No. A164880

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

SAMANTHA LIAPES,

Plaintiff and Appellant,

v.

FACEBOOK, INC.,

Defendant and Respondent.

From the Superior Court of California for the County of San Mateo

The Honorable V. Raymond Swope, Judge Presiding

Case No. 20CIV01712

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, ACLU OF SOUTHERN CALIFORNIA, ACLU OF NORTHERN CALIFORNIA, AND UPTURN

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INTRODUCTION

Facebook[1] intentionally targets and delivers certain content to some users and not others on the basis of protected user characteristics—in this case, gender and age—in violation of California's Unruh Civil Rights Act. Facebook has designed and uses various tools—some with solicited advertiser input, and others without—that treat users disparately on the basis of protected characteristics to provide advertisements for insurance. These undisputed practices are particularly concerning when they operate to deny information about insurance to users like Samantha Liapes, given the extensive history of harmful discrimination against women, older people, and others by the insurance industry.

Plaintiff Liapes sought insurance opportunities that included life, home, and automobile insurance. (See First Amended Complaint ("FAC") at ¶ 83.) She alleges that Facebook purposefully excluded older persons and women like herself from advertisements for these opportunities "because of their age and/or gender." (See FAC at ¶ 82.) The court demurred Plaintiff's complaint, holding that: (1) she had "not pled sufficient facts to allege the two causes of action for age and gender discrimination in violation of the Unruh Civil Rights Act," and (2) Section 230 of the Communications

[1] Defendant's parent company, Meta Platforms, Inc., operates multiple online services of which Facebook is one. Amici understand that Instagram uses the same advertising system as Facebook.

Decency Act immunized Facebook's conduct. (Order Sustaining Demurrer, at pp. 2, 4–5.) Ms. Liapes has credibly alleged that she was denied "full and equal" access to the Facebook service based on her age and gender, and this Court should overrule the demurrer so as to permit discovery into the scope and extent of Facebook's discriminatory practices.

ARGUMENT

On June 23, 2023, the U.S. Court of Appeals for the Ninth Circuit reversed the federal district court's dismissal of *Vargas v. Facebook, Inc.* (9th Cir. June 23, 2023, No. 21-16499) 2023 WL 4145434 (hereafter *Vargas*), a similar case alleging that Facebook discriminates in the provision of housing advertisements. The trial court in this case based its demurrer in substantial part on the *Vargas* district court decision. (Order Sustaining Demurrer, at pp. *1, 4–5.) The Ninth Circuit ruled that the district court erred both when it held that plaintiff had not alleged a cognizable injury and in its analysis of Section 230 of the Communications Decency Act. (*Vargas*, 2023 WL 4145434 at pp. *2–4 [standing] & pp. *5–9 [Section 230].) The Ninth Circuit held that "[a] patently discriminatory tool offered specifically and knowingly to housing advertisers does not become 'neutral' within the meaning of [Section 230] simply because the tool is also offered to others." (*Id.* at p. 9.)

Californians today rely on the Internet, including online advertising, to access important economic opportunities, such as insurance products. Amici file this brief to discuss how Facebook's advertising system works and why its discriminatory conduct is unlawful.

First, Facebook's advertising system unlawfully steers ads toward or away from various users based on their personal traits—including protected characteristics. As discussed below, this "targeted advertising" system is exclusionary and fundamentally different from traditional, "contextual" advertising systems that allow anyone viewing a particular medium to see an ad. In targeted advertising, users who are not part of the target audience never receive the ad and, therefore, are denied access to that opportunity.

Second, Section 230 of the Communications Decency Act does not apply to Facebook's conduct in this case for two independent reasons. For one, Plaintiff's claims do not turn on the content of the advertisements, but rather on Facebook's own conduct in their dissemination, which Section 230 does not immunize. For another, Section 230 does not apply because Facebook materially contributes to the alleged illegality. (See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1167–68 (en banc) (hereafter *Roommates.com*).)

Finally, Facebook's counterarguments fly in the face of longstanding civil rights precedent. First, Facebook cannot evade liability by claiming it provided excluded users with alternative valuable opportunities, nor can it

justify discrimination against an individual by asserting it simply gave users, in aggregate, what they want. Second, it is also well settled that Facebook cannot evade liability merely by telling advertisers not to discriminate. Third, Plaintiff has standing to bring this case because Facebook advertises insurance opportunities directly to some users, in this case men and younger people, while forcing other users, including women and older people, to make additional efforts to learn about those same opportunities. Injury in fact exists when there is a "barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," and does not depend solely on "the ultimate inability to obtain the benefit." (*Northeastern Florida Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.* (1993) 508 U.S. 656, 666 (hereafter *Northeastern Florida*).)

The Court, like the Ninth Circuit in *Vargas*, should reverse the erroneous decision of the trial court.

I. Facebook's Advertising System Discriminates in the Targeting and Delivery of Ads for Economic Opportunities

The court incorrectly found that Facebook's ad targeting tools do not discriminate under the Unruh Civil Rights Act because they purportedly are "neutral" tools that advertisers abuse and because Facebook's default setting would show ads to adults of all genders and all ages. Yet this ruling is grounded in a misunderstanding of how Facebook's advertising system

works. Through a combination of targeting tools and delivery algorithms, Facebook plays an active role in steering advertisements toward or away from different users. It uses protected characteristics to inform this steering. Irrespective of whatever default setting Facebook uses, Facebook's targeting tools are inherently not "neutral" because they are designed to provide advertisers with the explicit means to exclude particular people from receiving specific advertisements based on who they are. When these tools limit the user's access to advertising content, and in turn to economic opportunities, on the basis of age, gender or other protected characteristics, they are on their face illegal. Facebook likewise engaged in discrimination through its provision of "Lookalike Audiences" and in its design and operation of its own ad delivery algorithm, which selected recipients of advertising content based on age and gender.

The Unruh Civil Rights Act requires "equal treatment of patrons in all aspects" of California businesses. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 29 (hereafter *Koire*); see also *Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th 1171, 1174 [the Act applies "not merely in situations where businesses exclude individuals altogether, but also where treatment is unequal."].)[2]

[2] A discriminatory practice can be "upheld as reasonable, and therefore not arbitrary" under the Unruh Civil Rights Act, "when there is a strong public policy in favor of such treatment." (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1153) [overruling demurrer where dating app failed to

Discrimination has long been a facet of advertising for housing, employment, credit, and other areas of critical economic opportunity such as insurance. While courts have repudiated such discrimination in more traditional venues, Facebook's ad-steering system opened a new frontier of discrimination online. Yet discrimination online is no less illegal than discrimination offline. Researchers studying Facebook's tools have repeatedly found that they discriminate, and Facebook has been subject to numerous lawsuits that have forced it to change its advertising system for housing, employment, and credit opportunities. (See *infra*, at pp. 16–18.) Nevertheless, with respect to insurance and the protected categories of age and gender, Facebook continues to deploy its exclusionary tools unabated, thus unlawfully denying equal access to users like Plaintiff Liapes.

In this section, amici will (a) describe how Facebook's advertising system operates, (b) explain how discrimination is inherent to that system, (c) show how Facebook's past legal settlements of similar discrimination claims notably failed to remedy the discrimination alleged here, and (d) discuss the history of discrimination in insurance and advertising for economic opportunities.

