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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IMDB.COM, INC., a Delaware Corp.,

Plaintiff,

vs.

XAVIER BECERRA, in his official  
capacity as Attorney General of the  
State of California,<sup>1</sup>

Defendant.

Case No. 3:16-cv-06535-VC

**BRIEF OF AMICI CURIAE AARP AND  
AARP FOUNDATION IN SUPPORT  
OF DEFENDANT'S OPPOSITION TO  
PRELIMINARY INJUNCTION**

Judge: Hon. Vince Chhabria  
Date: February 16, 2017  
Time: 10:00 a.m.  
Location: Courtroom 4 – 17th Floor

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<sup>1</sup> Under Federal Rule of Civil Procedure 25(d), Attorney General Xavier Becerra is automatically substituted as a defendant in place of his predecessor, Kamala D. Harris.

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1 professionals to get work, amici urge the Court to deny IMDb's motion for a  
2 preliminary injunction.

### 3 INTRODUCTION AND SUMMARY OF ARGUMENT

4 An important purpose of California Civil Code section 1798.83.5(a), is "to  
5 ensure that information obtained on an Internet Web site regarding an  
6 individual's age will not be used in furtherance of employment or age  
7 discrimination." The statute was narrowly drafted to only affect commercial  
8 online entertainment *employment* service providers. Section 1798.83.5 is an  
9 important step to build upon existing age discrimination protections in FEHA  
10 aimed at safeguarding older workers and applicants from unlawful  
11 discrimination. "California unquestionably 'has a legitimate and compelling  
12 state interest in the battle against discrimination on the basis of race, gender,  
13 age, national origin, or other invidious categories of discrimination.'" *Alch*,  
14 165 Cal. App. 4th at 1437 (citation omitted); *Stevenson v. Super. Ct.*, 16 Cal.  
15 4th 880, 896 (1997) ("Like race and sex discrimination, age discrimination  
16 violates the basic principle that each person should be judged on the basis of  
17 individual merit, rather than by reference to group stereotypes."). The California  
18 Legislature appropriately limited employer access to date of birth and age  
19 information through Internet employment service providers.

20 IMDb subscribers, like the general public, have privacy rights that protect  
21 them from the publication of their age and birthdates. Several courts, have  
22 recognized employees' privacy interests in their birthdate and have denied  
23 others access to individuals' personal data. The law at issue in this case is  
24 narrowly tailored, does not violate federal or constitutional law, and should be  
25 upheld. As the U.S. Supreme Court has noted, courts must resort to "every  
26 reasonable construction . . . in order to save a statute from unconstitutionality."  
27 *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*,  
28 485 U.S. 568, 575 (1988). Therefore, the Court should deny the plaintiff's motion

1 for a preliminary injunction.

2 **ARGUMENT**

3 **I. OLDER WORKERS FACE WIDESPREAD HIRING DISCRIMINATION.**

4 Congress enacted the ADEA almost fifty years ago in response to  
5 employment policies and practices that were openly hostile to older workers.  
6 Before the ADEA, a job applicant's age was a determinative barrier to  
7 employment: approximately half of all job openings explicitly barred applicants  
8 over age fifty-five, and a quarter barred those over forty. Report of the Secretary  
9 of Labor, *The Older American Worker: Age Discrimination in Employment 6*  
10 (1965), reprinted in U.S. Equal Employment Opportunity Commission (EEOC),  
11 Legislative History of the Age Discrimination in Employment Act (1981)  
12 (hereinafter *The Older American Worker*). The ADEA sought to reverse trends  
13 that excluded older individuals from the workforce. In prompting Congress to  
14 act, Secretary of Labor Willard Wirtz declared:

15       There is . . . no harsher verdict in most [people's] lives than  
16       someone else's judgment that they are no longer worth their keep.  
17       It is then, when the answer at the hiring gate is 'You're too old' that  
18       a [person] turns away, in [a] poet's phrase, finding nothing to look  
19       backward to with pride and nothing forward to with hope.

