

**THIRTEEN GOING ON THIRTY:
REMEDYING GAPS IN THE ADEA THAT
ALLOW AGE DISCRIMINATION IN THE
ENTERTAINMENT INDUSTRY**

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It is no secret that, as they age, many older Americans face age discrimination. The Age Discrimination in Employment Act functions to protect these employees by prohibiting age discrimination in the workplace. While many older Americans can rely on this act to protect them and offer recourse, other Americans cannot. Older Americans in the entertainment industry, particularly actors and writers, find themselves experiencing age discrimination early in life. Actresses are the most susceptible, as their amount of representation on screen drops precipitously after age thirty. Beyond that, the unique hiring methods in the entertainment industry present their own challenges to older workers, including typecasting and “approved lists.”

This Note first provides a background on age discrimination and the hiring process within the entertainment industry. The Note goes on to examine protections against age discrimination and recent attempts to remedy gaps that affect the entertainment industry. Finally, this Note takes the unique nature of the entertainment industry into consideration and offers potential solutions in the form of incentives and legislation.

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I. Introduction

During their 2023 Golden Globes acceptance speeches, both Angela Bassett and Michelle Yeoh touched on the problem of ageism in Hollywood.¹ Yeoh said, “As time went by—I turned 60 last year—and I think all of you women understand this: As the days, years, numbers get bigger, the opportunities get smaller as well.”² Their speeches draw attention to a bigger issue: ageism in Hollywood.

The issue of ageism in Hollywood is not new. A 2017 USC study found that only 11.8% of characters in recent picture films were sixty or older.³ This number fell well below the 18.5% of adults in the general population above sixty.⁴ In 2021, a report from the Geena Davis Institute on Gender in Media found that characters over the age of fifty accounted for less than 25% of all characters in top grossing films and shows from 2010–2020.⁵

Age discrimination is not suffered by actors alone. In 2020, the Writer’s Guild of America West (WGAW) took up the issue of ageism again, demanding that the Academy of Motion Picture Arts and Sciences expand its rules for new best picture to include rules against age discrimination.⁶ Catherine Clinch, the committee chair at the time, asserted that the industry had been operating in violation of the Age Discrimination Employment Act (ADEA).⁷

The WGAW reported that “just 1% of TV writers at the supervising producer level or below were over 55.”⁸ Yeshiva University professors Dr. Shu Han and Dr. S. Abraham Ravid documented films made through 2018 by directors who started their careers between 1995 and

1. Mark D. Roberts, *Third Third in the News—February 2023: Ageism in Hollywood and the Question of “Old”*, FULLER DE PREE CTR. (Feb. 5, 2023), <https://depre.org/third-third-in-the-news-february-2023-ageism-in-hollywood-and-the-question-of-old/> [<https://perma.cc/98KW-DNPP>].

2. *Id.*

3. *Id.*

4. *Id.*

5. Richard Eisenberg, *Ageism in Hollywood: ‘The Worst I’ve Ever Seen It’*, NEXT AVE. (Aug. 3, 2022), <https://www.nextavenue.org/ageism-in-hollywood-the-worst-ever-seen-it/> [<https://perma.cc/RT7W-4R5B>].

6. Dave McNary, *Writer Guild Demands Age Discrimination Be Considered in New Best Picture Rules*, VARIETY (Sept. 30, 2020, 1:57 PM), <https://variety.com/2020/film/news/writers-demand-age-discrimination-best-picture-rules-1234788120/> [<https://perma.cc/F7SA-XQHE>].

7. *Id.*

8. Eisenberg, *supra* note 5.

2015, finding that “the probability of hiring drops by about a half, everything else equal, as a director ages from 40 to 55.”⁹

Older people within the entertainment industry have had limited recourse for the age discrimination they face. The ADEA¹⁰ protects employees by promoting employment based on ability rather than age.¹¹ However, it fails to adequately protect individuals within the entertainment industry who can experience age discrimination as early as age thirty.¹² Workers within the entertainment industry face many unique challenges in the hiring process that make them susceptible to discrimination based on age. Actors might not fit the “right look” or the “right body” to conjure “particular associations” for a role or for audiences.¹³ Screenwriters, may not be on the “approved writer lists” from networks and studios or subject to arbitrary metrics that disproportionately affect older writers.¹⁴

In an effort to better protect older workers in the entertainment industry, California passed a bill in 2016, AB 1687, barring subscriber-based online entertainment employment providers from publishing the ages of actors.¹⁵ The statute targeted IMDbPro, a database that allows subscribers to post headshots, resumes, and information for potential employers.¹⁶ The law required that sites like IMDb take down actor age information upon request of that actor.¹⁷

IMDb sued the state of California in *IMDb.com Inc. v. Becerra*,¹⁸ alleging that requiring them to delete information at the request of actors would violate IMDb’s right to free speech.¹⁹ Both the district court and

9. *Id.*

10. 29 U.S.C. §§ 621–34.

11. 29 U.S.C. §§ 621–34; Krista Irons, 25 *Is the New 40: California’s AB-1687*, JD SUPRA (Dec. 22, 2016), <https://www.jdsupra.com/legalnews/25-is-the-new-40-california-s-ab-1687-15211/> [<https://perma.cc/XER7-RE8A>].

12. Irons, *supra* note 11.

13. See Jayne Raisborough, Susan Watkins, Rachel Connor & Natalie Pitimson, *Reduced to Curtain Twitchers? Age, Ageism and the Careers of Four Women Actors*, 34 J. WOMEN & AGING 246, 251 (2022).

14. David Robb, *WGA West Career Longevity Committee Demands “Inclusion and Equity” for Older Writers*, DEADLINE (Sept. 30, 2020, 11:24 AM), <https://deadline.com/2020/09/wga-west-career-longevity-committee-demands-inclusion-and-equity-for-older-writers-1234588890/> [<https://perma.cc/3TQH-GLNA>].

15. *Ageism: The Subject of Protests, Legislation and Turbulence in Hollywood*, PEPP. UNIV. (Jan. 16, 2018), <https://onlinegrad.pepperdine.edu/blog/ageism-hollywood/> [<https://perma.cc/NJ53-HKPS>] [hereinafter *Ageism*].

16. *Id.*

17. *Id.*

18. *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1116 (9th Cir. 2020).

19. *Id.* at 1117.

court of appeals ruled in favor of IMDb, eliminating a statutory means to correct the gaps in the ADEA by preventing age discrimination in the entertainment industry hiring process.²⁰

The purpose of this Note is to address how age discrimination manifests in the entertainment industry and recommend solutions that take the industry's unique circumstances into account. Part II provides a background of age discrimination in the entertainment industry, the hiring process for the entertainment industry, and the use of subscription services within the hiring process. Part III analyzes protections against age discrimination along with their gaps. It then unpacks the attempts to remedy those gaps for the entertainment industry, as well as why those remedies have been largely unsuccessful. Part IV then uses the findings from Part III to offer a possible solution for future remedies.

II. Background

Older people working in entertainment are vulnerable to age discrimination in ways that employees in other industries are not.²¹ In order to address these issues and provide remedies, it is important to understand how age discrimination within the entertainment industry differs from other industries. This includes hiring, or, specifically, the casting process and the use of subscription services during casting.²²

A. Age Discrimination in General

Age discrimination in the workplace is a problem that many older people face across every industry.²³ It occurs "when employers, labor organizations, and employment agencies treat an employee less favorably because of his or her age if the employee is at least forty years old."²⁴ In fact, it happens remarkably often.

20. *Id.*

21. See *Ageism*, *supra* note 15.

22. See Srikanth An, *What Makes IMDbPro Most Resourceful Tool for People in Showbiz?*, BEEBOM (Jan. 4, 2024), <https://beebom.com/imdbpro-explained/> [https://perma.cc/N2TV-LD6S].