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demonstrate a strong public policy justification for charging older users higher prices for its service]; see also fn. 11, *infra*, p. 13.)

a. Facebook's Advertising System

Facebook presents advertising content to its users alongside user-generated posts and other content, and access to such advertising content is among the "advantages, . . . privileges, or services" that Facebook provides its users. (Civ. Code § 51(b).) Facebook collects huge swaths of data about its users, uses algorithms to analyze this data and profile users' traits, and then uses that analysis to steer different ads to different users.

Facebook's advertising system rests on the collection of data about its users. As a condition for joining and using the platform, Facebook requires users to provide certain personal information about themselves, including their age and gender. (FAC at ¶¶ 35–36.) As someone uses the platform, Facebook continues to collect information about them, including information collected from within the platform (such as from content that a user creates, shares, or views, a user's communications with others, uploaded photos, data about whom a user is connected to and how a user engages with the site, purchases or transactions made through the site, details about a user's device, or information that other users provide about the user) and collected from entities outside the platform (including third-party advertisers, app developers, publishers, and other third-party data brokers who provide Facebook with information about what a user views, purchases, or does

outside of Facebook both "online and offline"). (See *Data Policy*, Meta;[3] *Privacy Policy*, Meta.[4]) The vast trove of data that Facebook collects may include protected characteristics specifically as well as details that could be proxies for protected characteristics, such as a user's current and past location, employment, education history, family relationships, preferences about music or movies or other media, and myriad other data. (See *ibid*.)[5] Facebook uses the information about its users to classify and segregate them and feed its advertising system.

Facebook's advertising system has two stages, targeting and delivery. In the targeting stage, Facebook has developed tools that explicitly allow an advertiser to select the intended audiences for its ads. First, Facebook's ad targeting tool includes an interface through which an advertiser "is required by Facebook to specify the parameters of the target audience of Facebook users who will be eligible to receive the advertisement ('audience selection')." (FAC at ¶ 41.) The standard interface for Facebook's ads—including for insurance ads—*requires* an advertiser to select the target age, gender, and location of the audience eligible to receive the ad, which Facebook presents to an advertiser through drop-down menus. (FAC at ¶ 44.) Although the default setting for audience selection is all ages and genders,

[3] https://www.facebook.com/about/privacy/update/printable.

[4] https://mbasic.facebook.com/privacy/policy/printable/.

[5] https://www.facebook.com/help/239070709801747.

Facebook has built the selection of target age and gender into the standard workflow of posting an ad on Facebook and provides advertisers with a simple, ready means to exclude users based on these protected characteristics. (FAC at ¶¶ 46–47.)[6] Moreover, Facebook repeatedly encourages and trains advertisers to make use of their tools to narrow the target audience from the default to exclude categories of people based on their age and their gender. (FAC at ¶¶ 50–59.)

Facebook also builds Lookalike Audiences of "people who are similar to (or 'look like')" a list of people provided by an advertiser. (*About Lookalike Audiences*, Meta Business Help Center.)[7] To create a Lookalike Audience, Facebook starts by soliciting from an advertiser a "source audience" (or "seed audience") such as a list of customers or people who visited an advertiser's website or app or otherwise engaged with their product. (See *ibid.*; FAC at ¶ 64.) Once Facebook has this source list it takes

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[6] Unlike selecting for age, gender, and location—which Facebook requires—Facebook also provides advertisers with the option to target ads towards people based on a slew of additional categories of interests, characteristics, behaviors and more. (FAC at ¶ 48.) In some situations, these characteristics may individually or in the aggregate serve as proxies for protected characteristics. (See Speicher et al., *Potential for Discrimination in Online Targeted Advertising*, Proc. of Machine Learning Res. (2018) 81:1–15, Conference on Fairness, Accountability, and Transparency, at p. 14 (hereafter Speicher).)

[7] https://www.facebook.com/business/help/164749007013531?id=401668390442328.

several steps, with no additional input or action from the advertiser, to create the Lookalike Audience for the advertiser. First, Facebook locates user accounts that match the identifiers contained in the source audience. (FAC at ¶ 64.) Second, Facebook uses proprietary algorithms and personal data to extract "common qualities" of those users based on their demographics, interests, online behaviors, and other information. (*Ibid.*; see also *About Lookalike Audiences*, Meta Business Help Center, *supra*.) Finally, Facebook creates the new list of users similar to people in the source audience. (FAC ¶ 64.) That Lookalike Audience comprises the people who will be eligible to receive the advertisement, and anyone not in the Lookalike Audience will never receive the ad. (*Ibid*.)

After audience criteria are set through Facebook's targeting tools, Facebook applies its own ad delivery algorithm to determine to whom amongst the target audience Facebook will actually deliver the advertisement. (FAC at ¶¶ 71–73.) There is not enough virtual real estate for Facebook to show every ad to every user who may be within the target audience—or an advertiser may not be paying enough to reach every eligible user—so Facebook uses the delivery system to triage what subset of targeted users will actually receive each ad. (*Ibid.*) Facebook pitches to advertisers that it will "deliver your ads to the right people" by making its own predictions about who "the right people" are for any given ad. (*Performance Goals Available by Objective in Meta Ads Manager*, Meta Business Help

Center.)[8] These predictions are based on the content of a particular ad, Facebook's own knowledge of that user's characteristics and past behavior, and the behavior of other users. (*Good Questions, Real Answers: How Does Facebook Use Machine Learning to Deliver Ads?*, Meta (June 11, 2020).)[9] Consequently, Facebook is in sole control of and solely responsible for the output of the ad delivery stage.

b. Disparate Treatment Is Inherent to Facebook's Advertising System

Facebook's advertising system is designed to segregate users based upon, among other characteristics, legally protected traits or their proxies, and to provide different service on that basis. In other words, Facebook deliberately and thus illegally serves ads to some users that it withholds from other users, specifically because it knows or believes they belong to demographic categories protected by the Unruh Civil Rights Act. The ability to exclude people from seeing an ad is not an unanticipated bug in Facebook's system that advertisers might or might not decide to exploit—rather, it is a feature that is at the heart of the ad targeting system Facebook offers.

[8] https://www.facebook.com/business/help/416997652473726 (last visited May 10, 2023).

[9] https://www.facebook.com/business/news/good-questions-real-answers-how-does-facebook-use-machine-learning-to-deliver-ads.

While Facebook seeks to liken its tools to a "women's" clothing ad being placed in *Vogue* or a commercial for "men's" sneakers airing during Monday Night Football (Resp. Br. at p. 37), those are examples of traditional *contextual advertising*, wherein ad placement is chosen based on the specific *context*. (See Ur et al., *Smart, Useful, Scary, Creepy: Perceptions of Online Behavioral Advertising* (2012) in Proceedings of the Eighth Symposium on Usable Privacy and Security p. 1.)[10] Contextual advertising is not fundamentally exclusionary—anyone who views the medium (such as by driving by a billboard or reading a newspaper) would view the ad. Some groups may be more likely to see the ad (as when a billboard located within an enclave neighborhood primarily reaches viewers of a particular national origin) or may be more responsive to the content, but anyone interested in that context can access it. By contrast, targeted advertising *is* fundamentally exclusionary. Targeted advertising directs an ad at a specific individual or group, not a context viewable by any individual or group. Ads are directed at individuals based on who they are or who they are believed to be, and if an individual is not part of the target audience, they would never receive the ad and might not know they were missing out on the associated opportunity. (Speicher, *supra*, at p. 2.) This means that two people viewing the same post

10 https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.851.3914&rep=rep1&type=pdf.

on Facebook are likely to see different advertisements, and the same person looking at different websites may see similar ads across those different contexts.