20 *Id.* at 1. Representative Burke seconded this powerful sentiment, noting that "[i]t  
21 is one of the cruel paradoxes of our time that older workers holding jobs are  
22 considered invaluable because of their experience and stability. But let the same  
23 worker become unemployed and he is considered 'too old' to be hired." 113 Cong.  
24 Rec. 34, 742 (1967) (statement of Rep. Burke).

25       IMDb argues that Civil Code section 1798.83.5 is overbroad because the  
26 statute protects all workers in the entertainment industry and is not limited to  
27 unknown actors. Pl.'s Mot. at 7. Hiring discrimination against older applicants is  
28 not a problem that is limited to unknown actors. According to an AARP survey,  
two-thirds of workers aged forty-five to seventy-four in a variety of professions  
have encountered age discrimination in the workplace, with an overwhelming



1 majority of those workers describing it as “very or somewhat common.” AARP  
2 Research, *Staying Ahead of the Curve 2013: the AARP Work and Career Study*  
3 *Older Workers in an Uneasy Job Market* 28 (2014), <http://bit.ly/1p8Aard>.  
4 Furthermore, a majority of unemployed older survey respondents seeking  
5 employment (65%) described their age as having a negative effect on their  
6 prospects, labeling age discrimination as one of the most significant barriers to  
7 finding employment. AARP Pub. Policy Inst., *Boomers and the Great Recession:*  
8 *Struggling to Recover* 21-22 (2012), <http://bit.ly/2j8O1kL>; *see also*, S. Rules  
9 Comm., Analysis of Assemb. B. 1687, 2015-2016 Reg. Sess., at 3 (Cal. 2016)  
10 (discussing difficulties that women have to secure work in the entertainment  
11 industry due to their age).

12 Older workers’ perceptions of age discrimination also are supported by  
13 research that indicates widespread acceptance of ageist stereotypes and biases  
14 among employers, supervisors, and co-workers. David Neumark et al., *Is it*  
15 *Harder for Older Workers to Find Jobs? New and Improved Evidence From a*  
16 *Field Experiment* in NBER Working Paper Series 3-4 (2015),  
17 <http://www.nber.org/papers/w21669.pdf>. These biases, both conscious and  
18 unconscious, can include viewing older workers as “cognitively deficient;”  
19 “unhealthy, characterized by physical decline;” “chronically absent”; and  
20 susceptible to declines in memory, productivity, language skill, and the ability to  
21 adapt to new changes. Robert McCann & Howard Giles, *Ageism in the*  
22 *Workplace: A Communication Perspective*, in *Stereotyping and Prejudice Against*  
23 *Older Persons* 163, 166-77 (Todd D. Nelson ed., 2002). While these biases  
24 “stubbornly persist among American employers,” *see id.*, older workers regularly  
25 demonstrate – whether on the job or in court cases – that these biases have no  
26 basis in merit and are mere generalizations based on outdated assumptions and  
27 prejudices.

28 ///

1 **II. LONGSTANDING CALIFORNIA LAW PROHIBITING EMPLOYERS FROM**  
2 **INQUIRING ABOUT THE AGE OF A JOB APPLICANT IS FRUSTRATED**  
3 **WHEN ENTERTAINMENT INDUSTRY EMPLOYERS RECEIVE AGE-RELATED**  
4 **INFORMATION FROM EMPLOYMENT SERVICE PROVIDER WEBSITES.**

5 California unquestionably “has a legitimate and compelling state interest’  
6 . . .” in curtailing age discrimination. *Alch*, 165 Cal. App. 4th at 1437. The entire  
7 workforce is aging, and thus age discrimination is of increasing concern. Indeed,  
8 the number of charges that EEOC receives for age discrimination in California is  
9 approximately 3.5 times the national average. EEOC, *FY 2009 – 2015 EEOC*  
10 *Charge Receipts for California*, <http://bit.ly/2dtNeWX>. In fact, 25.4% of all EEOC  
11 charges in California relate to age discrimination, compared to 7.6% nationally.  
12 *Id.* The U.S. Supreme Court has held that California’s law protecting employees  
13 may surpass the protections extended by Congress, so long as the protections are  
14 “not inconsistent with the purposes of the federal statute.” *Cal. Fed. Sav. &*  
*Loan Ass’n v. Guerra*, 479 U.S. 272, 292 (1987).<sup>2</sup>

