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Target Hiring to Reach a Target Audience

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TARGET HIRING TO REACH A TARGET AUDIENCE

"[N]o writers on the set over the age of 29—by design." ¹

I. INTRODUCTION

For the past two decades, age discrimination has become an increasing problem in the hiring of writers for network television jobs.² While the Age Discrimination Employment Act ("ADEA") regulates employers in all other businesses,³ it is alleged that television networks hire employees as if they are exempt from the ADEA,⁴ preventing older talent from pursuing available jobs.⁵ The Networks are allegedly rejecting older writers solely because they are older without even looking at the quality of their work.⁶

Age discrimination persists because the Networks⁷ hire based on the preferences of a targeted demographic audience in order to cater to advertisers who prefer to buy time on shows that appeal to young viewers.⁸ While no one is contending that it is illegal for the Networks to target their message to the young audience preferred by their advertisers, the writers contend that it is both illegal and unnecessary to insist that this youthful

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¹. Plaintiff's First Amended Complaint for Damages, Restitution, Declaratory and Injunctive Relief at 3, Wynn v. NBC, No. CV-00-11248 (9th Cir. filed Nov. 16, 2000) (quoting an American Broadcasting Company network producer).


⁴. See First Amended Complaint at 47–50, Wynn (No. CV-00-11248).

⁵. Allred & Mochkatel, supra note 2.

⁶. First Amended Complaint at 2–3, Wynn (No. CV-00-11248).

⁷. For purposes of this article, the "Networks" consist of defendants in Wynn: National Broadcasting Company ("NBC"), Columbia Broadcasting System ("CBS"), American Broadcasting Company ("ABC"), United Fox Broadcasting Company ("Fox"), Paramount Network ("UPN"), and Warner Brothers Television Network ("WB"). See First Amended Complaint at 9–13, Wynn (No. CV-00-11248).

message be written by a youthful messenger. Although hiring based on customer preference is a well-established unlawful practice, it has been said that nothing stops Hollywood. Since the Networks rely heavily on advertisers to buy airtime on their television shows, their first priority is to please advertisers rather than adhere to any age discrimination laws or regulations. However, neither the ADEA nor the First Amendment provide an exemption for the television industry, and thus, the Networks are required to conform their hiring practices.

This Comment proposes that the root of age discrimination in network television starts with the Networks' biased decisions based on the advertisers' preference for young writers. The controversy surrounding plaintiffs' allegations in Wynn v. NBC, as presented in Section II, further reveals the impact of the Networks' alleged practices on writers. Section III provides the background of the doctrine of customer preference as it relates to television advertisers in the context of the ADEA. Section IV contends that an advertiser's preference for young talent does not warrant a bona-fide occupational qualification ("BFOQ") for age. Section V explains the reasons why the application of the ADEA to the Networks' discriminatory hiring policy does not infringe upon the Networks' First Amendment rights. In conclusion, section VI asserts that the ADEA must be enforced against the Networks in order to fill writers' positions based on the abilities of the applicants and not the preferences of the advertisers.

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9. See First Amended Complaint at 47–49, Wynn (No. CV-00-11248).
11. SAG, Casting the American Scene, supra note 8, at 13 ("The world of television seems to be frozen in a time-warp of obsolete and damaging representations."). Discrimination in casting has persisted in spite of the proactive approach to the problem taken by the Screen Actors Guild ("SAG"), the Writer’s Guild of America ("WGA"), and the NAACP. Screen Actor’s Guild, Hollywood Callsheet (Aug. 1999), reprinted in SAG, Casting the American Scene, supra note 8.
12. See SAG, Casting the American Scene, supra note 8, at 13.
13. See 29 U.S.C. § 623 (2000) (allowing age discrimination only in situations specifically listed). See also United States v. O’Brien, 391 U.S. 367, 376 (1968) (explaining that our First Amendment rights, although protected, are not absolute). "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Id.
14. Plaintiff’s First Amended Complaint for Damages, Restitution, Declaratory and Injunctive Relief, Wynn v. NBC, No. CV-00-11248 (9th Cir. filed Nov. 16, 2000).
15. See 29 U.S.C. § 623(f)(1); see discussion infra Part III.A.2 for details of BFOQ.
II. THE CONTROVERSY: THE WRITERS’ CLASS ACTION SUIT

If the Networks are unable to persuasively deny the existence of an industry-wide policy of refusing to consider writers over forty, they will most likely defend this blatant age discrimination, in *Wynn v. NBC*, by claiming a BFOQ under the ADEA. One of the reasons Hollywood caters to the preferences of the advertiser is because the Networks’ discriminatory hiring policy represents "precedents that have been set, but not necessarily rules that work." However, case law, which rejects the Networks’ argument, is catching up to Hollywood.

A. The Controversy

1. The Facts of *Wynn v. NBC*

Forty-four prominent writers filed a class action age discrimination suit against significant members of the television industry in October 2000, claiming they have been "gray-listed." The plaintiffs, accomplished writers who have brought American audiences endless hours of entertainment and whose countless Emmy Awards line mantels, are now filing for bankruptcy because of the Networks’ alleged industry-wide policy that discourages hiring any writer over the age of forty. The Networks unsuccessfully filed a motion to dismiss the case in January 2001.

16. Plaintiff’s First Amended Complaint for Damages, Restitution, Declaratory and Injunctive Relief, *Wynn v. NBC*, No. CV-00-11248 (9th Cir. filed Nov. 16, 2000).

17. See Allred & Mochkatel, supra note 2. The Networks have filed demurrers and not yet responded to the specific ageism allegations in the writers’ complaint, and therefore have not asserted any of the defenses discussed in this paper. Writers Case Website, Status of the Case at http://www.writerscase.com/ status_of_the_case.htm (last visited Sept. 10, 2002) [hereinafter Writers Case Website].

18. TODD GITLIN, INSIDE PRIME TIME 23 (Pantheon Books 1983).

19. See discussion infra Part III.B.3.

20. See generally First Amended Complaint, *Wynn* (No. CV-00-11248) (The filing of the complaint in *Wynn*, against so many important members of the industry, indicates that writers are not willing to stand for ageism any longer.).


22. Id. See generally First Amended Complaint at 16-47, *Wynn* (No. CV-00-11248) (listing specific allegations as to each individual plaintiff).

23. Pat Maio, High Noon for Older Writers: TV Writers Say Ageism Stymies Their Careers, AARP BULL. (June 2001), at http://www.aarp.org/bulletin/june01/writers.html (stating that Wynn filed for bankruptcy because he was not able to find steady work since 1997). See generally First Amended Complaint at 16-51, *Wynn* (No. CV-00-11248) (arguing that the policy corresponds with a concerted effort on the part of television networks to attract younger audiences).
2002.  Although almost two years have passed since the lawsuit was filed, the Networks have yet to file an answer, responding to the specific allegations of ageism. 25 Despite the non-response of the industry, the judge ruled that the writers could continue the suit against the Networks for age discrimination under the ADEA. 26

Since 1980, a majority of networks, studios, and talent agencies have engaged in this systematic pattern of age discrimination. 27 The root of the Networks' discriminatory hiring policy stems from a reaction to detailed demographic reports published around 1980. 28 This research revealed that the eighteen to thirty-four year-old age group was more susceptible to television advertising, and accordingly, the group became a key target for the advertisers that fund network television. 29 Thus, the Networks began shaping their image to respond to advertisers' preferences. 30

2. Statistics: The Impact on Writers

Prior to the implementation of this youth-oriented marketing strategy, writers in their fifties earned 118% more money than those in their twenties. 31 However, ageism became increasingly more pronounced by 1985, as writers over forty only earned eighty-seven cents for every dollar earned by a writer under age forty. 32 Today, writers over age forty, who account for more than two-thirds of the Writers Guild of America's ("WGA") members, 33 only make up one-third of network television's episodic comedy writing staffs. 34 In addition, they earn almost half of what

24. Writers Case Website, supra note 17.
25. Id.
26. Id.
27. Girion, supra note 21.
28. First Amended Complaint at 51, Wynn (No. CV-00-11248); see also Gitlin, supra note 18, at 47-48.
34. Id. tbl. 16b.
"twenty-something" writers, with little to no experience, earn in a year.\textsuperscript{35}

The numbers further indicate that the employment rate drops significantly with age.\textsuperscript{36} During the 1997–1998 television season, seventy-seven television series did not employ a writer over age fifty.\textsuperscript{37} Of those seventy-seven series, seven failed to employ a writer over the age of forty, including NBC’s \textit{Friends} and \textit{Veronica’s Closet}.\textsuperscript{38} Writers in the over-forty bracket are so desperate to find work that some have been relegated to taking writing assignments for German television via email.\textsuperscript{39}

3. The Writers’ Position

Writers over the age of forty do not believe that advertisers prefer youthful writers; they believe advertisers only prefer youthful material. Writers over the age of forty are confident that, not only can they write material that appeals to the targeted demographic group, but they can do it just as well, if not better than younger writers.\textsuperscript{40} Their argument is simple: they believe writing improves with experience.\textsuperscript{41} Further, they insist that the ability of an individual writer should be determined by the quality of the material, not the preferences of the advertisers.\textsuperscript{42}

Writers contend that the Networks typecast writers\textsuperscript{43} based on their appearance, rather than their ability.\textsuperscript{44} Because Networks inquire about a writers’ ages before reading their material,\textsuperscript{45} many writers go to great length to conceal their age.\textsuperscript{46} Some dye their hair to look younger,\textsuperscript{47} while others remove credits and awards from their resumes, in order to appear younger and less experienced.\textsuperscript{48} Nevertheless, this tactic has not been


\textsuperscript{37} \textit{Id.} at 29.

