

1 DAVID GREENE (SBN 160107)  
davidg@eff.org  
2 ELECTRONIC FRONTIER FOUNDATION  
815 Eddy Street  
3 San Francisco, CA 94109  
Telephone: (415) 436-9333  
4 Facsimile: (415) 436-9993

5 Attorney for *Amici Curiae*  
Electronic Frontier Foundation,  
6 The First Amendment Coalition, The Media  
Law Resource Center, The Wikimedia  
7 Foundation, and The Center For Democracy &  
Technology

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 IMDB.COM, INC., a Delaware Corporation

12 Plaintiff,

13 vs.

14 KAMALA HARRIS, in her official capacity as  
15 Attorney General of the State of California

16 Defendant.

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

**AMICUS CURIAE BRIEF OF  
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'S MOTION FOR  
PRELIMINARY INJUNCTION**

Judge: Hon. Vince Chhabria  
Crtm: 4, 17<sup>th</sup> Floor  
Time: February 16, 2017 at 10:00 a.m.

**TABLE OF CONTENTS**

1

2 INTRODUCTION ..... 1

3 ARGUMENT ..... 1

4 I. PUBLISHERS HAVE A NEAR ABSOLUTE RIGHT TO PUBLISH TRUTHFUL

5 INFORMATION ABOUT MATTERS OF PUBLIC INTEREST DESPITE

6 COMPELLING PUBLIC INTERESTS IN CONFIDENTIALITY ..... 1

7 II. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECEIVE

8 INFORMATION ..... 3

9 INTERESTS OF *AMICI CURIAE* ..... 4

10 CONCLUSION ..... 6

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**TABLE OF AUTHORITIES**

**Cases**

*ACLU v. Alvarez*,  
679 F.3d 583 (7th Cir. 2012) ..... 3

*Bartnicki v. Vopper*,  
532 U.S. 514 (2001)..... 1, 2

*Bd. of Educ. v. Pico*,  
457 U.S. 853 (1982)..... 3

*Conant v. Walters*,  
309 F.3d 629 (9th Cir. 2002) ..... 4

*Cox Broadcasting Corp. v. Cohn*,  
420 U.S. 469 (1975)..... 2, 3

*Lamont v. Postmaster Gen’l*,  
381 U.S. 301 (1965)..... 4

*Landmark Communications, Inc. v. Virginia*,  
435 U.S. 829 (1978)..... 2

*Martin v. City of Struthers*,  
319 U.S. 141 (1943)..... 4

*Oklahoma Pub. Co. v. Dist. Court*,  
430 U.S. 308 (1977)..... 2

*Richmond Newspapers v. Virginia*,  
448 U.S. 555 (1980) (plurality)..... 3

*Smith v. Daily Mail Publishing Co.*,  
443 U.S. 97 (1979)..... 1, 2

*Sorrell v. IMS Health Inc.*,  
564 U.S. 552 (2011)..... 2

*Stanley v. Georgia*,  
394 U.S. 557 (1969)..... 4

*The Florida Star v. B.J.F.*,  
491 U.S. 524 (1989)..... 2

*Virginia Pharmacy Bd. v. Virginia Consumer Council*,  
425 U.S. 748 (1976)..... 4

**Other Authorities**

9 Writings of James Madison 103 (G. Hunt ed. 1910) ..... 3

**Constitutional Provisions**

U.S. Constitution, amendment I..... 1, 2, 3, 4

## INTRODUCTION

1  
2 That one has a near absolute right to publish truthful information that pertains to a matter  
3 of public interest is a fundamental First Amendment value. *See Smith v. Daily Mail Publishing*  
4 *Co.*, 443 U.S. 97, 103 (1979). That right, like other First Amendment rights, is not diminished  
5 simply because others may use that truthful information for improper purposes such as age  
6 discrimination.

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

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

19 *Amici* thus urge this Court to grant plaintiff's motion for preliminary injunction.

