No B304022

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 5

TWENTIETH CENTURY FOX FILM CORPORATION, FOX 21, INC.,
Plaintiffs-Respondents,
vs.
NETFLIX, INC.,
Defendant-Appellant.

On Appeal from Los Angeles County Superior Court
Hon. Marc D. Gross, Case No. SC126423

AMICUS CURIAE BRIEF OF SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS IN SUPPORT OF NEITHER PARTY

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APPLICATION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF NEITHER PARTY

Pursuant to Rule 8.200(c)(1) of the California Rules of Court, Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") respectfully requests permission to file an *amicus curiae* brief in support of neither party.[1]

1. The Nature of Applicant's Interest

Applicant is the nation's largest labor union that represents working media and entertainment artists, including actors in the theatrical and television motion picture industry. More than 82,000 of its 160,000 members reside and work in California and rely on the critical protections for workers provided by the state's laws. As the collective bargaining representative for the on-screen talent whose work is produced and distributed by, among others, the parties to this litigation, and who sign personal services contracts with restrictive covenants similar to those at issue herein, SAG-AFTRA has a distinct interest and viewpoint relating to the outcome of this case.

Since the early days of the film and, later, the television industries, production companies have sought to control actors by binding them to onerous contracts that hold them off the market and restrict their ability to pursue their profession. Actors were bound to a single studio with no career freedom or mobility until court holdings in the 1940s helped create a freelance film industry where actors had some freedom of contract and, consequently, more opportunity because they could finally work with multiple production companies. As the television industry developed and grew, new forms of restrictive covenants in the form of far-reaching

[1] The brief of *amicus curiae* is submitted herewith, pending action on the request that the Court permit its filing.

exclusivity clauses and unilateral options for subsequent seasons exercisable only by the employing television studio ("O&E Restrictive Covenants") allowed employing producers once again to restrain actors' mobility.

New production paradigms arose when pay cable (such as HBO and Showtime) networks and streaming platforms began producing their own content: seasons shrank, reducing the number of episodes for which actors are paid; the unpaid hiatus period between seasons expanded; and production schedules became irregular and unpredictable, making coordination with film schedules during hiatuses more difficult, all having a collective effect of significantly reducing actors' earnings and earning opportunities. But O&E Restrictive Covenants did not evolve as the industry did. Instead, they became increasingly oppressive, keeping actors off the market and unable to work at their chosen profession, sometimes for years at a time, often stalling mobility at a time when their careers are just taking off.

Of critical importance to Applicant, the Superior Court's interpretation of Business and Professions Code section 16600 ("Section 16600") threatens to exacerbate this already unlawfully restrictive practice. The Lower Court was faced with assessing restrictive covenants in the contracts of experienced, highly-compensated, high-ranking executives with bargaining power commensurate to their roles. However, the consequences of this Court's interpretation will not be so narrow. The actors represented by Applicant, and countless other rank-and-file workers and freelancers who lack bargaining power, will be impacted by the outcome of this case.

2. Points to Be Argued in the Brief

The Applicant's brief will provide additional background and argument on the necessity of an expansive interpretation of Section 16600's protections for workers, particularly as to its importance for non-executive employees, including television actors. It also will provide additional background and argument regarding Section 16600, generally, and why the Lower Court's interpretation is inconsistent with prior case law interpreting it. Specifically, the brief will address the following issues:

(i) Production studios have a long history of using onerous contract terms and restrictive covenants, such as O&E Restrictive Covenants, that have increasingly restricted career mobility and prevented actors from pursuing their craft. These practices hold actors off the market, without compensation, for months to years (and this time span is ever increasing) and are particularly harmful to women and actors of color whose career opportunities are already limited.

(ii) California public policy favors employee mobility and the legislature has enshrined this principle in Section 16600. The Lower Court's holding cannot be squared with the plain language or intent of Section 16600 nor with the Supreme Court's past precedent interpreting it.

(iii) The employment cases relied upon by the Lower Court involved employees with a fiduciary duty to their employer who committed independently wrongful acts. Contrary to the holding below, they do not endorse a "while-employed" exception to Section 16600. Even if such an exception was to be implied, it should be limited to those classes of employees who have a heightened duty of loyalty to their employer.

(iv) Respondents and the Lower Court both rely on cases involving business-to-business transactions to justify an exception to Section 16600 to restrict employee mobility. These cases are not analogous.

They involve different interests, and should not be used to restrain workers from engaging in their chosen profession.

(v) Even if some "while-employed" restraints are permissible, this Court should clarify that they do not apply during unpaid periods, such as an employer-dictated production hiatus.

(vi) Section 16600 is just one part of an integrated statutory scheme that evidences California's intent to favor employee mobility over the employer's interests.

3. Request

Applicant is familiar with the questions involved in this case and the scope of their presentation and believes there is a necessity for additional argument on the points specified above. Accordingly, Applicant respectfully requests the Court's permission to file the accompanying brief.

Dated: January 7, 2021

Respectfully submitted,

/s/ Duncan W. Crabtree-Ireland

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

George Clooney. Tom Hanks. Michelle Williams. Melissa McCarthy. Even the late Robin Williams. Why are some of Hollywood's biggest stars relevant to a fight between two entertainment megaliths relating to the hiring of two corporate vice presidents? Because the lower court's decision in this case has potential significance far beyond the executive suite. Long before these critically and internationally acclaimed actors became film stars, they got their start on television. And long before these actors found fame, the California Legislature recognized that all workers, including actors, should be free to seek and obtain new employment.

As written, the Superior Court's opinion threatens to embolden a restrictive entertainment industry practice—the inclusion of restrictive covenants of indefinite and uncertain duration in television actors' contracts—that, with industry changes, has steadily moved into unlawful territory. These adhesive option and exclusivity provisions ("O&E Restrictive Covenants") hold actors off the market for increasingly long periods, restraining them from engaging in their trade and preventing them from establishing a market for their services. The lower court's interpretation and application of California Business and Professions Code section 16600 ("Section 16600") risks further exacerbating this practice. Had the cast of *E.R.* or *The Gilmore Girls* been working in today's entertainment industry, with these O&E Restrictive Covenants, the careers of George Clooney and Melissa McCarthy may have started and ended with those shows, with no opportunity to expand and extend those careers, much less become the film stars they are today.

Cases interpreting Section 16600 typically focus on highly compensated full time executives with fiduciary duties to their employers —executives who can afford years of litigation and are a far cry from the

average worker in the highly-competitive entertainment industry. Yet the outcomes of those cases, and this one, nevertheless impact the average worker—the vulnerable group the Legislature was seeking to protect when it first enacted Section 16600. Even cases ruling against the original employer often indirectly endorse and exacerbate oppressive employment practices by unnecessarily narrowing Section 16600's scope. These decisions are crafted only with the circumstances of elite executives in mind without ever hearing from the workers adversely impacted by them.

Amicus curiae Screen Actors Guild - American Federation of Television and Radio Artists ("SAG-AFTRA") does not write in support of either party. However, this brief illustrates both the harm to its membership of an overly-broad holding and the untenable nature of Respondent's position for the average California actor and other workers, particularly the ever-increasing number of freelance workers, who lack the stability of a traditional workweek and regular salary common to executives.

