IN THE CIRCUIT COURT FOR THE STATE OF OREGON

IN THE COUNTY OF JOSEPHINE

CASEY MARIE HOUTSINGER, an individual Plaintiff, v. US SUPPORT LLC, a Nevada limited liability company; and JASON WATSON, an Individual Defendant.	Case No.: 24CV49697 **PLAINTIFF'S RESPONSE TO DEFENDANTS' COMBINED SPECIAL MOTION TO STRIKE AND MOTION TO DISMISS** ORS 31.150 and 31.152 ORCP 21A

Plaintiff Casey Houtsinger, by and through counsel, responds to Defendant US Support LLC ("US Support") and Defendant Jason Watson's ("Watson," and collectively "Defendants") jointly filed Special Motion to Strike and Motion to Dismiss for Lack of Personal Jurisdiction ("Motion"). Defendants filed their motion under Oregon's anti-SLAPP law, ORS 31.152, and ORCP 21A. For the reasons set forth below, and in consideration of the Amended Complaint, filed and served under ORCP 23A contemporaneously with this response, Defendants' Motion should be denied in its entirety and attorneys' fees should be awarded to Plaintiff as prescribed by ORS 31.152(3).

Plaintiff files its Amended Complaint primarily for the inclusion of additional information discovered during the ongoing investigation of Plaintiff's records and files over the course of her many years attempting to resolve the cause for her complaint against Defendants. In particular, Plaintiff has uncovered additional correspondence, dated November 11, 2022, between Plaintiff and Defendants that adds to the timeline of interactions in this case. Although

Plaintiff maintains that inclusion of this correspondence would not be necessary to withstand Defendant's Motion, this response does incorporate the new exhibit.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In filing and arguing in support of their Motion, Defendants consistently recharacterize the nature of the misconduct that led to the ultimate filing of the original and now amended complaints. Plaintiff brings this case under a sole cause of action, that Defendants failed to comply with their duties and obligations set forth in ORS 133.875. That statute imposes a civil fine for failing to remove a booking photo (aka, a "mugshot") from publications that condition mugshot removal on the payment of some fee. This practice is commonly known as "mugshot extortion."

Defendants' own language is particularly salient in understanding their mischaracterization. They argue that this case and Plaintiff's actions amounted to a "completely unnecessary years-long campaign to have Plaintiff's photo removed, including by seeking assistance from government officials, legal aid organizations, and retaining counsel. All of this to accomplish what she could have done in a few minutes for, compared to the cost of this litigation, a pittance." Motion at 2. In short, Defendants' find this case "baffling" (Motion at 10 n.4) because Plaintiff could have, at any time in the last several years, paid the Defendants off rather than submit to their extortion.

The irony of Defendants' stance is that ***this is exactly how extortion is designed to work*** and exactly why many are unwilling to stand up to it.

The core of Defendants argument is that this case should be dismissed because it is unreasonable that Plaintiff did not pay off her extortionist. While Defendants' particular acts of extortion may or may not be criminal in nature (see ORS 133.875(2)(d)), the State of Oregon, and others like it, have taken a firm stance against mugshot extortion and given a route for plaintiffs to curb the antisocial, undesirable, and unprotected behavior rather than pay off their extortionists. Defendants may be baffled by Plaintiff's willingness to stand up to mugshot

extortion, but such confusion can only betray that extortion is difficult to confront. Unfortunately for Defendants, their prior success does not immunize them from the consequences of their years spent exploiting arrestees, including arrestees whose charges were ultimately dismissed as is the case here.

1. Timeline of Events

On May 12, 2020, Plaintiff was arrested for driving under the influence of intoxicants and her booking photo was posted on the Oregon Department of Corrections ("DOC") Oregon Offender Search website. Complaint ¶¶ 7, 14; Declaration of Jason Watson, filed in support of Motion, ¶ 5 ("Dec. Watson"). Shortly after it was posted by the DOC, Defendants copied the image to the website Arre.st, which Defendants admit they own and operate. Dec. Watson ¶ 4, 6.

Having become aware of the photo's presence on Arre.st, Plaintiff submitted a request to Defendants at their email address requesting removal on January 26, 2021. Complaint ¶ 19. That request contained her full name and an email address where she could be reached. *Id.* Exhibit 12.

At the time of the photo's posting, Defendant charged $199 for mugshot removal from their own website. Dec. Watson ¶ 8. On October 1, 2021, the Arre.st website allegedly offered a discount for removal such that the price for removal was $49.80. Notably, Defendants have provided no documentation in support of these discounts, nor the email address they were sent to, and Plaintiff has no record of receiving them. See Declaration of Casey Houtsinger in Support of Response to Defendants' Motion to Strike and Motion to Dismiss.

On January 1, 2022, ORS 133.875 became effective, imposing civil liability on the conditioning of mugshot removal on payments of more than $50 or on any amount if charges have been dismissed. *See* ORS 133.875; *Measure History*, HB 3273, 2021 Regular Session (available at https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB3273).

On January 6, 2022, this Court dismissed Plaintiff's criminal charges upon her successful completion of a rehabilitation program. Complaint ¶ 10.

On November 11, 2022, Plaintiff's then-counsel, Tucker Rosetto, sent a letter to Defendants at their address, 3157 N. Rainbow #328, Las Vegas, NV 89108. This letter informed

Defendants that Plaintiff's charges had been dismissed without conviction. See Amended Complaint, Exhibit 15.