23. See *New SHRM Research Details Age Discrimination in the Workplace*, SHRM (May 11, 2023), <https://www.shrm.org/about-shrm/press-room/press-releases/pages/new-shrm-research-details-age-discrimination-in-the-workplace.aspx> [https://perma.cc/2HSX-7MWK] [hereinafter SHRM].

24. CORNELL L. SCH., *Age Discrimination*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/age_discrimination [https://perma.cc/4UPV-N6ZZ] (last visited Aug. 21, 2024).

From February 2023 to April 2023, the Society for Human Resource Management (SHRM) surveyed 1,045 human resource professionals, 1,000 managers, and 1,749 workers to learn about the prevalence of age discrimination in the workplace.²⁵ The survey found that twenty-six percent of U.S. workers over fifty have received age-related remarks in the workplace within the past six months.²⁶ Beyond that, nearly one in five human resource professionals has received reports of perceived ageism.²⁷ Most shocking of all, however, it found that almost one-third of human resource professionals say that, during the job application process, an applicant's age "played a role" in the decisions made by their organization.²⁸

B. Age Discrimination in the Entertainment Industry

The entertainment industry is no exception.²⁹ Older people—particularly older women—are drastically underrepresented.³⁰ The Center for the Study of Women in Television & Film at San Diego State University analyzed the 2021–2022 television season to determine the number of women working on screen and behind the camera.³¹ They analyzed 3,000 characters and over 3,800 credits for the 2021–2022 season on major broadcast networks, live broadcasting to large audiences via channels, and top streaming services where viewers can stream content at any time.³²

The study revealed age-related cutoffs for actors. In their report, they found that female characters begin to disappear from broadcast and streaming programs at the age of forty.³³ In broadcast programs, the percentage of female characters drops from 42% in their thirties to 15% in their forties.³⁴ This drop is also reflected in streaming programs where the percentage drops from 33% in their thirties to 14% in their

25. SHRM, *supra* note 23.

26. *Id.*

27. *Id.*

28. *Id.*

29. See Elizabeth Blair, *There Are More Women on TV but Ageism Persists, Says New Study*, NPR (Oct. 18, 2022, 1:21 PM), <https://www.npr.org/2022/10/18/1129632989/there-are-more-women-on-tv-but-ageism-persists-says-new-study> [<https://perma.cc/6WDL-FU65>].

30. *Id.*

31. *Id.*

32. *Id.*; *Broadcasting vs. Streaming: What's the Difference?*, CASTR (Aug. 31, 2024) <https://castr.com/blog/broadcasting-vs-streaming> [<https://perma.cc/FH2B-V49R>].

33. Blair, *supra* note 29.

34. *Id.*

forties.³⁵ Finally, there is a 27% decrease in representation after forty for broadcast programs, and a 19% decrease in streaming programs.³⁶

Actors are not the only entertainment professionals experiencing underrepresentation. Screenwriters also experience ageism. A report, conducted by the WGAW in 2021 collected data on the status of writers from historically underrepresented groups.³⁷ One of these groups included older writers, which the WGAW identified as writers over the age of fifty-five.³⁸

Despite making up 29% of the U.S. population, only 18% of the employed screenwriters in 2020 were older writers.³⁹ The WGAW acknowledged that there is a small group of “highly successful screenwriters continue working long after age 55,” but emphasized that the vast majority see opportunities diminish or disappear as they age.⁴⁰ Moreover, the vast majority encounter ageism along the way.⁴¹ The survey also showed that 84% of older writers reported experiencing bullying, discrimination, or harassment due to their age.⁴²

Statistically, entertainment industry professionals experience ageism at high rates. Actresses in particular are hit the hardest, with their representation on screen dropping by a staggering 27% when they age from thirty to forty.⁴³ In some cases, they experience ageism at higher rates than the rates reported by the human resource professionals.⁴⁴ For example, the SHRM study found nearly 20% of human resource professionals received reports of perceived ageism,⁴⁵ while the WGAW survey showed that 84% of writers over fifty-five reported experiencing age-related bullying and other harassment.⁴⁶

In response to these high rates of age discrimination, agencies like the WGAW have called for changes in the entertainment industry. In 2020, the chair of WGAW’s Career Longevity Committee, Catherine

35. *Id.*

36. *Id.*

37. WGAW SCREEN INCLUSION REPORT 2021, WRITERS GUILD AM. W. 1, https://www.wga.org/uploadedfiles/the-guild/inclusion-and-equity/2021_screen_inclusion_report.pdf [<https://perma.cc/C563-BR24>].

38. *Id.*

39. *Id.* at 4.

40. *Id.*

41. *Id.*

42. *Id.*

43. Blair, *supra* note 29.

44. See SHRM, *supra* note 23.

45. *Id.*

46. WGAW SCREEN INCLUSION REPORT 2021, *supra* note 37, at 4.

Clinch, released a scathing open letter on behalf of the committee, demanding inclusion and equity for older writers in the entertainment industry.⁴⁷ Clinch wrote that the entertainment industry has been in violation of the ADEA.⁴⁸ While the ADEA “prohibits discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, benefits, and any other term or condition of employment,” Clinch claims that the entertainment industry has violated it through the use of an “approved writers list” that prevents older writers’ work from being read or seen by networks and studios.⁴⁹ Clinch demanded an elimination of the “approved writer lists” that networks and studios maintain.⁵⁰ The WGAW stated that these lists “perpetuate discrimination of all protected classes on the basis of age.”⁵¹

C. The Entertainment Industry Hiring Process

The ADEA fails to shield older workers in the entertainment industry from age discrimination, in part, due to the hiring process.⁵² Before discussing how the hiring process perpetuates ageism, it is important to understand what makes the entertainment hiring process functionally unique. At the hiring stage, ageism manifests in different ways for different roles in the Hollywood production process.⁵³ Older people are vulnerable to potential age discrimination during the casting process or even as they market themselves on subscriber-based hiring sites and databases.⁵⁴

1. THE CASTING PROCESS

To begin, the hiring process for actors, called casting, is typically run by casting directors, directors, and producers.⁵⁵ This process can look different depending on the project and network.⁵⁶ Casting directors can bring in hundreds of actors for a role—with the directors

47. Robb, *supra* note 14.

48. *Id.*

49. *See id.*

50. *Id.*

51. *Id.*

52. Irons, *supra* note 11.

53. *See id.*

54. *See id.*

55. Ken Lazer, *Casting 101: Everything Actors Need to Know About the Process*, BACKSTAGE (July 17, 2024), <https://www.backstage.com/magazine/article/inside-look-casting-process-13023/> [<https://perma.cc/9QDN-GKFD>].

56. *Id.*

choosing only one—or sometimes, actors may already be in mind for certain roles.⁵⁷ If the pilot episode for a project is cast-contingent on having a certain actor for a lead, offers will be made to those actors upfront.⁵⁸

More often than not, however, casting directors pull in actors through large-scale casting calls.⁵⁹ A casting call is a pre-production process where a production team sends notices to the public and casting agencies that they need actors for an upcoming production.⁶⁰ Casting calls start with notices that include the job description, the type of talent the production wants, where the project is filming, when the project is taking place, and payment.⁶¹ These notices can be placed on sites like Backstage, Actors Access, and Casting Networks.⁶² These are online membership sites that allow actors to respond to notices and submit direct applications to casting breakdowns.⁶³ The casting director also collects submissions directly from agents, as well as submissions from actors using casting sites.⁶⁴

But after the collection process is done, the casting director narrows the submissions down and decides who will receive an audition.⁶⁵ Actors who are chosen to participate begin with a first audition with the casting director, casting associates, and an audition reader, who recites the lines as the actor's scene partner.⁶⁶ The next step in the process is a callback session, where the director and producer will discuss and narrow down their selections.⁶⁷ Afterwards, they present a final list of options to their client, the network or service looking to hire actors, and make a casting decision.⁶⁸

57. *Id.*

58. *Id.*

59. *Id.*

60. Aimee Mitchell, *What Are Casting Calls?*, ACTINGBIZ, <https://www.actingbiz.com/acting-tips/what-are-casting-calls/> [https://perma.cc/Y7WP-FFZU] (last visited Aug. 21, 2024).