II. SUMMARY OF ARGUMENT

Section 16600 provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Yet as Fox points out, there is a line of cases where courts appear to have upheld contracts restraining persons from engaging in their profession.

Respondents, and the lower court, explain the disconnect by implying into Section 16600 an exception for restraints imposed on persons "while employed." As explained herein, that rationale does not square with the legislative history or broader California public policy. A better explanation, and one that is borne out in both case law and legislative history, is that there is a distinction between employer-imposed contractual restraints that **(1)** preclude employees from *violating an independent legal*

obligation (*e.g.*, a duty of loyalty) not to work for a competitor while still employed, and **(2)** restraints that bar employees from working for a competitor while still employed despite the *absence of a duty of loyalty*. The former is outside the scope of Section 16600 (and therefore lawful); the latter is squarely within its bounds (and therefore unlawful). In addition, there is a difference between a restriction on **(1)** a person who is employed and paid full time and **(2)** a person who, while technically employed, is not working or being paid due to decisions of their employer.

Current case law does not adequately parse the applicability of Section 16600 in these different circumstances because in prior cases, the employees were engaged in *blatant* violations of their fiduciary duty of loyalty. However, these cases should not be read to apply to California workers who do not owe fiduciary duties to their employers. Indeed, the broad language in the published decisions has inadvertently led to some producers exploiting television-series actors in precisely the manner that Section 16600 prohibits. Unlike the parties to this case, these actors lack the resources and fear the repercussions of suing to enforce their rights under Section 16600.

This case, however, presents the Court with an opportunity to clarify these distinctions and ensure the case law does not undermine the statute. Courts can and must enforce California's strong interest in employee mobility by holding that Section 16600 leaves no room for implied exceptions for restraints imposed by employers, including during the term of employment. At the same time, and without having to write in an implied exception to otherwise clear legislation, this court should clarify that Section 16600 does not alter the duty of loyalty that high-level executives with independent fiduciary duties may have.

The Lower Court Decision, if the rationale is left unaltered, harms SAG-AFTRA's members, particularly women and performers of color, by

indirectly endorsing a growing practice that restricts their career opportunities for long periods without work or any wages. While this case is not about the performers who are critical to both litigants' commercial success, the decision—unless corrected as identified herein—will harm them.

III. BACKGROUND

There's no business like show business. "Hollywood" is filled with wide-eyed workers who will turn a blind eye to oppressive working conditions rather than risk throwing away their "shot." This is particularly true for women, whose career trajectories are shorter on average, and for actors of color, whose role opportunities are fewer. While the executive suites of the entertainment industry resemble those of any other industry, the majority of entertainment workers—those creating the films and television shows we all know and love—work project-by-project. Among the workers potentially impacted by this case are over 82,000 California-based members of SAG-AFTRA—the nation's largest entertainment labor union representing working media artists—and countless others already working or hoping to someday work in this industry.

A. Production Studios Have Historically Sought to Control Actors and Restrict Their Mobility.

Hollywood's "Golden Age," from the 1920s through the early 1960s, was typified by a few vertically-integrated studios that controlled the means of motion picture production and distribution while binding actors to long-term employment contracts that limited their mobility.[2] The

[2] Stephen M. Gallagher, *NOTE: Who's Really "Winning"?: The Tension of Morals Clauses in Film and Television*, 16 VA. SPORTS & ENT. L.J. 88, 92 (2016); Margaret Heidenry, *How Hollywood Salaries Really Work*, VANITY FAIR, Feb 12, 2018,

so-called "studio system" or "star system" gave each studio control over the careers of actors in its employ.[3] Even the largest celebrities were bound to long-term, exclusive contracts by which the studio had the right to assign them to play *any* role the studio desired.[4] This system started to unravel in the mid-1940s, due in part to litigation by a brave union actor challenging the era's exclusive contracts.[5]

The long-term contracts of the Golden Age gave way to a freelance industry. Actors work on a project-by-project basis; employment contracts typically range from one day to the entire length of a film's or television series' production, with the former far more common than the latter. Nevertheless, restrictions on employee mobility have found their way back in other forms. "Series regulars"— the few lead actors who, as the name implies, regularly appear in a television series[6]—are bound to contracts with O&E Restrictive Covenants resembling the exclusive contracts of yesteryear . . . except worse. The studio often has options for a series regular's services for as many as six seasons after the first season. But the episodes for a season may take as little as three months to shoot and the actor is only paid for those episodes in which they appear.

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https://www.vanityfair.com/hollywood/2018/02/hollywood-movie-salaries-wage-gap-equality.

[3] *Id*.

[4] *Id*.

[5] Gallagher 16 VA. SPORTS & ENT. L.J. at 92; *De Haviland v. Warner Bros. Pictures*, 153 P.2d 983, 988 (1944).

[6] For example, series regulars might be the familiar doctors and nurses on a hospital drama, the main family and their circle of friends and neighbors on a family sitcom, or the superheroes and their teams on a comic book-based series.

The old system was dominated by a few broadcast networks, regular production schedules, and 23 or more episodes per season. Actors now work under a new model dominated by the streaming and pay cable companies where they are under contract for the same time period, but the gap between seasons often exceeds six months to two years, and the number of episodes per season has decreased to ten or fewer. Actors therefore are subjected to increasingly long periods of hiatus—the periods between seasons when the series is not in production—without any wages, work, or certainty of continued employment on a future season. Yet the O&E Restrictive Covenants prevent a series regular from obtaining other employment during these hiatus periods while the producer considers whether to produce another season and hire the actor for that next season. These contract provisions prohibit ***actors*** from ***acting,*** *i.e.* working in the profession of their choice, during the increasingly-long hiatus between seasons of their television show.

B. O&E Restrictive Covenants Hold Actors Off the Market Without Compensation and Restrain Their Ability to Pursue Their Craft.

Series regulars typically are bound to multi-year contracts. Unlike the executives whose contracts are central to this case, series regulars only work during that fraction of the time when the series is in production. Their contracts include clauses binding the actors to work exclusively for the series' producer (known as "exclusivity"), subject only to limited carve-outs. During the contract term, the producer *always* has a first-priority right to the actor's time for production services on the then-current season. This means that the studio can call on the actor to render production services whenever necessary unless it has waived that right for specific dates and projects. Even during a series' hiatus, the actor remains exclusive to the

producer in the scripted television market, irrespective of the role or program genre, and certain types of commercials.

After each production period, additional restrictive covenants in the form of unilateral options on the actor's services for successive seasons combine with the exclusivity provision to hold the actor off the market, unpaid, while the distributor (typically, a television or cable network or streaming platform) decides whether to renew the show for another season. When the producer has secured financing and distribution commitments, it will exercise its unilateral option on the actor's services, requiring the actor to provide services for the next season at a later, often undetermined, date.[7] Importantly, despite being held off the market by their contractual exclusivity to the series producer, actors do not receive any compensation during the period between the producer exercising its option for the next season and the actual commencement of production.