15 Under California law, an employer is specifically prohibited from asking  
16 about the age of a job applicant until a bona fide offer of employment is made.  
17 Cal. Code Regs. tit. 2, § 11079(a) (prohibiting pre-employment inquiries “that  
18 would result in the direct or indirect identification of persons on the basis of age  
19 . . . .”). The enforcement of this law has been greatly complicated by IMDb, and  
20 other entertainment employment websites, that offer prospective employers the

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22 <sup>2</sup> Congress made clear that it only intended the ADEA to provide a minimum  
23 floor of protection, 113 Cong. Rec. 2467 (1967) (statement of Sen. Yarborough),  
24 and that states remained free to enact legislation that provided even stronger  
25 protection for older workers. In response to the written question, “Does the  
26 preservation of the jurisdiction of State agencies in Sec. 14 [of the ADEA] allow  
27 State agencies to impose prohibitions against age discrimination in employment  
28 stricter than those provided under Federal law?,” Secretary of Labor Willard  
Wirtz, whose report *The Older American Worker*, *supra*, is considered to be the  
preeminent source for construing the legislative intent behind the ADEA,  
unequivocally responded, “Yes.” *Age Discrimination in Employment, Hearings*  
*Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 90th  
Cong. 48 (1967) (statement of Hon Willard H. Wirtz, Sec’y of Labor).

1 ability to know the exact age and/or birthdate of entertainment professionals,  
2 even when their age is unrelated to the work. Thus, a prospective employer  
3 considering a job applicant is provided access to information that permits age  
4 discrimination to occur without it being traced to the employer. In addition to  
5 actors, this is an issue of particular concern to a variety of entertainment  
6 professionals, who continue to face age discrimination.

7 California's prohibition on pre-employment inquiries is similar to the  
8 federal ban on pre-employment inquiries related to disability under the  
9 Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(d)(2). As Congress  
10 explained, "[t]his prohibition against inquiries regarding disability is critical to  
11 assure that bias does not enter the selection process." H.R. Rep. No. 101-485, pt.  
12 2, at 73 (1990). Congress also declared that "[a]n inquiry . . . that is not job-  
13 related serves no legitimate employer purpose, but simply serves to stigmatize  
14 the person." *Id.* at 75.

15 In discussing age discrimination under FEHA, the California Supreme  
16 Court has recognized a similar view that age does not adequately reflect the  
17 capabilities of an older worker:

18 Chronological age alone is not a reliable measure of any  
19 individual's vitality or ability, and many individuals remain  
20 robust and productive well past the normal retirement age.  
21 Nevertheless, some employers have discriminated against highly  
22 qualified older workers solely because of their age, either by not  
23 hiring them or by replacing them with younger persons.

24 *Stevenson*, 16 Cal. 4th at 909. In adopting both the existing FEHA provisions on  
25 age inquiries and Section 1798.83.5, the California legislature, has acted in a  
26 manner consistent with the determination that an individual's age is generally  
27 unrelated to employability and further that employer access to such age  
28 information creates an unacceptable risk of facilitating age discrimination in  
29 hiring.

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1 **III. ALLOWING INDIVIDUALS TO REQUEST A COMMERCIAL EMPLOYMENT**  
2 **SERVICE TO REMOVE THEIR AGE OR BIRTHDATE FROM ITS DATABASE IS**  
3 **NOT UNCONSTITUTIONAL.**