\textsuperscript{38} \textit{Id.} at 29–30.


\textsuperscript{40} See Shayne, \textit{supra} note 8.

\textsuperscript{41} Girion, \textit{supra} note 21.

\textsuperscript{42} \textit{Id.}


\textsuperscript{44} Girion, \textit{supra} note 21.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} Maio, \textit{supra} note 23.

\textsuperscript{48} Girion, \textit{supra} note 21; First Amended Complaint at 56–57, \textit{Wynn} (No. CV-00-11248). For one of its projects, Fox Television allegedly required that writers not have any prior writing
successful. After declaring her a great talent, Disney fired writer Riley Weston because she lied about her age to get a job on the show *Felicity*.  

Given that Networks have discouraged the hiring of writers over age forty, it becomes extremely difficult for this age group to find work. Not only can they not find a Network writing position, the writers claim that this policy prevents writers over the age of forty from pursuing any profession because a successful change of profession is not likely later in life.  

Finally, the writers allege that the Networks’ arbitrary hiring of writers before considering their abilities harms future writers. As a result, the economy suffers when writers are unemployed, as does the industry, from the loss of skills the more experienced writers would have passed on to younger writers.

4. The Networks’ Position

Networks believe that the writer directly influences the youthful message they wish to communicate. Consequently, the Networks refuse to hire older writers on the assumption that only young writers can write youthful material. Specifically, their customer preference argument is as follows: our customers (advertisers) prefer young material, therefore our customers prefer young writers because only young writers can write young material.

Therefore, to attain success in this business, the Networks think it is essential to cater to the preferences of the advertisers. The Networks compete for advertisers who are looking to buy time on shows catering to the eighteen- to thirty-four-year-old age group. Because higher ratings equal more money from the advertisers, the Networks strive to reach a
mass audience by targeting the preferred group.\textsuperscript{58} Thus, the Networks justify their discriminatory hiring policy on the grounds that advertisers will not buy time, thereby funding shows that purportedly will not appeal to their preferred target demographic group.\textsuperscript{59}

Although the Networks are competitors within the cutthroat entertainment business, many agree about one thing: writers over the age of forty are too old to write for the targeted group because they do not have the vitality, creativity, or stamina resulting in the necessary youthful edge.\textsuperscript{60} This youthful edge encompasses a familiarity with the jargon and needs of the targeted group,\textsuperscript{61} and, according to the Networks, older writers are out of touch with this group.\textsuperscript{62} In order to effectively target the preferred age group of the advertisers, the Networks contend they must hire younger writers who better understand younger viewers.\textsuperscript{63}

A further justification for the discriminatory hiring policy is that young executives feel more comfortable working with young writers.\textsuperscript{64} “Most people are more comfortable around people they perceive as similar to themselves than around people they think of as outsiders.”\textsuperscript{65} Because most executives are under age forty, they prefer working with writers under age forty.\textsuperscript{66}

Finally, the Networks might argue that the increased business costs to comply with the ADEA are substantial, as they would have to defend more suits, change their current discriminatory policies, and adopt non-discriminatory policies.\textsuperscript{67} Currently, many younger writers accept less pay for the same amount of work, thereby saving the Networks a significant amount of money.\textsuperscript{68} Given that, along with change comes significant cost increases, the burdens would be substantial if the ADEA was enforced

\textsuperscript{58} See Gitlin, supra note 18, at 24–25.
\textsuperscript{59} See Girion, supra note 21.
\textsuperscript{60} First Amended Complaint at 55, Wynn (No. CV-00-11248); see also Girion, supra note 21.
\textsuperscript{61} Girion, supra note 21.
\textsuperscript{62} See id.
\textsuperscript{63} Allred & Mochkatel, supra note 2, at 6.
\textsuperscript{64} Girion, supra note 21.
\textsuperscript{66} See First Amended Complaint at 52, Wynn (No. CV-00-11248).
\textsuperscript{68} First Amended Complaint at 48–49, Wynn (No. CV-00-11248); see The 1998 Hollywood Writers’ Report, supra note 30, at tbl.7.
against the Networks.  

B. The Networks' Policy and Control of the Industry

The Networks have successfully shaped the Hollywood writers' market by weeding out many participants over the age of forty. They are able to dictate which writers fill which roles because they dominate and control the television industry. In replacing older writers with younger ones that are "'hotter,' 'edgier,' and 'more hip'" in order to aggressively target a younger audience, the Networks hire as if they were immune from discrimination laws. The ADEA, however, contains no special exemption for the entertainment industry. Nevertheless, the Networks portray a powerful image, one that most people in the industry do not want to disturb for fear they will never be hired again. Thus, rarely are the Networks subjected to discrimination suits.

The Networks not only control the direct hiring process, they also indirectly control the ability of a writer to be represented by an agent. Representation is essential to success in the entertainment industry. In order to be considered for a network job, an agent must submit a writer's script to the Network. When a network writing position is available, Networks request that talent agencies submit scripts of writers who meet the requisite Network qualifications. Thus, when the Networks request young, talented writers, talent agencies submit the scripts of writers under the age of forty, thereby excluding writers over forty from a chance at getting the job in question. In this way, though Networks depend on

69. See Bronstad, supra note 67, at 3.
71. Muriel G. Cantor, Prime-Time Television Content and Control 19 (F. Gerald Kline & Susan H. Evans eds., Sage Publications 1980). Because each network discussed in this comment adheres to the policy, there is a trickle-down effect that influences agents and other employees to adhere to the policy as well. This makes it almost impossible for writers over the age of forty to get a job because everyone knows how the business operates—writers are hired subject to network approval. See id. at 17.
72. First Amended Complaint at 51, Wynn (No. CV-00-11248).
74. Girion, supra note 21.
75. Id. (Although age discrimination is pervasive in Hollywood, this is the first time writers have filed suit against the Networks.).
76. See id.; see also First Amended Complaint at 53, Wynn (No. CV-00-11248).
77. See Shayne, supra note 8.
78. See First Amended Complaint at 38–40, Wynn (No. CV-00-11248).
79. See id. at 55; see also Gitlin, supra note 18, at 143.
80. See First Amended Complaint at 55, Wynn (No. CV-00-11248).
talent agencies to find writers, they exert a strong influence over the agencies, as it is futile to represent a writer whom you know will not be hired.  

III. BACKGROUND OF CUSTOMER PREFERENCE IN THE CONTEXT OF THE ADEA

The purpose behind the ADEA is "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." Nevertheless, in some circumstances, the doctrine of customer preference validates the practice of hiring employees based on the preferences of an employer's customers, rather than the ability of the prospective employee. Networks allegedly base their decision to hire writers on the preferences of advertisers, instead of the writers' qualifications. This practice is inconsistent with the ADEA because it does not fall within any of the exceptions to customer preference.  

A. Background of the ADEA

1. Legislative History of the ADEA

The ADEA, passed in 1967, was a response to the negative impact discriminatory hiring policies had on workers over the age of forty. Shortly after Congress passed Title VII of the Civil Rights Act of 1964, the Secretary of Labor researched age discrimination in employment. This research, which led to the adoption of the ADEA, confirmed that age is an arbitrary factor in determining ability of prospective employees

81. See Shayne, supra note 8. "Age matters. When we have someone network executives haven't heard of, they want to know how old the writer is." Girion, supra note 21 (quoting Paul Haas, senior vice president of the talent agency International Creative Management (ICM)).
84. First Amended Complaint at 50–53, Wynn (No. CV-00-11248).
85. Id. See discussion infra Part IV.A for discussion on why the Networks’ hiring practices do not fall within the exceptions to customer preference.
86. Western, 472 U.S. at 409–10.
89. See 29 U.S.C. § 623(a)(1) (2000); id. The Secretary’s report found that “a substantial amount of age discrimination in employment did exist and, furthermore, that almost all of it was arbitrary.” 113 CONG. REC. 31,254 (1967) (statement of Sen. Javits).
because many workers perform as well as, if not better than, younger employees.90 Therefore, Congress enacted the ADEA to ensure that older workers would be considered for their ability, not the biased preferences of their employers.91

Furthermore, legislative history reveals that discrimination based on age can have a profound negative impact on workers over age forty.92 For example, excluding older writers from the work force can have a severe emotional impact.93 In fact, the writers in Wynn allege that they “have suffered from constant depression, loss of self worth and such severe emotional distress that they have required hospitalization.”94 Similarly, such discrimination inflicts financial and psychological suffering on a significant percentage of workers over age forty.95 Thus, the ADEA is designed to remedy such negative effects where age is determined to be an arbitrary factor.

2. BFOQ: An Exception to the ADEA

The ADEA makes it unlawful for employers to fail to hire, or refuse to hire, or to discriminate against a prospective employees based on their age.96 Thus, the Networks cannot “fail or refuse to hire” or discriminate against a writer because of that writer’s age.97 However, in certain circumstances, discrimination based on age can be justified if it qualifies as an age BFOQ.98 Because a BFOQ is a defense under the ADEA,99 the Networks can argue that discrimination against older writers qualifies as a BFOQ.