On November 22, 2022, Defendants allegedly disabled the option to purchase the removal of a mugshot from their website. Dec. Watson ¶ 14.

On November 27, 2023, a copy of the November 11, 2022, letter was sent, re-dated for November 27, 2023, on behalf of Plaintiff to US Support's registered agent address at 401 Rylander St., Suite 200-A, Reno, NV 89502. Complaint, Exhibit 14.

On October 21, 2024, US Support was served with the original complaint in this matter and a demand letter.

II. OREGON'S ANTI-SLAPP LAW

Defendants' basis for its special motion to strike is Oregon's ant-SLAPP law. The anti-SLAPP statute, ORS 31.150 and 31.152, allows defendants, before incurring significant expenses, "to expeditiously move to dismiss *nonmeritorious* claims that were filed in a strategic effort to chill participation in public affairs." *DeHart v. Tofte*, 326 Or App 720, 724, review denied, 371 Or 715 (2023) (emphasis added) (quoting *C.I.C.S. Empl. Servs. v. Newport Newspapers*, 291 Or App 316, 320 (2018)). It is not meant to deprive Plaintiffs of "the benefit of a jury determination that a claim is *meritorious*." *Staten v. Steel*, 222 Or App 17, 32 (2008) (emphasis in original).

ORS 31.150 provides in relevant part that:

> (1) A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (4) of this section that there is a probability that the plaintiff will prevail on the claim....
>
> (2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:
>
> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;
>
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;

> (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (d) Any other conduct in furtherance of the exercise of the constitutional right of assembly, petition or association or the constitutional right of free speech or freedom of the press in connection with a public issue or an issue of public interest.
>
> ....
>
> (4) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.

If a defendant makes a prima facie showing that the plaintiff's claim arises out of a covered action, set forth in paragraph (2), the burden shifts to the plaintiff to show that there is a probability that she will prevail on her claim. In doing so, the plaintiff must present substantial evidence to support a prima facie case. ORS 31.150(4).

However, this burden shift is not meant to do anything more than make sure a plaintiff has met her burden of production. *Handy v. Lane Cnty*., 360 Or. 605, 622–23 (2016). "In using terms like 'probability' and 'substantial evidence,' the legislature did not intend to require a plaintiff to do more than meet its burden of production." *Id.* This is because the goal of the special motion to strike is to "weed out meritless claims meant to harass or intimidate—not require that a plaintiff prove its case before being allowed to proceed further." *Young v. Davis*, 259 Or App 497, 508 (2013). A court applying the anti-SLAPP statute should not weigh credibility or weight of evidence; it accepts all evidence favorable to the plaintiff as true and reviews the defendants' evidence only to see if it defeats the plaintiff's claims as a matter of law. *Id.* at 509.

A further restriction on the anti-SLAPP laws is provided by ORS 31.150(3): "A special motion to strike may not be made against a claim under this section against a person primarily engaged in the business of selling or leasing goods or services if the claim arises out of a communication related to the person's sale or lease of the goods or services."

Lastly, a Defendant must file its motion to strike within 60 days of service of the complaint.

As is set forth in the sections below, Defendants may not avail themselves of the statute because the claim brought by Plaintiff arose from communications (or lack thereof) relating to Defendants' sale of services, that is, pay for removal mugshot removal. Further, Defendants have not proven that the conduct for which they have been sued is covered conduct under ORS 31.150(2) as all their arguments ignore the truly offensive conduct in favor of arguments that they should be treated like a news publication. But even were their conduct covered, Plaintiff has met her burden of production under either the original or amended complaints. Lastly, Defendant US Support LLC should not be permitted to join the motion to strike because they were served more than 60 days ago. ORS 31.152(1).

1. Defendants May Not Avail Themselves of Anti-SLAPP laws Because the Claim Arises from Communications Relating to Commercial Activities

As stated above, special motions to strike are not available to Defendants who are primarily engaged in the sale of goods or services if the claim sought to be struck arises out of communication related to such sales. ORS 31.150(3). Despite Defendants' insistence that they cannot be held liable for their conduct in posting mugshots, that is not the conduct for which Plaintiff has brought suit.

During the time they operated a pay-for-removal mugshot hosting site, Defendants offered a service: the removal of mugshots from their automatic reposting system, Arre.st, by paying for a license key to remove the photo. The process, by Watson's own admission, was fully automated such that no screening procedures would be used to ensure that certain photos were not taken down. Dec. Watson ¶ 11. Defendants offered this service to any person who was willing to pay, and they allegedly sent increasing discounts as per "the <arre.st> website's normal *business* practices." *Id.* ¶ 9 (emphasis added).

Plaintiff made multiple communications to Defendants requesting the removal of the mugshots and it is the willingness of Defendants to ignore these repeated messages that gives

rise to the action under ORS 133.875, *not* the posting of mugshots itself. Thus, each element of the statutory bar on special motions to strike is met: (1) Defendants primarily offered a service, removing mugshots for pay; (2) the claims arise from communications relating to that service. Each Defendant was an owner-operator of Arre.st, and as such, neither Defendant may avail themselves of the anti-SLAPP statute.

