

Appeal Nos. 18-15463 & 18-15469 (Consolidated)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IMDB.COM, INC. a Delaware corporation, *Plaintiff-Appellee*,

v.

XAVIER BECERRA, in his official capacity as Attorney General
of the State of California, *Defendant-Appellant*,

and

SCREEN ACTORS GUILD-AMERICAN FEDERATION OF
TELEVISION AND RADIO ARTISTS, *Defendant-Intervenor-Appellant*.

On Appeal From the United States District Court
for the Northern District of California
Hon. Vince Chhabria, District Judge
Case No. 3:16-cv-06535-VC

**BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, ALLIANCE
OF RETIRED AMERICANS AND COMMUNICATION WORKERS OF
AMERICA, AFL-CIO, IN SUPPORT OF APPELLANTS XAVIER
BECERRA AND SCREEN ACTORS GUILD-AMERICAN FEDERATION
OF TELEVISION AND RADIO ARTISTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to § 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to § 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

The Alliance of Retired Americans is a nonprofit corporation. It has no parent corporation and has not issued shares or securities.

The Communication Workers of America, AFL-CIO is an unincorporated labor union.

Dated: October 3, 2018

/s/ Barbara A. Jones
Barbara A. Jones

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INTEREST OF AMICI CURIAE¹

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation litigate and file amicus briefs to address employment practices and other conduct that threaten the financial security and well-being of older Americans. In particular, they are active in trial and appellate matters nationwide seeking vigorous enforcement of age discrimination statutes. *See, e.g., Rabin v. PricewaterhouseCoopers, LLP*, 236 F. Supp. 3d 1126 (N.D. Cal. 2017); *Reid v. Google*, 50 Cal. 4th 512 (2012); *Alch v. Superior Court*, 165 Cal. App. 4th 1412 (2008). Approximately one-third of AARP members work or are

¹ Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certify that no person, other than amici, contributed money intended to prepare or submit this brief. Fed. R. App. P. 29(c)(5). Counsel for both parties have consented to the filing of this brief.

seeking work and are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and by state age discrimination laws such as the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12900-12996.

AARP supported the enactment of California Assembly Bill 1687 (codified at Cal. Civil Code section 1798.83.5), the legislation at issue in this appeal, and, along with AARP Foundation, filed an amici curiae brief in the district court in this case. In 1999, AARP supported the amendment to FEHA (S.B. 26, 1999-2000 Reg. Sess. (Cal. 1999)) that overturned *Marks v. Loral Corp.*, 57 Cal. App. 4th 30 (1997), and allowed older workers to use the same legal theories available in race and gender discrimination cases to prove their claims. Beginning in 2000 and continuing for nearly a decade, AARP Foundation lawyers, along with other private counsel, represented hundreds of television writers over the age of forty in a series of twenty-three age discrimination class actions alleging an industrywide pattern and practice of age discrimination. The complaints alleged that television networks, studios, and entertainment industry talent agencies, engage in a pattern and practice of intentional age discrimination against older writers. *Alch*, 165 Cal. App. 4th at 1412. The settlements in those cases have not halted discrimination in the entertainment industry.

The Communications Workers of America, AFL-CIO (CWA) is an international labor organization representing more than 700,000 workers in the telecommunications, media, manufacturing, airlines, and health care industries and in a wide variety of public sector positions in the United States, Canada, and Puerto Rico. CWA represents and advocates on behalf of workers with respect to workplace rights and broader political and civil rights, specifically including age discrimination. As a part of that mission, CWA supports the eradication of age discrimination in all aspects of employment advertising, recruitment, and hiring and the vindication of older workers' rights to be free from discrimination in any aspect of employment advertisement, recruitment, or hiring.

The Alliance for Retired Americans is a national grassroots, advocacy organization with more than 4.4 million members who work together to make their voices heard in the laws, policies, politics and institutions that shape American life. The Alliance's members advocate for an agenda that respects work, strengthens families, and protects the dignity of older Americans. Its members include both active workers and retirees who are united in their belief that age discrimination in employment is an ongoing problem that takes many forms, and that individuals should be allowed to determine whether and when they disclose their age.