The guidelines for age BFOQs suggest that the preferences of advertisers do not, as a general rule, give rise to a BFOQ to hire writers of a particular age.100 Most age BFOQs that meet the requirements for this test have been recognized because of serious public safety concerns.101 For

90. See Western, 472 U.S. at 409–11.
91. Id.
92. Id.
93. See id. at 409–10.
94. First Amended Complaint at 56–58, Wynn (No. CV-00-11248).
95. See Western, 472 U.S. at 409–11.
97. See id.
98. Id. § 623(f)(1).
99. Id.
100. See id.
101. See, e.g., Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976).
example, in *Weeks v. Southern Bell Telephone & Telegraph Co.*, the court suggested that a sex BFOQ for male switchmen could have existed had there been a factual basis or evidentiary showing that "substantially all women would be unable" to lift the heavy equipment. In *Weeks*, the court reasoned that lifting items in excess of thirty pounds with certain frequency could endanger a woman’s health and safety. An age BFOQ has also been extended to pilots over the age of sixty because the health risks for this age group could potentially affect a pilot’s ability to fly or land an aircraft. Obviously, if an older pilot experiences health risks while in the air, he places many passengers in danger. However, because the exception is very narrow, it has not been extended to assistant pilots, who do not operate the flight controls unless the captain and first officer become incapacitated.

Nonetheless, if the writers succeed in proving a prima facie case of age discrimination, the burden will shift to the Networks to show that age is a BFOQ. The Networks will avoid liability for the alleged age discrimination, no matter how blatant the discrimination, if they satisfy the two-prong BFOQ test. Under the first inquiry, Networks must establish that the age restriction is "reasonably necessary" to the normal operation of the particular business. In other words, the Networks must establish that age is essential to the writer’s ability to entertain viewers by showing that the Networks would be unable to entertain viewers if they hired older writers. If the Networks pass the first inquiry, then under the second

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102. *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 234 (9th Cir. 1969).
103. *Id.* at 232 (Switchmen operate and maintain air conditioners, which often requires them to lift in excess of thirty pounds.).
104. *Id.* (rejecting a sex BFOQ for male switchmen for safety reasons because the employer was unable to show that "substantially all women would be unable" to lift heavy equipment). *Id.* at 236.
105. *Id.*
106. *Western*, 472 U.S. at 404–05.
107. *Id.* at 412.
108. *Id.* at 404, 423. Even though Western required assistant pilots to retire before age seventy for potential safety reasons, the Court affirmed the district court’s holding that the mandatory retirement requirement was not an age BFOQ. *Id.* at 423.
109. See generally discussion *supra* Part II. Because of the abundant evidence, both direct and statistical, corroborating the Networks’ hiring policy, this Comment assumes that a prima facie case of age discrimination has successfully been established.
110. See *Western*, 472 U.S. at 416 n.24.
111. *Id.* at 413–16.
112. *Id.*
inquiry, the Networks must justify its use of age as a proxy for the ability to entertain viewers by demonstrating that,

there is a reasonable basis to believe either that virtually all members of the class discriminated against would be unable to perform the job ... efficiently, or that some members of the group possess undesirable traits that preclude their ... efficient job performance but which could not be discerned practicably except by reference to age.\textsuperscript{114}

\textbf{B. Background of Customer Preference}

In very rare circumstances, customer preference may give rise to an age \textit{BFOQ},\textsuperscript{115} although many cases have held that customer preferences cannot justify discriminatory practices.\textsuperscript{116} While customer preference has been recognized,

\begin{itemize}
  \item [1] the care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening the kind of enormous gap in the law which would exist if [for example] an employer could legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group.\textsuperscript{117}
\end{itemize}

\textbf{1. Roots of Customer Preference}

Restaurant owners in the 1960s argued that their Caucasian customer base would never patronize an establishment that hired African American servers or permitted African Americans to eat with them.\textsuperscript{118} Using the Commerce Clause, the Court upheld the Civil Rights Act of 1964, rejecting

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\textsuperscript{114} Kathleen M. McLeod, Comment, \textit{Defining the Narrow Scope of the BFOQ Exception to the ADEA}: Western Air Lines v. Criswell, 28 B.C. L. REV. 195, 198 (1986).
\textsuperscript{115} See Diaz, 442 F.2d at 387.
\textsuperscript{116} See, e.g., Diaz, 442 F.2d at 388 (holding that where customer preferences are "tangential to the essence of the business involved" they do not justify sex discrimination); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981) (rejecting lower court's holding that an international company's discriminatory hiring practices based on the preference that their international customers did not like to do business with women did not qualify as a BFOQ); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 303 (N.D. Tex. 1981) (stressing gender discriminatory practices based on customer preferences qualifies as a BFOQ only when the business necessity test is met).
\textsuperscript{117} Id.
\end{flushright}
the restaurant’s justification, regardless of whether or not it accurately reflected the views of its Caucasian customers. The Court held the practice of discrimination against African Americans at Ollie’s Barbeque because of white customers’ preferences was unconstitutional. Further, this preference imposed an “artificial restriction on the market,” which deterred skilled African Americans from pursuing jobs in the community.

2. Customer Preference: Legislative Response

The Equal Employment Opportunity Commission (“EEOC”) guidelines were designed, in part, to overcome discriminatory policies due to customer preferences: a sex BFOQ is not recognized if an employer “refus[es] to hire an individual because of the preferences of . . . customers . . . .” However, the EEOC provides a very narrow exception for sex discrimination: a BFOQ defense applies where customer preference “is necessary for the purpose of authenticity or genuineness.” For example, a network is free to reject a female in favor of a male to play a role intended for a male actor because this is necessary for purposes of the authenticity or genuineness of the character.

The EEOC’s recognition of “authenticity or genuineness” is consistent with the legislative history of Title VII. Title VII’s legislative history suggests that these types of exceptions are permissible. During the Congressional Hearings on the Civil Rights Act of 1964, senators discussed reasonable situations where one might prefer a particular employee for purposes of authenticity. Representative Dent believed it

119. See id. at 304–05. Legislative history of Title VII of the Civil Rights Act of 1964 suggests that Congress rejected discrimination because of customer preference in an employment setting. See Diaz, 442 F.2d at 386–87.
120. Katzenbach, 379 U.S. at 304. In a companion case, the Court also held the practice of a hotel’s discrimination against African Americans because of white customers’ preferences was unconstitutional under the Commerce Clause. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964).
121. See Katzenbach, 379 U.S. at 299–300. The purpose of Title VII of the Civil Rights Act was to “provide equal access to the job market” for individuals, regardless of immutable traits. Diaz, 442 F.2d at 386–87.
123. Id. § 1604.2(a)(2).
124. See id.
125. See Western, 472 U.S. at 411–12.
126. Id.
would be permissible to allow considerations of customer preference when, for example, a French restaurant is looking for a French chef.¹²⁸


Customer preferences can be considered when those preferences are essential to the “essence of the business.”¹²⁹ In Diaz, the court applied the “essence of the business” test and analyzed whether Pan American would be able to perform the “primary function” of flying an airplane safely if they were required to hire male flight attendants.¹³⁰ The court found that allowing “preferences and prejudices of the customers”¹³¹ to determine whether discrimination is valid is inconsistent with Title VII.¹³² Ultimately, the court rejected the defendant’s argument that sex was a BFOQ because customers preferred female flight attendants who provide a more “pleasant environment” and “cosmetic effect.”¹³³ Pan American’s discriminatory practices based upon their customers’ stereotyped preferences could not be justified as they were not essential to the business of transporting passengers.¹³⁴ The duties of a flight attendant are successfully performed by both genders. Even if a male flight attendant is unable to provide the reassurances of a female flight attendant, this non-mechanical aspect of a flight attendant’s duties is not essential to transporting passengers because it would not likely endanger the passengers or cause the system to break down.¹³⁵

Wilson v. Southwest Airlines Co.¹³⁶ added to Diaz, holding that stereotyped customer preferences may not be used to justify a discriminatory act, even where it is the majority’s preference.¹³⁷ As with Pan American, Southwest Airlines unsuccessfully defended its practice of hiring only attractive female flight attendants by arguing that, based on marketing surveys, most of its customers are male and prefer attractive

¹²⁸. See id. at 7213.
¹²⁹. Diaz, 442 F.2d. at 388.
¹³⁰. Id. at 388–89.
¹³¹. Id. at 389 (noting that “it was . . . these very prejudices the Act was meant to overcome”).
¹³². See id. at 388–89; Western, 472 U.S. at 409–12 (explaining that the BFOQ exception was “meant to be an extremely narrow exception to the general prohibition” of age discrimination contained in the ADEA because the language was borrowed from Title VII).
¹³³. Diaz, 422 F.2d. at 388–89.
¹³⁴. Id.
¹³⁵. Id. at 388.
¹³⁷. See id. at 296, 303.
female flight attendants. Although the court recognized that Southwest’s success was due, in a large part, to a reinvented image featuring female flight attendants in an effort to attract businessmen, the court did not feel the practice of employing only females was essential to safely transporting customers.

Moreover, surveys showing other factors attributable to Southwest’s success persuaded the court that Southwest’s customers consisted of passengers who did not prefer female flight attendants. Southwest claimed that female flight attendants, who personified “youth and vitality,” were the “largest single component” of its success. The court, while recognizing that sex appeal might have increased Southwest’s profitability, rejected the argument that Southwest could justify discrimination “merely on the grounds that it is necessary to make a profit.”

In addition, the court found that discriminating on the basis of sex to sustain a reinvented image was not a permissible justification. Not only did Southwest hire based on the preferences of its customers, it nurtured the policy by creating a “love” campaign, promoting the very preference they were defending. The court stated that it does not recognize a BFOQ “merely because an employer chooses to exploit female sexuality as a marketing tool, or to better insure profitability.”