The oppression of O&E Restrictive Covenants cannot be overstated. These provisions, for all practical purposes, are non-negotiable—frequently included within the contract's boilerplate terms, unmodified for everyone but the handful of biggest stars. While the standard O&E Restrictive Covenants allow the actor, *with their employer's consent*, to perform in a limited number of *single-episode* guest spots, this is an illusory accommodation. First, most guest-star roles are for multi-episode "arcs," not a single episode. Additionally, consent is rarely, if ever, granted; when it is, the negotiations for it are so protracted it often results in the

[7] The "option" period can be divided into two parts: **(1)** the "pre-option exercise period," which runs from the end of the actor's acting services for a season to the studio's exercise or declination of its option to extend the actor's services for another season, and **(2)** the "post-option exercise period," which is the time period between the studio's decision to exercise its option on the actor's services and the commencement of the actor's services for the new season.

opportunity being lost. Similarly, although work in movies is not prohibited, this has become a hollow concession because the possibility of a scheduling conflict due to the uncertain production schedule of a season that may never be produced makes film producers hesitant to audition, let alone hire, a television series regular.

For most of television history, the period between seasons was relatively brief—seasons were long (22, 26 or even 39 episodes)[8] and followed a predictable schedule (typically, September-to-May), resulting in well-salaried actors and relatively little fuss over the brief uncompensated hiatus, which was a welcomed vacation or a set period of time to fit in

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[8] For example, *Leave it to Beaver* had 39 episodes per season, *I Love Lucy* ranged from 26-35, and *The Andy Griffith Show* ranged from 30-32. *See*, List of Leave It to Beaver episodes, https://en.wikipedia.org/w/index.php?title=List_of_Leave_It_to_Beaver_episodes&oldid=961138912; List of I Love Lucy episodes, https://en.wikipedia.org/w/index.php?title=List_of_I_Love_Lucy_episodes&oldid=998145088; List of The Andy Griffith Show episodes, https://en.wikipedia.org/w/index.php?title=List_of_The_Andy_Griffith_Show_episodes&oldid=996330173 (all URLs, last visited Jan. 5, 2021).

In the 1970s-1980s, seasons typically ran for 22 - 26 episodes. For example, *The Brady Bunch* in the early 70s ranged from 22-25 episodes and *The Golden Girls*, which ran from 1986-1991 was 26 episodes per season. *See,* List of The Brady Bunch episodes, https://en.wikipedia.org/w/index.php?title=List_of_The_Brady_Bunch_episodes&oldid=993031697; List of The Golden Girls episodes, https://en.wikipedia.org/w/index.php?title=List_of_The_Golden_Girls_episodes&oldid=983252771.

More recently, broadcast television shows in the 90s and 2000s typically had 22 episodes. For example, *ER* ranged from 19-25 episodes. List of ER episodes, https://en.wikipedia.org/w/index.php?title=List_of_ER_episodes&oldid=996429204. Likewise, *Gilmore Girls* had 22 nearly every season. List of Gilmore Girls episodes, https://en.wikipedia.org/w/index.php?title=List_of_Gilmore_Girls_episodes&oldid=994987713.

movie opportunities. The rise of original television series on premium pay cable and streaming platforms brought with it a new and different paradigm—seasons got shorter, hiatuses got longer, and production schedules became increasingly irregular, commencing at varying times of the year. (*See* Figure 1.) For actors who typically are paid on a per episode basis, the consequences are obvious.

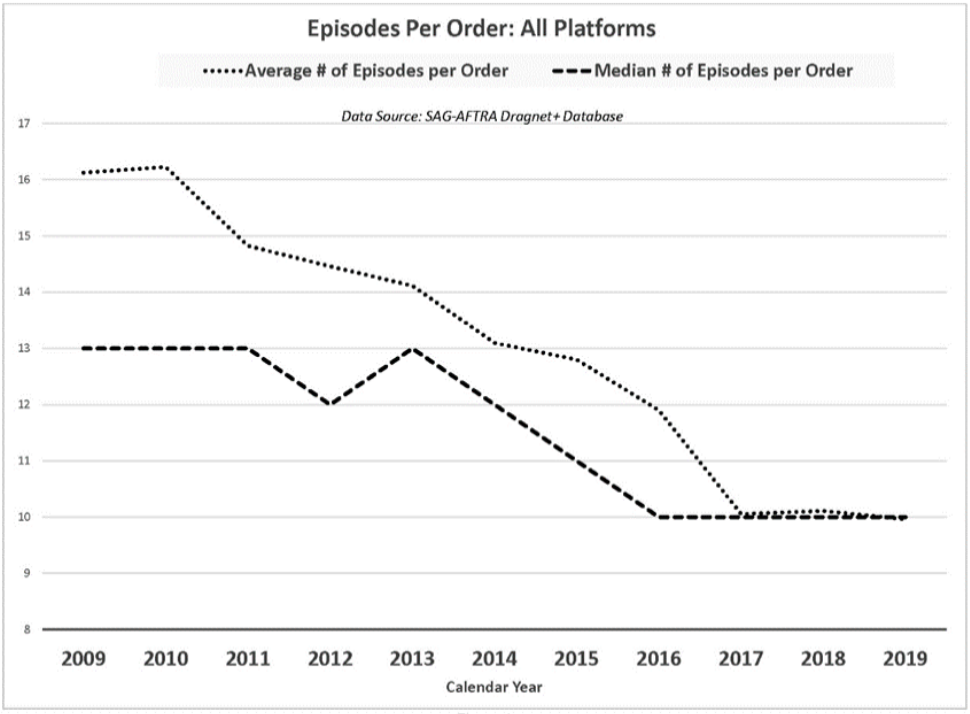

Figure 1

As a result of these changes, actors are idled for extended and unpredictable durations often exceeding six or seven months, sometimes lasting as long as two years. (*See* Figure 2.)[9] During these increasingly

[9] While Figure 2 provides an average across all platforms based on data SAG-AFTRA has collected, longer hiatus periods are becoming the norm on non-broadcast platforms, particularly on pay cable and the streaming services. SAG-AFTRA is aware of accounts of post-option exercise periods running well over one year and as long as two years or more. In some of these cases, the actors were held off the market for long periods, only to have the producer or distributor make the decision to cancel the series. The COVID-19 pandemic has exacerbated this situation by further extending series regulars' periods of unemployment after abruptly

protracted intervals, series regulars are left to rely on lower earnings due to the condensed employment without the realistic ability to audition for other opportunities.