2. The Court Should Not Allow the Motion to Strike on Behalf of US Support LLC

Even should this Court find that Defendants are not subject to the statutory bar for commercial-speech, it should deny the motion as untimely with regard to US Support. Plaintiff successfully served US Support on October 21, 2024, five and a half months prior to US Support's joining of the special motion to strike. Instead of responding to service as prescribed by the Oregon Rules of Civil Procedure, US Support chose to bury its head in the sand for months and now seeks relief on the inaccurate grounds that there has been 'no meaningful litigation activity' since US Support was served.

Yet, in those five months, Defendants reached out with a settlement offer, Plaintiff counter-offered, Plaintiff initiated the process of default against US Support, and Plaintiff sought alternate service against Watson based on the nature of the communications from Defendant. Plaintiff may have disclaimed her notice of intent to default US Support in her motion for alternative service, but she did so in furtherance of maintaining a clean judicial record by consolidating default proceedings and avoiding competing default orders. Yet, the intention was never to absolve US Support of its responsibility to take this suit seriously. US Support flagrantly ignored its having been served (in the same manner it ignored Plaintiff's requests for mugshot removal). It should not be rewarded for doing so.

3. Defendants Have Failed to Show Their Activity is Covered Under ORS 31.150(2)

There are two steps in an anti-SLAPP motion. First, the moving defendant bears the burden to show that the conduct rising to the suit covered by ORS 31.150(2). *Tofte*, 326 Or App at 725. Defendants seemingly rely on either ORS 31.150(2)(c) or (d) as the sections describing their conduct. Motion at 7-9. Subparagraph (c) covers "[a]ny oral statement made, or written

statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest" whereas (d) covers "[a]ny other conduct in furtherance of the exercise of the constitutional right of assembly, petition or association or the constitutional right of free speech or freedom of the press in connection with a public issue or an issue of public interest."

In support of their contention that Defendants' conduct was covered, Defendants argue that their conduct was of a public interest, in furtherance of their constitutional right to free speech, and, as required by ORS 31.150(2)(c) only, that the website Arre.st is a public forum. Plaintiff does not dispute the final point. As to whether Defendants' conduct was of a public interest in furtherance of their right to free speech, Plaintiff notes that Defendant ignores the most relevant conduct giving rise to Plaintiff's sole claim. Defendants cite a litany of cases to show that arrest records may be issues of public interest, but not a single case that argues that mugshot extortion is itself an issue of public interest (even if colored more favorably as pay-for-removal booking photo hosting).

To determine whether an issue is of the public interest, courts focus on the content, form, and context of the relevant conduct. *Mouktabis v. Clackamas Cty.*, 327 Or App 769, 773 (2023). Defendants argued that "[r]eposting booking photos obtained from local law enforcement is unquestionably conduct in connection with an issue of public interest." Motion at 7. Reposting the photos, they argue, notifies the public that someone may be a criminal suspect, may help prevent wrongful arrests, may assist the public in policing law enforcement activities, and keeps potential employers informed of unlawful conduct. *Id.* In Plaintiff's particular case, Defendants argue that the "public is still entitled to know of her criminal history." *Id.* at 8. Yet all of these concerns may be addressed by mere posting of the arrest record itself. As the Oregon legislature realized, posting of a *photo and requiring payment for its removal* unnecessarily injures and embarrasses arrestees. *See* Exhibit 1, Janelle Bynum, Testimony on HB 3047 and 3273, March 2, 2021) ("On the issue of mugshots, it's time for our society to move past them. The day someone gets arrested can quite frankly be one [of] the worst days of their lives. Those mugshots are

sometimes of people in a mental health crisis. Those photos that are published can ruin a person's life who has not yet been found guilty of any crime. They can linger on and impact people's lives for years to come. We can do better for them and for others.").

Were Defendants truly interested in providing a public service, then why allow arrestees to pay for the removal of their entire arrest record? Why offer increasingly steeper discounts, automatically sent such that no screening or review of the arrest records is necessary? It is clear from the context of Defendants' conduct that they were running a pay-for-removal mugshot website with the primary goal of making a profit.[1] They cite no support for why this conduct should be in the public interest. Thus, for much the same reasons that Defendants may not avail themselves of the anti-SLAPP statute under the commercial-speech bar, ORS 31.150(3), Defendants have failed to meet their burden to show that their conduct was within the public interest.

4. Plaintiff Has Met Her Burden to Show Success on the Merits

Should this Court decide that Defendants have met their burden of demonstrating that their conduct was within the scope of ORS 31.150(2), then the burden shifts to Plaintiff to establish that she is likely to succeed on the merits of the cause of action. To meet that threshold Plaintiff must merely "meet its burden of production." *Handy v. Lane Cty.*, 360 Or 605, 623 (2016). In other words, the statute does not require more than submitting sufficient evidence on each element of the claim to survive an anti-SLAPP motion. *Id*. "The statute does not require more." Or. Civ. Pleading & Lit. § 19.5-3 (2020). This is in line with the purpose of the statute, which is to dismiss with *nonmeritorious* or *unfounded* claims. *C.I.C.S. Emp. Servs., Inc. v. Newport Newspapers, Inc.*, 291 Or. App. 316, 319–20 (2018); *Staten*, 222 Or App at 32. Plaintiff has met this burden.