State laws such as FEHA serve as invaluable complements to the ADEA in eliminating age bias in the workplace. Vigorous enforcement of FEHA and other

state laws prohibiting age discrimination is of paramount importance to amici, their working members, and the millions of older workers who rely on these laws to deter and remedy ageism in the workplace.

Amici Curiae submit this brief because the district court incorrectly held that California Civil Code section 1798.83.5 was unconstitutional and that entertainment employment service providers have a First Amendment right to publish subscribers' age and birthdate information on the Internet without their consent. The resolution of the issues in this case will have a significant impact on a variety of older people who wish to be considered for, and obtain work, in their chosen profession. In light of the significance of the issues this case presents, amici curiae respectfully submit this brief to facilitate the Court's full consideration of these issues.

SUMMARY OF ARGUMENT

The sole purpose of California Civil Code section 1798.83.5(a) is "to ensure that information obtained on an Internet Web site regarding an individual's age will not be used in furtherance of employment or age discrimination." The statute was narrowly drafted to affect only commercial online entertainment *employment* service providers. Section 1798.83.5 is an important addition to existing age discrimination protections in FEHA aimed at safeguarding older workers and applicants from unlawful discrimination. California unquestionably has a

“legitimate and compelling state interest” in the battle against age discrimination. *Alch*, 165 Cal. App. 4th at 1437 (citation omitted); *Stevenson v. Superior Court*, 16 Cal. 4th 880, 896 (1997) (“Like race and sex discrimination, age discrimination violates the basic principle that each person should be judged on the basis of individual merit, rather than by reference to group stereotypes.”). The California Legislature appropriately limited employer access to date of birth and age information through Internet employment service providers.

IMDb subscribers, like the general public, have privacy rights that protect them from the publication of their ages and birthdates. Several courts have recognized employees’ privacy interests in their birthdate and have denied others access to individuals’ personal data. The law at issue in this case is narrowly tailored and does not violate federal or constitutional law.

The district court’s order granting IMDb’s motion for summary judgment should be reversed.

ARGUMENT

I. OLDER WORKERS FACE WIDESPREAD HIRING DISCRIMINATION.

Congress enacted the ADEA fifty years ago in response to employment policies and practices that were openly hostile to older workers. Before the ADEA, a job applicant’s age was a determinative barrier to employment: approximately half of all job openings explicitly barred applicants over age fifty-five, and a

quarter barred those over forty. U.S. Dep't of Labor, *The Older Worker: Age Discrimination Employment* 6 (1965), <https://bit.ly/2InhqTe> [hereinafter Wirtz Report]. The ADEA sought to reverse trends in employment practices that excluded older individuals from the workforce. In prompting Congress to act, Secretary of Labor Willard Wirtz declared:

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

Id. at 1.

Representative Burke seconded this powerful sentiment, noting that “[i]t is one of the cruel paradoxes of our time that older workers holding jobs are considered invaluable because of their experience and stability. But let the same worker become unemployed and he is considered ‘too old’ to be hired.” 113 Cong. Rec. 34, 742 (1967) (statement of Rep. Burke).

Despite the ADEA and FEHA's protections, employers continue to engage in discrimination against older job applicants.² According to an AARP survey, two-thirds of workers aged forty-five to seventy-four in a variety of professions

² Vivian Giang, *This is the Latest Way Employers Mask Age Bias, Lawyers Say*, *Fortune* (May 4, 2015), <http://fortune.com/2015/05/04/digital-native-employers-bias/>; see also Laurie McCann, *The Age Discrimination in Employment Act at 50: When Will it Become a “Real” Civil Rights Statute*, 33 A.B.A. J. Lab. & Empl. L. 89, 91 (2018).

