NOS. 18-15463; 18-15469

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,

INTERVENOR-DEFENDANT-APPELLANT.

On Appeal from the United States District Court
for the Northern District of California, San Francisco
Case No. 3:16-cv-06535-VC
The Honorable Vince Chhabria, District Court Judge

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION, THE FIRST AMENDMENT COALITION, THE MEDIA LAW RESOURCE CENTER, THE WIKIMEDIA FOUNDATION, AND THE CENTER FOR DEMOCRACY & TECHNOLOGY IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENTS OF INTEREST[1]

EFF is a non-profit civil liberties organization that has worked for more than 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 37,000 active members have a strong interest in free speech online and in helping the courts and policy-makers develop technology policy that serves the public interest. As part of its mission, EFF has often served as *amicus* in cases involving online speech, including *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014); and *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015).

The First Amendment Coalition (FAC) is a nonprofit public interest organization (incorporated under California's non-profit law and tax exempt under 501(c)(3) of the Internal Revenue Code) that is dedicated to advancing freedom of expression and the dissemination and receipt of truthful information, to resisting censorship of all kinds, and to promoting the "people's right to know" about their government so that they may hold it accountable.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. This brief is filed pursuant to Federal Rule of Appellate Procedure Rule 29(a)(2) with the consent of all parties.

The Media Law Resource Center ("MLRC") is a non-profit membership association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law and policy issues. MLRC also works with its membership to respond to legislative and policy matters, and speaks to the press and public on media law and freedom of speech issues. MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting freedom of expression in all media. Today MLRC is supported by over one hundred and thirty member media organizations, including leading publishers, broadcasters, and cable programmers, digital companies, media and professional trade associations, and media insurance professionals in America and around the world.

The Wikimedia Foundation is a non-profit organization based in San Francisco, California, which operates twelve free-knowledge projects on the Internet, including Wikipedia. Wikimedia's mission is to develop and maintain educational content created by volunteer contributors, and to provide this content to people around the world free of charge. Since its creation, users have created over 40 million articles on Wikipedia. The Wikimedia Foundation has a strong interest in ensuring that people can speak freely and receive information online. In 2015, a German director filed a lawsuit against Wikimedia over the inclusion of her birthdate in a Wikipedia article about her; among other claims, she argued that

the publication of the information could cause discrimination on the basis of her age. The German court rejected this argument, noting that other public information about the claimant's career (such as her filmography and the dates of past projects) allowed an estimate of her age.[2] The case was dismissed.

The Center for Democracy & Technology ("CDT") is a non-profit public interest organization that advocates for individual rights in Internet law and policy. CDT represents the public's interest in an open, innovative, and decentralized Internet that promotes constitutional and democratic values of free expression, access to information, privacy, and individual liberty. CDT has participated in a number of cases addressing First Amendment rights and the Internet, including as *amicus curiae* in *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016); and *State v. Packingham*, 368 N.C. 380 (2015), *cert. granted*, 85 U.S.L.W. 3208 (U.S. Oct. 28. 2016) (No. 15-1194).

[2] https://blog.wikimedia.org/2015/11/24/victory-germany-court-ruling/
For more information, *see*
https://upload.wikimedia.org/wikipedia/foundation/1/10/Schels_v_Wikimedia_Foundation_%28English_translation%29.pdf

INTRODUCTION

That one has a near absolute right to publish truthful information that pertains to a matter of public interest is a fundamental First Amendment value. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). That right, like other First Amendment rights, is not diminished simply because others may use that truthful information for improper purposes such as age discrimination.

The *Daily Mail* principle protects publishers; but it serves a larger purpose: to ensure that truthful information flows to readers. The California Legislature has identified age discrimination in the movie industry as an issue of great public importance. Yet the statute challenged in this lawsuit denies the public crucial age information it needs to meaningfully participate in the debate on this issue.

Amici, public interest organizations dedicated to preserving First Amendment rights of freedom of speech and access to information, write very briefly to emphasize that although this challenge is brought by a plaintiff-appellee with a financial interest in the result, the fundamental First Amendment issues raised are important to everyone who values the dissemination of information and informed engagement in public debate. Indeed, at the present time, when we voice great concern regarding the mass dissemination of *false* information, it is critically important to preserve the public's right to receive truthful information.