[1] Defendants make much of the fact that their website is no longer a pay-for-removal site and that the ability to pay to have a mugshot removed was ended in November of 2022. Yet, Plaintiff does not seek to hold Defendants liable for their running such a website *now*. The simple facts are, Defendants, during the time that Plaintiff's mugshot was posted on Arre.st ignored requests to have the photos removed.

The sole claim Plaintiff brings arises under ORS 133.875, which sets duties and obligations for "publish-for-pay publications" ("PFPPs"). A PFPP is "a publication or website that requires the payment of a fee or other consideration in order to remove or delete a booking photo from the publication or website." ORS 133.875(3)(b). Arre.st was, until its pay-for-removal system was ended, undeniably a website publication that required payment of a fee in order to remove or delete a photo. Thus, it is subject to the duties and obligations of ORS 133.875 for the time that it was a PFPP. Defendants by their own admission owned and operated Arre.st as part of their regular business activities. They cannot then, despite Defendants' protests, avoid their duties and liability under ORS 133.875 merely by having ended Arre.st's time as a PFPP.

ORS 133.875(1) gives a PFPP 30 calendar days to comply with any request to remove and destroy a booking photo of a person. The PFPP may condition the removal on not more than $50. If it fails to do so, it shall be held liable for "[a]ll costs, including reasonable attorney fees, resulting from any legal action the person brings in relation to the failure" to comply and "[s]tatutory damages of $500 per day for each day after the 30-day deadline that the photo is visible or accessible..." ORS 133.875(1). Should the requesting plaintiff have had her charges "set aside, vacated or pardoned" and provide "documentation of [such a] disposition," the PFPP must remove the photo within 7 calendar days, and the PFPP may not condition removal on any fee. ORS 133.875(2).

As noted by Defendants in their Motion, the statute does not define "request for removal and destruction." Motion at 9. Nor does it define the "documentation" necessary to establish the heightened duties set forth for charges that have been dismissed. Furthermore, neither Plaintiff nor Defendants have yet located an opinion interpreting ORS 133.875.

a. Elements of Violation of ORS 133.875

As the plain language of the statute sets forth, there are three elements the Plaintiff must meet her production on to establish the duties and obligations under ORS 133.875(1): First,

Defendants are a PFPP. Second, Plaintiff must have submitted a request for removal. Third, Defendants must not have complied with this request within the statutory time period. For liability under ORS 133.875(2), Plaintiff must also establish that she submitted documentation of the disposition of her underlying case.

As stated above, Defendants are by their own admission the owners and operators of a PFPP, and they so were during the effective life of the statute. ORS 133.875 came into effect on January 1, 2022, and Defendants ended the pay-for-removal service ten months later on November 22, 2022.

Second, Plaintiff must have submitted a request to have the photo removed and destroyed. Plaintiff, in fact, sent multiple requests for removal of her booking photo. Starting on January 26, 2021, Plaintiff submitted an email to websupport@ussupportllc.com, which Defendants claim as their email address.

On November 11, 2022, Attorney Tucker Rosetto sent a letter request on behalf of Plaintiff to Defendant US Support LLC's Rainbow Road Address, which is listed on the US Support LLC webpage and was included as both Defendants' address in their settlement offer dated December 9, 2024. (*See* Exhibit 5 to January 27, 2025, declaration of Stuart Leijon in support of the Motion for Alternative Service.) The November 11, 2022, letter stated, in relevant part, "The case [Plaintiff] was arrested for was ultimately dismissed but not before your website published her booking photo and linked it on your Facebook 'Oregon Mugshots' page...." Amended Complaint, Exhibit 15. Plaintiff sent the same letter again on November 27, 2023, to US Support's registered agent. *Id*. Exhibit 14.

Finally, on October 21, 2024, Plaintiff's current attorney caused a demand letter and the original complaint in this matter to be served on US Support, each of which was clearly obtained by Watson as well. While this final communication clearly and unequivocally contained documentation of the of the dismissal of Plaintiff's underlying charges, Defendants argue that the November 2023 letter from Mr. Rosetto did not contain sufficient documentation of disposition (Motion at 10 n.3), though they admit it contained enough information to process a request under

ORS 133.875(1). Motion at 11. Defendants state, however, that it came too late because Defendants were no longer a PFPP at the time. This is not the case for the virtually identical letter sent on November 11, 2022.

Defendants argue that at "a bare minimum, such a request must include the date (at least approximately) and location of the arrest for a publish-for-pay publication to act on it... The statute must allow for some screening or verification procedures, otherwise anyone could request removal of a booking photo for any reason, regardless of whether they were the affected party or a representative." Motion at 11. Yet Defendants clearly engaged in no screening procedures. They made no attempt to screen the requests or find out additional information about Plaintiff, despite receiving signed correspondence from Mr. Rosetto.

Instead, if Defendants are to be believed, all they did was trust that their automatic and unmonitored online system, that existed prior to the effective date of ORS 133.875, would convey to Plaintiff that her request for removal could be processed at a discounted rate of $49.80. Plaintiff does not recall ever having received such requests (Dec. Houtsinger), and Defendant has provided neither documentation in support of this claim nor even the email address to which the discount price reductions were supposedly sent.