Traditional contextual advertising content is available to anyone, including consumers who do *not* conform to assumptions and expectations about their media diet. To revisit Facebook's own example, an ad for dresses in *Vogue* will reach many women readers, but it will be available to other people who are also interested in reading *Vogue*. Unlike such contextual advertising practices, Facebook's deliberate provision of specific content only to one demographic but not others crosses the line established by the California Supreme Court in defining intentional discrimination: it singles out specific users for different treatment as a result of their membership in protected classes. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1163 [economic access criteria are permissible only if they are *not* based on personal characteristics and could conceivably be met by anyone]; *Koire*, *supra*, 40 Cal.3d at pp. 35–36 [discount programs cannot single out customers based on protected class status].) Because Facebook's user-sorting tools and algorithms impose a bright-line rule, never presenting the content to users outside the selected group, their operation differs from traditional contextual advertising and violates the "essence" of the Unruh Civil Rights Act's guarantee of equality. (*Koire*, *supra*, at p. 34; *O'Connor v. Vill. Green Owners Assn*. (1983) 33 Cal.3d 790, 794; *Marina Point, Ltd. V. Wolfson*

(1982) 30 Cal.3d 721, 740 ["The statute's focus on the individual . . . precludes treatment of individuals as simply components of a racial, religious, sexual or national class," quoting *Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 708].)

When a targeted advertising system excludes consumers based on protected characteristics from full and equal access to content that leads to economic opportunities, that system is illegal.[11] Such disparate treatment is endemic to Facebook's advertising system. (FAC at ¶¶ 50–57, 64–65, 74–81.) *First*, as described above, Facebook has intentionally designed its targeting tools to readily and explicitly pick cohorts of Facebook users based on age and gender.

Second, Facebook designed its algorithms used to create Lookalike Audiences to engage in disparate treatment. Researchers have found that where a source audience list is skewed demographically, Facebook's algorithm picks up on those demographic differences and builds the

[11] Facebook has not shown, nor can it show, that a "compelling societal interest" warrants targeting insurance ads to men and only men. (Cf. *Howe. v. Bank of America N.A.* (2009) 179 Cal.App.4th 1443 [credit card company justified in requiring additional documentation from some applicants based on immigration status and other protected characteristics].) Similarly, the exclusion of older people from insurance ad access at issue here does not "favor the elderly" so as to warrant potential exemption from Unruh Civil Rights Act liability. (Cf. *Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1048 [mortgage discount for seniors acceptable under the Unruh Civil Rights Act].)

Lookalike Audience to be skewed demographically in the same way. (See Sapiezynski et al., *Algorithms that "Don't See Color": Measuring Biases in Lookalike and Special Ad Audiences* (July 27, 2022) in Proceedings of the 2022 AAI/ACM Conference on AI, Ethics, and Society p. 610 [when Facebook constructed a Lookalike Audience using a source audience list solely comprised of women, 96.1% of the people who received the ad were women].)[12] Even when protected characteristics are removed from explicit consideration by the algorithm, Facebook designed its Lookalike Audience algorithm in a manner that nevertheless skews a Lookalike Audience according to the demographics of the source list. (*Ibid.*)

Third, even when advertisers do not seek to exclude on the basis of protected characteristics, researchers have found that Facebook's ad delivery algorithms themselves treat users differently based on their gender, age, and other protected characteristics. Facebook, through the design and execution of its algorithms, chooses to exclude individual users from particular opportunities, which at an aggregate level produces disparities by protected class. For example, in one test, Facebook delivered a job ad for mechanics to men 13 times as often as to women but delivered an ad for summer jobs for high schoolers to women 9 times as often as to men—despite both ads being targeted to reach all genders. (Merrill, *Does Facebook Still Sell*

[12] https://dl.acm.org/doi/pdf/10.1145/3514094.3534135.

Discriminatory Ads?, The Markup (Aug. 25, 2020).)[13] Another study found Facebook delivered job ads for truck drivers to men 13 times as often as women, but sent childcare ads to women 25 times as often as men—again, without any gender targeting by the advertiser. (Kayser-Bril, *Automated Discrimination: Facebook Uses Gross Stereotypes to Optimize Ad Delivery*, Algorithm Watch (Oct. 18, 2020);[14] see also Ali et al., *Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Biased Outcomes* (Nov. 2019) in Proceedings of the ACM on Human-Computer Interaction, art. 199, vol. 3 [finding that even when the advertiser selected the same targeting criteria, lumber industry job ads reached an audience that is 72% white and 90% male, while supermarket cashier ads reached an 85% female audience and taxi company ads reached an audience that was 75% Black];[15] Duffy & Dotto, *People Are Missing Out on Job Opportunities on Facebook Because of Gender, Research Suggests*, CNN (June 12, 2023) [job ads for mechanics delivered 89–96% to "male" users while job ads for preschool teachers delivered 70–97% to "female" users].[16]) At this stage of

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[13] https://themarkup.org/ask-the-markup/2020/08/25/does-facebook-still-sell-discriminatory-ads.

[14] https://algorithmwatch.org/en/story/automated-discrimination-facebook-google/.

[15] https://dl.acm.org/doi/pdf/10.1145/3359301.

[16] https://www.cnn.com/2023/06/12/tech/facebook-job-ads-gender-discrimination-asequals-intl-cmd/index.html.

the proceeding, plaintiff has adequately pled a claim of disparate treatment and deserves her chance at discovery to uncover *how* Facebook's algorithms produce that disparate treatment.

At the root of Facebook's algorithmic discrimination is its own conduct: Facebook designed its algorithms to analyze information drawn from a society containing systemic inequities without adequate safeguards to prevent disparate treatment, and the result is the replication of unequal opportunity. (See Ali, *supra*, at 4, 23 ["Our results show Facebook's integral role in shaping the delivery mechanism . . . . Facebook's ad delivery process can significantly alter the audience the ad is delivered to compared to the one intended by the advertiser based on the content of the ad itself"].)[17] These algorithms find hidden correlations in the data. But the output is only as good as the input, and the data fed into the algorithm—a user's neighborhood, employment history, credit history, education, associations, wealth, and health—are themselves inextricably intertwined with generations of discrimination in housing, employment, education, banking, insurance, and criminal justice. (See, e.g., Spann, *Race Ipsa Loquitur* (2018) Mich. St. L. Rev. 1025.) When Facebook applies its ad delivery algorithms to this personal data, the algorithms mistake the *consequences* of historical discrimination for *preferences*. What may appear to an algorithm as a user's

[17] https://dl.acm.org/doi/pdf/10.1145/3359301.

personal preference may not be a preference at all, but instead the result from a lack of choice. The algorithms deliberately provide different advertising content, including ads that connect users to economic opportunities, to different users. When they do so based on users' protected characteristics, Facebook engages in intentional discrimination that violates the Unruh Civil Rights Act.

c. Civil Rights Lawsuits Caused Facebook to Modify Its Targeting Tools, But Not for Age and Gender Targeting of Insurance Advertising

Facebook knows that its advertising system is discriminatory and continues operating it without fixing the problem at issue in this case. To resolve civil rights lawsuits, Facebook has modified its ad targeting tools in housing, employment, and credit contexts. But Facebook has not applied those changes to age and gender discrimination in insurance ads, both of which continue unabated.