61. Lazer, *supra* note 55.

62. Loring Weisenberger, *8 Best Casting Websites for Working Actors*, WRAPBOOK (Oct. 29, 2019), <https://www.wrapbook.com/blog/best-casting-websites> [https://perma.cc/BC6V-27ND].

63. Michael Moreno, *A Complete Guide to Actors Access*, STAGEMILK (Sept. 27, 2020), <https://www.stagemilk.com/actors-access/> [perma.cc/XTP2-RFHF].

64. Lazer, *supra* note 55.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

The goal of the casting process is to find the right actor to portray a character in a way that makes the film immersive and engaging for audiences.⁶⁹ During casting, casting directors and agents seek the “right look” in actors to convey a particular meaning or association to audiences.⁷⁰ The search for this “right look” can lead to typecasting.⁷¹ Typecasting is when an actor is consistently assigned roles that are similar due to many factors, which can include appearance, gender, age, or even ethnicity.⁷² The “right look” can also lead to an over-supply of roles for certain groups, while constraining the range and quality of roles for others.⁷³

While this damaging tendency can affect all acting careers, female actresses in particular are the most vulnerable to it. Actresses lose out on leading roles as early as their thirtieth birthday.⁷⁴ Elizabeth Banks claimed that, at twenty-eight, she was turned down for the role of Mary Jane in *Spider-Man*.⁷⁵ Instead, an eighteen-year-old Kirsten Dunst was cast to portray twenty-seven-year-old Toby Maguire’s on-screen girlfriend.⁷⁶ Maggie Gyllenhaal notably claimed, “[S]he was told that she was too old, at age 37, to play the love interest of a 55 year-old male lead.”⁷⁷

69. Indeed Editorial Team, *How to Cast a Movie (Plus Why Casting Is Important)*, INDEED (June 28, 2024), <https://www.indeed.com/career-advice/career-development/how-to-cast-movie> [<https://perma.cc/CTB8-9NTZ>].

70. Raisborough et al., *supra* note 13, at 251.

71. *See id.*

72. Samantha Gallegos, *Typecasting Still Happens, but Actors Are Fighting Back*, MOVIEWEB (Dec. 21, 2022), <https://movieweb.com/does-typecasting-still-happen-today-2022/> [<https://perma.cc/KFF2-R6HK>].

73. *See* Raisborough et al., *supra* note 13, at 251.

74. Irons, *supra* note 11.

75. *Id.*

76. *Id.*

77. *Id.*

2. THE IMPORTANCE AND ROLE OF SUBSCRIPTION SERVICES IN THE CASTING PROCESS

Many actors choose to use subscription services as they market themselves and look for work.⁷⁸ There are a few services that allow entertainment industry professionals to connect with leading entertainment companies, including IMDb, CastCaller, Mandy, Actors Access, Casting Frontier, L.A. Casting, and Casting Networks.⁷⁹ IMDb, for example, is a database that allows subscribers to post headshots, resumes, and information for potential employers.⁸⁰ Actors can use these sites to create and manage a profile where they can highlight their work credits and portfolio.⁸¹

IMDbPro is a popular subscription service where industry professionals can access representation details, client rosters, and contact information.⁸² They can also view project listings, news, and IMDb.com's (IMDbPro's free companion site) data trends.⁸³

The entertainment industry's hiring process is functionally unique from the traditional process, creating challenges that the ADEA cannot cover with the same breadth it does in other industries.⁸⁴ To begin, the casting process includes "typecasting" that can alienate older actors, particularly women, before they meet the age requirements for ADEA protections.⁸⁵ Subscription services are a vital source for actors to find jobs and connect, yet they create another avenue for potential age discrimination.⁸⁶

78. See *7 Ways to Market Yourself as an Actor*, AMP TALENT GRP., https://amptalent.com/learning_centers/7-ways-to-market-yourself-as-an-actor/ [https://perma.cc/27VW-T4T5] (last visited Aug. 21, 2024).

79. See *What Is the Difference Between IMDb and IMDbPro?*, IMDb, <https://help.imdb.com/article/imdb/general-information/what-is-the-difference-between-imdb-and-imdbpro/G9PS4SXQVSC34B3L> [https://perma.cc/9LRR-XWAP] (last visited Aug. 21, 2024); Usama Bin Javed, *9 Sites Like IMDbPro*, JAT, <https://justalternative.to.com/imdbpro/> [https://perma.cc/RU89-PXZH] (last visited Aug. 21, 2024).

80. *Ageism*, *supra* note 15.

81. See *What is the Difference between IMDb and IMDbPro?*, *supra* note 79.

82. *Id.*

83. *Id.*

84. See Irons, *supra* note 11.

85. *Id.*

86. See *id.*

III. Analysis

Given how unique the hiring process is and the reliance on subscription services, age discrimination manifests in ways that the ADEA does not cover.⁸⁷ In the process of finding solutions, it is important to understand the ADEA and examples of age discrimination in the industry. Beyond that, there are attempts to remedy the discrimination, which have had varying degrees of success.⁸⁸

A. Age Discrimination in Employment Act

Older people who face age discrimination are protected by the ADEA,⁸⁹ which was enacted in 1967 to prohibit workplace age discrimination and promote employment of older workers.⁹⁰ The ADEA sought to remedy the age discrimination caused by an employer's assumptions that age impedes ability.⁹¹ To prevent this arbitrary discrimination, the ADEA requires that individual ability be taken into account instead of age during employment decisions.⁹² The ADEA prohibits an employer from failing to hire, discharging, or discriminating against an individual with respect to her or his compensation or terms, conditions, or privileges of employment because of her or his age.⁹³ However, the ADEA only protects individuals who are age forty or older.⁹⁴

In order to establish a case of a discriminatory failure to hire, a plaintiff must show that he or she: "(1) is a member of a protected class; (2) applied for and was qualified for the job; (3) was not hired despite

87. *Id.*

88. *See generally id.* (discussing state and federal laws combatting discrimination in the entertainment industry); *see also* Erik Pedersen, *Appeals Court Upholds Ruling Against California's IMDb Age Law; Bill's Sponsor SAG-AFTRA Calls Decision "Simply Ill-Informed" — Update*, DEADLINE (June 19, 2020, 3:35 PM), <https://deadline.com/2020/06/imdb-age-law-violates-first-amendment-california-1202296413/> [<https://perma.cc/7P35-JC84>].

89. Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After Age Discrimination in Employment Act (ADEA)*, EEOC (June 2018), <https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment> [<https://perma.cc/5BLA-TKDG>].

90. *Id.*

91. *Id.*

92. *Id.*

93. Annotation, *Construction and Application of Age Discrimination in Employment Act of 1967* (29 U.S.C.A. § 621 *et seq.*), 24 A.L.R. Fed. 808 § 2[a] (1975).