have encountered age discrimination in the workplace, with an overwhelming majority of those workers describing it as “very or somewhat common.” Rebecca Perron, AARP Research, *The Value of Experience: Age Discrimination Against Older Workers Persists* (2018), <https://www.aarp.org/research/topics/economics/info-2018/multicultural-work-jobs.html>. Furthermore, a majority of unemployed older survey respondents seeking employment (65%) described their age as having a negative effect on their prospects, labeling age discrimination as one of the most significant barriers to finding employment. AARP Pub. Policy Inst., *Boomers and the Great Recession: Struggling to Recover* 21-22 (2012), <http://bit.ly/2j8O1kL>; see also S. Rules Comm., Analysis of Assemb. B. 1687, 2015-2016 Reg. Sess., at 3 (Cal. 2016) (discussing difficulties that women have to secure work in the entertainment industry due to their age).

Age bias against older writers has been going on for decades. By the early 2000s, age bias against television writers over the age of 40 had become so commonplace that one entertainment reporter commented, “[i]n Hollywood, a new kind of blacklist targets older writers.”³ Award-winning writers themselves have felt blacklisted simply due to their age. Emmy award winner Bob Shayne wrote, “I

³ Denise D. Bielby & William T. Bielby, *Audience Segmentation and Age Stratification Among Television Writers*, 45 J. Broadcasting & Electronic Media 391, 392 (2001).

for one, feel like a blacklisted writer in the 1950s, only I didn't have to sign anything, join anything or march in anything to get that way.”⁴ Age discrimination is not limited to a single profession in the entertainment industry, but occurs throughout a variety of entertainment-related professions. *E.g.*, *Klausen v. Warner Bros. TV*, 158 F. Supp. 3d 925 (C.D. Cal. 2016) (age discrimination suit filed by Second Assistant Director); Kristen Acuna, *Age Discrimination on TV: 10 Anchors Who Were Replaced By Younger Women*, Business Insider (Aug. 8, 2012), <https://www.businessinsider.com/age-discrimination-on-tv-10-anchors-who-were-replaced-by-younger-women-2012-8>.

Older workers' perceptions of age discrimination are supported by research that indicates widespread acceptance of ageist stereotypes and biases among employers, supervisors, and co-workers.⁵ While these biases “stubbornly persist

⁴ Bob Shayne, *No Experience Wanted*, L.A. Times (June 10, 2001) at 5, <http://articles.latimes.com/2001/jun/10/entertainment/ca-8511/3>. The age discrimination Shayne spoke of in 2001 continues to the present. *See, e.g.*, Kathleen Antonia, *Bias and the Business of Show-Employment Discrimination in the “Entertainment” Industry*, Cultural Weekly (Jan. 4, 2107) (“[n]otwithstanding settlement of an age discrimination lawsuit in 2012, the employment rate of industry writers still declines sharply with age.”).

⁵ David Neumark et al., *Is it Harder for Older Workers to Find Jobs? New and Improved Evidence From a Field Experiment* (Nat'l Bureau of Econ. Research, Working Paper No. 21669, 2015), <http://www.nber.org/papers/w21669.pdf>; Robert McCann & Howard Giles, *Ageism in the Workplace: A Communication Perspective*, in *Ageism: Stereotyping and Prejudice Against Older Persons* 163, 166-77 (Todd D. Nelson ed., 2002).

among American employers,” *id.*, older workers regularly demonstrate – whether on the job or in court cases – that these biases have no basis in merit and are mere generalizations based on outdated assumptions and prejudices.

II. THE ENTERTAINMENT INDUSTRY AND ITS RELATED EMPLOYMENT WEBSITES ARE UNIQUE. PROFESSIONAL EMPLOYMENT WEBSITES, OUTSIDE THE ENTERTAINMENT INDUSTRY, DO NOT PUBLISH WORKERS’ AGES OR THEIR BIRTHDATES.

Section 1798.83.5 addresses pervasive age discrimination in the entertainment industry. The industry is unique in that entertainment employment service providers, like IMDb, publish workers’ ages and birthdates. Outside the entertainment industry, there are a variety of websites that list professionals in specific fields or industries; however, other industries do not publish personal data like birthdates and specific ages on their websites. Examples of such websites include physician-lists.com (doctors), plasticsurgery.org (board certified plastic surgeons), Avvo (lawyers) and AngiesList.com (home repair professionals including plumbers and carpenters).