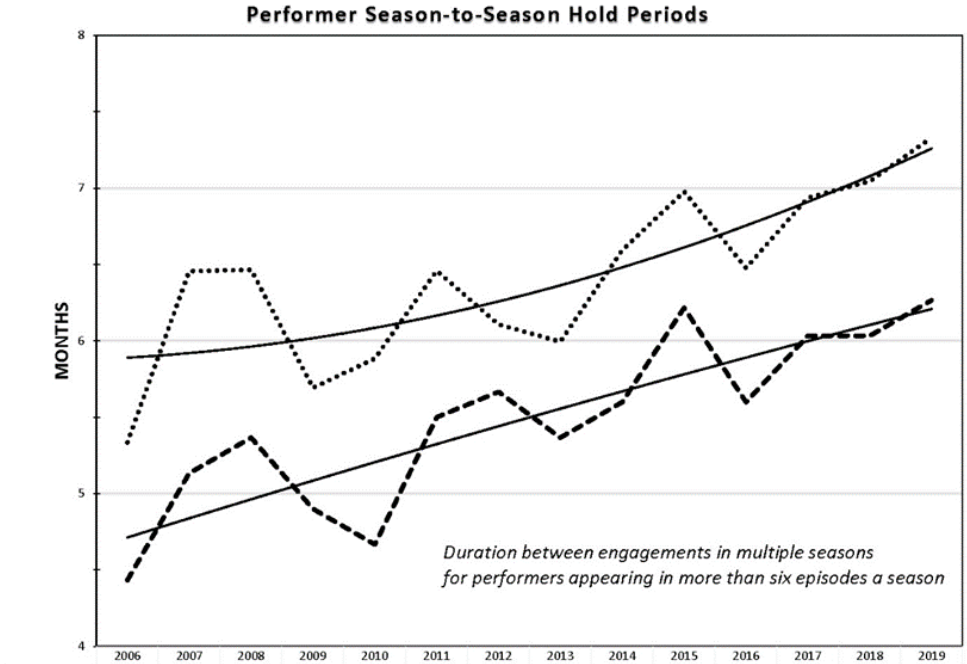

Figure 2

stopping production in March 2020 with the future of many series left in limbo and an alarming number of shows cancelled, even after renewal. Alan Sepinwall, *Has Covid Leveled Peak TV?,* ROLLING STONE, Oct 15, 2020, https://www.rollingstone.com/tv/tv-features/covid-precaution-protocol-budget-netflix-cancel-peak-tv-1075454/; Meaghan Darwish, *'Queen Sono' & More Series Canceled Due to Coronavirus*, TV INSIDER, Dec 1, 2020, https://www.tvinsider.com/gallery/tv-shows-canceled-due-to-coronavirus-the-society-im-sorry. *See also* List of American television series impacted by the COVID-19 pandemic, https://en.wikipedia.org/w/index.php?title=List_of_American_television_series_impacted_by_the_COVID-19_pandemic&oldid=998365610 (last visited Jan. 5, 2021) (including, among other lists, lists of approximately 125 scripted series that were canceled or had production on their prior season cut short or their coming season postponed, suspended, or modified due to COVID-19).

O&E Restrictive Covenants—especially in the context of shrinking seasons and growing hiatuses—restrict performers from working, practicing their craft, and seeking out opportunities for professional fulfillment and compensation.

C. O&E Restrictive Covenants Are a Harmful Practice with Lasting Long-Term Impact, Particularly on Underrepresented Groups of Actors

For many actors, a television series regular role is their "big break" that comes just as their career is starting to take off. As Figure 3[10] illustrates, actors are most in demand for approximately a decade beginning in their thirties and then begin a steady decline (with brief spikes for men in later years). O&E Restrictive Covenants in a series regular's contract can stall their career momentum precisely at the point when it is just taking off.

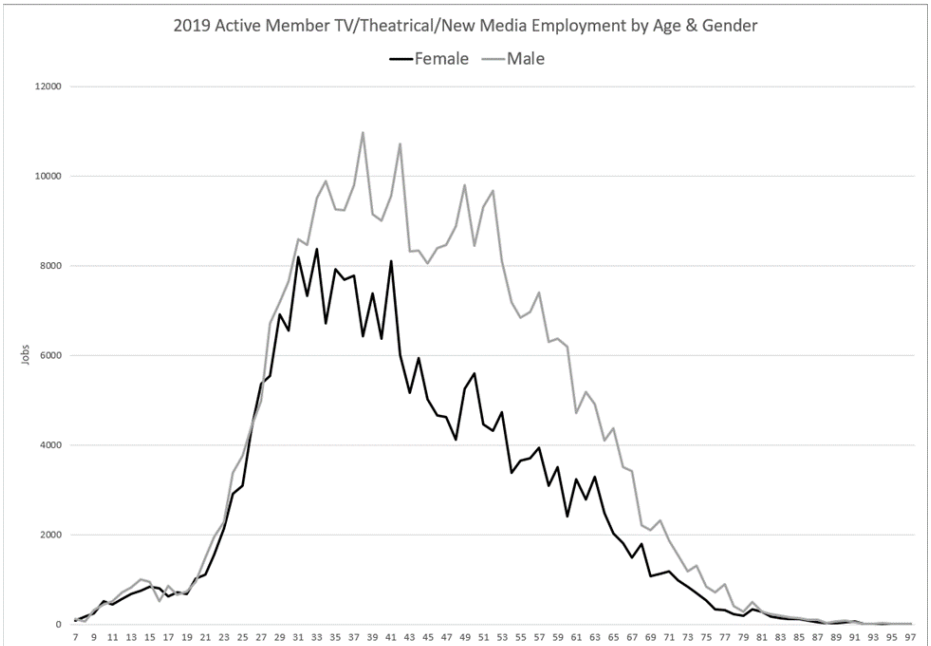

Figure 3

[10] Figure 3 is based on SAG-AFTRA research relating to employment by age and gender.

Women and actors of color are disproportionately disadvantaged by this practice.[11] According to a UCLA study analyzing the 2018-19 television season, "both groups still are not represented proportionately to their share of the U.S. population overall, even though audiences continue to show interest in programs whose casts, directors and writers represent the nation's diversity."[12] Actors of color portray only 24% of lead roles in broadcast television and streaming series while women portray just over 41% in broadcast television.[13] In film, the statistics are even worse—in the top 100 films in 2019, women and actors of color each portrayed just over one-third of speaking roles or named characters.[14] Only 14 of the top 100 films were gender balanced and a concerning number of films featured no actors of color, particularly women of color, at all.[15]

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[11] According to SAG-AFTRA staff on the frontlines of dealing with these issues, the majority of inquiries and requests for assistance relating to O&E Restrictive Covenants come from actors of color and female actors, both groups who have shorter careers and lower salaries than their white male counterparts.

[12] Jessica Wolf, *Diversity improves among TV actors, but executives still overwhelmingly white and male*, UCLA NEWSROOM, Oct 22, 2020, https://newsroom.ucla.edu/releases/hollywood-diversity-report-2020-television.

[13] Dr. Darnell Hunt and Dr. Ana-Christina Ramón, Hollywood Diversity Report 2020, Part 2: Television UCLA, pp 3-4 https://socialsciences.ucla.edu/hollywood-diversity-report-2020/.

[14] Annenberg Inclusion Initiative *Inequality in 1,300 Popular Films: Examining Portrayals of Gender, Race/Ethnicity, LGBTQ & Disability from 2007 to 2019*, Sept 2020, pp 1, 3, http://assets.uscannenberg.org/docs/aii-inequality_1300_popular_films_09-08-2020.pdf.