94. *Age Discrimination*, EEOC, <https://www.eeoc.gov/age-discrimination> [<https://perma.cc/EPK4-8Q9W>] (last visited Aug. 21, 2024).

being qualified for the job; and (4) the position remained open or was filled by a person outside the protected class.”⁹⁵

Beyond the elements, a court may also consider other factors when determining if age discrimination occurred, including “[an] employer’s continued solicitation of applications from people with qualifications similar to those of [the rejected job applicant], [discriminatory] language used to criticize the [rejected job applicant], disparaging comments about people in the [rejected job applicant’s] protected class, more favorable treatment to others not in the protected group, [and] the circumstances.”⁹⁶

B. Age Discrimination Lawsuits in the Entertainment Industry

Of the several instances of age discrimination in the entertainment industry, there are three infamous lawsuits: *Hoang v. Amazon.com, Inc.*,⁹⁷ *Wynn v. National Broadcasting Co., Inc.*,⁹⁸ and *Alch v. Superior Court*.⁹⁹

1. HUONG HOANG V. AMAZON.COM, INC.

In the entertainment industry, opportunities for age discrimination begin as early as the casting process. One unfortunate example is Huong “Junie” Hoang, an actress who sought to use IMDbPro services to help her career.¹⁰⁰ IMDb is a service used by entertainment industry professionals to market themselves during their career.¹⁰¹ It is considered an essential tool for working actors¹⁰² because the membership tier, IMDbPro, includes tools for these professionals to upload images, demo reels, and videos.¹⁰³ It allows them to share their credits, work

95. *Failure to Hire*, JAMES P. TARQUIN, P.A. EMP. L., <https://www.ocalaemploymentlawyer.com/failure-to-hire/> [<https://perma.cc/34HV-RJUW>] (last visited Aug. 21, 2024).

96. *Taylor v. Local 32E SEIU*, 286 F. Supp. 2d 246, 253 (S.D.N.Y. 2003).

97. *Huong Hoang v. Amazon.com, Inc.*, No. C11-1709MJP, 2013 U.S. Dist. LEXIS 190477, *3 (W.D. Wash. Mar. 18, 2013).

98. *Wynn v. NBC*, 234 F. Supp. 2d 1067, 1074 (C.D. Cal. 2002).

99. *Alch v. Super. Ct.*, 19 Cal. Rptr. 3d 29, 38 (Cal. Ct. App. 2004).

100. Irons, *supra* note 11.

101. *What is IMDbPro?*, IMDB, <https://help.imdb.com/article/imdbpro/your-account/what-is-imdbpro/G26UX3XND4ZD8P53> [<https://perma.cc/85WB-8Q7L>] (last visited Aug. 21, 2024).

102. Aaron Pruner, *Using an IMDb Account: An Actor’s Guide*, BACKSTAGE (July 21, 2022), <https://www.backstage.com/magazine/article/imdb-account-for-actors-guide-75282/> [<https://perma.cc/SW7Z-Y3KD>].

103. *What Is IMDbPro?*, *supra* note 101.

history, and professional network.¹⁰⁴ This service is helpful because it allows actors to research for their next audition and connect with casting directors to identify roles for future projects.¹⁰⁵

When she joined IMDb in 2001, Hoang provided the site with false birthdate information. Although she eventually corrected it in 2007, she portrayed herself as seven years younger than her actual age for six years.¹⁰⁶ When IMDb published her actual birthday, Hoang requested its removal.¹⁰⁷ IMDb refused to do so and Hoang filed suit.¹⁰⁸ She alleged that wrongful use of her IMDbPro account caused her to suffer age discrimination after her age was published online, and she sought to recover her lost acting income.¹⁰⁹ Although her suit was ultimately unsuccessful, it led to the Screen Actors Guild and the American Federation of Television and Radio Artists (SAG-AFTRA) publicly condemning IMDb for publishing the ages and birthdays of actors without their consent.¹¹⁰

2. WYNN V. NATIONAL BROADCASTING CO., INC.

There have been lawsuits for age discrimination against screenwriters as well.¹¹¹ Of those, the biggest case was *Wynn v. National Broadcasting Co., Inc.*¹¹² In *Wynn*, fifty-one individual television writers alleged they were victims of a “pattern or practice” of age discrimination across the industry.¹¹³ They claimed the discrimination was perpetrated by fifty separate entities in the television industry, from talent agencies to broadcasting companies.¹¹⁴

The plaintiffs brought several causes of action involving discrimination under the ADEA.¹¹⁵ They sought to certify two umbrella classes for Plaintiffs, including (1) writers who were denied employment or

104. *Id.*

105. *Pro Tips for Talent*, IMDb, https://help.imdb.com/article/imdbpro/membership-benefits/pro-tips-for-talent/GHQ5W5C2BJ2KWP77?ref=helpsect_pro_2_5# [https://perma.cc/NR2P-PTPU] (last visited Aug. 21, 2024).

106. Irons, *supra* note 11.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *See, e.g., Wynn v. NBC*, 234 F. Supp. 2d 1067 (C.D. Cal. 2002); *Alch v. Super. Ct.*, 19 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004).

112. *See Wynn*, 234 F. Supp. 2d at 1067.

113. *Id.* at 1074.

114. *Id.*

115. *Id.* at 1075–76.

deterred from employment with employer defendants due to ageist hiring practices, and (2) writers who were denied representation and referrals by agency defendants due to ageist practices.¹¹⁶

The causes of action against the employer defendants and agency defendants failed.¹¹⁷ The court found issue with the plaintiffs' theory of joint and several liability in a suit dealing with the "carefully-constructed liability framework of anti-discrimination laws."¹¹⁸ The court rejected the plaintiffs' theory that all parties were responsible for some general perception that was formed by prior acts of alleged discrimination.¹¹⁹ The court instead said that Plaintiffs must plead how a particular Plaintiff was deterred from applying.¹²⁰

3. ALCH V. SUPERIOR COURT

Another example of screenwriter age discrimination is *Alch v. Superior Court*.¹²¹ Before it settled in 2010, *Alch* was a combination of twenty-three class action suits filed by writers in 2002.¹²² And like in *Wynn*, the writers alleged patterns and practices of discrimination.¹²³ Generally, they alleged that employers have employed fewer older writers than would be expected if age discrimination were not present.¹²⁴ For example, they asserted that two out of every three nighttime television series failed to employ a single writer over fifty.¹²⁵ Beyond that, writers over fifty held five percent of the writing positions on comedy series, while thirty-three percent of the WGAW membership was over fifty.¹²⁶ They alleged that these disparities were a result of employers using "word of mouth" hiring practices that preselected young writers, and failing to use defined criteria to evaluate each writer's ability.¹²⁷

116. *Id.* at 1075.

117. *Id.* at 1090.

118. *Id.* at 1096.

119. *Id.* at 1104.

120. *Id.*

121. *Alch v. Super. Ct.*, 19 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004).

122. *Id.* at 38.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

This case settled in 2010 for \$70 million and, at the time, was the largest settlement for age discrimination litigation.¹²⁸

C. Attempts to Remedy the Gaps in ADEA—California: AB 1687

The entertainment industry is particularly susceptible to age discrimination, with many incidents falling through gaps in the ADEA.¹²⁹

The largest gap in the ADEA is its failure to address age discrimination that starts before forty. Female actresses, in particular, are passed over for roles due to their age as early as age thirty.¹³⁰ But actresses who experience age discrimination under those circumstances cannot make out a *prima facie* age discrimination case under the ADEA because they cannot meet the forty year age barrier.¹³¹ As most states have similar age discrimination requirements to the ADEA, these actresses have limited recourse under state law as well.¹³²

There have been attempts to remedy gaps left in the ADEA to prevent age discrimination in the entertainment industry, but none have managed to stick.¹³³ SAG-AFTRA had previously condemned IMDb's publishing of ages because—once casting personnel know an actor's age—the age range they perceive an actor portraying shrinks drastically.¹³⁴ This limits an actor's opportunity to be selected for roles by limiting them to older roles, thus increasing the competition.¹³⁵ SAG-AFTRA supported California's AB 1687, because requiring services like IMDb to take down ages upon request would remove the temptation for employers to engage in age discrimination.¹³⁶

128. Nikki Finke, *Huge \$70M Settlement in TV Writers Age Discrimination Lawsuit: CAA Lone Holdout*, DEADLINE (Jan. 22, 2010, 12:35 PM), <https://deadline.com/2010/01/huge-70m-settlement-in-tv-writers-age-discrimination-lawsuit-23180/> [https://perma.cc/Q562-PRU9].