IMDbPro, the entertainment employment subscriber website, has “profile pages for more than 4 million people and cast and crew listings for more than 2 million titles.”⁶ IMDbPro’s website “*includes all the data from IMDb*, plus features

⁶ IMDbPro an Amazon Company, <https://pro.imdb.com/signup/index.html?u=https%3A%2F%2Fpro.imdb.com%2F>.

specifically designed for industry professionals.” (Emphasis added).⁷ IMDb, a related website that publishes age and birthdate information, currently has 8,702,001 accessible profiles of people with 91,169,747 credits.⁸ Approximately one-third of the profiles on IMDb are actors and actresses.⁹ The remaining profiles concern people who either currently work, or have worked in the past, in the camera department (5,081,800 profiles), sound department (4,101,525), art department (2,754,182), music department (1,949,083), makeup department (1,725,653), editorial department (1,821,115), casting department (544,609), animation department (1,513,318), transportation department (400,798), or as cinematographers (1,583,041), writers (5,053,759), producers (7,811,179), or in multiple other positions.¹⁰

⁷ IMDb Help Center, https://help.imdb.com/article/imdb/general-information/what-is-the-difference-between-imdb-and-imdbpro/G9PS4SXQVSC34B3L?ref_=helpart_nav_35#. IMDbPro and Amazon Studios are both subsidiaries of Amazon.

⁸ *Press Room*, IMDb, <https://www.imdb.com/pressroom/stats/>.

⁹ *Id.*

¹⁰ *Id.*

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

California unquestionably “has a legitimate and compelling state interest” in curtailing age discrimination. *Alch*, 165 Cal. App. 4th at 1437. The entire workforce is aging, and thus age discrimination is of increasing concern. Indeed, the number of charges that the EEOC receives for age discrimination in California is approximately 3.5 times the national average. EEOC, *FY 2009 – 2017 EEOC Charge Receipts for California*, <http://bit.ly/2dtNeWX>. In fact, 25.3% of all EEOC charges in California relate to age discrimination, compared to 7.5% nationally. *Id.* The U.S. Supreme Court has held that California’s law protecting employees may surpass the protections extended by Congress, so long as the protections are “not inconsistent with the purposes of the federal statute.” *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 292 (1987).¹¹

While not doubting that “age discrimination remains a problem,” the district court opined that California should have explored less speech-restrictive

¹¹ Congress made clear that it only intended the ADEA to provide a minimum floor of protection, 113 Cong. Rec. 2467 (1967) (statement of Sen. Yarborough), and that states remained free to enact legislation that provided even stronger protection for older workers. *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).

alternatives like “enhanced enforcement” of other antidiscrimination statutes before passing the legislation at bar. *IMDb.com, Inc. v. Becerra*, 2018 U.S. Dist. LEXIS 27898, at *6 (N.D. Cal. Feb. 20, 2018). Under California law, an employer is specifically prohibited from asking about the age of a job applicant until a bona fide offer of employment is made. Cal. Code Regs. tit. 2, § 11079(a) (prohibiting pre-employment inquiries “that would result in the direct or indirect identification of persons on the basis of age”). The enforcement of this law in the entertainment field has obviously been greatly complicated by IMDb, and other entertainment employment websites, that publish age and birthdate information giving potential employers full access to that information. A prospective employer in the entertainment field considering job applicants is provided access to information that permits age discrimination to occur without it being traced to the employer. Even where a role calls for an age range, an older actor may still qualify. Not all actors look their age. Specifying a specific birthdate limits their employment opportunities. In addition to actors, this is an issue of particular concern to a variety of entertainment professionals who work behind the camera and who continue to face age discrimination even though their age may be completely irrelevant to their position.