In 2018, Facebook agreed to cease excluding users from ads for insurance, housing, employment, credit, or public accommodations, based on race, national origin, disability, and a number of other protected characteristics, but not based on age and gender. (FAC at ¶ 20; Washington State Office of the Attorney General, *AG Ferguson Investigation Leads to Facebook Making Nationwide Changes to Prohibit Discriminatory*

Advertisements on Its Platform (July 24, 2018).[18]) In 2019, Facebook settled a series of civil rights lawsuits in which it agreed to cease explicit targeting of and limit use of Lookalike Audiences for housing, employment, and credit ads based on gender, age, or other protected characteristics or proxies thereof. (*Summary of Settlements Between Civil Rights Advocates and Facebook*, ACLU (Mar. 19, 2019);[19] see also *Facebook Settlement Programmatic Relief*, ACLU (Mar. 20, 2019).[20]) However, this settlement only addressed ad targeting, not ad delivery. And its reforms did not apply to insurance ads.

In 2022, Facebook settled a Fair Housing Act lawsuit brought by U.S. Department of Justice for discrimination in both ad targeting and ad delivery. (*United States v. Meta Platforms, Inc.* (S.D.N.Y. June 21, 2022, No. 22-cv-05187) 2022 WL 2835379, ECF No. 1 (hereafter *Meta Platforms*, Complaint); *Meta Platforms* (June 27, 2022, No. 22-cv-05187, ECF No. 7) [Settlement Agreement & Final Judgment] (hereafter *Meta Platforms*, Settlement Agreement).) Facebook again agreed to prohibit the use of protected characteristics and close proxies thereof in targeting tools for

[18] https://www.atg.wa.gov/news/newsreleases/ag-ferguson-investigation-leads-facebook-making-nationwide-changes-prohibit.

[19] https://www.aclu.org/other/summary-settlements-between-civil-rights-advocates-and-facebook.

[20] https://www.aclu.org/cases/facebook-eeoc-complaints?document=exhibit-describing-programmatic-relief-facebook-settlement#legal-documents.

housing ads, but also agreed to cease offering the Lookalike Audience tool entirely for housing ads. (*Meta Platforms*, Settlement Agreement, *supra*, at pp. 5–6.) In addition, Facebook agreed to adopt a new process—called the Variance Reduction System ("VRS")—designed to minimize sex and race/ethnicity discrimination in its ad delivery algorithm for housing ads. (*Id*. at pp. 6–8; see also *Towards Fairness in Personalized Ads*, Meta (Jan. 2023).[21]) Although the settlement only related to housing ads, Facebook announced that it would voluntarily apply these changes to employment and credit ads as well in the future. (Austin, *Expanding Our Work on Ads Fairness*, Meta (June 21, 2022).)[22] But no part of this settlement or the changes Facebook implemented applied to insurance ads.

Notably, in announcing the settlement, Facebook acknowledged the discrimination inherent in its ad targeting tools and delivery algorithm—the very same systems that Facebook denies are discriminatory in this lawsuit and that it is seeking to continue to use to discriminate by age and gender in insurance ads.

> Today's announcement reflects more than a year of collaboration with HUD to develop a novel use of machine learning technology that will *work to ensure the age, gender and estimated race or ethnicity of a housing ad's overall audience matches the age, gender, and estimated race or*

[21] https://about.fb.com/wp-content/uploads/2023/01/Toward_fairness_in_personalized_ads.pdf.

[22] https://about.fb.com/news/2022/06/expanding-our-work-on-ads-fairness/.

> *ethnicity mix of the population eligible to see that ad*. To protect against discrimination, advertisers running housing ads on our platforms already have a limited number of targeting options they can choose from while setting up their campaigns, *including a restriction on using age, gender* or ZIP code. Our new method builds on that foundation, and strives to make additional progress toward a more equitable distribution of ads through our ad delivery process. . . . We're making this change in part to address feedback we've heard from civil rights groups, policymakers and regulators about how our ad system delivers certain categories of personalized ads, especially when it comes to fairness.

(*Id.*, italics added; see also *Toward Fairness in Personalized Ads*, Meta (January 2023).)[23]

Discrimination in insurance ads on the basis of age and gender is no less invidious, and yet to this day Facebook continues to offer age- and gender-based targeting tools for insurance advertising. Indeed, it *requires* insurance advertisers to select the age and gender of their target audience, and it discriminates based on age and gender in the algorithms it uses for Lookalike Audiences and ad delivery for insurance ads.

d. Facebook's Practices Exacerbate a Long History of Discriminatory Advertising for Economic Opportunities

Advertising is an important gateway to key economic opportunities, serving to "inform[] consumers about product choices available in the

[23] https://about.fb.com/wp-content/uploads/2023/01/Toward_fairness_in_personalized_ads.pdf.

marketplace" and "educat[ing] them about issues that affect their lives." (Association of National Advertisers, *The Role of Advertising in America* (2017) at p. 7;[24] see also LaMarco, *The Role of Advertising in Media*, Chron (Mar. 16, 2019) ["media . . . spreads awareness about products and services, broadcasting the benefits of specific products and services, via advertising"].) Indeed, Facebook says its advertising serves to "make meaningful connections between businesses and people" and compares advertising content to "the other content you see" as a user of Facebook and its other platforms. (*Our Advertising Principles*, Meta (Nov. 27, 2017).)[25]

Discriminatory advertisements have long been used to segregate unlawfully, either through ads that contained explicit discriminatory preferences or ads with facially neutral content published in a discriminatory manner. Such advertisements have been part of a larger history of discriminatory practices and inequality in critical areas such as employment and housing, and discrimination in insurance has likewise been widespread and pernicious. As digital advertising has recently come to dominate the market for advertising in the United States,[26] the Internet has become the new

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[24] https://www.ana.net/content/show/id/role-of-advertising-in-america.

[25] https://www.facebook.com/business/news/our-advertising-principles.

[26] "Digital advertising has grown to become one of the most important forms of advertising." (*Digital Advertising in the United States—Statistics & Facts*, Statista.) In 2017, online advertising expenditures totaled $69.2 billion and made up 35% of total advertising expenditures across the various media. Just 5 years later, in 2022, 8 in 10 dollars invested in ads in the United States were

frontier for discrimination, providing industries with long histories of disparate treatment with an operationalized but hidden means to target and exclude based on protected characteristics.

