff has *not* tried to show the nexus clause is constitutional, there is no need for the Court to consider the secondary question of whether the clause conflicts with the CDA. Assuming the Court agrees the nexus clause is unconstitutional as a primary matter, then it simply does not matter whether the law would *also* conflict with the CDA; the finding of unconstitutionality would completely resolve the issue. For that reason, it was entirely unnecessary for Plaintiff to spend more than half his brief explaining why he believes the CDA does not apply here.

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Since it is no longer necessary for the Court to consider that secondary issue, this Reply will not attempt to correct every error in Plaintiff's CDA discussion, except to note that Plaintiff's central premise is that the CDA does not apply to Travis because Plaintiff does not believe MCSO "provided" his arrest information to Travis. Like so many other points Plaintiff has raised, this one is simply dead wrong, both as a matter of fact and as a matter of law. Factually, MCSO absolutely did provide copies of Plaintiff's mugshot and arrest details to Travis, just as it does when any person visits MCSO's website and views content appearing there. By transmitting information *to Travis* (or more accurately to Travis's computer) across the Internet, MCSO "provided" that information to Travis in precisely the manner contemplated by the CDA. Legally, the fact that Sheriff Penzone or one of his deputies did not personally initiate or approve the transfer is simply irrelevant as a matter of law; "no case supports the conclusion that § 230(a)(1) immunity applies only if the website operator obtained the third-party content from the original author." *Callahan v. Ancentry.com, Inc.*, 2021 WL 783524 (N.D.Cal. March 1, 2021).

But again, a full and complete discussion of this issue is both unnecessary at this point and would vastly exceed the page limits for this Reply brief (particularly given how broadly erroneous Plaintiff's CDA analysis is). For now, it suffices to say that if this case is not dismissed for lack of jurisdiction, Defendants will gladly provide the Court with a full, complete, and accurate response regarding the CDA at the proper time.[3]

III. CONCLUSION

For the reasons stated above, the Complaint should be dismissed.

DATED: March 11, 2021.

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[3] The CDA is an *affirmative defense*. Like any defense, it is not necessary to consider the CDA unless the plaintiff first makes a *prima facie* showing that his claims are viable. Here, Plaintiff cannot establish any valid *prima facie* claims for reasons completely unrelated to the CDA (i.e., because the speech is protected by the First Amendment which is *not* a defense, but rather a federal limitation on a state's ability to restrict speech). Because Plaintiff's claims do not pass First Amendment scrutiny, it is unlikely any defense, including the CDA, will be necessary.

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2021 I transmitted the attached document to the Clerk's Office for filing and e-service via AzTurboCourt to:

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