[15] According to the USC Annenberg study: "Looking across all racial/ethnic groups measured, the number of films that erased [*i.e.* completely eliminated] girls/women from all speaking or named roles across the 100 top films of 2019 was as follows: Hispanic/Latinas (71 movies), Black (33 movies), American Indian/Alaskan Native (97

The on-screen inequities have a direct effect on the working lives of the actors who play those characters. As Figure 3 illustrates, SAG-AFTRA data shows that women generally have a shorter window in their career during which they are most in demand.[16] Outside analysts agree. A study of 6,000 actors and actresses in the top 5,000 grossing movies found that the number of roles female actors obtain peaks at age 30, while males see increasing opportunities for another decade and a half, peaking at age 46. Chris Wilson, This *Chart Shows Hollywood's Glaring Gender Gap,* TIME (10/6/2015), https://time.com/4062700/hollywood-gender-gap/. Another study found the number of roles declining for both genders as actors age, but again with a gender differential: "Significant interaction effects exist between gender and age with respect to occupational outcomes. … [W]omen are subject to 'double jeopardy' inasmuch as the disparities in the number of film roles and the average star presence of male and female stars increase as they age. … [F]emale stars have more modest careers than their male counterparts and … this gap increases as they age." Anne E. Lincoln & Michael Patrick Allen, *Double Jeopardy in Hollywood: Age and Gender in the Careers of Film Actors, 1926-1999,* 19 SOCIOLOGICAL FORUM, 611, 625, 626 (December 2004).

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movies), Native Hawaiian/Pacific Islander (99 movies), Asian (55 movies), Middle Eastern/North African (92 movies), Multiracial/Multiethnic (45 movies). In contrast, White girls and women were only erased from 7 movies. *Id.* at p 3.

[16] SAG-AFTRA does not have recent internal data correlating race and ethnicity with age and work opportunities. However, a recent Washington Post article highlighted the continuing struggle for older actors of color. *See* Ruth Tam, *For older actors of color, the movement for a more diverse Hollywood has come too late*, WASHINGTON POST, Mar 9, 2020, https://www.washingtonpost.com/news/post-nation/wp/2018/03/09/for-older-actors-of-color-is-the-movement-for-representation-in-hollywood-too-late/.

Studies of compensation echo those results. One examination of 265 top stars found that female actors' average wages per film peak at age 34 and decrease "significantly" thereafter, while males' peak at age 51 and remain stable thereafter. Irene E. De Pater, et al., *Age, Gender, and Compensation: A Study of Hollywood Movie Stars,* 23 J. MGT. INQ. 407, 413 (2014).

Thus, being held off the market—and therefore off-screen—for years during the period when they would statistically have the most opportunities impacts these underrepresented actors' career earning potential. It not only prevents actors from taking existing opportunities, but also prevents them from gaining exposure at the most critical juncture in their careers. It also harms the public by further reducing the pool of available talent to depict the diverse characters audiences want.

Not only are O&E Restrictive Covenants intrinsically harmful to actors, they lack a pro-competitive justification in today's market. With hundreds of consumer outlets for content, and the broad availability of reruns and video-on-demand services, actors are already seen across multiple outlets, sometimes at times that are competitive to their current series employer. Producers therefore would not suffer any added market harm by an actor working on another series, commercial, or movie during hiatus periods. This practice of holding actors off the market through O&E Restrictive Covenants also prevents the series from gaining potential audiences—when viewers discover an actor in a guest role on another show, they may follow them back to their primary show. It further disadvantages the industry as a whole by keeping some of the best, and most popular, actors from contributing to their fullest ability. Finally, the audiences suffer by having fewer options to watch their favorite actors, or even to discover them in the first place.

* * *

As is explained below, despite O&E Restrictive Covenants not being directly at issue in the instant case, the decision this Court renders will affect these practices, for good or for ill. We urge that, in drafting its opinion, this Court be sensitive to the fact that all employees are not like the full-time executives in the pending case and that it ensure its holding will not restrict the mobility of employees, like actors, who are not high-ranking executives working and getting paid full time. An outcome to the contrary risks further emboldening gross violations of Section 16600 and harming actors and other workers in the gig economy.

IV. ARGUMENT

A. The Lower Court Failed to Appreciate California's Public Policy That Favors Employee Mobility and Open Competition.

The lower court's decision did not adequately account for California's keystone public policy favoring employee mobility, which is embodied in case law and multiple statutes. One bedrock of this policy, with deep roots in the common law, is Section 16600, in which the Legislature broadly commanded that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The plain meaning of the statute invalidates *all* contracts that would prevent *anyone* from engaging in their chosen profession, trade or business.

1. California Codified the Strict Common Law Right to Pursue Employment of Choice, Not a Relaxed "Rule of Reasonableness."

The common law rule that a contract restricting one's right to pursue a trade, profession or business of choice is *per se* invalid originated in a desire to prevent masters from wrongfully prolonging the subservience of apprentices and blocking their entry into medieval craft guilds. *See* Harlan

Blake, *Employee Agreements Not to Compete*, 73 HARV. L.REV. 625, 631-32 (1960). A more modern gloss reinterpreted the policy foundations of this rule as being based on two principal grounds: "One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family." *Oregon Steam Nav. Co. v. Winsor*, 87 U.S. 64, 68 (1873). Today, society recognizes an additional public injury as well: the risk that an idled worker will become a public charge. As the Court of Appeal held in a related context, "Legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood and which is calculated to confer direct or indirect benefits upon the people as a whole must be presumed to have been enacted for a public reason and as an expression of public policy in the field to which the legislation relates." *De Haviland*, 153 P.2d at 236.

Over the course of the late 1800s, as employers consolidated power during the Industrial Revolution, many courts relaxed the strict common law rule to permit "reasonable" restraints on employee mobility supported by "good and valuable consideration." *See, e.g.*, *Wright v. Ryder*, 36 Cal. 342, 357-58 (1868). Under this permissive standard, employers could bar employees from leaving to compete or work for competitors as long as the restraints were reasonable and the employees received valuable consideration. *Id*. at 358.

California curtailed this laissez-faire approach to employment restrictions with the adoption of what is now Section 16600, whose antecedent was enacted in 1872 and then recodified in 1941. *See* Stats. 1941, ch. 526, § 1, p. 1834, § 2, p. 1847; *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 945 (2008). As the Supreme Court explained as recently as a dozen years ago in *Edwards*, when the Legislature enacted Section 16600,

it "rejected the [relaxed] common law 'rule of reasonableness.'" *Edwards*, 44 Cal. 4th at 945. Thus, "[i]n the years since its original enactment as Civil Code section 1673, [California] courts have consistently affirmed that section 16600 evinces settled legislative policy in favor of open competition and employee mobility." *Id.* at 946.

2. California Supreme Court Precedent Expressly Endorses Section 16600's Employee Mobility Policy.

In *Edwards,* the Court underscored Section 16600's emphasis on mobility, explaining that the statute "protects Californians and ensures that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." *Id.* (internal citations and quotation marks omitted). Section 16600 thereby "protects the important legal right of persons to engage in businesses and occupations of their choosing." *Id*.

Reaffirming the public policy of employee mobility upon which Section 16600 is based, the *Edwards* Court held that "an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the [statutory] exceptions to the rule"—which have no application in the context of an employment agreement. *Id.* at 946-48. The Court held that Section 16600 does not apply *solely* to restraints that "*totally prohibit* an employee from engaging in his or profession, or business," but also to "mere limitation[s] on an employee's ability to practice his or her vocation . . . as long as it is reasonably based." *Id*. at 947 (emphasis added).