California’s prohibition on pre-employment inquiries is similar to the federal ban on pre-employment inquiries related to disability under the Americans with

Disabilities Act (ADA), 42 U.S.C. § 12112(d)(2). As Congress explained, “[t]his prohibition against inquiries regarding disability is critical to assure that bias does not enter the selection process.” H.R. Rep. No. 101-485, pt. 2, at 73 (1990).

Congress also declared, “[a]n inquiry . . . that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person.” *Id.* at 75.

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

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

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

IV. ALLOWING INDIVIDUALS TO REQUEST A COMMERCIAL EMPLOYMENT SERVICE TO REMOVE THEIR AGE OR BIRTHDATE FROM ITS DATABASE IS CONSTITUTIONAL.

As the party invoking the First Amendment, Plaintiff has the burden of showing that it applies. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288,

293 n.5 (1984). Section 1798.83.5 does not offend the First Amendment because age and birthdates are personal data similar to a social security number and not expressive speech as IMDb has argued.

Even if personal data were classified as speech, several courts have held that publication of birthdates is a violation of the employees' right to privacy. *E.g.*, *Tex. Comptroller of Pub. Accounts v. AG of Tex.*, 354 S.W.3d 336 (Tex. 2010) (describing such information as "sensitive" and holding that state employees' privacy interests outweighed newspapers' interest in their birthdates); *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 955 P.2d 534, 536 (Ariz. 1998) (holding that teachers' confidentiality and privacy rights outweighed broadcasters' public purpose in obtaining birthdates of public teachers); *Okla. Pub. Emps. Ass'n v. State ex rel. Okla. Office of Pers. Mgmt.*, 267 P.3d 838, 848-50 (Okla. 2011) (noting that the majority of courts that have considered the issue of whether birthdates should be excluded from public disclosure have held that the public disclosure of birthdates would be an unwarranted invasion of privacy and could facilitate identity theft).¹² While these cases dealt with disclosure by government agencies of information relating to current or former government

¹² Identity theft in the U.S. has reached "epidemic" proportions. Javelin Strategy & Research, *2018 Identity Fraud: Fraud Enters a New Era of Complexity* (2018), <https://www.javelinstrategy.com/coverage-area/2018-identity-fraud-fraud-enters-new-era-complexity#> (noting that more than 16 million Americans were victims of identity theft in 2017).

employees, the underlying principle applies here, as well – a state may protect individuals’ privacy interests by prohibiting the involuntary disclosure of their age or birthdate, without offending the First Amendment. Protecting the unwanted disclosure of private information by a commercial employment service is especially important for entertainment industry workers, such as IMDb subscribers, to assure that they are considered for jobs based on their qualifications, and not discriminated against based on their age or birthdate.

Furthermore, the record does not support Plaintiff’s characterization of date of birth or age as necessarily public information. In fact, most of the millions of IMDb subscribers are not famous, and their records are often not readily available outside of IMDb. *See, e.g.,* Micah Altman et al., *Towards a Modern Approach to Privacy-Aware Government Data Releases*, 30 Berkeley Tech. L.J. 1967, 1990 (2015) (noting that access to birth records are now “typically available only to the person to whom the record pertains, or to certain family members or representatives of that person”).¹³ Thus, but for IMDb’s commercial employment

¹³ *See also*, Ark. Code Ann. § 20-18-305(9) (restricts public release of vital records until 100 years after birth date or 50 years “after the date of death, marriage, divorce, or annulment . . .”); Cal. Health & Safety Code § 102231(e)(1) (“Birth . . . data files, and any portion thereof, obtained pursuant to this section, . . . shall not be posted on the Internet.”); Conn. Gen. Stat. § 7-51 (access to and issuing copies of birth certificates restricted only to those enumerated in the statute (e.g. person whose birth is recorded if the person is over 18 years old, an emancipated minor, or attorneys representing the person whose record it is, etc.); Kan. Stat. Ann. § 65-2422d(c) (statute limits the state registrar from allowing

service and its closely related website, an employer would be less likely – if not altogether unlikely – to know an individual’s age when that individual applies for employment, thereby reducing the likelihood of age discrimination.