IV. THE NETWORKS’ HIRING POLICY IS NOT A PERMISSIBLE AGE BFOQ

The Networks’ discriminatory hiring policy does not give rise to an age BFOQ because it is not essential to entertaining viewers or

138. See id. at 294.
139. See id. at 295.
140. See id. at 296.
141. Id. at 294.
142. Southwest Airlines, 517 F. Supp. at 295. Surveys revealed that passengers flew Southwest Airlines for many reasons that had nothing to do with female flight attendants. Id. at 295-96. For example, passengers also flew Southwest because of convenience, promptness, and friendly service. See id. at 295. Although the surveys found that some passengers preferred female flight attendants, the surveys did not find that Southwest’s success was attributable to the female flight attendants, nor did they show the airline would suffer if they hired men. See id. at 303.
143. Id. at 302 n.25.
144. Id. at 303.
145. Id. at 294.
146. Id. at 303.
communicating authentically youthful material.147 Furthermore, because there are many ways to communicate this youthful message without looking at the age of the writer, the message is not necessarily linked to the writer.148 Based on this reasoning, the writers in Wynn should prevail because it would force Networks to abide by the ADEA.

A. An Advertiser’s Preference for Hiring Young Writers Does Not Meet the First Prong of the BFOQ Test

Under the first prong of the BFOQ inquiry, the Networks would have to show that a preference for young writers is essential to the Networks’ business.149 The BFOQ exception for the ADEA is essentially the same as the “essence of the business” test in Diaz v. Pan American World Airways, Inc.,150 the leading case on customer preference.151 In fact, the Supreme Court used Diaz’s “essence of the business” test for customer preference to interpret the “normal operation of the business” language in the Act’s BFOQ exception.152 Under the Court’s holding, the Networks’ preference in employing young writers is not “reasonably necessary to the normal operation of the particular business”153 because it is not essential to entertaining viewers.154

1. The Networks’ Hiring Policy is Not Essential to the Networks’ Business

a. The Essence of the Networks’ Business Is to Entertain Viewers, Not to Target Younger Audiences

Under Diaz, “the essence of the business” is defined as the “primary function” of that business.155 The Networks’ can argue that the writer is necessarily linked to the message because the “primary function” of

148. See discussion infra Part IV.B.
149. See Western, 472 U.S. at 413.
150. 442 F.2d 385, 388 (5th Cir. 1971).
151. Western, 472 U.S. at 413.
152. Id. (quoting Diaz, 442 F.2d at 388).
154. See Western, 472 U.S. at 413.
155. Diaz, 442 F.2d at 388.
network television is to cater to the tastes of its targeted young audience. Unlike *Diaz*, where a flight attendant’s duties were tangential to transporting passengers, the Networks could argue that hiring young writers is essential to catering to the preferences of its young viewers. However, the Networks would still need to show that the writers they hire contribute to the youthful message.

Although the Networks may argue that the essence of their business is catering to the tastes of the target audience, network television’s ultimate goal is to “attract as broad and big an audience as possible” because economic success in television is determined by the size, not the defined age group, of the audience: “Nothing can dissolve the [N]etwork’s dependence on certification by a mass audience.” Hiring based on advertisers’ preferences cannot justify discriminating against writers on the basis of age because it is not essential to the “primary function” of network television—entertaining viewers. Thus, if the Networks’ “primary function” is to entertain *all* viewers, then the Networks would have to argue that hiring young writers is essential to entertaining all viewers, not just the targeted group.

b. Advertisers Will Buy Time on Shows Written by Older Writers

The hiring policy is not essential to the Networks’ business because advertisers will buy time, regardless of the age of the writer, and thereby fund shows that purportedly will not appeal to the advertisers’ preferred target demographic group. Similar to the arguments made on behalf of Ollie’s Barbeque in *Katzenbach*, the Networks argue that if they hire older talent the viewers will tune in to another channel; thus, advertisers

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156. See id.
157. Id.
158. See discussion infra Part IV.B (For example, if the Networks marketed themselves as networks that only hire young writers, they may be able to show a link between the youthful messenger and the youthful message preferred by the advertisers.).
160. See Bauder, supra note 159. Moreover, many of the writers over forty in *Wynn* contributed to successful television series, which attracted a wide range of audiences, including the target group. First Amended Complaint at 52–53, *Wynn* (No. CV-00-11248).
161. GITLIN, supra note 18, at 203.
162. Id. at 24–25.
163. See id. at 203.
will buy less air-time, and business will suffer. As a result, Networks contend that eliminating generations who are out of touch with the target audience helps guarantee that the written material will be geared toward the targeted age group, and this, in essence, will entertain the viewers they depend on for the financial backing of the advertisers.

Whereas advertisers certainly find it reasonably convenient to advertise on shows where there is a guaranteed maximum exposure to the targeted audience, this goal is not reasonably necessary. If the ADEA prohibits all the Networks from discriminating against writers solely on the basis of age, advertisers will have no place to go but to the highest-rated, non-discriminatory shows. Good shows that draw large audiences will always survive if no one is permitted to cater to the customers’ biased preferences.

c. The Hiring Policy May Not Meet Its Intended Goals

The Networks’ discriminatory hiring practices may not even have a direct effect on fulfilling its intended goals, making it meaningless to the Networks’ business. Networks would have a difficult time proving the necessity in hiring talent of a particular age to achieve the goal of reaching a particular target group. Adam Lapidus, who wrote a script about menopause for The Golden Girls that launched his career at age twenty-one, said “[t]he point of being a good writer is you can write for

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166. See Allred & Mochkatel, supra note 2.
167. See First Amended Complaint at 50–51, Wynn (No. CV-00-11248); GITLIN, supra note 18, at 56–59. Networks cater to “[w]hatever component of audience taste seems to rise to the surface at a given moment and holds out the possibility of being measured simply.” Id. at 55.
168. See Western, 472 U.S. at 413–14.
171. See GITLIN, supra note 18, at 53–58. “[T]he haste to make investments pay off quickly is no better for art, even for entertainment, than it is for wine.” Id. at 55.
anybody.” Thus, the Networks’ fear of economic disaster is unjustified because writing on television shows was, at one time, successful without these discriminatory policies in place.

Another problem the Networks’ potential claim that this hiring policy is essential to entertaining viewers is that there is no proof that Networks derive success from younger writers’ material and no proof that viewers will change the channel if older writers write for the shows. The Networks cannot base their arguments on speculation. In order to justify the Networks’ discriminatory policies, the Networks would have to prove that younger viewers are more valuable to advertisers. Even though there is proof that the targeted group is more susceptible to television advertising, the reports do not compare the Networks’ success before and after the implementation of the discriminatory hiring policy. Furthermore, the Networks must show that attracting young viewers is directly related to hiring those who understand the needs of the age group.

d. Writers Over Age Forty Are Not Too Old to Write for the Targeted Audience

Age discrimination is not essential to the essence of the Networks’ business given that writers over age forty are not too old to write material for a youthful audience. A writer with more experience in writing and in life potentially has the ability to write material that would appeal to a much broader audience. For example, Larry David, co-creator of the hit television series Seinfeld, said “Seinfeld was produced for the overall television audience, not for a particular age demographic.” Moreover,

173. Girion, supra note 21.
174. See generally GITLIN, supra note 18, at 53–58 (explaining that even though the ratings produce the most accurate measure of network viewers, it is not an accurate measure of network success).
175. See generally Palumbo, supra note 172 (stating that the Networks’ assumptions about older writers do not “hold up under examination.”). See also Wilson v. Southwest Airlines, 517 F. Supp. 292, 303 (N.D. Tex. 1981).
177. See id. (supporting the argument that they only strive to entertain the eighteen to thirty-four year-old age group).
179. See discussion supra Part IV.B.
180. See Girion, supra note 21 (Writers of all ages can successfully write for audience of all ages, thus reaching a much broader audience than the targeted group.).
181. Saunders, supra note 170.
shows employing a significant amount of writers over age forty, such as *Baywatch Nights*, also appeal to the target audience of eighteen to thirty-four.\(^{182}\) Thus, these writers successfully use their experience to write material that entertains many age groups.\(^{183}\)

\[\text{e. Some Advertisers Do Not Prefer Young Writers} \]

Excluding older writers from consideration for network television jobs is not essential to the business because other significant factors, such as the quality of the material, contribute to the Network's success.\(^{184}\) Southwest Airlines argued that their females-only hiring practice was crucial to financial success.\(^{185}\) However, surveys revealed some passengers flew Southwest Airlines because of convenience and punctuality, in addition to the friendly personnel.\(^{186}\)

Even if hiring young writers is the majority of advertiser's preference, the preference for younger writers is not essential to the business because not all advertisers prefer young writers.\(^{187}\) As some businessmen preferred female flight attendants in *Southwest*, there are advertisers who prefer younger talent in television show writing.\(^{188}\) On the other hand, there are also advertisers who prefer quality material to the age make-up of the writer.\(^{189}\) Networks will have a hard time arguing that age matters more than quality because they depend on talent agencies and script 'readers' to find quality young talent.\(^{190}\) Consequently, the writers in *Wynn* only seek an equal opportunity to submit their material for consideration.\(^{191}\)