In the context of employment, Facebook's ad targeting tools harken back to a time when print media routinely segregated job advertisements, in separate columns, for men and women in ways that reflected and reinforced longstanding stereotypes about gender roles. (See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.* (1973) 413 U.S. 376 (hereafter *Pittsburgh Press*).) For example, jobs targeted to men often emphasized intellectual acuity and competitive pay that could support a family, while jobs targeted to women prioritized physical appearance and presumed that women would not need family-supporting wages. (Tanenbaum & Engler, *Help Wanted – Female*, The New Republic (Aug. 30, 2017).)[27] Segregated advertising also reinforced discriminatory racial norms, maintaining "separate sections for

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spent on digital ads. (*Ibid*.) In fact Facebook reported over $110 billion in revenue from advertising last year alone. (*How Does Facebook (Meta) Make Its Money*, Investopedia, January 10, 2023; see also *Meta Reports Fourth Quarter and Full Year 2022 Results*, Meta.) Digital ads also have significant impacts on consumers. A 2021 survey found that 35-50% of people surveyed were influenced in their decisions of what to purchase by ads on social media. (*Share of Consumers Whose Purchasing Decisions Were Influenced by Social Media Advertising in the United States as of June 2021, by Age Group*, Statista.)

[27] https://newrepublic.com/article/144614/help-wantedfemale.

'domestic female' help that were widely understood as targeting African-American women." (*Ibid.*)

In the housing context, discriminatory advertising and steering were a part of a larger system of policies designed to ensure racial segregation of housing and devaluation of areas in which Black people and other people of color were concentrated. That discrimination had the effect of excluding people of color from low-cost mortgage loans available to white buyers, denying government-insured mortgages in redlined Black neighborhoods, and barring certain home developers from selling to Black buyers. (See Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) pp. 18–24.) Developers using federal dollars conditioned on selling suburban homes solely to white families used discriminatory advertising to directly solicit white buyers. (See, e.g., Massey & Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) p. 20.) Likewise, real estate agents targeted white families with the message that their existing city homes would lose value if they did not sell immediately, and then steered Black families to those vacated homes at inflated prices and high interest rates. (See Taylor, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* (2019) pp. 48–49, 117 (hereafter Taylor, *Race for Profit*).) The legacy of these and other discriminatory housing policies continues today: As of 2020, 73.7% of white families own homes, whereas only 44% of Black families are

homeowners. (See generally Homeowners' Insurance Discrimination: Hearings before Sen. Com. On Banking, Housing and Urban Affairs, 103d Cong., 2d Sess. (1994); see also Lerner, *One Home, A Lifetime of Impact*, The Washington Post (Jul. 23, 2020).[28])

Courts ultimately found that newspapers were violating discrimination laws when they ran employment and housing ads directed at certain groups and away from others. (See *Pittsburgh Press*, *supra*, 413 U.S. 376 [upholding ordinance prohibiting explicit designation of newspaper employment ads "for men" and "for women"]; see also *Ragin v. N.Y. Times Co.* (2d Cir. 1991) 923 F.2d 995 [challengers stated claim for housing discrimination against newspaper that ran housing ads visually implying a preference for white residents].)

Insurance is a critical prerequisite to many economic opportunities, such as owning a home or driving a car, and to ensuring that people's families will have financial stability after their death. (See, e.g., *N.A.A.C.P. v. Am. Fam. Mut. Ins. Co.* (7th Cir. 1992) 978 F.2d 287, 297 ["No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable"].)

Redlining in housing insurance was pivotal to creating and enforcing housing segregation, and insurance companies deployed myriad practices to

[28] https://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap/.

deny people of color access to homeowners' insurance. (See generally Homeowners' Insurance Discrimination Hearings before Sen. Com. On Banking, Housing and Urban Affairs, 103d Cong., 2d Sess. (1994); see also Squires, *Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions* (1997); Taylor, *Race for Profit*, *supra*, ch. 2 ["The Business of the Urban Housing Crisis"].) For example, homeowners' insurance underwriting guidelines redlined neighborhoods where insurance should either be withheld or subject to special review and terms. (See, e.g., Heimer, *The Racial and Organizational Origins of Insurance Redlining* (Autumn 1982) X:3 J. Intergroup Relations 49.) Insurance companies also collaborated with realtors to advertise and sell dilapidated homes to unsuspecting Black homeowners, often Black women, "for three to four times more than they were worth," leaving them with the crippling cost of repairs. (Taylor, *supra*, at p. 134.) And more recently, insurance companies engaged in discriminatory practices such as offering worse prices for homeowners' insurance to Black people compared to their white counterparts based on discriminatory credit evaluations and scoring. (See *Lumpkin v. Farmers Grp., Inc.* (W.D. Tenn. Apr. 26, 2007, No. 05-2868 MA/V) 2007 WL 6996584.) In 2012, Mortgage Guaranty Insurance Corporation ("MGIC") settled with the U.S. Department of Justice after the insurance company refused to process a mortgage loan until the applicant returned from maternity leave. (*United States v. Mortg. Guar. Ins. Corp.*

(W.D. Pa. Apr. 30, 2012, No. CIV.A. 11-882) 2012 WL 1606235, at p. *1.) DOJ was able to recover damages for "dozens of other mortgage applicants," mostly women who were "aggrieved by similar alleged discriminatory conduct by MGIC between July 2007 and September 2010." (*Id.*)

This pattern repeats for life insurance, where Black people have been steered into substandard policies in which they often pay more while receiving fewer benefits. For example, one company sold policies to Black policyholders that "generally accrue little, if any, cash value, and d[id] not provide increased death benefits, they have little or no value to policyholders until they die." (*Thompson v. Metro. Life Ins. Co*. (S.D.N.Y. 2001) 149 F.Supp.2d 38, 41–42.) Black policyholders "were forced to continue making payments long after their premiums exceeded the face amount of the policy or risk losing all of the premiums they had paid and receiving nothing." (*Id.* at p. 42.)

Likewise, for auto insurance—a prerequisite to driving and thus to being able to work or care for a family where public transportation is inadequate or nonexistent[29]—a driver's gender has often affected pricing

[29] Considering that a person cannot lawfully operate a motor vehicle without insurance in California and most other states, high insurance premiums can often serve as a socioeconomic barrier for individuals who need a vehicle to acquire better employment. (See Navarro et al., Gender Disparities in Auto Insurance Pricing in the State of Delaware (Mar. 2022), https://news.delaware.gov/files/2022/03/Gender-Disparities-in-Auto-Insurance-Pricing-Report.pdf, p. 4 (hereafter Navarro); see generally, Medders, et al., *Gender X and Auto Insurance: Is Gender Rating Unfairly*

notwithstanding that it is unrelated to driving. "Many major insurers make women pay rates 8–9% higher than men simply because of their identified gender." (See Navarro et al., *Gender Disparities in Auto Insurance Pricing in the State of Delaware* (Mar. 2022) p. 5 (hereafter Navarro);[30] see also *Women Now Pay More Than Men for Car Insurance in 25 States (Despite Men Being Riskier)*, The Zebra (Jan. 31, 2023);[31] Povich, *What? Women Pay More Than Men for Auto Insurance? (Yup.)*, Stateline (Feb. 11, 2019).[32]) Because of the gender disparities in auto insurance pricing, and long history of the explicit use of gender as a factor in pricing auto insurance, California and at least five other states have prohibited the use of gender in auto insurance pricing. (Navarro, supra, at p. 7; Medders, *supra*, at p. 11; see also State of California Department of Insurance, *Initial Statement of Reasons: Gender Non-Discrimination in Automobile Insurance Rating* (Oct. 19, 2018); Kunkle, *Gender Can No Longer Be Used to Calculate Auto Insurance*

Discriminatory? (2021) National Association of Insurance Commissioners, https://content.naic.org/sites/default/files/JIR%20Article%20-%20Gender%20X%20and%20auto%20insurace%20-%20is%20gender%20rating%20unfairly%20discriminatory.pdf (hereafter Medders).)