ORS 133.875 creates a liability for Defendants' failure to comply with requests for removal. Defendants improperly attempt to shift the burden of that liability on plaintiffs. According to Defendants' interpretation of the statute, plaintiffs would be required to provide information that complied with inaccessible and secret removal request procedures that defendants do not have to share. It cannot be so. Defendants were made liable by statute and the failure to provide any procedure, or even effective correspondence mechanism, for removing a mugshot where additional documentation is needed, is tantamount to ignoring the requests themselves.

Furthermore, Defendants' pay-for-removal system clearly did not account for the unconditioned removal required by ORS 133.875(2). Defendants never requested follow-up information from Mr. Rosetto or Plaintiff in order to determine whether her charges had been

dismissed. They never screened the request and communicated the request's denial because it was missing any documentation or directed Plaintiff back to the payment system. They never provided a mechanism for submitting such documentation. Defendants seek to avoid liability by burying their heads in the sand and blindly throwing out discounts through an insufficient removal system.

Finally, to the third element under ORS 133.875(1), Plaintiff must show that Defendants failed to comply with her requests within the 30-days of the request. Assuming a request start date from at least as early as November 11, 2022,[2] Defendants clearly did not comply with Plaintiff's request for removal Plaintiff's booking photo until after this case was filed, nearly two years later. Assuming a start date from effective service on Defendants, October 21, 2024, (which Plaintiff does not by this motion concede is the appropriate start for the removal period), Defendants still did not remove the booking photo until making a settlement offer in December of 2024.

Defendants argue in their motion that may avoid any liability they may have had because they ended their pay-for-removal system on November 22, 2022, and as such were no longer a PFPP. This is devoid of logic. If a plaintiff submitted a timely removal request, which she did, it cannot be the legislature's intent that defendants may 'shut off' their liability by deciding that they no longer wish to receive payment for mugshot removal. Such activity invites defendants to game the system by shutting down the pay-for-removal system in response to any sufficient request for removal. From there, nothing stops the extortionist from opening a new site or new business and continuing the same practices as before, or shutting down the pay-for-removal system for individual requestors such that they are never out of compliance with ORS 133.875.

The simple facts are that Defendants owned and operated a PFPP on which Plaintiff's mugshot could only be removed by her paying an extorted fee; Plaintiff submitted several requests for removal that are not out of compliance with either the plain language or legislative

[2] Plaintiff reserves the right to provide new evidence, upon its discovery, that a valid request for removal was submitted prior to this date, but during the effective date of the statute.

intent of ORS 133.875; and Defendants categorically ignored those requests. Plaintiff has met her burden of production to show she will succeed on her claim.

III. DEFENDANT IS NOT STATUTORILY IMMUNIZED FROM LIABILITY AND PLAINTIFF'S CLAIM IS CONSTITUTIONAL

1. The communications Decency Act does not immunize Defendants for their own Conduct

Defendants next argue that Plaintiff cannot show that she will succeed under ORS 133.875 because Section 230 of the Communications Decency Act immunizes them from liability. But as with all of Defendants' analysis of their own conduct, it ignores that the conduct for which ORS 133.875 makes them liable is not the kind of content that Section 230 immunizes.

Section 230 of Title 47 of the United States Code, subsection (c)(1) is often hailed as "the Twenty-Six Words that Created the Internet."[3] Those 26 words state "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230 has been used to grant broad protections to computer service providers for content that is created by another person. *See, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009). It is commonly used to immunize social media service providers from hosting defamatory or dangerous content that is created by a user. *See, e.g., Anderson v. TikTok*, 116 F.4th 180 (3d Cir. 2024).

But Section 230 does not apply where the defendant was at least partly responsible for the development of the content. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc) ("[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."). ORS 133.875 does not create civil liability for hosting mugshots. It creates liability for PFPPs for failing to comply with removal requests.

In this case, Defendants are the only parties who contributed to the illegality of the conduct, that is, failing to respond to legitimate requests for removal of booking photos. While

[3] Accord, Jeff Kosseff, *The Twenty-Six Words that Created the Internet* (Cornell University Press; 1st edition (2019)

the booking photo might have been provided by the Oregon Department of Corrections ("DOC"), the DOC was not publishing booking photos and demanding money for their removal, so they were not a PFPP. That conduct is purely Defendants' own. Defendants may not have *created* Plaintiff's booking photo, but they created the listing, the business transaction, claimed a license in the photo, claimed the right to sell the license in the photo, and called for offers to sell the license in the photo to remove the photo. They are not liable for the existence of the booking photo. They are liable for the conduct of extorting Plaintiff.

The cases Defendants cite in support of their immunity under Section 230 are distinguishable in that the immunized parties in each of those cases was being sued for speech that they merely copied, but in none of those cases did the speaker condition removal on the payment of some sum of money. For example, Defendants' citations to *MA ex rel PK v. Vill. Voice Media Holdings, LLC,* 809 F. Supp. 2d 1041 (E.D. Mo. 2011) is inapposite. Defendants quote this case for the proposition that "the fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider creates or develops that content." Yet, this cuts against Defendants argument. They are not being sued for posting a booking photo created by someone else. They are being sued for conditioning removal on payment of a sum and then ignoring legitimate requests to remove the photo. The DOC did not "create or develop" that content. Furthermore, Defendants' website does not "elicit content," it actively sought and republished that content and created its own content in charging for removal during the time it was a PFPP.