Moreover, in striving to entertain as many viewers as possible, the

\[\text{\[183. See id.}}\]
\[\text{\[184. See Southwest Airlines, 517 F. Supp. at 295–96.}}\]
\[\text{\[185. Id. at 293.}}\]
\[\text{\[186. Id. at 295–96.}}\]
\[\text{\[187. See id. at 303.}}\]
\[\text{\[188. Id. at 296. Nielson research revealed that "[y]outhful audiences are less settled in their preferences and more susceptible to television advertising than older audiences." First Amended Complaint at 51, Wynn (No. CV-00-11248).}}\]
\[\text{\[189. See GITLIN, supra note 18, at 49.}}\]
\[\text{\[190. See Shayne, supra note 8.}}\]
\[\text{\[191. See First Amended Complaint at 1–7, Wynn (No. CV-00-11248) (requesting equal access to Network television jobs). There are other groups, however, that advocate equal rights in Hollywood essentially through quotas for minority talent. See Audiotape: Words into Pictures: The Writer as Subversive, presented by the Writers Guild Foundation (June 9, 2002) (on file with the WGA library) (discussing the reverse discriminatory effects of quotas in the Television Industry for minority talent).}}\]
Networks reach viewers outside the targeted group as well. These viewers are significant in determining whether or not the advertisers will purchase time on a particular show. Most likely, as advertisers try to market to the total group, there are necessarily some advertisers who would not prefer young writers, in favor of material that appeals to all viewers.

f. The Networks’ Youthsful Image Does Not Justify Its Hiring Policy

The Networks, like Southwest Airlines, reinvented their image to respond to advertisers’ preferences by allegedly exploiting youth as a marketing tool for the youthful message they deliver, and as a justification for hiring youthful employees. Seeing as sustaining this reinvented image is not essential to entertaining viewers, it should not serve as a justification for the Networks’ hiring policy. In order to sustain the image, the Networks have effectively directed everyone in the hiring chain toward a common goal: catering to the advertisers’ preferences. The Networks allegedly work towards this goal by dictating which writers will be considered for various writing positions through both a direct-hiring process and control over various employees, such as executives and talent agents. Nevertheless, this scheme is not permissible under Southwest’s rationale because choosing to exploit youth as a marketing tool, in order to ensure profitability, is not a permissible BFOQ.

Furthermore, because this reinvented image promotes the hiring of young network executives in addition to young writers, it is even more difficult for older writers to land a network television job given an overall

192. Id. Networks also compete for the most viewers. This number determines the top shows, not the most viewers in the eighteen to thirty-four year old target group. “Only two of the top ten shows skew even slightly youthful.” See Shayne, supra note 8.

193. See Shayne, supra note 8.

194. See Southwest Airlines, 517 F. Supp. at 295–96. As there are passengers that flew Southwest for reasons other than attractive female flight attendants, there are audience members who view television for reasons other than young talent. See id.

195. See Girion, supra note 21.

196. See Southwest, 517 F. Supp. at 303. Network control over hiring is not essential to business; similarly, the hiring of attractive young flight attendants is not essential to Southwest’s business. See id.

197. See Shayne, supra note 8 (“The old boys’ club has been replaced by a just as insidious young girls’ and boys’ club. Now that these twentysomething gatekeepers are no longer under their parents and teachers’ thumbs, it’s their turn to have a little bit of power . . . ”).

198. See id.

199. Southwest Airlines, 517 F. Supp. at 303 (emphasizing that case law supports the conclusion that “sex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool, or to better ensure profitability.”).
lack of comfort in working under younger executives.\textsuperscript{200} Although young executives may feel more comfortable working with young writers, it is not essential to the Networks' hiring policy. If Networks discontinued the practice of only hiring young executives, the Networks might feel more comfortable hiring older writers, knowing that the writers themselves would be more comfortable in the workplace.\textsuperscript{201} There is a disproportionate amount of young executives only because the Networks' alleged hiring practices extend to executives as well.\textsuperscript{202} If Networks discontinued this alleged practice, the eighty-eight percent of executives under age forty might not remain, making Networks less uncomfortable about hiring older writers who write quality material.\textsuperscript{203}

Networks' youthful image is a direct result of ads targeting the preferred group, but this advertising fact should not be a justification for the Networks' alleged discriminatory hiring practices.\textsuperscript{204} Customer preference alone simply cannot justify age discrimination.\textsuperscript{205} Like Southwest Airlines, the Networks nurtured the very policy that they are now defending.\textsuperscript{206} Just as Southwest Airlines enhanced the preference for female flight attendants with a "love" marketing campaign,\textsuperscript{207} the Networks enhance their youthful image by saturating prime-time television\textsuperscript{208} with advertisements consisting of young actors and youthful themes.\textsuperscript{209} Under Southwest, even if the Networks directly marketed themselves as networks that only hire youthful writers who write youthful material geared toward the targeted group, this is merely a marketing tool to ensure profitability, which is not permissible.\textsuperscript{210}

\textsuperscript{200} See Shayne, supra note 8.
\textsuperscript{201} See id.
\textsuperscript{202} See First Amended Complaint at 55, Wynn (No. CV-00-11248); see also THE 1987 HOLLYWOOD WRITERS' REPORT, supra note 31, at S-24.
\textsuperscript{203} Id.
\textsuperscript{204} See Saunders, supra note 170.
\textsuperscript{205} Diaz, 442 F.2d at 389.
\textsuperscript{206} See Southwest, 517 F. Supp. at 303.
\textsuperscript{207} Id. at 294 (Southwest ran ads such as "WE'RE SPREADING LOVE ALL OVER TEXAS" and "AT LAST THERE IS SOMEBODY UP THERE WHO LOVES YOU.").
\textsuperscript{208} See CANTOR, supra note 71, at 12.
\textsuperscript{209} See First Amended Complaint at 50–51, Wynn (No. CV-00-11248); see also GILTIN, supra note 18, at 53–58.
\textsuperscript{210} See Southwest, 517 F. Supp. at 303.
g. Courts Only Recognize Age BFOQs Adopted to Protect an Important Government Interest

The Networks' hiring policy is not essential, and therefore not permissible, because the age qualification was not adopted to protect an important government interest. A BFOQ will sometimes be adopted in cases where the health and safety of the employee makes discrimination necessary, which is simply not the situation with not hiring older writers. Writing is not a physical activity that affects the health or safety of the writer or others. Even though writing entails demanding hours that could affect a writer's health, writing is an occupation which, unlike the job of a switchman or pilot, does not pose a threat to the public or other employees. "Labeling a job 'strenuous' simply does not meet the burden of proving that the job is within the bona fide occupational qualification exception."

h. Stereotyped Beliefs Are Never a Legitimate Reason for Discriminating

Courts have not extended the BFOQ exception for age to include stereotyped beliefs, like the belief that an age group is incapable of performing a job. The network's actual purpose for discriminating—suspected preferences of a targeted audience—is nothing more than a stereotype. Further, when individuals are prevented from obtaining a position available to other members of the public due to stereotyped preferences, rather than ability, they are deprived of the benefits of participating in the workplace. Inevitably, this arbitrary discrimination leads to a devastating loss of self-worth, one of the complaints in

211. See Western, 472 U.S. at 416 n.24 (If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.).
212. See id. at 422–23.
213. See id. at 413–14.
214. See Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 234–36 (5th Cir. 1969).
215. Id. at 234.
216. See, e.g., Western, 472 U.S. at 410–11.
217. See discussion supra Part IV.B. (explaining that the eighteen to thirty-four year-old age group prefers material written by younger writers because older writers do not have the "vitality, creativity, or stamina" to write for younger audiences).
218. See Roberts, 468 U.S. at 625.
219. See id. at 625–26. This is also one of the many circumstances that led to the enactment of the ADEA. Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 409–410 (1985).
Though the Networks *may* consider customer preferences essential to entertaining viewers, preferences based on advertisers' biases do not serve a similar legitimate purpose.\(^{221}\)

This rationale is consistent with Equal Protection cases under the Fourteenth Amendment,\(^{222}\) which continually reject stereotyped preferences as a legitimate basis for discriminating.\(^{223}\) The Networks' argument still fails because hiring based on suspected advertisers' biases is not a legitimate justification under rational basis review for Equal Protection purposes.\(^{224}\) It seems unlikely that the Court would find this false stereotype an illegitimate justification for purposes of Equal Protection but then allow it to serve as a justification under the ADEA.\(^{225}\) Even though "[p]rivate biases may be outside the reach of the law," the ADEA "cannot, directly or indirectly, give them effect."\(^{226}\)

i. Economic Harm Is Not a Legitimate Reason for Discriminating Based on Customer Preference

Allowing older writers to write for the targeted age group imposes only a *potential* financial harm, which does not justify age discrimination.\(^{227}\) Age discrimination based on customers' preferences cannot be justified "merely on the grounds that it is necessary to make a profit."\(^{228}\) Courts continuously refuse to extend a BFOQ exception to include potential economic harm as a legitimate reason for discriminating on the basis of age.\(^{229}\) Therefore, the potential financial harm to the

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\(^{220}\) First Amended Complaint at 16–46, *Wynn* (No. CV-00-11248).

\(^{221}\) See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (The law will never give effect to private bias' even though they may be out of the law's reach.).

\(^{222}\) U.S. CONST. amend. XIV, § 1. The Equal Protection Clause influenced Congress to extend protection to private parties. Congress borrowed much of the language for Title VII from the fourteenth amendment, and then used Title VII's language for the ADEA. *Western*, 472 U.S. at 411–12.

\(^{223}\) See *Palmore*, 466 U.S. at 433.