[30] https://news.delaware.gov/files/2022/03/Gender-Disparities-in-Auto-Insurance-Pricing-Report.pdf.

[31] https://www.thezebra.com/resources/research/men-women-auto-insurance-differences-by-state/#key-finding-3.

[32] https://stateline.org/2019/02/11/what-women-pay-more-than-men-for-auto-insurance-yup/.

Rates in California and Other States, The Washington Post (Feb. 11, 2019).[33])

Facebook has operationalized ad targeting and exclusion based on protected characteristics and has unleashed those tools to industries with long histories of discrimination in key areas such as housing, employment, insurance, and others. Facebook has been forced to curtail and modify those tools in some contexts, and yet continues to use the very same discriminatory practices to engage in disparate treatment based on age and gender in insurance advertisements.

II. Section 230 of the Communications Decency Act Does Not Apply to Facebook's Advertising System

Section 230 of the Communications Decency Act (47 U.S.C. § 230 ("Section 230")), immunizes online platforms from a legal claim that seeks to treat the platform as a publisher of information generated by a third party. But this statute "was not meant to create a lawless no-man's-land on the Internet." (*Roommates.com, supra*, 521 F.3d at p. 1164.) Indeed, the Ninth Circuit just ruled on June 23, 2023, that Section 230 does not apply to unlawful discrimination by Facebook's advertising system. (See *Vargas*, *supra*, 2023 WL 4145434, at pp. *5–9). For two reasons, each of which independently merits reversal, this statute does not apply to the claims at

[33] https://www.washingtonpost.com/transportation/2019/02/11/gender-can-no-longer-be-used-calculate-auto-insurance-rates-california-other-states/.

issue in this case. First, Plaintiff's claim does not seek to hold Facebook liable for content created by a third party. Second, even if it did, Facebook materially contributed to the creation of the content at issue and, consequently, is not entitled to immunity under Section 230.

Section 230 states that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230I(1).) Section 230 "only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider." (*Barnes v. Yahoo!* (9th Cir. 2009) 570 F.3d 1096, 1100–01 (hereafter *Barnes*).) Because there is no dispute that Facebook is a provider of an interactive computer service, we focus on the second and third elements. Courts ask first whether the claim treats the defendant as a publisher of third-party content and, if yes, whether the defendant materially contributed to what made the conduct at issue illegal. (See *Roommates.com*, *supra*, 521 F.3d at p. 1168; *Henderson v. Source for Pub. Data, L.P.* (4th Cir. 2022) 53 F.4th 110, 127–29 (hereafter *Henderson*); *Jones v. Dirty World Enter. Recordings, LLC* (6th Cir. 2014) 755 F.3d 398, 410 (hereafter *Jones*).)

a. Section 230 Does Not Apply Because the Claim Does Not Seek to Hold Facebook Liable for the Content of a Third Party

When assessing the first prong of this test—determining whether a claim seeks to treat the defendant as a publisher of third-party content—the focus is "on whether 'the duty the plaintiff alleges' stems 'from the defendant's status or conduct as a publisher or speaker.'" (*Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085, 1091 (hereafter *Lemmon*), quoting *Barnes*, *supra*, 570 F.3d at p. 1107.) Publication means "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." (*HomeAway.com, Inc. v. City of Santa Monica*, (9th Cir. 2019) 918 F.3d 676, 681 (hereafter *HomeAway.com*).) Section 230 applies *only if* the alleged basis of liability is the contents of the information provided by the third party; if the claim arises from the conduct of the platform, Section 230 does not apply. (See *Henderson*, *supra*, 53 F.4th at p. 123.)

Whether a defendant is an online publisher is not, on its own, sufficient to confer immunity. "To be held liable for information 'as the publisher or speaker' means more than the publication of information was a but-for cause of the harm." (*Henderson*, *supra*, 53 F.4th. at p. 122.) Rather, the claim must be aimed at a specific publishing activity to trigger Section 230 protection. Moreover, even where the subject of an advertisement is what brings it under the scope of civil rights protections, Section 230 does not apply where the *content* of the ad is not the basis of the claim but rather the claim turns on the platform's *conduct* such as in the configuration of its targeting tools or the design of its delivery algorithm. (Cf. *id.* at pp. 122–24.)

In *Henderson*, the court held that Section 230 did not immunize claims that an online background-check company did not comply with disclosure and certification requirements imposed by the Fair Credit Reporting Act ("FCRA"). (*Henderson*, *supra*, 53 F.4th at pp. 123–25.) Section 230 "does not provide blanket protection from claims asserted under the FCRA just because they depend in some way on publishing information." (*Id*. at p. 123.) Courts "must instead examine each specific claim" to see if it necessarily treats a defendant as a publisher of someone else's information. (*Ibid*.) A claim treats a defendant as a publisher, and triggers Section 230 immunity, only when the claim depends on the propriety of the content. (*Id*. at p. 125.) Even though the defendant was under the scope of the FCRA because it was publishing information that was credit-related, Section 230 did not provide immunity for claims that were based on the defendant's conduct and not the content of the credit-related information. (*Id.* at p. 124.) The alleged liability must not derive vicariously from another actor, but rather from the online platform's own illegal actions.

Internet companies do not get a blanket exemption from complying with laws of general applicability, like civil rights laws, just because they happen to do business online. The Ninth Circuit's decision in *HomeAway.com*, *supra*, 918 F.3d 676, is instructive. There, a municipal ordinance restricted short-term property rentals and imposed obligations on websites transacting them, which the websites challenged. (See *id*. at p. 680.)

The court held Section 230 does not apply "any time a legal duty might lead a company to respond with monitoring or other publication activities. . . . We look instead to . . . whether the duty would necessarily require an internet company to monitor third-party content." (*Id*. at p. 682) In sum, Section 230 did not apply because under that ordinance, "[p]latforms face[d] no liability for the content of the bookings; rather, any liability arises only from unlicensed bookings." (*Id*. at p. 684.)

Other cases have similarly held that online platforms do not get Section 230 immunity when the claim is rooted in their own conduct, not the contents of information provided by a third party. (See *Lemmon*, *supra*, 995 F.3d 1085 [negligent design of an app]; *Erie Ins. Co. v. Amazon.com* (4th Cir. 2019) 925 F.3d 135 [product liability of an online store]; *Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 852–53 [failure to warn claim does not treat defendant as a publisher even when "[p]ublishing activity is a but for cause of just about everything [defendant] is involved in"]; *Barnes*, *supra*, 570 F.3d at p. 1107 [promissory estoppel claim].)