129. See Irons, *supra* note 11.

130. *Id.*

131. *Id.*

132. *Id.*

133. See *id.*

134. *Id.*

135. See *id.*

136. *Id.*

D. The Court's Response to Remedies—IMDb.com, Inc. v. Becerra**1. PROCEDURAL HISTORY**

California's attempt to remedy the gap in the ADEA ultimately failed. IMDb sued the state of California in federal court to prevent the future enforcement of AB 1687.¹³⁷ IMDb claimed the law violated IMDb's First Amendment right to free speech by requiring it to delete information at the request of actors.¹³⁸

The case went to the United States District Court for Northern District of California, where the district court granted a preliminary injunction prohibiting the enforcement of the statute until the resolution of the case.¹³⁹ SAG-AFTRA intervened to defend AB 1687 alongside the State.¹⁴⁰ An intervenor is a third-party who enters into an existing civil case by filing a motion to intervene, which is granted if they have a significant legal interest vindicated by their participation in the proceedings.¹⁴¹ IMDb moved for summary judgment on the basis that AB 1687 violated the First Amendment.¹⁴² The district court granted it.¹⁴³ Both the state of California and SAG-AFTRA appealed the case to the United States Circuit Court for the Ninth Circuit.¹⁴⁴

2. HISTORY OF THE LAW

AB 1687 imposes two separate—but related—prohibitions. First, it forbids the publication of age-related information on subscriber profiles when the subscriber has requested it not be published.¹⁴⁵ Second, it prohibits a provider from publishing age-related information on any public “companion” websites such as IMDb.com.¹⁴⁶ The State and SAG-AFTRA focused on the first provision, while IMDb contests the second

137. *IMDb.com, Inc. v. Becerra*, 962 F.3d 1111, 1116 (9th Cir. 2020).

138. Dave McNary, *IMDb Sues California to Invalidate Actor-Age Law*, VARIETY (Nov. 10, 2016, 3:45 PM), <https://variety.com/2016/film/news/imdb-sues-california-actor-age-law-1201915252/> [<https://perma.cc/R2UZ-NEMM>].

139. *IMDb.com, Inc.*, 962 F.3d at 1118.

140. *Id.*

141. CORNELL L. SCH., *Intervene*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/intervene> [<https://perma.cc/49WB-TBXS>] (last visited Aug. 21, 2024).

142. *IMDb.com, Inc.*, 962 F.3d at 1119.

143. *Id.*

144. *Id.* at 1116.

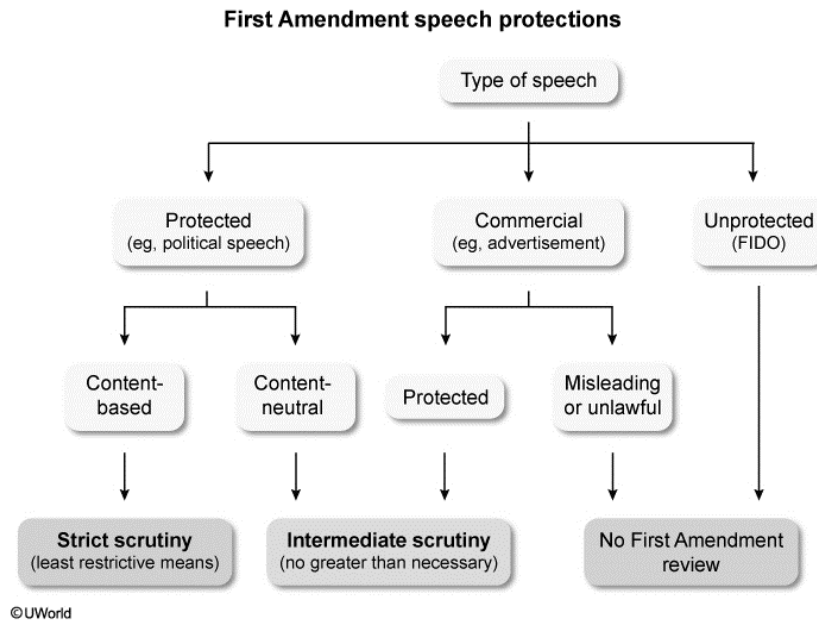
145. *Id.* at 1119.

146. *Id.*

provision.¹⁴⁷ The Ninth Circuit focused its inquiry on the second prohibition, as it was the central issue on appeal.¹⁴⁸

The Ninth Circuit held AB 1687 to be constitutionally defective.¹⁴⁹ First, the court determined that AB 1687 was a content-based restriction on speech, and thus subject to analysis under the protections granted by the First Amendment.¹⁵⁰ Second, the court determined AB 1687 does not fall into any categories that would entitle it to reduced scrutiny.¹⁵¹ Finally, the court determined that AB 1687 does not survive strict scrutiny, and thus is unconstitutional.¹⁵²

FIGURE 1: FIRST AMENDMENT SPEECH PROTECTIONS, UWORLD LEGAL, <https://legal.uworld.com/blog/bar-review/con-law-quick-tip-free-speech-and-its-scope-of-protection/> (last visited Nov. 10, 2024).



147. *Id.*

148. *Id.* at 1119–20.

149. *Id.* at 1128.

150. *Id.* at 1121.

151. *Id.* at 1124–25.

152. *Id.* at 1127.

3. AB 1687 IS A CONTENT-BASED RESTRICTION ON SPEECH

First, the court determined that AB 1687 was a content-based restriction on speech, and thus subject to analysis under the First Amendment.¹⁵³ The First Amendment prohibits laws that “abridg[e] the freedom of speech.”¹⁵⁴ This means, subject to limited exceptions, that the government cannot restrict expression because of its subject matter, content, message, or ideas.¹⁵⁵

Content-based restrictions seek to do just that. A law imposes a content-based restriction on speech if it “target[s] speech based on its communicative content.”¹⁵⁶ Content-based laws are presumptively unconstitutional, but they may be justified if the government proves that the law is (1) narrowly tailored and (2) serves a compelling state interest.¹⁵⁷ In contrast, laws of general applicability have only an incidental effect on speech.¹⁵⁸

A statute seeking to restrict speech is content based if it “by its very terms, singles out particular content for differential treatment.”¹⁵⁹ Here, the court determined that AB 1687 restricted speech because it targeted a particular subset of content.¹⁶⁰ Specifically, it restricted the dissemination of one type of speech: birthdates and age information.¹⁶¹

The State and SAG-AFTRA pushed back on this conclusion. They argued that, instead of regulating a specific type of content, AB 1687 merely regulated the contractual obligations between IMDb’s subscription service (IMDbPro) and its subscribers.¹⁶² However, the appellate court determined that AB 1687 regulated more than just contractual obligations as it restricted the publication of age information submitted by members of the public on IMDb’s non-subscription site (IMDb.com).¹⁶³ Because the court determined that AB 1687 was a content-based restriction, AB 1687 was thus subject to analysis under the First Amendment.¹⁶⁴

153. *Id.* at 1121.

154. U.S. Const. amend. I; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

155. *Reed*, 576 U.S. at 163 (2015).

156. *Id.*

157. *Id.*

158. *IMDb.com, Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020)

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1121.