\(^{224}\) See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 473, 433 (1985) (holding that private biases against the mentally retarded are not a legitimate government interest, even under rational basis review).

\(^{225}\) See *Palmore*, 466 U.S. at 433.

\(^{226}\) See id. at 441.

\(^{227}\) See *Allred & Mochkatel*, *supra* note 2 (The writer's age is not essential to the Networks' business success.).

\(^{228}\) *Southwest Airlines*, 517 F. Supp. at 302 n.25.

\(^{229}\) *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (concluding that potential lost revenue does not justify hiring based on customer preferences); *Southwest Airlines*, 517 F. Supp. at 302 n.25 (rejecting the argument that Southwest Airlines could justify
Networks is also not a legitimate reason for hiring and script decisions based on age. Moreover, this feared economic harm would never materialize if all Networks routinely made hiring and script decisions without regard to age.Advertisers would almost certainly continue to buy time on "quality" shows, regardless of whether they were written by older writers.

In addition, although younger writers on average accept less pay for the same amount of work, this too is an illegitimate justification for the Networks' discriminatory hiring decisions. This is merely another economic harm argument, which is not a good enough reason to discriminate based on age.

Wyyn seeks to eliminate reliance on ageist stereotypes by forcing employers to select writers blindly, based on the quality of their scripts, not on their age. Initially, this might subject the Networks to more litigation, a significant business expense. However, just as it was insufficient to justify race discrimination, the threat of litigation cannot justify age discrimination. "Society has to make a choice."

2. An Advertiser's Preference in Hiring Young Writers Is Not Necessary for the Purposes of Authenticity or Genuineness

Another exception to the doctrine of customer preference might apply if the advertisers' preferences were "necessary for the purposes of authenticity or genuineness." Within the television industry, customer preference is relevant for purposes of a BFOQ with hiring decisions for on-

discrimination "merely on the grounds that it is necessary to make a profit.").

231. GITLIN, supra note 18, at 49. Although there are other methods of advertising such as billboards and magazines, none of the other methods reach as many consumers. See id. at 24-25.
232. See THE 1998 HOLLYWOOD WRITERS' REPORT, supra note 30, tbl.23.
234. See First Amended Complaint at 1-7, Wyyn (No. CV-00-11248).
235. See Bronstad, supra note 67, at 3 ("But passing the Civil Rights Act of 1964 had the same result.").
screen talent because audience members watch particular television shows based on whether or not they authentically and genuinely believe that the actor is the character they perceive.\textsuperscript{239} However, the audience never perceives the writer, and therefore, an advertiser's preference for a younger writer is not necessary, or even relevant, for purposes of authenticity or genuineness.\textsuperscript{240}

a. Older Writers Can Authentically Communicate a Message That Appeals to Young Viewers

The Networks' could potentially argue that hiring writers based on age is "necessary for the purpose of authenticity or genuineness."\textsuperscript{241} The argument would be based on the Networks' belief that only younger writers can authentically communicate a message that appeals to young viewers.\textsuperscript{242} Because advertisers prefer youthful material, the Networks believe that they must have youthful writers who can write authentic material geared towards the youth of today.\textsuperscript{243} Writers over forty may be able to write youthful material based on experiences from their youth, but they may not be able to authentically write about what it is like to be young today.

The Networks can argue that the advertisers' preference for youthful writers is analogous to customers of a French restaurant who prefer a French chef—a preference that Representative Dent suggested was permissible during the Congressional Hearings on Title VII.\textsuperscript{244} As in the case of the French restaurant, even though customers may not be aware of the chef, they still prefer that an authentic French chef prepare the food. Here, even though advertisers may not ever see the writer, they still prefer material by young writers because of its authenticity and its increased potential of reaching the targeted young viewers.

Arguably, however, the authenticity exception should not apply even in the case of the French restaurant because an exception based on authenticity should be limited to cases where the authenticity can actually be observed.\textsuperscript{245} "It is doubtful whether restaurant patrons can tell from the

\textsuperscript{239} See Southwest Airlines, 517 F. Supp. at 301.
\textsuperscript{240} See id.
\textsuperscript{241} See 29 C.F.R. § 1604(a)(2) (2001) (The Networks would have to argue for an extension of the authenticity and genuineness exception to sex discrimination.).
\textsuperscript{242} See id.
\textsuperscript{244} See 110 Cong. Rec. 7213 (1964).
\textsuperscript{245} See Symposium, Sex Discrimination, 84 Harv. L. Rev. 1166, 1178–79 n.63 (1970–71).
quality of food produced who produced it." Similarly, in the case of network writers, preference for a young writer should not be allowed because neither the advertiser, nor the audience ever observes the writer.

A cable network that caters to a particular group, such as a Black entertainment network, might have a more persuasive argument for an authenticity exception. For example, advertisers on a Black network might prefer that a Black writer write about the experiences of growing up Black because a white writer has never experienced what it is like to grow up Black. This choice would help ensure that the material was geared to a targeted Black audience. However, this would set a dangerous precedent as many writers appeal to audiences in which they have no familiarity. For example, J.K. Rowling never experienced what it is like to be a little boy, yet her *Harry Potter* series reaches millions of little boys across the world.

b. The Limited BFOQ for the Purpose of Authenticity When Hiring On-Screen Talent Does Not Extend to Off-Screen Talent

Age discrimination is not only prevalent among writers, but also among the industry as a whole. For example, the Networks’ hiring policies extend to actors who audition for network television shows. In furtherance of an attempt to cater to young audiences, network television executives dictate which actors will fill particular roles. As a result, “[older actors] of both genders are greatly underrepresented and seem to be vanishing instead of increasing as in real life.” Nonetheless, whereas discriminating on the basis of age for off-screen talent, such as writers, will most likely be seen as invidious discrimination, discriminating on the basis of age for on-screen talent, such as actors, is generally more permissible.

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247. See id.

248. See Shayne, *supra* note 8 (discussing the vast character make-up of network television shows).


250. See Nellie Anderson, *No Gray Area: TV Ageism Bashed*, HOLLYWOOD REPORTER, Mar. 1, 2000, at 8 (“[T]elevision is getting younger on every level, from actors to top executives, leaving older viewers drastically underrepresented.”).

251. See Shayne, *supra* note 8 (discussing how Networks think they will get more sponsors if they produce shows that fit the demographics of the time slot).


253. See generally 110 CONG. REC. 7213, 7217 (1964) (providing examples of reasonable occupational qualification on the basis of race and religion).
The nature of network television fosters consideration of subjective factors when making hiring decisions and thus, what is entertainment to one, may not be to another. For instance, whether or not a writer's material is entertaining to the reader or viewer is an individual determination. However, because the audience never sees the writer, there is absolutely no reason to ever consider a writer's physical appearance.

On the other hand, an actor's job is to "fulfill the audience's expectation and desire for a particular role, characterized by particular physical or emotional traits." An actor's appearance and performance to an audience is crucial to the actor's success in a particular role. Accordingly, discrimination laws allow an exception in hiring actors in order for performances to achieve authenticity or genuineness.

The EEOC's recognition of "authenticity or genuineness," as an exception to age discrimination, enables Networks to consider whether or not an audience will believe a character is of a particular sex, and most likely of a particular age. Further, Title VII's legislative history suggests these exceptions are permissible. The Eighth Circuit stated that the appearance of an on-screen newscaster in the television industry is a reasonable consideration because television is a "visual medium," and the station is in a better position than the courts to make such decisions. Most likely, the "authenticity or genuineness" exception extends only to considerations of age when casting a specific role for on-screen talent, and not to hiring considerations for writers. Audiences generally do not voice a preference for the age of writers; they just prefer material geared toward particular audiences.

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255. See Girion, supra note 21 (Aaron Spelling, Chairman of Spelling Television, said "[n]o writer should ever be judged by their age.").

256. Southwest Airlines, 517 F. Supp. at 301.

257. See 110 CONG. REC. 7213, 7217 (1964). Although, it has been suggested that hiring based on age, race, and gender is not necessary in casting actors because "imagination is the key to entertainment, and one could hardly characterize asking an audience to contribute a greater dose of it as a defect." Frank, supra note 246, at 518–19.

258. 29 C.F.R. § 1604.2(a)(2) (limiting the "authenticity or genuineness" exception to sex BFOQs).