The Court also rejected the U.S. Court of Appeals for the Ninth Circuit's judicially-created exception for "narrow" restraints, finding it in direct conflict with the plain language of Section 16600 and the robust public policy served by the statute. "California courts have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat." *Id.* at 949-50. The Court

refused to "adopt a narrow-restraint exception to section 16600" and left it "to the Legislature . . . to relax the statutory restrictions or adopt additional exceptions" because "if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect." *Id.* at 950 (internal citations and quotation marks omitted). Tellingly, the Legislature has not amended Section 16600.

B. Section 16600 Bars Restraints on the Mobility of Current Employees—Except For Conduct That Would Violate an Independent Legal Duty.

Respondents argue that Section 16600 is inapplicable to all contractual restraints on mobility imposed on then-current employees. The opinions cited by Fox, however, do not support the existence of any such implied exception. Rather, they stand for the non-controversial principle that Section 16600 does not *completely supersede* a current employee's independently-applicable legal duties, nor does it empower employees to engage in *independently wrongful* conduct. That is what the *Angelica* and *Techno Lite* Courts meant when they said that Section 16600 "does not affect **limitations** [such as a fiduciary or good-faith-and-fair-dealing duty of loyalty] on an employee's conduct or duties *while employed*." *Techno Lite, Inc. v. Emcode, LLC*, 44 Cal. App. 5th 462, 471 (2020), quoting *Angelica Textile Services, Inc. v. Park*, 220 Cal. App. 4th 495, 509 (2013) (italics in original; bold added). Two post-*Edwards* cases reinforce this proposition. *See Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564 (2009); *Ret. Grp. v. Galante*, 176 Cal. App. 4th 1226 (2009).

Under Section 16600, "[t]he interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed *any illegal act* accompanying the employment change." *Dowell*, 179 Cal. App. 4th at 575, *quoting Diodes, Inc. v.*

Franzen, 260 Cal. App. 2d 244, 255 (1968) (emphasis added). The court in *Dowell* explained: "the conduct [was] enjoinable not because it falls within a judicially created 'exception' to section 16600's ban on contractual nonsolicitation clauses, but is instead enjoinable because it is wrongful *independent of* any contractual undertaking." *Id*. at 577, quoting *Galante*, 176 Cal. App. 4th at 1233.

1. *Angelica* and *Techno-Lite*, Which Arose out of Employees' Independently Wrongful Acts, Do Not Endorse a While-Employed Exception to Section 16600.

At first glance, the *Angelica* and *Techno-Lite* decisions cited by Fox are challenging to reconcile with the *Edwards* holding and the public policy that undergirds Section 16600 in the employment context. A deeper analysis of the cases, however, shows that each employee's independent and intentional wrongs while actively employed were the basis for the respective holdings. There is no exception to Section 16600 for current employees, particularly workers like actors who are not working and not getting paid for increasingly long time periods between seasons.

In *Angelica*, a high-level, full time corporate officer betrayed his then-employer (who was still paying him) as he undermined the company to his new employer's benefit by: disparaging the company to financiers; misusing confidential information, including sharing it with potential competitors; and granting the company's customers non-standard, readily terminable contracts that paved the way for those customers to end their relationship with Angelica and transfer their business to his new employer. The employee profited at his employer's expense, in clear violation of his fiduciary duty of loyalty—not just a contractual duty not to compete. *Angelica*, 220 Cal. App. 4th at 509, relying on *Fowler v. Varian Associates,*

Inc., 196 Cal. App. 3d 34, 41 (1987) (holding that profiting at an employer's expense violated the employee's duty of loyalty).

In *Techno Lite*, the full time employee defendants, while being paid by Techno Lite, misused their positions with their employer to facilitate the later theft of customers—an obvious breach of fiduciary duty and act of unfair competition that was wrongful independent of any contractual non-compete provision. *Techno Lite*, 44 Cal. App. 5th at 467-68, 471-72. Indeed, courts have long "regard[ed] as unfair competition, and will enjoin, the use by an employee to the prejudice of his former employer of the confidential information gained by the employee during his prior employment as to the business secrets of such employer." *Continental Car-Na-Var Corp. v. Mosely*, 24 Cal. 2d 104, 110 (1944). That is so "independent of any express contract between the parties" because it is "a violation of duty having its origin in the relation of employer and employed, and an implied contract that an employee will not divulge confidential knowledge gained in the course of his employment, or use such information to his employer's prejudice." *Pasadena Ice Co. v. Reeder*, 206 Cal. 697, 704 (1929).

The *Techno Lite* Court reconciled Section 16600 with other independent violations:

> The public policy behind Section 16600 is to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice; it is not to immunize employees who undermine their employer by competing with it while still employed . . . . [N]o firmly established principle of public policy authorizes an employee to assist his employer's competitors . . . . It should be even more obvious that no firmly established principle of public policy authorizes an employee to become his employer's competitor while still employed.

> Section 16600 is not an invitation to employees to bite the hand that feeds them.

Techno Lite, 44 Cal. App. 5th at 473-74 (internal citations and quotation marks omitted).

These cases that purport to apply an exception to Section 16600 for contractual restraints on employees while employed do not actually apply any such exception. They must be read much more narrowly based on the facts presented in those cases—obvious violations of statutory, fiduciary or contractual duties other than the violation of a non-compete provision. Even to the extent that the court in *Techno-Lite* said it was applying an exception to Section 16600, it emphasized that there is no case in which "Section 16600 was held to invalidate an agreement not to compete with one's current employer *while employed* by that employer." *Id*. at 472-73 (emphasis added). This Court should therefore be sensitive to this distinction and not include language in its opinion that can be read to suggest that employers can impose restrictions on workers who are not engaging in any wrongdoing (and are not being paid or working during hiatus periods) from seeking other employment just because they are within the term of an employment contract.

2. Actors Do Not Have An Independent Legal Duty To Their Employer.

The practical impact of this more correct reading of the case law is that courts must undertake an analysis of the degree of duty owed by the restrained employee. An employee owes a duty of loyalty if it is imposed by contract terms or if there is a fiduciary duty of trust or confidences. *Huong Que, Inc. v. Luu,* 150 Cal. App. 4th 400, 410 (2007); RESTATEMENT OF EMPLOYMENT LAW § 8.01(a) ("Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer" and "may, depending on the nature of the employment position,

owe an implied contractual duty of loyalty to the employer in matters related to their employment"). The degree and nature of the loyalty an employee owes depends on the nature of the employment relationship. The most stringent *fiduciary* duty of loyalty arises from a position of "trust and confidence." Below that lies a limited fiduciary duty of loyalty arising from an employee's *access* to confidential materials, such as trade secrets. The most diluted of the duties of loyalty—a *non-fiduciary* duty of loyalty—is implied from the contract of employment. RESTATEMENT OF EMPLOYMENT LAW § 8.01(a); *see also* § 8.01 cmt. a, b ("[D]epending on the nature or circumstances of their employment, other employees may owe an implied contractual duty of loyalty to their employer and are subject only to contract remedies for breach of that contractual duty"); Reporters' Notes to comments a-b ("The precise contours of an employee's duty of loyalty vary according to the scope of the employee's responsibilities and other circumstances of the employment.").