164. *Id.*

4. UNDER THE FIRST AMENDMENT, SPEECH RESTRICTED BY AB 1687 IS NOT ENTITLED TO REDUCED PROTECTIONS

Second, the court determined that AB 1687 was not entitled to a reduced level of protection under the First Amendment.¹⁶⁵ In the majority of cases, strict scrutiny is applied to determine whether a content-based restriction on speech is valid.¹⁶⁶ However, some categories of speech receive reduced protections.¹⁶⁷ The categories subject to reduced protections are limited and “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.”¹⁶⁸ Under those circumstances, the court defers to the state’s policy judgment, making the law more likely to survive.¹⁶⁹

Having a law fall into one of the reduced protection categories would have arguably made it easier for the State to defend AB 1687.¹⁷⁰ If AB 1687 had not fallen into one of the reduced protection categories, it would be subject to strict scrutiny.¹⁷¹ This would have placed the burden on the State to show that AB 1687 (1) served a compelling government interest, and (2) was narrowly tailored to achieve that interest.¹⁷² In contrast, if AB 1687 had been subject to reduced scrutiny—either intermediate scrutiny or rational-basis review—then the State would not have been required to meet the high strict scrutiny bar, making AB 1687 easier to defend.¹⁷³

The State and SAG-AFTA argued that the speech prohibited by AB 1687 fell into one or more of the categories for reduced scrutiny including: commercial speech, speech facilitating illegal conduct, or speech implicating privacy concerns.¹⁷⁴ But as the court held, speech restricted by AB 1687 does not fall into any of these categories.¹⁷⁵

165. *Id.* at 1124–25.

166. *Id.* at 1121.

167. *Id.* at 1121–22. Reduced protection categories include: 1) commercial speech, 2) illegal speech, and 3) speech implicating private matters.

168. *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992).

169. *See id.* at 383.

170. *See* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT’L AFFS. 72, 72–73 (2019), <https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny> [perma.cc/R7N5-YGVV] (discussing protection categories that lower the level of scrutiny).

171. *See IMDB.com Inc.*, 962 F.3d at 1125.

172. *See* Alicea & Ohlendorf, *supra* note 170, at 72–73 (discussing what is needed to pass strict scrutiny).

173. *See id.*

174. *IMDb.com, Inc.*, 962 F.3d at 1121–22.

175. *Id.* at 1121–24.

To begin, the court determined that age-related content on IMDb's public website (IMDb.com) does not qualify as commercial speech.¹⁷⁶ Commercial speech is speech that merely "propose[s] a commercial transaction."¹⁷⁷ The test for identifying commercial speech is simply whether the speech does, in fact, propose a commercial transaction.¹⁷⁸

However, if the facts present a close question, then the court considers the three *Bolger* factors to determine if the speech proposes commercial transaction.¹⁷⁹ "Where the facts present a close question, 'strong support' that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation."¹⁸⁰

The court did not consider the *Bolger* factors, instead determining that the language in AB 1687 was not a "close question."¹⁸¹ Rather, the court stated that public profiles on IMDb.com did not propose commercial transactions, as they are merely an online database of information.¹⁸²

Additionally, the court stated that, even if AB 1687 was a "close question," it would still not satisfy the *Bolger* factors.¹⁸³ While IMDb definitely has an economic interest in their subscription service (IMDb-Pro), their free companion site's economic interest is less clear.¹⁸⁴ IMDb-Pro's companion site (IMDb.com) arguably has an economic interest in their public profiles through advertising and providing casting directors information to make their decisions.¹⁸⁵ Economic motivation, however, is only one of the *Bolger* factors.¹⁸⁶ Nothing in the record indicated that the IMDb.com profiles satisfied the other *Bolger* factors—it was not

176. *Id.* at 1122.

177. *Id.*

178. *Bd. of Trs. v. Fox*, 492 U.S. 469, 473–74 (1989); *Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011).

179. *IMDb.com, Inc.*, 962 F.3d at 1122. *See generally* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983) (discussing the *Bolger* factors).

180. *IMDb.com, Inc.*, 962 F.3d at 1122 (citing *Hunt*, 638 F.3d at 715).

181. *Id.*

182. *Id.*

183. *Id.*

184. *See The IMDb Business Model Explained*, WORK THEATER (May 2, 2023), <https://worktheater.com/the-imdb-business-model-explained/> [https://perma.cc/4P GN-T2PG].

185. *Id.*

186. *IMDb.com, Inc.*, 962 F.3d at 1121–22.

an advertisement and did not refer to a particular product.¹⁸⁷ As used by the sites, age information is encyclopedic, not transactional.¹⁸⁸

Next, the court determined that the speech AB 1687 sought to prevent was not speech that facilitated illegal conduct.¹⁸⁹ SAG-AFTRA argued that the speech fit into this category by analogizing to *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.¹⁹⁰ There, the Supreme Court examined an ordinance forbidding the dissemination of advertisements that “indicate[d] any discrimination because of sex.”¹⁹¹ In that case, the Supreme Court upheld the ordinance as constitutional.¹⁹² The ordinance was constitutional because the advertisement’s “First Amendment interest” was absent due to the commercial activity itself, which indicated a preference for a specific sex—an action that is illegal.¹⁹³

The appellate court, however, determined that the *Pittsburgh Press* rationale did not apply to AB 1687, which presented an altogether different scenario.¹⁹⁴ The appellate court said that *Pittsburgh Press* only implicated instances when the State restricted speech proposing illegal transactions, and declined to expand it beyond that scope.¹⁹⁵ Instead, the court held that there was nothing illegal about the truthful publication of lawfully-obtained age and birthdate information.¹⁹⁶

Finally, the court determined that the speech AB 1687 sought to prevent was not entitled to reduced First Amendment protections based on privacy concerns.¹⁹⁷ The State and SAG-AFTRA argued that the law only restricts speech of a “purely private concern.”¹⁹⁸ The courts have recognized some limited categories of speech where reduced protections apply.¹⁹⁹ In those cases, the courts recognize that an

187. *Id.*

188. *Id.*

189. *Id.* at 1122–23

190. *Id.* at 1122.

191. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 378 (1973); *IMDb.com, Inc.*, 962 F.3d at 1123.

192. *Pittsburgh Press Co.*, 413 U.S. at 380.

193. *Id.*

194. *IMDb.com, Inc.*, 962 F.3d at 1122–23.

195. *Id.*

196. *Id.*

197. *Id.* at 1123–24.

198. *Id.*

199. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011); *IMDb.com, Inc.*, 962 F.3d at 1123.

individual's right to privacy and another individual's First Amendment rights can be at odds.²⁰⁰

However, the Supreme Court has not granted reduced protection to content-based restrictions on public speech that concern private issues.²⁰¹ As the appellate court noted, offering privacy concerns reduced protections would create a new, broad category of speech with reduced protection.²⁰² If the State or SAG-AFTRA could show that privacy concerns were "part of a long . . . tradition of proscription" then the court would consider reduced protections.²⁰³ However, the State and SAG-AFTRA did not offer any such evidence, which is unsurprising considering the fact that data is a product of the modern age.²⁰⁴ As such, the court did not grant reduced protections to the speech AB 1687 sought to prohibit.²⁰⁵

The State and SAG-AFTRA also argued that AB 1687 was similar to state and federal statutes that "regulate data collection and disclosure" without First Amendment scrutiny.²⁰⁶ These statutes all regulate the misuse of information that an entity obtained from individuals through some exchange.²⁰⁷ For example, 47 U.S.C. § 551 protects cable subscribers who have entered into an agreement with a cable operator.²⁰⁸ It provides that cable operators "shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber."²⁰⁹ However, the Ninth Circuit dismissed this argument as AB 1687, as drafted, prohibited the publication of age information without regard to the manner in which it was obtained.²¹⁰

5. AB 1687 IS UNCONSTITUTIONAL UNDER STRICT SCRUTINY

As the speech AB 1687 restricted did not fall into a category subject to reduced protections, the appellate court applied strict scrutiny to determine AB 1687's validity.²¹¹ As shown above, applying strict

200. *IMDb.com, Inc.*, 962 F.3d at 1124.