4 As the party invoking the First Amendment, Plaintiff has the burden of  
5 showing that it applies. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288,  
6 293 n.5 (1984). Section 1798.83.5 does not offend the First Amendment because  
7 age and date of birth are private information, as several courts have recognized.  
8 *E.g., Tex. Comptroller of Pub. Accounts v. AG of Tex.*, 354 S.W.3d 336 (Tex. 2010)  
9 (describing such information as “sensitive” and holding that state employees’  
10 privacy interests outweighed newspaper’s interest in their birthdates); *Okla.*  
11 *Pub. Emples. Ass’n v. State ex rel. Okla. Office of Pers. Mgmt.*, 267 P.3d 838, 848-  
12 50 (Okla. 2011) (noting that the majority of courts that have considered the issue  
13 of whether birthdates should be excluded from public disclosure have held that  
14 the public disclosure of birthdates would be an unwarranted invasion of privacy  
15 and could facilitate identity theft); *Scottsdale Unified Sch. Dist. No. 48 v. KPNX*  
16 *Broad. Co.*, 955 P.2d 534, 536 (Ariz. 1998) (holding that teachers’ confidentiality  
17 and privacy rights outweighed broadcasters’ public purpose in obtaining  
18 birthdates of public teachers). While these cases dealt with disclosure by  
19 government agencies of information relating to current or former government  
20 employees, the underlying principle applies here, as well – a state may protect  
21 individuals’ privacy interests by prohibiting the involuntary disclosure of their  
22 age or birthdate, without offending the First Amendment. Protecting the  
23 unwanted disclosure of private information by a commercial employment service  
24 is especially important for entertainment industry workers, such as IMDb  
25 subscribers.

26 Furthermore, the record does not support Plaintiff’s characterization of  
27 date of birth or age as public information. In fact, most IMDb subscribers are not  
28 famous, and their records are often not readily available outside of IMDb. *See*

1 e.g., Micah Altman, et al., *Towards a Modern Approach to Privacy-Aware*  
2 *Government Data Releases*, 30 Berkeley Tech. L.J. 1967, 1990 (2015) (noting that  
3 access to birth records are now “typically available only to the person to whom  
4 the record pertains, or to certain family members or representatives of that  
5 person). Thus, but for IMDb’s commercial employment service and its closely  
6 related website, an employer would be less likely – if not altogether unlikely – to  
7 know an individual’s age when that individual applies for employment, thereby  
8 reducing the likelihood of age discrimination.

9 Furthermore, “California’s explicit constitutional privacy provision (Cal.  
10 Const., art. I, § 1) was enacted in part specifically to protect Californians from  
11 overly intrusive business practices that were seen to pose a significant and  
12 increasing threat to personal privacy.” *Kearney v. Salomon Smith Barney, Inc.*,  
13 39 Cal. 4th 95, 125 (2006);<sup>3</sup> see also Susan Y. Soon, *Representing Yourself in*  
14 *Federal Court: A Handbook for Pro Se Litigants* 1 (2015), <http://bit.ly/2jluefM>  
15 (recognizing that individuals have a privacy interest in their birthdate and  
16 recommending that *pro se* litigants in the Northern District protect their privacy  
17 by leaving off their birthdate from documents submitted to the Court for filing).  
18 Section 1798.83.5 is consistent with employment workers’ right to privacy,  
19 promotes the State’s compelling interest in combatting employment  
20 discrimination, and is constitutional.

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25 <sup>3</sup> Additionally, forty-seven states have laws designed to protect privacy in data  
26 breaches. See Nat’l Conf. of St. Leg. *State Laws Related to Internet Privacy*, (Jan.  
27 6, 2016), <http://bit.ly/1GY6p3z> for a summary of state laws related to internet  
28 privacy. There are also multiple federal laws that protect privacy. Gina Stevens,  
*Federal Information Security and Data Breach Notification Laws*, Cong. Res.  
Serv. 1 (2010), <https://fas.org/sgp/crs/secretcy/RL34120.pdf> (discussing federal  
laws).