## ARGUMENT

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

20  
21  
22  
23 The First Amendment guarantees that persons have a near absolute right to publish  
24 truthful information about matters of public interest that they lawfully acquire. *See Smith v. Daily*  
25 *Mail Publishing Co.*, 443 U.S. 97, 103 (1979). The protection is so strong and essential to our  
26 democratic society that it applies even when the publisher knows that its source obtained the  
27 information illegally. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

28 The *Daily Mail* rule has been applied to a wide variety of information in which, as is

1 asserted by the Legislature here, there were significant privacy interests. In *Daily Mail* itself, the  
2 Court protected the publication of the name of a juvenile defendant despite the fact that state law  
3 deemed such information confidential. 443 U.S. at 104. *See also Oklahoma Pub. Co. v. Dist.*  
4 *Court*, 430 U.S. 308, 311–12 (1977) (same). The *Daily Mail* rule has similarly protected the  
5 publication of other information deemed confidential by law, including information regarding  
6 judicial disciplinary proceedings, *see Landmark Communications, Inc. v. Virginia*, 435 U.S. 829,  
7 839 (1978), and the name of a sexual assault victim. *See The Florida Star v. B.J.F.*, 491 U.S.  
8 524, 537–38 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

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

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

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

24 At the very least, the First and Fourteenth Amendments will not allow exposing  
25 the press to liability for truthfully publishing information released to the public in  
26 official court records. If there are privacy interests to be protected in judicial  
27 proceedings, the States must respond by means which avoid public documentation  
28 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.

1 *Id.*

2 That age information may be readily derived from official vital records thus strengthens  
3 an already potent First Amendment right.

4 **II. THE FIRST AMENDMENT PROTECTS THE RIGHT TO RECEIVE**  
5 **INFORMATION**

6 The First Amendment also protects the right to receive information, which is often a  
7 necessary predicate to meaningful exercise of the rights to speak about matters of public concern,  
8 to petition government for redress of grievances, and to participate in democratic self-  
9 government. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality) (protecting the right to  
10 gather information in libraries, because “the right to receive ideas is a necessary predicate to the  
11 recipient’s meaningful exercise of his own rights of speech, press, and political freedom”). In the  
12 words of James Madison, who wrote much of the U.S. Constitution before serving as the fourth  
13 U.S. President:

14 A popular Government, without popular information, or the means of acquiring it,  
15 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.

16 9 Writings of James Madison 103 (G. Hunt ed. 1910), quoted in *Pico*, 457 U.S. at 867.

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

23 In this case, the denial of the age information barred by this statute hinders the public’s  
24 ability to engage in the very important debates the statute aims to address regarding age  
25 discrimination in the movie industry. Members of the public who wish to participate in this  
26 debate, scrutinize the positions taken by advocates on each side, and form opinions about both  
27 the industry’s practices and their government’s response to it, are not be able to do so if they are  
28

1 denied access to the best proof of the problem.

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

#### 16 INTERESTS OF AMICI CURIAE

17 EFF is a non-profit civil liberties organization that has worked for more than 25 years to  
18 protect consumer interests, innovation, and free expression in the digital world. EFF and its more  
19 than 33,000 active members have a strong interest in free speech online and in helping the courts  
20 and policy-makers develop technology policy that serves the public interest. As part of its  
21 mission, EFF has often served as *amicus* in cases involving online speech, including  
22 *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Kinney v. Barnes*, 443 S.W.3d 87  
23 (Tex. 2014); and *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015).

24 The First Amendment Coalition (FAC) is a nonprofit public interest organization  
25 (incorporated under California’s non-profit law and tax exempt under 501(c)(3) of the Internal  
26 Revenue Code) that is dedicated to advancing freedom of expression and the dissemination and  
27 receipt of truthful information, to resisting censorship of all kinds, and to promoting the  
28

1 “people’s right to know” about their government so that they may hold it accountable.

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

11 The Wikimedia Foundation is a non-profit organization based in San Francisco,  
12 California, which operates twelve free-knowledge projects on the Internet, including Wikipedia.  
13 Wikimedia’s mission is to develop and maintain educational content created by volunteer  
14 contributors, and to provide this content to people around the world free of charge. Since it's  
15 creation, users have created over 40 million articles on Wikipedia. The Wikimedia Foundation  
16 has a strong interest in ensuring that people can speak freely and receive information online.

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

25  
26 ///

27 ///

28 ///



**CONCLUSION**

For the above-stated reasons, *amici* urge this Court to grant plaintiff’s motion for a preliminary injunction.

DATED: January 12, 2017

Respectfully submitted,

By:  /s/ David Greene

David Greene  
ELECTRONIC FRONTIER FOUNDATION  
815 Eddy Street  
San Francisco, CA 94109  
Telephone: (415) 436-9333  
Facsimile: (415) 436-9993

*Attorney for Amici Curiae*  
Electronic Frontier Foundation, The First  
Amendment Coalition, The Media Law Resource  
Center, The Wikimedia Foundation, and The  
Center For Democracy & Technology