259. See discussion supra Part II.B.2.


261. See id. (stating that it is reasonable to consider the appearance of an on-screen newscaster in the television industry); Miller v. Tex. State Bd. of Barber Exam’rs, 615 F.2d 650, 654 (5th Cir. 1980) ("[I]t is likely that a Black actor could not appropriately portray George Wallace, and a White actor could not appropriately portray Martin Luther King, Jr."). But see
Although the exception for a BFOQ based on authenticity or genuineness seems broad at first glance, there is a very logical limitation: a position in which the customer perceives the employee must exist before the exception can be applied.\textsuperscript{262} One of the many problems with the Networks' hiring policy, is that it does not differentiate between on-screen and off-screen talent.\textsuperscript{263} By not confronting this difference, the Networks essentially shape television industry jobs before they exist,\textsuperscript{264} thereby negatively impacting both on-screen and off-screen talent.\textsuperscript{265}

\textbf{B. An Advertiser's Preference for Hiring Younger Writers Does Not Meet the Second Prong of the BFOQ Test}

Assuming the Networks pass the first BFOQ inquiry and establish that the advertisers' preference for youthful writers is essential to either entertaining viewers or targeting young audiences, the Networks would still have to justify their use of age as a proxy for the second prong of the BFOQ test.\textsuperscript{266} In other words, the Networks would need to demonstrate that they were "compelled to rely on age as a proxy for the [age] qualifications validated in the first inquiry."\textsuperscript{267} The Networks can attempt to meet this inquiry by showing that there is a factual basis for believing that "all or substantially all [writers]" over the age of forty would be unable to perform their writing duties in an efficient manner, or by showing that it is nearly impossible to determine if an individual writer is able to write in an efficient manner without reference to age.\textsuperscript{268} Meeting either test will be difficult as the age qualification must be "reasonably necessary"\textsuperscript{269} to the essence of the Networks' business, and not just "reasonable" or "convenient."\textsuperscript{270}

Networks will probably not be able to establish a factual basis for supporting the belief that "all or substantially all [writers]" over the age of

\begin{footnotes}
\item[262.] Ferrill v. Parker Group, Inc., 168 F.3d 468, 474–75 (11th Cir. 1999) (Distinguishing the case from Miller, the court held that the employers could not insist that telemarketer be Black in order to convey a Black accent.).
\item[263.] See Allred & Mochkatel, supra note 2.
\item[265.] See Allred & Mochkatel, supra note 2.
\item[266.] See \textit{Western}, 472 U.S. at 414.
\item[267.] See \textit{id}.
\item[268.] \textit{Id.} at 414–15.
\item[269.] See \textit{Diaz v. Pan Am. World Airways, Inc.}, 442 F.2d 385, 388–89 (5th Cir. 1971).
\item[270.] \textit{Western}, 472 U.S. at 413–14.
\end{footnotes}
forty are unable to write material for the target audience, given that many successful writers over forty have contributed to shows that profit from the targeted audience.\textsuperscript{271} Evidence suggests that shows written by writers of all ages would not result in loss of viewers.\textsuperscript{272} 

To rebut the Networks’ argument to the contrary, the plaintiffs in \textit{Wynn} need only turn to the many examples of writers over forty who have contributed to successful shows which cater to the targeted group.\textsuperscript{273} For example, during the 1997–1998 television season, shows such as \textit{Dharma and Greg}, \textit{Ally McBeal}, \textit{Frasier}, and \textit{Sabrina the Teenage Witch}, appealed to the target audience of eighteen to thirty-four year-olds, even though writers over age forty made up at least one-third of each show’s writing staff.\textsuperscript{274} Currently, Linwood Boomer, age forty-five, attracts a young audience with his popular show, \textit{Malcolm in the Middle}.\textsuperscript{275} If “all or substantially all [writers]”\textsuperscript{276} over age forty could not write for the targeted age group, the Networks would have a hard time explaining how some of the most successful shows that cater to this targeted group have been written by writers in this age group.\textsuperscript{277} 

Alternatively, in another attempt to justify the ‘no-writers-over-the-age-of-forty’ job qualification, the Networks could try to show that it is nearly impossible to determine if an individual writer is able to write for the targeted group without reference to age.\textsuperscript{278} Prior to the alleged implementation of this policy, however, writers over the age of forty were regularly employed by the Networks without destruction to the essence of network television.\textsuperscript{279} Moreover, determining writers’ abilities simply by reading material they have written is the most practical means of sorting through talent, eliminating the need to distinguish older writers from

\begin{itemize}
\item \textsuperscript{271} First Amended Complaint at 53, \textit{Wynn} (No. CV-00-11248) (Plaintiffs in \textit{Wynn} have written for \textit{The Practice, J.A.G., The Sopranos, Diagnosis Murder}, and other shows.).
\item \textsuperscript{272} See generally \textit{THE 1998 HOLLYWOOD WRITERS' REPORT, supra} note 30, tbl. 21. \textit{See also} Palumbo, \textit{supra} note 172.
\item \textsuperscript{273} \textit{See, e.g., THE 1998 HOLLYWOOD WRITERS' REPORT, supra} note 30, tbl.21.
\item \textsuperscript{274} Id.
\item \textsuperscript{276} \textit{Western}, 472 U.S. at 416 n.24.
\item \textsuperscript{277} \textit{See, e.g., THE 1998 HOLLYWOOD WRITERS' REPORT, supra} note 30, tbl.21.
\item \textsuperscript{278} \textit{Western}, 472 U.S. at 414–15 (adopting the test from \textit{Usery v. Tamiami Trail Tours, Inc.}, 351 F.2d 224 (5th Cir. 1976)).
\item \textsuperscript{279} See generally First Amended Complaint at 49–50, \textit{Wynn} (No. CV-00-11248) (claiming that the plaintiffs in \textit{Wynn} were all successful before the Networks' policy was implemented). \textit{See also} \textit{THE 1987 HOLLYWOOD WRITERS' REPORT, supra} note 31, at 4 (concluding rates of unemployment for older writers is on the rise).
\end{itemize}
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younger writers. Thus, the discriminatory age qualification is "reasonably convenient" at best and not "reasonably necessary" to the essence of the Networks' business.

When television shows only hire writers who are the same age as the target audience and direct them to write scripts for actors who are the same age as the target audience, the ability of both on-screen and off-screen talent is never taken into account. Decisions are not made based on aptitude or writing ability, but rather on purely arbitrary analyses of superficial factors.

Not every hiring consideration for a network television job is subjective. There are many objective factors that go into hiring writers and actors, such as writing style, past experience, reputation, credits, and awards. However, because the Networks' current hiring policy excludes writers from even the consideration process, a writer's writing style, past experience, reputation, credits, and awards are not factors in the denial of a network television writing job. Presumably, the quality of television would improve if ability, rather than age, were taken into account.

C. Policy

The Networks' hiring policy is unlawful, as it runs contrary to the purposes behind the ADEA—"to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." It also runs contrary to several prominent Civil Rights cases, which helped guarantee equal access to the market. The Supreme Court has found that artificial restrictions on a

280. See GITLIN, supra note 18, at 20–21. Aaron Spelling said, "No writer should ever be judged by his age." GIRION, supra note 21.

281. See Western, 472 U.S. at 413–14 (stating "that the ADEA requires that age qualifications be something more than 'convenient' or 'reasonable'"). Id. at 414.

282. Shayne, supra note 8.

283. See discussion supra Part II.A.1.


285. See THE 1998 HOLLYWOOD WRITERS' REPORT, supra note 30, at 36–39 (indicating that network hiring decisions are "highly subjective"). Because Networks use "highly subjective" hiring criteria, they do not account for objective factors that distinguish writers. Id. at 39.

286. Saunders, supra note 170. It has been suggested that the quality of network television has declined in part due to the Networks' hiring policy. Id. Larry David, Co-creator of Seinfeld, "blamed the increasing emphasis on age demographics for the decline of quality in network situation comedy." Id.

287. Western, 472 U.S. at 410 (emphasis added).

market, such as the Networks’ policy alleged here, deter skilled employees from pursuing their profession in the community in which the discrimination takes place.289 A preference for younger writers essentially prevents skilled writers over forty from participating in the television market—their chosen career.290

In fact, legislative findings indicate that a significant portion of writers over age forty suffer both financially and psychologically due to the Networks’ preference for younger writers.291 Consistent with this finding, the plaintiffs in Wynn complain of depression and loss of self-worth which, in some cases, has led to hospitalization.292 The Networks, however, seem unconcerned with this misfortune.293 Therefore, although the outcome in Wynn is unclear at this point, a court should not allow this invidious discrimination to continue because it runs counter to the ADEA’s purpose of preventing older workers from experiencing these very hardships.294

Even though the television industry is somewhat unique in that job ability considerations are in some ways subjective, the discrimination alleged is common in that it is still based solely on age.295 It is one thing for advertisers to look at existing shows that hired personnel without regard to age, and decide which ones appeal to consumers that are most likely to buy their products.296 It is quite another for a network to dictate the age of its employees on the show by hiring personnel strictly to conform to the advertiser’s targeted consumers.297 Because Wynn is still pending,298 it remains to be seen whether a court will view ageism in television as a brutal reality of the industry or invidious discrimination.

289. Id. at 300.
290. See id.; First Amended Complaint at 57, Wynn (No. CV-00-11248).
291. See Western, 472 U.S. at 409–12.
292. First Amended Complaint at 57, Wynn (No. CV-00-11248).
293. See Western, 472 U.S. at 409–12. Defendants are allegedly aware of the problem and nonetheless continue to discriminate. Allred & Mochkatel, supra note 2.
294. See Western, 472 U.S. at 409–11.
295. See Allred & Mochkatel, supra note 2.
V. THE FIRST AMENDMENT DOES NOT PROTECT THE NETWORKS’ DISCRIMINATORY HIRING POLICY

Assuming an advertiser’s preference for a young writer does not warrant an age BFOQ, the Networks are subject to the restrictions of the ADEA unless they can successfully establish that the ADEA, as applied to the discriminatory hiring activity, violates the Networks’ First Amendment rights. In order for the hiring policy to come within the First Amendment, the Networks would have to show that hiring young writers is expressive speech. The Networks can potentially make either of two superficial arguments that their decision to exclude older writers is speech: 1) the hiring decision itself is an expressive act; or 2) the hiring decision is inextricably linked to the youthful message they are trying to convey. However, neither argument will prevail because hiring based on an advertiser’s preference is not speech.

First, to prove that the hiring decision itself is an expressive act, Networks would have to show that they intended to communicate a message by hiring young writers and that the message had an effect on the advertiser. In determining whether an act was intended to communicate a message, the court looks to the traditional use of the activity and the

299. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 572 (1995) (This is not a facial attack on the ADEA “since it does not, on its face, target speech or discriminate on the basis of its content . . .”).