Unlike the defendants in *Angelica* and *Techno-Lite*, actors do not have a fiduciary duty to their employers.[17] In fact, the trust-based fiduciary duty of loyalty "has little practical application to the employer's 'rank-and-file' employees, i.e., employees who are subject to the employer's close oversight or supervision, or who are not granted substantial discretion in carrying out their work responsibilities." Restatement of Employment Law § 8.01(a), cmt. a. Actors lack discretion and are subject to close supervision in all aspects of their employment. While they imbue the performance with original expression that conveys emotion and brings the character to life, they do so under the direct and immediate control of a director and other

[17] In some cases, more prevalent in movies than television, actors may also serve in an executive capacity (*e.g.* as a producer), which may give rise to a heightened duty through the executive, non-acting, role.

production executives. In sum, actors are in no meaningful sense entrusted to act as agents of their employing studios, nor do they have unsupervised discretion in performing their essential job functions and owe their employer only the limited non-fiduciary duty of loyalty.

Employees, such as actors, who owe their employers only a *non-fiduciary* duty of loyalty may work for an employer's competitor while employed "as long as the work [1] is not done during time committed to the first employer, [2] does not involve the use or disclosure of the first employer's trade secrets, and [3] does not injure the employer to any greater extent than would any other individual working for the competitor." RESTATEMENT OF EMPLOYMENT LAW § 8.04(c). If the second acting job can be performed during the hiatus period, the first part of this condition is easily satisfied. The second limitation is mostly irrelevant because actors do not have access to trade secrets—and even to the extent a storyline in a script may be considered a trade secret, it is of no value to the second employer.

The third limitation, too, is inapposite in today's television market. These are not the early days of television when there were a handful of broadcast networks with shows that were directly competitive. Today's industry features hundreds of channels on broadcast television, pay television, cable television and even streaming services. Digital video recorders and video-on-demand services allow viewers to watch shows at their convenience. For "cord-cutters," online platforms allow viewers to watch content on any device, in any place, at any time. There is no longer the kind of direct competition that existed 60+ years ago when O&E Restrictive Covenants arose. Consequently, even if the most recognizable series actor goes to work for a competitor, it has no real competitive harm to the first employer.

C. Respondents Ignore the California Supreme Court's Distinction Between Employment Agreements and Business-to-Business or Sale-of-Business Transactions.

The policy concerns animating Section 16600 are rooted in the inherently dependent, even coercive nature of the employment relationship. Different rules and conclusions apply in business-to-business contexts, where the parties are presumed to have greater independence and more equal bargaining power. Nonetheless, Respondents place heavy reliance on two cases involving business contract disputes—neither has any relevance to, nor should have any bearing on, this case.

In *Ixchel Pharma, LLC v. Biogen, Inc.,* 9 Cal. 5th 1130 (2020), the Supreme Court held that a competition dispute between two companies in a joint venture implicated a "rule of reason" approach under Section 16600. Respondents strip *Ixchel* from its context and draws conclusions that directly contradict Section 16600's dictates. It argues that "*Ixchel* explicitly addressed *Edwards* and *Chamberlain* and explained both are limited to post-termination non-competes." Fox Br. at p. 40. This argument misconstrues the *Ixchel* court's discussion of *Edwards* and Section 16600. In fact, the remainder of the paragraph from which Fox pulled its parenthetical goes on to state: "Nothing about *Edwards* indicates a departure from that precedent to also invalidate reasonable contractual limitations on ***business operations*** and ***commercial dealings***." *Id*. at 1159 (emphasis added).

Fox similarly misapplies *Chamberlain v. Augustine*, 172 Cal. 285 (1916), a century-old case involving noncompetition when selling a business interest, for the proposition that Section 16600 is expressly limited to post-termination non-competition covenants.[18] The lower court, and Fox,

[18] Fox includes two parenthetical citations with quotations from the case. As Fox quoted, *Chamberlain* and the other cases cited by the *Ixchel* court

do likewise in citing *Imperial Ice Company v. Rossier*, 18 Cal. 2d 33 (1941), another antediluvian case involving the sale of a business. Opinion at p. 26, n. 17; Respondent's Br. at 35. Critically, *Imperial Ice Company* did not involve Section 16600 or its predecessor. Even if it had, Business and Professions Code section 16601 (previously, Civil Code section 1674) expressly allows the seller of a business to agree to territorial restrictions in connection with the sale of a business. In other words, the type of restraint at issue in *Imperial Ice* is *expressly authorized* by a statutory exception to Section 16660.

None of these cases represent an analogous situation to this case nor to the O&E Restrictive Covenants faced by actors. The societal interest in competitive freedom between business competitors—which the Supreme Court found subordinate to contractual stability—differs greatly from the societal interest and public policy codified just decades after the Civil War, enshrining an individual's right to work, including to change employers, which the Supreme Court has found to outweigh the employer's interests. The lower court did not account for this distinction, and Fox invites this Court to compound the error by ignoring this critical distinction.

D. Section 16600 Bars Employers From Precluding Employees from Working in Their Chosen Trade During an Employer-Dictated Unpaid Hiatus.

The lower court refers repeatedly to whether the contracts at issue barred the pursuit of "post-contract expiration" employment opportunities, using this as a synonym for "post-employment." While these terms may be synonymous for a full-time executive, who works and is well-paid

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in section 3.B. of its opinion are "informed and limited by the factual context presented"—non-competition in connection with the sale of an interest in a business. *Chamberlain* has no bearing on employment, whether in-term or post-term, cases.

throughout the term of their employment contract, they are not for series regulars who are placed in limbo, without pay, after a season ends while those in the executive suites decide the series' and each performer's fate. In so doing, the employing studios prevent series regulars from earning a living at their chosen profession—acting—solely for the employer's own economic benefit. If Fox were correct in arguing that Section 16600 has no application during the contract term, studio employers would be free to do what Section 16600 was intended to preclude—prevent actors from working in their trade of choice for long periods without pay, all to the studios' economic benefit. *See Edwards*, 44 Cal. 4th at 946-47. While no such cases have been addressed by California state courts, federal courts in the state have faced the issue.

In *Loew's Inc. v. Cole,* 185 F.2d 641 (9th Cir. 1950), the Ninth Circuit considered an analogous employer-dictated restraint during the term of employment. The plaintiff, a screenwriter, was suspended without pay after he refused to answer questions about alleged communist affiliations when called before the House of Representatives' infamous Committee on Un-American Activities. *Id.* at 644-45. Although the writer was *currently employed* in the sense that he was within the term of his contract and could be recalled at any time, he was not working or being paid due to the employer-imposed suspension. The Ninth Circuit held that "[t]he provisions of the [employment] contract . . . which purport to forbid [the writer] from practicing his profession during the period of suspension are ***manifestly void*** under the California Code." *Id.* at 657 (emphasis added). This is similar to actors during the hiatus periods who, while technically in the term of employment, are not working or getting paid for reasons beyond their control.