Defendant cites *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D. Cal. 2020), for the idea that there is no exception because a service provider makes a profit off of the services they provide. In that case, Facebook was not barred from Section 230 immunity for the sole reason that it made billions of dollars per year by hosting content. But Facebook did not contribute to the illegality of the conduct in that case.

Recent cases have sought to limit the reach of Section 230. In *Anderson v. TikTok, Inc.*, the Third Circuit held that TikTok was not immunized under Section 230 even though the

damaging content was created by a user of the TikTok platform. 116 F.4th 180, 184 (3d Cir. 2024). In reaching this conclusion, the Third Circuit noted that the claims were directed to TikTok's promotion of that content rather than the content itself. In other words, even if underlying content was not created by defendants, a defendant may still be held liable for their own conduct surrounding that content, as is the case with Defendants. As *Anderson v. TikTok* shows, Section 230(c)(1) prohibits treating a defendant as the publisher of content posted by third parties, which means that a defendant cannot be liable for the mere act of hosting that content, "[b]ut § 230(c)(1) does not immunize more." *Id.* at 192.

2. ORS 133.875 is Not Unconstitutional

Defendants next argue that Plaintiff has not met its burden to show success under the statute because the ORS 133.875 is an unconstitutional prohibition on speech. But as above, Defendants separate the illegal aspects of their conduct from the legal aspects of their conduct.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.' U.S. Const., Amdt. 1. Under that Clause, a government, ... 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

However, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, ... because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (citing see *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984)). Generally, "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based... By contrast,

laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id.*, at 643. ORS 133.875 does not facially target or distinguish specific content, it targets conduct designed to obtain a profit at the expense of privacy, and is thus presumptively content-neutral.

In this case, Defendants' conduct is what is at issue, not just that they have been hosting booking photos. And "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Supreme Court of the United States has] asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (cleaned up); *see also United States v. Swisher*, 811 F.3d 299, 311 (9th Cir. 2016) ("A message delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative...is symbolic speech that falls within the scope of the First and Fourteenth Amendments." (internal quotes omitted)).

It is clear from Defendants' actions that they have no particularized or communicative message. Defendants never conditioned removal on anything more than payment, without regard to reason for arrest, underlying criminal charges, dismissal, or any circumstances that would suggest any particularized message. Defendants even went so far as to avoid communication by automating their entire process. The conduct is and was inherently a business transaction. This will be true of all PFPPs, whose primary purpose is to extort a profit from arrestees, rather than inform the public of the fact of that person's arrest. Accordingly, regulation of their conduct is not a restriction on speech rights and is only subject to less than strict scrutiny.

Under an intermediate scrutiny analysis, a regulation may be justified if it is within the authority of the government, furthers an important or substantial government interest, is unrelated to the suppression of free expression, and the incidental restriction is no greater than essential to further the interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). ORS 133.875 has the important government interest in avoiding the continued and costly extortion of

arrestees, especially those whose charges are set aside. The statute does not target anybody other than PFPPs—that is those who demand payment for removal of mugshots and so its incidental restriction is no greater than essential. Furthermore, Defendants have provided no argument that demanding payment for removal of embarrassing photos is protected expression. Accordingly, ORS 133.875 withstands scrutiny.

But "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny. Although '[c]ontent-based regulations are presumptively invalid,' the Court 'has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992)). Here, the Oregon Legislature has rightly determined that mugshot extortion is of such low social value that its conduct is outweighed by the social interest in morality and order.

Accordingly, ORS 133.875 is constitutional under the laws of the United States and Plaintiff has still met her burden of production on the merits.

3. Defendant's Motion to Strike Was Frivolous and Intended to Cause Unnecessary Delay

Oregon's anti-SLAPP law provides that, if a special motion to strike is found to be frivolous, the Court denying the motion shall award costs and attorneys' fees to the plaintiff who successfully defends against the motion. ORS 31.152(3). In its special motion to strike, Defendants argued that ORS 133.875 was unconstitutional and that Defendants were immunized by Section 230 of the Communications Decency Act. In making both arguments, Defendants ignored that the conduct for which Plaintiff claims they are liable was not their hosting of booking photos on Arre.st, but was instead due to Defendants' failure to comply with the statutory removal requirements. Instead, Defendants reframed Plaintiff's arguments as challenging the sharing of booking photos in public fora. In doing so, Defendants cited dozens of cases, which Plaintiff was required to review. In none of these cases, did Plaintiff ever find

support for an argument that charging for mugshot removal and failing to comply with requests for removal is protected under either statute. No case cited claims that such action is protected free expression. Furthermore, Defendants, in asserting Section 230 quietly ignored that they had created and developed additional content when scraping photos of the Oregon DOC website. Accordingly, each of these issues could only be frivolous or intended to cause unnecessary delay.

Plaintiff thus requests that this Court order Defendants pay attorneys' fees and costs for the time spent briefing and arguing the motion to strike.

IV. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS

Should this Court deny Defendants' special motion to strike, Defendants argue in the alternative that this Court has no personal jurisdiction over Defendants. ORCP 4 controls jurisdiction in Oregon.