Amici thus urge this Court to affirm the district court's grant of summary judgment in appellee's favor.

ARGUMENT

I. PUBLISHERS HAVE A NEAR ABSOLUTE RIGHT TO PUBLISH TRUTHFUL INFORMATION ABOUT MATTERS OF PUBLIC INTEREST DESPITE COMPELLING PUBLIC INTERESTS IN CONFIDENTIALITY

The First Amendment guarantees that persons have a near absolute right to publish truthful information about matters of public interest that they lawfully acquire. *See Smith v. Daily Mail Publishing Co*., 443 U.S. 97, 103 (1979). The protection is so strong and essential to our democratic society that it applies even when the publisher knows that its source obtained the information illegally. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

The *Daily Mail* rule has been applied to a wide variety of information in which, as is asserted by the Legislature here, significant privacy interests existed. In *Daily Mail* itself, the Court protected the publication of the name of a juvenile defendant despite the fact that state law deemed such information confidential. 443 U.S. at 104. *See also Oklahoma Pub. Co. v. Dist. Court*, 430 U.S. 308, 311–12 (1977) (same). The *Daily Mail* rule has similarly protected the publication of other information deemed confidential by law, including information regarding judicial disciplinary proceedings, *see Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978), and the name of a sexual assault victim. *See The Florida*

Star v. B.J.F., 491 U.S. 524, 537–38 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

And, like other First Amendment protections, the *Daily Mail* rule is not weakened in response to a concern that others will use truthful information for harmful or illegal purposes. *See Bartnicki*, 532 U.S. at 529-30 ("[I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party."). As the Supreme Court has repeatedly explained, "Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011).

The rule has been applied to both criminal and civil penalties against publication. *See Bartnicki v. Vopper*, 532 U.S. at 521 & n.3 (both); *Florida Star*, 491 U.S. at 526 (civil); *Landmark Communications*, 435 U.S. at 830 (criminal); *Daily Mail*, 443 U.S. at 99 (criminal); *Cox Broadcasting*, 420 U.S. at 471 (civil).

The *Daily Mail* rule provides *absolute* protection when the information is also contained in official governmental records, such as court records. *Cox*, 420 U.S. at 496. As the U.S. Supreme Court explained:

At the very least, the First and Fourteenth Amendments will not allow

> exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to the public inspection, the press cannot be sanctioned for publishing it.
>
> *Id.*

That age information may be readily derived from official vital records thus strengthens an already potent First Amendment right. Indeed, this line of cases led the California Supreme Court to reverse its previous authority in this area. Prior to *Cox et al.*, the Court allowed for an invasion of privacy tort claim based on the publication of an 11-year-old criminal conviction, citing the state's compelling interest in promoting rehabilitation. But the Court's holding in *Cox* and its progeny "fatally undermined" that prior holding as applied to facts obtained from court records. *Gates v. Discovery Networks*, 34 Cal. 4th 679, 692 (2004) (*overruling Briscoe v. Reader's Digest Association, Inc.*, 4 Cal. 3d 529 (1971)).

II. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECEIVE NEWSWORTHY INFORMATION

The First Amendment also protects the right to receive newsworthy information, which is often a necessary predicate to meaningful exercise of the rights to speak about matters of public concern, to petition government for redress of grievances, and to participate in democratic self-government. *Bd. of Educ. v.*

Pico, 457 U.S. 853, 867 (1982) (plurality) (protecting the right to gather information in libraries, because "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"). In the words of James Madison, who wrote much of the U.S. Constitution before serving as the fourth U.S. President:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 Writings of James Madison 103 (G. Hunt ed. 1910), quoted in *Pico*, 457 U.S. at 867.

Indeed, the right to receive information is the basis for the right to gather information in varying circumstances. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (plurality) (protecting the right to gather information in courtrooms, because "free speech carries with it some freedom to listen"); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (protecting the right to record on-duty police officers, "as a corollary of the right to disseminate the resulting recording").