201. *Id.* at 1123.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 1125.

206. *Id.* at 1124.

207. *Id.*

208. 47 U.S.C. § 551.

209. *Id.* § 551(c)(1).

210. *IMDb.com, Inc.*, 962 F.3d at 1124.

211. *Id.* at 1125.

scrutiny to the State's legislative rationale creates a high burden for justifying it.²¹² After reviewing AB 1687 under strict scrutiny, the court found that it was unconstitutional and violated the First Amendment.²¹³

Strict scrutiny is the highest standard of review and requires the government to prove that the statute "furthers a compelling governmental interest and is narrowly tailored to that end."²¹⁴ The appellate court found that AB 1687 served a compelling government interest by reducing incidents of age discrimination, and the issue laid with the second requirement—that the law be narrowly tailored.²¹⁵

The court determined that AB 1687 was not narrowly tailored to serve the compelling interest of reducing age discrimination.²¹⁶ When determining if a law is narrowly tailored, courts look to (1) whether a less restrictive alternative would serve the compelling government interest, and (2) if the statute is underinclusive or overinclusive in scope.²¹⁷

E. Least Restrictive

First, the court was not persuaded that AB 1687 used the least restrictive means to reduce age discrimination within the entertainment industry. Simply put, the State did not present evidence to show it had explored, or even considered, a less restrictive way to combat age discrimination in the entertainment industry before drafting AB 1687.²¹⁸ The court found that remedies for age discrimination that did not restrict speech exist.²¹⁹

Neither the State nor SAG-AFTRA disputed the existence of these laws, and they offered little argument to show their insufficiency.²²⁰ While they pointed to AB 1687's legislative history to demonstrate that current laws failed to do enough, the court did not find this persuasive.²²¹

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* (citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018)).

218. *IMDb.com, Inc.*, 962 F.3d at 1125.

219. *Id.*

220. *Id.*

221. *Id.*

The legislative history consisted largely of one anecdotal account of discrimination [within the entertainment industry].²²² The legislative history pointed to an article from *The Guardian* in 2015 where an Academy Award nominated actress said a casting director rejected her for a role due to age.²²³ The court reasoned that this evidence was “murky” since the article never addressed if the actress attempted to avail herself of any remedy.²²⁴ The court questioned the fact that the legislative history never addressed whether the actress from that account pursued any other remedy.²²⁵

The legislative history of AB 1687 also included discrimination statistics from the U.S. Equal Employment Opportunity Commission (EEOC).²²⁶ The EEOC enforces federal laws that make it illegal to discriminate against employees and job applicants on the basis of “race, color, religion, sex (including pregnancy and related conditions, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.”²²⁷ While these statistics show that age discrimination claims increased by thirty-eight percent from 2006 to 2013, the court determined that these statistics were too generalized and not industry-specific.²²⁸

Because the State did not offer entertainment industry-specific statistics, the court found that the State did not show the entertainment industry had a higher rate of age discrimination than those industries that are unaffected by age information from IMDb’s sites.²²⁹ The court pointed to other laws that achieved the government interest of reducing age discrimination without restricting speech, including the California Fair Employment & Housing Act.²³⁰ This law makes it unlawful for any employer to discriminate in hiring.²³¹ The court determined the Fair Employment & Housing Act was the least restrictive means to address age discrimination because it did not “resort[] to the drastic step of

222. *Id.*

223. *Id.* at 1117.

224. *Id.* at 1125–26.

225. *Id.*

226. *Id.* at 1126.

227. *Overview*, EEOC, <https://www.eeoc.gov/overview> [<https://perma.cc/T9FT-SAXQ>] (last visited Aug. 21, 2024).

228. *IMDb.com, Inc.*, 962 F.3d at 1126.

229. *Id.*

230. California Fair Employment & Housing Act, CAL. GOV’T CODE §§ 12900–12996 (West 1980); *IMDb.com, Inc.*, 962 F.3d at 1125.

231. California Fair Employment & Housing Act, CAL. GOV’T CODE § 12940 (2023).

restricting speech.”²³² This contrasts sharply with AB 1687, which restricts speech by not allowing IMDb.com to publish age information.²³³

F. Underinclusive/Overinclusive

Second, the court found that AB 1687 was not narrowly tailored because it is underinclusive.²³⁴ “[A] state fails to narrowly tailor a speech-restrictive law where it eliminates one form of speech ‘while at the same time allowing unlimited numbers of other types . . . that create the same problem.’”²³⁵ In other words, a law is underinclusive when it regulates too little speech to actually accomplish the compelling government interest.²³⁶ Here, AB 1687 restricts IMDb.com and websites like it, but fails to restrict every other avenue through which age information could be disseminated.²³⁷ The court said this was a serious concern, because “AB 1687 appears designed to reach *only* IMDb.”²³⁸ Underinclusive laws like AB 1687 create constitutional issues because they provoke doubts about “whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”²³⁹ But when one company is clearly dominant, it can be difficult to pursue a particular interest without inadvertently disfavoring a particular speaker.²⁴⁰

The State argued that AB 1687’s limitation on speech was justified and not underinclusive because IMDb is the primary source of age information for casting directors.²⁴¹ As of 2015, IMDbPro’s database had over six million users, including filmmakers, actors, and journalists.²⁴² IMDbPro’s own site even claims that “[t]ens of thousands of industry decision makers . . . use IMDbPro every day.”²⁴³ However, IMDbPro

232. *IMDb.com, Inc.*, 962 F.3d at 1125.

233. *Id.* at 1117–18.

234. *Id.* at 1126.

235. *IMDb.com, Inc.*, 962 F.3d at 1126 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015)).

236. Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After Williams-Yulee*, 48 ARIZ. ST. L.J. 525, 528 (2016).

237. *IMDb.com, Inc.*, 962 F.3d at 1126.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *An*, *supra* note 22.

243. *Pro Tips for Talent*, *supra* note 105.

has several competitors, including: CastCaller, Mandy, Actors Access, Casting Frontier, L.A. Casting, and Casting Networks.²⁴⁴

The court dismissed this argument as irrelevant.²⁴⁵ It stressed that “we have never conditioned our strict scrutiny analysis on whether others outside the scope of the statute are currently engaging in the same speech.”²⁴⁶ For example, in *The Florida Star v. B. J. F.*, a statute was underinclusive when it restricted newspapers from disseminating certain information, but failed to restrict a hypothetical individual from maliciously disseminating the same information.²⁴⁷

The court found the argument that IMDbPro is the primary source of age information was irrelevant, because “[a] ban on disclosures effected by ‘instrument[s] of mass communication’ simply cannot be defended on the ground that partial prohibitions may effect partial relief.”²⁴⁸ Even if IMDb were the primary source, AB 1687 leaves the opportunity open for others to disseminate the same age information.²⁴⁹ A selective ban—a ban primarily on IMDb—does not satisfactorily accomplish the purpose of reducing age discrimination.²⁵⁰

Beyond that, the court also reasoned the statute was underinclusive because it limited its restrictions to IMDbPro subscribers and people who request that IMDb remove their information from the website.²⁵¹ The State and SAG-AFTRA claimed that this feature demonstrated AB 1687’s narrow tailoring.²⁵² However, the court considered this feature to be an issue because it meant that AB 1687 would not extend protection to everyone in the entertainment industry, only subscribers and those who opt-in.²⁵³ Given that AB 1687 failed to reach several potential sources that could disseminate age information and only protected industry professionals who subscribe to a service or opt-in, it was not narrowly tailored and thus unconstitutional.²⁵⁴

244. Javed, *supra* note 79.

245. *IMDb.com, Inc.*, 962 F.3d at 1127.