There are multiple federal laws that protect privacy.¹⁴ For example, Federal Rule of Civil Procedure 5.2, which was adopted in compliance with section

inspection of a vital record unless the requester has a “direct interest in the matter recorded and the information contained in the record is necessary for the determination of personal or property rights.”); Me. Stat. tit. 22, § 2706 (government employees or municipalities cannot disclose data in vital records unless authorized by statute and other details of birth may not be available to the general public); 105 Mass. Code Regs. 305.030(A) (“Birth information collected pursuant to M.G.L. c. 111, § 24B, and 105 CMR 305.000 shall be considered confidential and is exempt from disclosure under the public records law . . .”); Mont. Code Ann. § 50-15-122(5)(a) (“Notwithstanding the restrictions provided in 50-15-121, complete birth records may be released to the public 30 years after the date of birth”); Nev. Rev. Stat. Ann. § 440.125 (vital statistics are confidential and may be released after 125 years of birth date); N.Y. Comp. Codes R. & Regs. tit. 10, § 35.2(b) (“A certification of birth shall be issued when required for a proper purpose. A proper purpose shall not exist when the record is requested for commercial or profit making purposes or to satisfy idle curiosity.”); N.D. Cent. Code § 23-02.1-27 (a birth record must be over 125 years from birth date to be considered an open record); S.D. Codified Laws § 34-25-8 (birth records are available to the public without restriction after 100 years from birth date); W. Va. Code § 16-5-27 (birth records are available to the public without restriction after 100 years from birth date or 50 years after death); Wis. Stat. § 69.20 (statute limits inspection or disclosure of vital records and confers to the state registrar a duty to “protect the privacy rights of registrants and their families by strictly controlling direct access to any vital record filed or registered in paper form.”); Wis. Stat. § 69.21 (limits who can obtain copies of vital records).

¹⁴ Ieuan Jolly, *Data Protection in the United States: Overview*, Thomson Reuters (Jul. 1, 2017), <https://bit.ly/2vuTPsd>; Gina Stevens, Cong. Research Serv. RL34120, *Federal Information Security and Data Breach Notification Laws 1*, (2010), <https://fas.org/sgp/crs/secretcy/RL34120.pdf>.

25(c)(3) of the E-Government Act of 2002, Pub. L. No. 107-347, addresses privacy protection for filings in federal court. The rule mandates that a party filing documents must redact from those documents Social Security numbers, dates of birth, the initials of minors and financial account numbers. Fed. R. Civ. P. 5.2(a)(1)-(4).

Furthermore, “California’s explicit constitutional privacy provision (Cal. Const., art. I, § 1) was enacted in part specifically to protect Californians from overly intrusive business practices that were seen to pose a significant and increasing threat to personal privacy.” *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 125 (2006). Other states have passed legislation protecting the privacy rights of individuals, and both private businesses and governmental entities are required to notify individuals of security breaches involving personally identifiable information. *See e.g.*, Nat’l Conf. of St. Leg., *Security Breach Notification Laws* (Mar. 29, 2018), <https://bit.ly/1ao7NAi> (noting that “[a]ll 50 states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands have enacted legislation requiring private or governmental entities to notify individuals of security breaches of information involving personally identifiable information.”).

The Supreme Court has further affirmed the importance of maintaining “privacy” as an important public policy goal—even in respect to information already disclosed to the public for particular purposes (but not others). *Dep’t of*

Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 762-71 (1989); cf. *NASA v. Nelson*, 562 U.S. 134, 144-46 (2011); see also, *Sorrell v. IMS. Health Inc.*, 564 U.S. 552, 596 (2011) (Breyer, J. dissenting); Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 520-22 (2006) (discussing multiple statutes that limit “reuse” of personal data for purposes unrelated to the purposes for which the data was initially collected).

V. THE PUBLIC HAS A COMPELLING INTEREST IN VIGOROUS ENFORCEMENT OF ANTIDISCRIMINATION STATUTES. THE EQUITIES AND PUBLIC INTEREST FAVOR ENFORCING CIVIL CODE SECTION 1798.83.5.