In this case, the denial of the age information deemed contraband by the challenged statue hinders the public's ability to engage in the very debate the statute aims to address regarding age discrimination in the movie industry. Members of the public who wish to participate in this debate, scrutinize the

positions taken by advocates on each side, and form opinions about both the industry's practices and their government's response to it, are not be able to do so if they are denied access to the best proof of the problem. *See Copp v. Paxton*, 45 Cal. App. 4th 829, 846 (1996) (explaining that earthquake mitigation information must be of public concern because Legislature acted on it).

But even if one will not participate in the public debate, the First Amendment protects the right to receive information for exclusively private use. *See, e.g., Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 757 (1976) (protecting the right to advertise, based in part on the consumer's "reciprocal right to receive the advertising" in order to make informed decisions); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (protecting the right to possess obscene materials at home, because "the right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society"); *Lamont v. Postmaster Gen'l*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (protecting the "right to receive" foreign publications, because "[i]t would be a barren marketplace of ideas that had only sellers and no buyers"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (protecting door-to- door leafleting, based in part on "the right of the individual householder to determine whether he is willing to receive her message"); *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (protecting a patient's "right to receive" information from a physician about

medical marijuana, because "the right to hear and the right to speak are flip sides of the same coin").

III. THE STATE'S BLANKET ASSERTION THAT THE LAW "RESTRICTS ONLY SPEECH RELATING TO PRIVATE MATTERS" MUST BE REJECTED

The State's assertion that the law "restricts only speech relating to private matters" vastly oversimplifies the public concern determination, and as a result vastly underappreciates the First Amendment values tied to it. *See* Becerra Appellant's Opening Brief ("Becerra AOB") at 32. Indeed, even the State cannot sustain its blanket assertion throughout its brief: it later can only assert quite weakly that "IMDb's speech when publishing individuals' ages and birthdates on its public website *does not necessarily* involve matters of public concern," tacitly admitting that the law will be unconstitutional in many, if not most, applications. *See* Becerra AOB 35 (emphasis added).

Where the public concern/privacy balance varies among specific situations, a law must allow a publisher wide discretion to make publication decisions. As the California Supreme Court has recognized in balancing the First Amendment rights of publishers against the privacy rights of those whose information is published, the government intrudes into a publisher's determination of newsworthiness only in "extreme cases":

> An analysis measuring newsworthiness of facts about an otherwise private person involuntarily involved in an event of public interest by

> their relevance to a newsworthy subject matter incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest. In general, it is not for a court or jury to say how a particular story is best covered. The constitutional privilege to publish truthful material "ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest." (*Gilbert, supra,* 665 F.2d at p. 308.) By confining our interference to extreme cases, the courts "avoid[ ] unduly limiting ... the exercise of effective editorial judgment." (*Virgil v. Time, Inc., supra,* 527 F.2d at p. 1129.)

Shulman v. Grp. W Prods., Inc., 18 Cal. 4th 200, 222–26 (1998).

The Court thus placed on plaintiffs the burden of proving an absence of newsworthiness in every situation. *Id.* at 229-30. The challenged law improperly reverses that presumption.

Any other rule will subject publishers to a classic chilling effect: it will "invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public." *Cox*, 420 U.S. at 496. Publishers will opt not to publish, even when to do so would be protected by the First Amendment, in order to steer far clear of potential liability under the law.

Lastly, the State also errs in asserting that public concern or newsworthiness is limited to political speech.

> Nor is newsworthiness governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it. Our analysis thus does not purport to distinguish among

> the various legitimate purposes that may be served by truthful publications and broadcasts.

Shulman, 18 Cal. 4th at 26.

The State's call for a blanket exclusion of birth date information from the *Daily Mail* rule must thus be rejected.

CONCLUSION

For the above-stated reasons, *amici* urge this Court to affirm the District Court's decision granting plaintiff-appellee's motion for a preliminary injunction.

Dated: November 28, 2018

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amici Curiae* In Support of Plaintiff-Appellee complies with the type-volume limitation, because this brief contains 2,649 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: November 28, 2018

By: /s/ *David Greene*
David Greene

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 28, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 28, 2018

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