300. See U.S. CONST. amend. I. Thus far, writers lack protection from the Networks’ discriminatory hiring practices due to the false belief that hiring based on customer preference falls within the Networks’ First Amendment right to free speech. See Frank, supra note 246, at 514–15 (2001).


302. Even assuming that the hiring decision is expressive activity, a court would most likely review the application of the ADEA to the Networks’ hiring decision, under the United States v. O’Brien, 391 U.S. 367 (1968), intermediate scrutiny test because hiring is a commercial activity. O’Brien, 391 U.S. at 376. Further, because the conduct at issue here is illegal, it deserves less protection. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 388 (1973).

Any First Amendment interest which might be served by [hiring related to] an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the [ADEA] is altogether absent when the commercial activity itself is illegal and the restriction on [hiring] is incidental to a valid limitation on economic activity.

ld. at 389.

context in which it occurs. However, the act of hiring an employee, in general, is not usually intended as a communication because, traditionally, businesses hire employees as a routine operation of business, not to make a statement. The Networks could argue that, in the context of network television, they hire young writers to convey a message of favoritism for young people. Even in the unlikely event that the Networks could show the hiring decision was expressive, they would have a difficult time showing that it had an effect on the advertiser because the advertiser only cares about the message, not the messenger.

Second, the Networks could make a superficially plausible argument that the hiring decision is inextricably linked to the youthful message they are trying to convey. Specifically, the associational claim might be that these younger writers are the only ones capable of articulating the young message. Using the speaker's autonomy principle of free speech, articulated in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, the Networks will argue that they must be permitted to hire young writers to control the content of their own speech (the youthful message). If the Networks could show that older writers “had become so publicly and pervasively identified with a position advocating [an older viewpoint] (as opposed to just being ... individual[s] who [are] older),” and that, if hired, the older writers would use the Networks as a means of expressing this older viewpoint, then they may be able to show that the message is inextricably linked to the writer.

The Court in Hurley held that a public accommodation law that prohibited discrimination against homosexuals from participating in a

304. Id. at 404–05. For example, the First Circuit has stated that the act of canceling an actresses' performance could be an expressive act, if intended to communicate a message. Redgrave v. Boston Symphony Orchestra, 855 F.2d 888, 896 (1st Cir. 1988).
305. See Spence, 418 U.S. at 410.
306. See id.
307. See Johnson, 491 U.S. at 404.
308. See Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Although the First Amendment protects the Networks right to express a youthful viewpoint that appeals to advertisers, it does not guarantee a right to insist that its message be communicated by younger writers. See id. at 502. In other words, it is the content of the message, not the identity of the messenger (the writer) that warrants First Amendment protection. See id.
309. For example, the KKK need not consider Black applicants for Grand Wizard. See Boy Scouts of America v. Dale, 530 U.S. 640, 660 (2000).
311. See Hurley, 515 U.S. at 574.
312. See Boy Scouts of America, 530 U.S. at 695 n.21 (Stevens, J., dissenting).
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parade, violated the speaker's autonomy principle of free speech. In Hurley, the group that organized the annual St. Patrick's Day parade in Boston refused to let an Irish gay pride group march in the parade with a gay pride banner. The Court specifically noted that the parade did not exclude gay people in general, but rather, it excluded a particular gay group that wished to express a message not of the parade organizers' own choosing. Further, it was important that the gay pride group was formed for the very purpose of openly expressing gay pride at the parade. The inclusion of the gay pride group "would likely be perceived" as the parade organizers' own speech, thereby "alter[ing] the expressive content of their parade."

Wynn can easily be distinguished from Hurley because the Networks are not excluding older writers who wish to alter their youthful message. Instead, the Networks are excluding older writers in general, including those who wish to express their message. Further, older writers are not trying to push their own agenda on the Networks, they only wish to be considered for a writing position in which they would contribute to the Networks' ongoing youthful message. Moreover, although network televisions' message may be dependent upon a speaker, this argument fails because the actor, not the writer is the speaker.

Alternatively, the associational claim might be that the inclusion of older writers would alter the expressive content of the Networks' youthful message. However, the mere inclusion of older writers has apparently not altered the Networks' ability to express a youthful message. The organization in Roberts v. United States Jaycees, fearing that women's votes would change their message, limited regular membership to young men between the ages of eighteen to thirty-four, arguing that an anti-

314. Id. at 561.
315. Id. at 572.
316. Id. at 572–73.
317. Id. at 572–75.
318. See discussion supra Part IV.
319. See discussion supra Part II.A.3. (discussing why plaintiffs in Wynn claim they can express a youthful viewpoint as well as, if not better than younger writers).
320. See discussion supra Part IV.A.2.b.
322. See Boy Scouts of America, 530 U.S. at 698 (Stevens, J., dissenting). "[O]rganizations are not forced by antidiscrimination laws to take any position on the legitimacy of any individual's private beliefs or private conduct." Id.
discrimination act abridged their First Amendment right to freedom of association.\textsuperscript{324} However, the Jaycees, who already invite women to participate in some activities, failed to demonstrate that allowing women to vote would abridge their message; thus, it did not alter the ability to express the message behind the group’s belief.\textsuperscript{325} Similar to Roberts,\textsuperscript{326} the Networks already hire some writers over the age of forty, allowing them to participate in the writing process targeted at a young audience; this has not interfered with the Networks’ young message.\textsuperscript{327}

Ironically, the Networks’ best way to present this argument is to not only admit that they discriminate in hiring, but also that they publicize their discrimination as a selling point for advertising space.\textsuperscript{328} Then they could conceivably argue that being compelled to hire an older writer would be the antithesis to the message they are trying to convey to the advertisers.\textsuperscript{329} The clearest example would be if a network like MTV, which is arguably formed to convey a youthful message targeted to a youthful audience, touts themselves as the network who only hires young writers who write authentically youthful material. In that situation, that particular network could argue that hiring an older writer “sends a distinctly different message” from the message they simply like young people.\textsuperscript{330}

However, \textit{Hishon v. King & Spalding}\textsuperscript{331} rejected a similar argument that the application of an anti-discrimination statute to a discriminatory hiring practice infringed upon First Amendment rights.\textsuperscript{332} In \textit{Hishon}, a female associate at a law firm sued under Title VII claiming that the law firm refused to consider her for partnership solely on the basis of her gender.\textsuperscript{333} The law firm countered that it could not be compelled to consider a woman for partnership because it had expressive and associational rights under the First Amendment.\textsuperscript{334} The Supreme Court rejected this argument because the law firm failed to show “how its ability

\begin{itemize}
\item \textsuperscript{324} \textit{Id.} at 618.
\item \textsuperscript{325} \textit{Id.} at 626–27.
\item \textsuperscript{326} \textit{See id.} at 613.
\item \textsuperscript{327} \textit{See, e.g., The 1998 Hollywood Writers’ Report, supra} note 30, tbl.16a.
\item \textsuperscript{328} \textit{See Boy Scouts of America,} 530 U.S. at 656 (2000) (holding that the “forced inclusion” of a homosexual boy scout “would significantly affect [the Boy Scouts of America’s] expression” with respect to homosexual conduct).
\item \textsuperscript{329} \textit{See id.}
\item \textsuperscript{330} \textit{See id.} at 655–56.
\item \textsuperscript{331} 467 U.S. 69 (1984).
\item \textsuperscript{332} \textit{Id.} at 78.
\item \textsuperscript{333} \textit{Id.}
\item \textsuperscript{334} \textit{Id.}
to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits" rather than her gender.\textsuperscript{335} In short, subjecting Networks to the non-discriminatory hiring requirements in the ADEA, would help guarantee writers' rights to fair employment, without altering the protected message of the Networks' shows. Further, an extensive discussion of these arguments merely replicate the BFOQ argument rejected in Part IV of this Comment.\textsuperscript{336}

VI. CONCLUSION

If customer preference was held not to be an excuse for discriminating against African American restaurant patrons in the 1960s,\textsuperscript{337} or male flight attendants in the 1970s,\textsuperscript{338} the Networks should not be able to justify their alleged invidious discrimination on the grounds that advertisers will not buy time, and thereby fund shows, that purportedly will not appeal to their preferred target demographic group. Today businessmen still regularly fly the ever popular Southwest Airlines,\textsuperscript{339} just as Caucasian customers continued to patronize Ollie's Barbeque for another thirty-seven years after the Court decided Katzenbach.\textsuperscript{340} If no network or cable channel were legally permitted to indulge the bigoted preferences of these "advertising customers," the feared financial harm that Networks now use

\begin{footnotesize}
\begin{enumerate}
\item[336.] See discussion supra Part IV. Though the court in Southwest did not analyze the issue from a First Amendment perspective, the court rejected the argument that a marketing strategy based on customer preferences could outweigh the interest in eradicating discrimination based on gender. Wilson v. Southwest Airlines, Co., 517 F. Supp. 292, 302 n.25 (N.D. Tex. 1981).
\item[339.] See generally SWA, Southwest Airlines Fact Sheet, at http://www.iflyswa.com/about_swa/press/factsheet.html (last visited Sept. 25, 2002) ("Year end results for 2001 marked Southwest Airlines' 29th consecutive year of profitability.").
\end{enumerate}
\end{footnotesize}
to justify discrimination would likely never materialize, and artists over the age of forty, who have been discriminated against, would have a shot at competing for the jobs at issue.

Gina Browne*

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