Similarly, in *ITN Flix, LLC v. Hinojosa*, 686 Fed. Appx 441 (9th Cir. 2017), the Ninth Circuit addressed the case of a motion picture actor who

was under contract to appear in a series of films in the role of a vigilante. The contract precluded the actor from portraying a "vigilante character" in any other film that may "hurt" or be "similar" to the employer's first film for a period of at least eight years. *ITN Flix, LLC v. Hinojosa,* 2015 U.S. Dist. LEXIS 176676, at *2 (C.D. Cal. May 13, 2015). The actor did exactly that, taking a prohibited role during the contract term but outside the period during which he was actively working for the first employer. Citing *Edwards* and its progeny, the Ninth Circuit held that the "in term" restrictive covenant was an illegal restraint on competition. *ITN Flix*, 686 Fed. Appx. at 444. The court further rejected the plaintiff company's argument that "applying § 16600 to the entertainment industry would be unworkable because personal services contracts are so often needed to ensure the availability of celebrities." *Id.* As the Ninth Circuit made clear, even an argument that O&E Restrictive Covenants are necessary to maintain cast continuity rests on a shaky foundation.

The restrictive covenants at issue in *ITN Flix* are similar to O&E Restrictive Covenants, if not narrower—limiting the actor from taking only a subset of potential work that may "hurt" or be "similar" to his role in the first employer's films. By contrast, O&E Restrictive Covenants keep actors completely off the market, both by their language and in practical effect. The Ninth Circuit got it right in holding these types of restrictive covenants violate Section 16600.

The public policy embodied in Section 16600 is best effectuated by precluding employers from enforcing odious non-compete agreements on employees during time periods when they are not working or being paid, even while still under contract. Thus, *amici* urge this Court to render an opinion that is more precise in its analysis than the lower court's opinion. Parsing this distinction is vital to avoid inadvertently authorizing unlawful

restrictions—such as O&E Restrictive Covenants in actors' contracts—that are not presented in the instant case.

E. Section 16600 Is Part of an Integrated Statutory Scheme Protecting Employee Mobility.

Section 16600 is buttressed by at least five other statutes that reiterate the legislative judgement in favor of employee mobility. Like Section 16600, these statutes reflect the importance the legislature has placed on protections for the most vulnerable workers who are most at risk from oppressive, one-sided contracts. Perhaps the best known of the other protective statutes is Labor Code section 2855, which prohibits employment terms exceeding seven years except under limited circumstances.[19] The pivotal case interpreting Section 2855, *De Haviland v. Warner Bros. Pictures,* evinces many of the same policy concerns that animate Section 16600.[20]

Much like today's O&E Restrictive Covenants, Ms. de Havilland's "Golden Age" contract had successive options exercisable at the studio's discretion, for a maximum of seven consecutive one-year terms. The Court of Appeal rejected the studio's assertion that periods of suspension when de

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[19] The other statutes key to the legislative scheme are a trio of provisions that limit injunctive enforcement of employment agreements, Civil Code sections 3390(a) & 3423(e) and Code of Civil Procedure section 526(b)(5)). These statutes (along with Labor Code section 2855(a)) prohibit injunctive relief unless the contract is *otherwise* valid and the services are non-fungible. Labor Code section 925 generally prohibits employers from foisting non-California choice of law or venue on California employees, in order to preserve for employees "the substantive protection of California law."

[20] Critically, the *De Haviland* court also rejected the studio's argument that the statutory prohibition was waivable under Civil Code section 3513 as a law intended solely for the employee's advantage. *De Haviland*,153 P.2d at 988. This reasoning mirrors the public policy principles underlying Section 16600.

Havilland refused to work tolled the seven-year duration. *De Haviland,* 153 P.2d at 984-85. Notably, the court emphasized employee mobility as a basis for the statute, stating, "[s]even years of time is fixed as the maximum time for which [employees] may contract for their services without the right to change employers or occupations. Thereafter they may make a change if they deem it necessary or advisable." *Id*. at 988.

V. CONCLUSION

In many ways, the industry has come full circle since its early years. While there are more competitors in the marketplace now—including streaming services such as Netflix—the industry has once again become heavily vertically integrated with conglomerates controlling the means of production and distribution. This is particularly true in television, where most of the key players own companies across the spectrum of television production and distribution.

Simultaneously, O&E Restrictive Covenants morphed from a simple way to maintain cast continuity into an insidious restraint on actors' ability to earn a living. The practical consequence of today's O&E Restrictive Covenants is little different from the exclusive contracts of Ms. de Havilland's era—actors are held off the market, bound to a single studio on long-term deals. But today's series regular actors are paid per-episode and are unable to earn any paycheck from their chosen profession during their hiatus periods, which are of an increasingly lengthy and undefined duration.

O&E Restrictive Covenants go much further than the clauses invalidated in cases like *Edwards* and they lack even the justifications underlying those restrictions. There are no customer lists or sales territories to protect, no trade secrets to keep confidential. With the long periods of hiatus between individual seasons, there is little concern that the actor will be available and ready to perform for the following season. These

restrictive covenants are nothing more than a way to keep an actor off the market and under the control of the series' producer, solely to prevent competitors from having access to a coveted actor's services. They plainly violate the letter, and certainly the spirit, of Section 16600.

For the foregoing reasons, SAG-AFTRA respectfully urges this Court to recognize the broader context in which this case arises and to zealously maintain and protect California's longstanding policy of employee mobility. It should clearly explain the applicability of Section 16600 to employees within the term of their employment agreement where there is no independent fiduciary duty violated by the employee, and craft a decision which does not risk exacerbating an already egregious contract practice that prevents actors from being able to freely engage in their profession. Further, if the Court upholds the decision below, in addition to the foregoing, it should carefully limit its holding to the facts of the case.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the attached amicus brief is proportionally spaced, has a typeface of 13 points and contains approximately 8,370 words, which is less than the total permitted by the rules.

DATE: January 7, 2021

By: /s/ Duncan W. Crabtree-Ireland
DUNCAN W. CRABTREE-IRELAND

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 801 North Brand Blvd., Suite 950, Glendale, California 91203.

On January 7, 2021, I served true copies of the following document(s) described as **Amicus Curiae Brief of Screen Actors Guild – American Federation of Television and Radio Artists in Support of Neither Party** on all interested parties in this action as follows:

Court of Appeals, Division 2 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 **via TrueFiling system**	Sup. Court of California County of Los Angeles Civil Unlimited - Appeals 111 N. Hill St., Rm. 111(a) Los Angeles, CA 90012 **via US Mail (1) copy**
Daniel M. Petrocelli Molly M. Lens Melissa Rabbani David Marroso Kelsey M. Irish Leah Godesky O'Melveny & Myers LLP 1999 Avenue of the Stars, 8th Floor Los Angeles, CA 90067 **Via US Mail**	Attorneys for Respondent

Eric A. Shumsky Jeremy Peterman Anne Savin Orrick, Herrington & Sutcliffe LLP 1152 15th Street, N.W. Washington, D.C. 20005-8464 **Via US Mail**	Attorneys for Appellant
State of California Department of Justice **Via TrueFiling**	State of California Department of Justice Office of the Attorney General
Los Angeles County District Attorney's Office 211 West Temple Street Suite 1200 Los Angeles, CA 90012 **Via US Mail**	L.A. County District Attorney

BY ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

BY US MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 7, 2021, at Pomona, California.

/s/Ian Zulueta
IAN ZULUETA