The public has a compelling interest in vigorous enforcement of statutes aimed at curtailing discrimination. “Employment discrimination ‘foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.’” *Aguilar v. Avis Rent A Car Sys. Inc.*, 21 Cal. 4th 121, 129 (1999) (quoting *Brown v. Superior Court*, 37 Cal. 3d 477, 486 (1984)). Indeed, individuals who lose work, or future prospects of work, due to discrimination are often irreparably harmed. See, e.g., *EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984) (holding that injuries such as loss of work and loss of future prospects, combined with “emotional distress, depression, increased drug use, decrease in feelings of a useful life . . . ,” can support findings of irreparable harm). These are precisely the types of harm suffered by the

television writers who sued multiple entertainment studios, networks and talent agencies for subjecting them to age discrimination. The injury that results from age discrimination can be devastating. As an example, after Emmy-winning writer Tracy Keenan Wynn, the writer of “The Longest Yard” and the television movie, “The Autobiography of Miss Jane Pittman” turned 50 and was unable to find work, he lost his house and was forced into bankruptcy.¹⁵ Wynn’s experience of age discrimination in the entertainment industry is not unique.¹⁶ Section 1798.83.5 simply allows subscribers of entertainment employment websites to request the removal of their age and/or birthdate and requires these websites to remove age data within five (5) days, nothing more.

Words can, in some circumstances, violate laws directed not against speech but against conduct. Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. That this will require an employer to take down a sign reading “White Applicants Only” hardly means that the law

¹⁵ Lynn Elber, *Hollywood Writers Allege Age Bias*, Wash. Post (Oct. 23, 2000), http://www.washingtonpost.com/wp-srv/aponline/20001023/aponline233701_000.htm?noredirect=on.

¹⁶ See, e.g., *Klausen v. Warner Bros. TV*, 158 F. Supp. 3d 925 (C.D. Cal. 2016) (age discrimination suit filed by Second Assistant Director); Kristen Acuna, *Age Discrimination on TV: 10 Anchors Who Were Replaced By Younger Women*, Business Insider (Aug. 8, 2012); Shayne, *supra* note 4; *Wynn v. National Broadcasting Co., Inc.*, No. 00-11248 (C.D. Cal. filed Oct. 23, 2001), Compl., ECF No. 1.

should be analyzed as one regulating the employer's speech rather than conduct. *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014) (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)).

Here, the governmental interest in preventing and eliminating age discrimination, a legitimate and compelling governmental interest, is unrelated to the suppression of free expression. Even if there were an incidental restriction on alleged First Amendment rights, that restriction in this case is no greater than is essential to further that interest. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (noting that an incidental restriction on First Amendment rights is justified if it furthers an important or substantial interest). Civil Code section 1798.83.5 will help stop the misuse of individuals' birthdates on entertainment employment-related websites and is a crucial step toward helping entertainment professionals avoid age discrimination. As a result of Civil Code section 1798.83.5, entertainment employers will no longer be able to use IMDb to look up an entertainment worker's age and simply refuse to consider her for a job solely on the basis of her birthdate. Additionally, the statute will protect the worker's privacy rights from the unwarranted posting of her age or birthdate on the Internet.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's order granting IMDb's motion for summary judgment and remand this case for further proceedings consistent with its opinion.

Dated: October 3, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

To the best of my knowledge, there are no related cases.

Dated: October 3, 2018

Respectfully submitted,

/s/ Barbara A. Jones

Barbara A. Jones, SBN 88448*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2018, I filed the foregoing Brief of Amici Curiae AARP, AARP Foundation, Alliance of Retired Americans and Communication Workers of America, AFL-CIO in Support Of Defendants-Appellants with the Clerk of the United States Court of Appeals for the Ninth Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

Dated: October 3, 2018

/s/ Barbara A. Jones
Barbara A. Jones

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-15463/15469

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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Signature of Attorney or Unrepresented Litigant

/s/ Barbara A. Jones

Date

October 3, 2018

("s/" plus typed name is acceptable for electronically-filed documents)