The conclusion is that Section 230 only applies when a claim is dependent on holding the defendant liable for the content of a third party. Section 230 does not "render unlawful conduct 'magically . . . lawful when [conducted] online. . . . Like their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations[.]" (*HomeAway.com*, *supra*, 918 F.3d at pp. 683–84.)

In the instant case, Plaintiff seeks to hold Facebook liable in a similar manner as *Henderson*, *HomeAway.com*, and *Lemmon*. Plaintiff does not allege that the content of the insurance advertisements created by third parties is the source of liability. (See *Henderson*, *supra*, 53 F.4th at p. 125.) Plaintiff does not argue the insurance ad content itself is malignant nor do they allege liability on Facebook's "reviewing, editing, and deciding whether to publish or to withdraw from publication" the ads. (*HomeAway.com*, *supra*, 918 F.3d at p. 681.) Rather, Plaintiff alleges that Facebook's own conduct in how it chose to target and deliver those ads is illegal. Facebook "could have satisfied its 'alleged obligation' . . . without altering the content that [Facebook's advertisers] generate." (*Lemmon*, *supra*, 995 F.3d at p. 1092.) Consequently, Plaintiff's claims do not seek to treat Facebook as the publisher of another's information, and Section 230 does not apply. The trial court erred.

b. Section 230 Does Not Apply Because Facebook Materially Contributed to the Alleged Illegality, and the Neutral Tools Framework Has No Applicability Here

Even if the court concludes Plaintiff's claim treats Facebook as a publisher, Facebook would still not receive Section 230 immunity because it materially contributed to the alleged impropriety. "As the website's actions did in [*Roommates.com*], Facebook's own actions 'contribute[d] materially to the alleged illegality of the conduct.'" (*Vargas*, *supra*, 2023 WL 4145434 at p. *6 [quoting *Roommates.com*, *supra*, 521 F.3d at p. 1168].)

i. Facebook Loses Immunity Because It Co-developed the Unlawful Content

The last element of the Section 230 test establishes that even if a claim does treat an online platform as a publisher, if that platform "contributes materially to the alleged illegality of the conduct" then Section 230 does not apply. (*Roommates.com*, *supra*, 521 F.3d at p. 1168.) "A material contribution . . . means being responsible for what makes the displayed content allegedly unlawful." (*Jones*, *supra*, 755 F.3d at p. 410.) Here, Plaintiff alleges Facebook materially contributed to the illegality: it targeted and delivered advertisements in an unlawful discriminatory manner. Indeed, Facebook has designed its advertising system to allow advertisers to easily exclude users by age and gender with a click of the mouse and even requires advertisers to select the age and gender of the advertisement's audience. Such conduct is clearly not protected by Section 230.

Section 230 gives publishers immunity for "any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) An information content provider ("ICP") is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service." (47 U.S.C. § 230(f)(3).) The statute recognizes that more than one person can co-create or co-develop information. When the publisher is "responsible . . . in part" for the "creation or development" of the

information, it qualifies as an ICP with regard to that information. (*Ibid*.) If that is the case, then the information was not "provided by another" ICP (47 U.S.C. § 230(c)(1)), and the publisher does not receive immunity from liability stemming from publication of that information. (See *Roommates.com*, *supra*, 521 F.3d at pp. 1162–63; *Henderson*, *supra*, 53 F.4th at p. 126.) "An interactive service provider becomes an information content provider whenever their actions cross the line into substantively altering the content at issue in ways that make it unlawful." (*Jones*, *supra*, 755 F.3d at p. 129; see also *Henderson*, 53 F.4th at pp. 128–29 [omitting and summarizing information in a way that made it misleading constituted material contribution].) There is a "crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable." (*Jones*, *supra*, 755 F.3d at p. 414.) The provision of targeting tools that enable disparate treatment on the basis of age and gender is directly analogous to the conduct that the Ninth Circuit deemed to be illegal in *Roommates.com*. (See *supra*, at pp. 6–24.) In *Roommates.com*, *supra*, 521 F.3d at p. 1165, a rental housing website allegedly "induced third parties to express illegal preferences" in housing advertisements by having users fill out forms that included discriminatory criteria. "Roommate designed its search and email systems to limit the listings available to subscribers based

on sex, sexual orientation and presence of children" and "selected the criteria used to hide listings" from renters. (*Id*. at p. 1169.) "Roommate's work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site." (*Id*. at p. 1172.) That is precisely what Facebook is doing by requiring advertisers to make a selection as to the age and gender of its audience and designing its targeting tool to withhold ads based on those characteristics.

Likewise, when a defendant takes benign third-party content and uses it to engage in discrimination or other unlawful acts—such as directly excluding specific users on the basis of protected characteristics from receiving ads for economic opportunities—the defendant is not immune because it is responsible for developing the illegality. (See *Roommates.com*, *supra*, 521 F.3d at p. 1165.) Facebook's advertising delivery algorithms develop such allegedly illegal conduct here: the gravamen of Plaintiff's claim is that Facebook takes innocuous and desirable ads and steers them away discriminatorily. As the U.S. Department of Justice described it, "[E]ven when advertisers do not employ discriminatory targeting options, Facebook's Personalization Algorithm nonetheless steers certain housing ads disproportionately to White users and away from Black users, and vice versa." (*Meta Platforms*, Complaint, *supra*, 2022 WL 2835379 at ¶ 85.) Facebook, not the advertiser, has materially contributed to the illegal and

discriminatory acts and therefore is responsible for the harm caused by its delivery system.

In addition, a defendant can also materially contribute when it takes unlawful content and exacerbates the injury. For example, a service provider was not entitled to Section 230 immunity when it allegedly helped select ZIP codes to target Black neighborhoods for voter intimidation robocalls. (See *Nat'l Coalition on Black Civic Participation v. Wohl* (S.D.N.Y. 2021) 2021 WL 4254802 at pp. *9–10.) "Defendants' active efforts in targeting Black neighborhoods for dissemination of the robocall message so as to maximize its threatening effect" materially contributed to the alleged violation. (*Id*. at p. *8.) The targeting conduct in *Wohl* is similar to Facebook's use of discriminatory targeting choices and Lookalike audiences in this case; Facebook enables an advertiser to make a discriminatory targeting choice and then deploys its Lookalike algorithm to select a broader pool of users that match the unlawful preference. Facebook creates discriminatory audiences which it uses to exclude protected groups from learning about economic opportunities. In these ways, Facebook is illegally discriminating, and because Facebook materially contributed it does not receive immunity.

The Ninth Circuit in *Vargas* held that, with regard to these various advertising tools, Facebook is "a co-developer of content and not merely [a] publisher of information provided by another information content provider." (*Vargas*, *supra*, 2023 WL 4145434 at p. *5.)

> The Ad Platform allowed advertisers to target specific audiences, both by including categories of persons and by excluding categories of persons, through the use of drop-down menus and toggle buttons. For example, an advertiser could choose to exclude women or persons with children, and an advertiser could draw a boundary around a geographic location and exclude persons falling within that location. Facebook permitted all paid advertisers, including housing advertisers, to use those tools.