1 **IV. THE PUBLIC HAS A STRONG INTEREST IN VIGOROUS ENFORCEMENT OF**  
2 **ANTIDISCRIMINATION STATUTES. THE EQUITIES AND PUBLIC INTEREST**  
3 **FAVOR ENFORCING CIVIL CODE SECTION 1798.83.5.**

4 The public has a strong interest in vigorous enforcement of statutes aimed  
5 at curtailing discrimination. “Just as the First Amendment does not immunize  
6 physical attacks on persons or property, it does not immunize discriminatory  
7 conduct illegal under the Equal Protection Clause, civil rights acts, or labor  
8 laws.” Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a*  
9 *University*, 53 L. and Contemp. Probs. 195, 211 (1990). As the California  
10 Supreme Court has noted: “Employment discrimination ‘foments domestic strife  
11 and unrest, deprives the state of the fullest utilization of its capacities for  
12 development and advance, and substantially and adversely affects the interest of  
13 employees, employers, and the public in general.’” *Aguilar v. Avis Rent A Car*  
14 *Sys. Inc.*, 21 Cal. 4th 121, 129 (1999) (quoting *Brown v. Super. Ct.*, 37 Cal.3d  
15 477, 485 (1984)). Indeed, individuals who lose work, or future prospects of work,  
16 due to discrimination are often irreparably harmed. *See, e.g., EEOC v. Chrysler*  
17 *Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984) (holding that injuries such as loss of  
18 work and loss of future prospects, combined with “emotional distress, depression,  
19 increased drug use, decrease in feelings of a useful life . . .”, can support findings  
20 of irreparable harm). Furthermore, as pointed out by Defendant, the  
21 administrative burden of removing ages on request is relatively minor. Def.’s  
22 Opp’n. at 15. Section 1798.83.5 simply allows subscribers of entertainment  
23 employment websites to request the removal of their age or birthdates, and  
24 requires these websites to remove age data within five (5) days, nothing more.

24 Words can, in some circumstances, violate laws directed not against  
25 speech but against conduct. Congress, for example, can prohibit employers from  
26 discriminating in hiring on the basis of race. That this will require an employer  
27 to take down a sign reading “White Applicants Only” hardly means that the law  
28 should be analyzed as one regulating the employer’s speech rather than conduct.

1 *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014) (citing *Rumsfeld v. Forum*  
2 *for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)). Here, the  
3 governmental interest in stopping the conduct of discrimination, an important  
4 and substantial governmental interest, is unrelated to the suppression of free  
5 expression. Even if there were an incidental restriction on alleged First  
6 Amendment rights, that restriction in this case is no greater than is essential to  
7 further that interest. *See e.g., United States v. O'Brien*, 391 U.S. 367 (1968)  
8 (noting that an incidental restriction on First Amendment rights is justified if it  
9 furthers an important or substantial interest). Civil Code section 1798.83.5 will  
10 help stop the misuse of individuals' birthdates on entertainment employment-  
11 related websites and is a crucial step toward helping entertainment  
12 professionals avoid age discrimination. As a result of Civil Code section  
13 1798.83.5, entertainment employers will no longer be able to use IMDb to look  
14 up an entertainment worker's age and simply refuse to consider her for a job  
15 solely on the basis of her birthdate. Additionally, the worker's privacy rights will  
16 not be violated by the unwarranted posting of her age or birthdate on the  
17 Internet.

#### 18 CONCLUSION

19 For the reasons set forth above, the Court should deny IMDb's motion for  
20 preliminary injunction.

21 Dated: January 25, 2017

Respectfully submitted,

22  
23 By: /s/ Barbara A. Jones

24 Barbara A. Jones  
25 *Attorney for Amici Curiae*  
26 *AARP & AARP Foundation*  
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**PROOF OF SERVICE**

I hereby certify that on January 25, 2017, I filed the foregoing document:  
**BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF DEFENDANT’S OPPOSITION TO PRELIMINARY INJUNCTION** with the Court through this district’s CM/ECF system. Pursuant to Local Rule 5-1(h)(1), the notice of electronic filing automatically generated by the CM/ECF at the time the document is filed with the system constitutes automatic service of the document on counsel of record who have consented to electronic service.

Dated: January 25, 2017

Respectfully submitted,

By: /s/ Barbara A. Jones

Barbara A. Jones