ORCP 4A–4K provide specific bases of personal jurisdiction, and ORCP 4L is Oregon's "catch-all" provision. The "catchall provision" in ORCP 4 confers jurisdiction to the extent permitted by due process. *Cox v. HP Inc.*, 368 Or. 477, 480-81 (2021); *see also Swank v. Terex Utils., Inc.*, 274 Or. App. 47, 57, 360 P.3d 586 (2015).

ORCP 4L provides for personal jurisdiction "[n]otwithstanding a failure to satisfy the requirement of sections B through K of this rule, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States." The statute confers jurisdiction to the "outer limits of due process under the...United States Constitution." *State ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or 381, 384, 657 P2d 211 (1982) (footnote omitted). Because the Oregon Constitution does not have a due-process provision, the effect of ORCP 4L is "to turn every case of questionable jurisdiction into an issue, not of Oregon law, but of federal constitutional law." *State ex rel. Jones v. Crookham*, 296 Or 735, 742, 681 P2d 103 (1984) (Linde, J., concurring).

As a result, in considering whether personal jurisdiction is available under ORCP 4L, Oregon courts are "guided by decisions of the Supreme Court of the United States regarding the

constitutionality of such exercise under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." *State ex rel. Circus Circus Reno, Inc. v. Pope*, 317 Or 151, 156, 854 P2d 461 (1993) (footnote omitted).

"In *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), the Supreme Court held that a court may exercise personal jurisdiction over a defendant consistent with due process only if he or she has certain minimum contacts with the relevant forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F3d 1199, 1205 (9th Cir 2006) (internal cites and quotes omitted)In *Cox* the Oregon Supreme Court described "three inquiries" that govern "whether specific jurisdiction exists," and all three inquiries must be satisfied in the affirmative for jurisdiction to exist. *Cox v. HP Inc.*, 368 Or. 477, 485-86 (2021). The three inquiries are:

(1) Whether the defendant purposefully directed its activities at the forum state, or purposefully availed itself of the privileges of conducting activities in the forum state;

(2) whether the litigation "arises out of or relates to" these activities; and

(3) whether the exercise of jurisdiction is reasonable?

Cox, 368 Or. at 485. Jurisdiction only exists where all three inquiries are satisfied. *Id.* at 485-86.

1. Defendants Purposely Directed Activities to Oregon

The Ninth Circuit recognizes that one way to show purposeful availment is by satisfying the *Calder* effects test, which requires that "the defendant allegedly [must] have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (quoting *Schwarzenegger v. Fred Martin Motor Co.,* 374 F.3d 797, 803 (9th Cir. 2004)).

In *Calder v. Jones*, 465 U.S. 783, 788–90 (1984) (the namesake of the *Calder* effects test), the Supreme Court of the United States held that the author and editor of an allegedly libelous article circulated in California, albeit written and edited in Florida, which "they knew would have a potentially devastating impact upon [the plaintiff]," and which targeted a resident of California, was not "mere untargeted negligence." "Rather, their intentional, and allegedly tortious, actions were expressly aimed at California," and thus they "must 'reasonably anticipate being haled into court there.'" *Id.* at 789–90 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

Mere physical absence from the forum state is not enough to avoid jurisdiction, particularly now that so much of modern commerce is conducted remotely, as long as the defendant's efforts are purposefully directed toward residents of the forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

In the instant case, Defendants established continuing contacts with the State of Oregon by setting up a continuous system for targeting arrestees in Oregon. Defendants pulled each booking photo posted by the Oregon DOC and copied them over to their wholly owned and managed website. Through that website, the arrestees, who were necessarily all arrested in Oregon and regularly were Oregon residents, could engage in a transaction with Defendants in which they would pay Defendants for the service of having their mugshot removed. This is the mechanism by which Plaintiff's own booking photo was appropriated for profit by Defendants and their subsequent violation of ORS 133.875. *See* Dec. Watson ¶¶ 4-5. Where arrestees sought to have their photos removed by initiating the removal procedure, Defendants allegedly continuously contacted those arrestees when they did not complete the process. Their actions thus satisfy all three inquiries of the *Calder* effects test. Like in *Calder*, Defendants' conduct targeted residents of in a foreign state, with anti-social activity that could be devastating to the residents. Furthermore, in Defendants' FAQ page on Arre.st at the time of filing of the original complaint contained a notice that only a valid court order would result in a booking photo's

removal from the site. Accordingly, Defendants must have anticipated that they would eventually offend enough for a party to seek judicial intervention.

2. The Claim at Issue Arise Out of Defendants' Actions

To satisfy the second element, the claims must "arise out of or relate to the defendant's contacts with the forum." *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 592 U.S. 351, 362 (2021). Pointing to its common formulation of this requirement—that the claims must "arise out of *or relate to* the defendant's contacts with the forum"—the Court explained: "The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." *Ford Motor Co.*, 592 U.S. at 362 (internal quotation marks omitted, emphasis in original). In *Cox*, 368 Or at 494, the Oregon Supreme Court rejected the idea that a defendant's activities in Oregon must always be the but-for cause of Plaintiff's claim in order to satisfy the "arise out of or relate to" requirement. Nevertheless, brought this claim as both a but-for *and* proximate cause of the Defendants' actions and omissions within and relating to Oregon. Defendants sought arrest records and booking photos from an Oregon DOC website and republished them then targeted Oregon arrestees with purchase options for removing the photos. Plaintiff submitted several requests to have her photo removed, all of which were ignored. While none of these requests necessarily were ignored in Oregon, Defendants' having ignored them is not too attenuated avoid even relating to their actions in this state.