246. *Id.* at 1126.

247. *Fla. Star v. B. J. F.*, 491 U.S. 524, 540 (1989).

248. *IMDb.com, Inc.*, 962 F.3d at 1127.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

IV. Recommendation

Due to the unique nature of the hiring process within the entertainment industry, older workers in the industry are particularly susceptible to age discrimination.²⁵⁵ Older members of the entertainment industry often fall through the gaps in the ADEA.²⁵⁶ However, it is clear that, given the several case examples of age discrimination, there is no ‘one size fits all approach’ that can be taken to completely eradicate age discrimination in the entertainment industry.²⁵⁷ Reducing age discrimination in the entertainment industry is a complicated task that will likely only work with the combination of several efforts.

A. Law Similar to AB 1687, Minding First Amendment Challenges

To begin, one possibility is for legislatures to look at drafting laws similar to AB 1687 while keeping the potential First Amendment challenges in mind. Given the result of *IMDb.com, Inc. v. Becerra*, it is clear that any attempt to pass a statute restricting subscriber-based entertainment industry hiring service would be met with First Amendment challenges.²⁵⁸ One option—drafting the law to take advantage of reduced protections—would likely be unsuccessful. Instead, a law of general applicability should be drafted.

An option to successfully draft a law similar to AB 1687 would be to draft it so that the speech it restricts fits within one of the categories subject to reduced protections—commercial speech or speech facilitating illegal conduct. However, given the Ninth Circuit’s unwillingness to include online databases of information like IMDb into speech that proposes commercial transaction, it is unlikely that any similar law regulating subscription hiring sites will qualify as commercial speech.²⁵⁹ The Ninth Circuit was also unpersuaded that disseminating lawfully-obtained age information could constitute illegal conduct, rendering speech facilitating illegal conduct an unlikely route.²⁶⁰ Any attempt at drafting a law that takes advantage of the reduced protections would

255. Irons, *supra* note 11.

256. See *Wynn v. NBC, Inc.*, 234 F. Supp. 2d 1067, 1074 (C.D. Cal. 2002) (citing age discrimination by plaintiffs); Irons, *supra* note 11.

257. See *Huong Hoang v. Amazon.com, Inc.*, No. C11-1709MJP, 2013 U.S. Dist. LEXIS 190477 (W.D. Wash. Mar. 18, 2013); *Wynn v. NBC, Inc.*, 234 F. Supp. 2d 1067 (C.D. Cal. 2002); *Alch v. Super. Ct.*, 19 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004).

258. See *IMDb.com, Inc.*, 962 F.3d at 1125–26 (9th Cir. 2020).

259. *Id.* at 1122.

260. *Id.* at 1123.

likely be difficult to navigate, and at risk of meeting the same fate as AB 1687.

The best option would be to pass a law of general applicability that would bar all hiring sites from using age in their application process. Laws of general applicability have an incidental effect on speech and, as such, are “immune from the strictures of the First Amendment.”²⁶¹ The Ninth Circuit was unpersuaded that AB 1687 was a law of general applicability because it did not merely regulate contractual obligations; instead, it regulated specific content.²⁶² Moreover, the Ninth Circuit was concerned that AB 1687 seemed to only regulate IMDb.²⁶³ If a law only regulated the dissemination of subscriber age information on all subscription-based hiring and networking platforms, then it would likely qualify as a law of general applicability.²⁶⁴ However, this would only address part of the issue as it would only affect subscription-based services, leaving free companion sites open to display age information.

B. Law Regulating Data Collection and Disclosure

Another potential solution would be to pass a law similar that regulates the data collection and disclosure—similar to 47 U.S.C. § 551. Laws regulating the collection and disclosure of data typically do not implicate the First Amendment.²⁶⁵ While the State and SAG-AFTRA argued that AB 1687 was a law regulating data collection and disclosure, the Ninth Circuit did not find this persuasive because AB 1687 did not prohibit publication of information based on the manner it was obtained.²⁶⁶

A law that regulates the data collection and disclosure of personal and age information between subscribers and subscription-based hiring and networking services would be a good solution. This law would be modelled from regulation laws like 47 U.S.C. § 551 and prohibit the publication of age information (without consent) based on the manner in which it was obtained—through subscribers signing up for services. A law drafted in this manner would be more likely to survive First

261. *Id.* at 1120.

262. *Id.* at 1120.

263. *Id.* at 1126.

264. *See id.* at 1120.

265. *Id.* at 1124.

266. *Id.*

Amendment challenges.²⁶⁷ This law would be more effective than a law of general applicability because it would be able to regulate the publication of age information on not only subscription sites like IMDbPro and CastCaller, but also on companion sites like IMDb.com that may publish information obtained through subscription sites.

C. Broadening the Scope of ADEA

Given the First Amendment challenges to AB 1687, there is a possibility that similar laws will face the same treatment. Another way to reduce the impact of age discrimination in the entertainment industry would be to broaden the scope of the ADEA.

In the entertainment industry, it is clear that individuals experience age discrimination much earlier than people in other industries.²⁶⁸ The ADEA's restrictions protect only those over forty-years-old.²⁶⁹ One possible solution to at least mitigate some of the age discrimination in the industry would be to lower the age at which older employees can be protected under the ADEA. Women in the entertainment industry experience age discrimination as early as thirty, with no recourse under the ADEA.²⁷⁰

D. Incentives Within the Industry to Promote

Lastly, states could try to offer incentives for the entertainment industry to showcase diverse talent. However, it is unlikely that this will be successful. Based on box office revenue alone, there are already incentives for studios to uplift diverse talent and stories.²⁷¹ UCLA's Center for Scholars & Storytellers found that movies that are not authentically inclusive and have a low diversity score underperform at the box office compared to those with high diversity scores.²⁷² Specifically, big-budget films without diverse casts lost up to \$32 million on opening

267. *See id.*

268. *See* Irons, *supra* note 11.

269. *Age Discrimination*, *supra* note 94.

270. *See* Irons, *supra* note 11.

271. *See* LEE LAZAR, GERALD D. HIGGINBOTHAM, JENNA SIGNORELLI, CHRISTY WANG, JAMIE AZAR, YALDA T. UHLS, DRIVING BOX OFFICE PERFORMANCE THROUGH AUTHENTICALLY INCLUSIVE STORYTELLING 10 UCLA CTR. FOR SCHOLARS & STORYTELLERS, https://www.fullstoryinitiative.com/Full_Story_Research.pdf [https://perma.cc/CXR3-RSHZ].

272. *Id.*

weekend.²⁷³ Given that age discrimination is still rampant in the entertainment industry,²⁷⁴ even though there are existing monetary incentives to showcase diverse talent,²⁷⁵ it is unlikely that further incentives will help.

V. Conclusion

The best method to protect older individuals in the entertainment industry would be either (1) a general applicability law, (2) data regulation and protection, or (3) broadening the ADEA. A law of general applicability barring all hiring sites from using age in their application process would protect individuals using subscription-based hiring sites; however, it would not protect them from companion sites. A law regulating data collection and disclosure of age information between subscribers, subscription-based hiring, and networking services would be a better solution. Unlike a law of general applicability, this law would protect individuals on both subscription and companion sites. Lastly, broadening the ADEA to begin protecting individuals before age forty would provide some recourse for individuals who suffer age discrimination and are not protected under the current framework.

273. *Id.*

274. *See, e.g.,* Irons, *supra* note 11; Blair, *supra* note 29.

275. LAZAR ET AL., *supra* note 271, at 10.