3. Oregon's Exercise of Jurisdiction Over Defendants is Reasonable

"The reasonableness of a state exercising jurisdiction over non-residents is a case-by-case question. It is a determination 'in which few answers will be written in black and white. The greys are dominant and even among them, the shades are innumerable.'" *State ex rel. Jones v. Crookham*, 296 Or. 735, 740 (1984) (quoting *Kulko v. Superior Court of Cal. in & for City & Cty. of San Francisco*, 436 U.S. 84, 92 (1978) (internal citations omitted)). Whether the exercise of jurisdiction in a given case is reasonable turns on the consideration of several factors: (1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining

relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Kotera v. Daioh Int'l U.S.A. Corp.*, 179 Or. App. 253, 266–67 (2002).

In this case, all of these factors cut in favor of the exercise of reasonable jurisdiction over Defendants. The burden on the Defendants for operating in Oregon as opposed to Nevada does not come with the difficulties of decades past. Remote appearances and conferences are ever-more prevalent. Furthermore, the difficulty of hiring counsel is simplified by increasingly globalized (or nationalized) practice organizations that permit local counsel to be located easily. Further, Defendants have been placed on notice by letters from Tucker Rosetto in both 2022 and 2023 that outline that Plaintiff sought to apply ORS 133.875 against them, so Defendants cannot burdened by a lack of notice.

Moreover, Oregon has a special interest in ensuring the broad application of ORS 133.875. It is undoubted that the mugshots posted on the Oregon-targeted pages of Arre.st originated from the Oregon DOC. Passage of HB 3273 A was intended to protect people from embarrassment, as most privacy laws are. *See* Exhibit 1, Janelle Bynum, Testimony on HB 3047 and 3273, March 2, 2021) ("On the issue of mugshots, it's time for our society to move past them. The day someone gets arrested can quite frankly be one [of] the worst days of their lives. Those mugshots are sometimes of people in a mental health crisis. Those photos that are published can ruin a person's life who has not yet been found guilty of any crime. They can linger on and impact people's lives for years to come. We can do better for them and for others."); Exhibit 2, *PRESS RELEASE, Oregon House Passes Bills to Protect Privacy of Oregonians*, OREGON HOUSE DEMOCRATS (same and noting that HB 3273 A passed the Oregon House 54-4). This interest is best served by broad application of the statute such that its teeth are not filed merely by refusing to enforce it against defendants who necessarily engage with Oregon to violate it.

Plaintiff likewise has a strong interest in obtaining relief. She has been given the runaround by Defendants for over four years with no response to her requests for mugshot

removal. She has sought the assistance of government officials, legal aid organizations, legislative representatives, and more than one attorney because the embarrassment and harassment that the sponsors of HB 3273 A recognized comes with mugshot extortion has far-reaching consequences that amount to cruel and disproportionate punishment.

Jurisdiction in Oregon will likewise present the motion efficient path to success between the interstate judicial system. Defendants propose jurisdiction in Nevada with the possible application of Oregon law. Motion at 20-21. Yet, contrary to Defendants' assertion, it is unlikely that Nevada's judges and counsel are better prepared to interpret Oregon statutes than Oregon judges and counsel. Furthermore, jurisdiction in Oregon will likely avoid the necessity of a conflict of laws dispute. Lastly, Defendants' Nevada counsel have already sought local counsel, moved for *pro hac vice* admission, and entered their motion to strike and dismiss under Oregon law. Judicial efficiency is best served by not restarting this dispute in Nevada.

V. CONCLUSION

For all the reasons stated above, Plaintiff's claim as supported by the Amended Complaint and this response overcome Defendants' special motion to strike under Oregon's anti-SLAPP law. Defendant is immunized from liability under ORS 133.875 by neither the United States Constitution nor the Communications Decency Act. Furthermore, in arguing that their conduct is immunized without proper analysis or recognition of exactly *what* activity ORS 133.875 imposes civil liability for, Defendants have raised frivolous arguments that create unnecessary delay. Should the Court agree with Plaintiff's assessment, it is required under ORS 31.152(3) to order Defendants to pay all reasonable fees and costs relating to the motion to strike.

Furthermore, Defendants have failed to demonstrate that personal jurisdiction over Defendants is unwarranted in this case. The singular cause of action arises directly from acts and omissions of Defendants, and the Plaintiff's and the State of Oregon's interests in seeing justice done here outweigh any burden to Defendants. Accordingly, this Court should hold that it has personal jurisdiction over both Defendants.

DATED: April 21, 2025.

Respectfully submitted,

s/Stuart Leijon

Stuart Leijon, OSB 213992
CHERNOFF VILHAUER LLP
111 SW Columbia St., Ste 725
Portland, OR 97201
503.227.5631
stuart@chernofflaw.com

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document(s) on the date indicated below by email to counsel for both Defendants:

Alex Shepard
ajs@randazza.com

Marc Randazza
mjr@randazza.com

Eric Fournier
ericf@roguefirm.com

Dated: April 21, 2025.

Respectfully submitted,

s/Stuart Leijon
Stuart B. Leijon, OSB 213992