(*Id.* at p. *6.) With regard to age and gender discrimination, the Ninth Circuit ruled that Facebook's advertising system is "identical" to the conduct in *Roommates.com*. (*Id.* at p. *7.) "Indeed, Facebook is *more* of a developer than the website in *Roommates.com* in one respect because, even if a user did not intend to reveal a particular characteristic, Facebook's algorithms nevertheless ascertained that information from the user's online activities and allowed advertisers to target ads depending on the characteristic." (*Ibid.*)

ii. The Neutral Tools Framework Does Not Fit This Case, and Even if It Did, Facebook's Tools Are Not Neutral

The lower court held that Section 230 barred Plaintiff's claims because Facebook's Audience Selection and Lookalike Audience tools were "neutral," noting that "[i]t is the users that ultimately determine what content to post, such that the tool merely provides a framework that could be utilized for proper or improper purposes…" (Order Sustaining Demurrer, at p. 5 [citing *Roommates.com*, *supra*, 521 F.3d at p. 1172].) Besides being an incomplete analysis of the Section 230 issues in this case, the holding that Facebook's tools are neutral is erroneous. The trial court relied on the district

court decision in *Vargas* for this conclusion (see Order Sustaining Demurrer at p. 5), but the Ninth Circuit just reversed that specific holding. "A patently discriminatory tool offered specifically and knowingly to housing advertisers does not become 'neutral' within the meaning of this doctrine simply because the tool is also offered to others." (*Vargas*, *supra*, 2023 WL 4145434 at p. *9.)

Introduced by the Ninth Circuit in *Roommates.com*, *supra*, 521 F.3d at page 1169, as dicta, the "neutral tools" concept was never defined except by analogy to a search engine; it was just a phrase used to illustrate "a few examples" of immunized conduct. (See also *ibid*. ["providing neutral tools to carry out what may be unlawful or illicit searches does not amount to 'development' for purposes of the immunity exception"].) The neutral tools test has no textual foundation in the statute and it does not resolve whether Facebook is "responsible, in whole or in part, for the creation or development of information." (47 U.S.C. § 230(f)(3)).) Whether a "tool" is "neutral" may be illustrative, but it is not dispositive because even a purportedly neutral tool can cause, in whole or in part, the creation or development of information.

Just because a tool is automated does not mean it is neutral—often the opposite. Complex algorithms, like those used by Facebook's advertising system, do not treat all content and users neutrally. All too often, a dataset will reflect race, sex, disability, and other protected characteristics. "Even if a particular attribute is not present in the data, combinations of other

attributes can act as a proxy. Algorithmic parameters are never neutral. They are always imbued with values." (Tene & Polonetsky, *Taming the Golem: Challenges of Ethical Algorithmic Decision-Making* (2017) 19 N.C.J.L. & Tech. 125, 136.) There is nothing neutral about an algorithm that takes different data about different people in different contexts and provides those people with different outcomes—as its human designers instructed it to do. Even if the neutral tools test applied to conduct, Facebook's conduct here is not neutral. When Facebook creates a targeting system that requires advertisers to select their age and gender preferences, that is a non-neutral design choice. When Facebook deploys its Lookalike algorithm, it makes choices—Facebook decides which of its users are the best match to the source list. And when Facebook takes the targeting criteria of advertisers and uses its delivery algorithm to decide to which users to serve the ads, it is Facebook—and not the advertisers—that is in control over the delivery process. (See *infra* at pp. 6–24.)

Furthermore, *Roommates.com*'s conception of neutrality was centered on adjudicating immunity when content was illegal. (See *Roomates.com*, *supra*, 521 F.3d at p. 1175 ["If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune"].) It has no application when the allegation is that illegality stems from the conduct surrounding the publication of otherwise lawful content. Plaintiff is not alleging that the content of the ads at issue in this case is unlawful;

Plaintiff is alleging that Facebook handled the ads unlawfully, like a realtor who steers Black and white homebuyers to different neighborhoods.

For these reasons, Section 230 does not apply, and the trial court erred.

III. Facebook's Arguments Seek to Upend Longstanding Civil Rights Precedents

Facebook makes various unavailing counterarguments in its opposition brief. Amici respond here only to some that fly in the face of well-established civil rights law. First, Facebook's purported delivery of *other* relevant ads to Plaintiff does not excuse the discriminatory conduct Plaintiff alleges—it is not permissible under the Unruh Civil Rights Act to provide separate "but equal" service. Second, Facebook cannot avoid its own legal obligations by telling advertisers not to discriminate. Third, denial of an ad for a protected opportunity creates an injury in fact that gives rise to standing.

First, there is no legal significance to Facebook's speculative argument that users it discriminated against as to some insurance ads may have received other insurance ads instead. (Resp. Br. at p. 28; cf. FAC at ¶¶ 124–26; Resp. Br. at p. 27.) Facebook's vague protestations do not outweigh the operative pleading at this stage of the case.

Moreover, it is well established that a business cannot escape liability for discrimination in protected opportunities by providing different but equivalent offerings. (See *Suttles v. Hollywood Turf Club* (1941) 45 Cal.App.2d 283; *Jones v. Kehrlein* (1920) 49 Cal.App. 646, 651

[entertainment venues violated Unruh Civil Rights Act when they did admit Black customers but confined them to specific seating areas, thus excluding Black patrons from "full and equal enjoyment" of the spaces]; see also *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155 [patient stated Unruh Civil Rights Act claim for denial of care at hospital regardless of whether hospital chain offered him the same care at a different facility].)[34]

To the extent Facebook is claiming that customers *want* exclusionary targeting of ads and therefore such targeting must be legal, the U.S. Supreme Court has repeatedly rebuked this argument. For example, in *Henderson v. United States* (1950) 339 U.S. 816, the Court rejected arguments from the Southern Railway Company that "[t]he separation of the races is based upon considerations of the safety, comfort, and general satisfaction of travelers of both races." (*Southern Railway Br.* (Oct. 5, 1949) 1949 WL 50329 at p. *26.) Likewise in *Pittsburgh Press*, *supra*, 413 U.S. at p. 381 fn.7, the Court rejected a newspaper's arguments that gender segregation of classified ads was "for the convenience of its readers" as "most jobs generally appeal more to persons of one sex than the other." At least with newspaper ads, a person

[34] Facebook also cannot escape liability by establishing that its practices deny one stream of content or another to people of all genders. (See, e.g., *Bostock v. Clayton County* (2020) 140 S.Ct. 1731, 1741 ["Nor is it a defense for an employer to say it discriminates against both men and women because of sex. . . . Instead of avoiding Title VII exposure, this employer doubles it."].)

could see the jobs in the other column; not so with Facebook's exclusionary advertising system. (See *supra* at p. 20–21.) At a minimum, Plaintiff is entitled to discovery, so that a factfinder may ultimately assess what (if any) alternative or "parallel" content was made available to her and similarly situated users, and whether the discrepancy constituted illegal discrimination.

Second, Facebook cannot immunize itself from Unruh Civil Rights Act liability merely by telling advertisers not to discriminate. (Resp. Br. at p. 39.) A party with a duty to ensure equal treatment cannot satisfy that duty simply by issuing an ineffective instruction to third parties not to discriminate. (See *Nicole M. By and Through Jacqueline M. v. Martinez Unified School Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1389 [allowing student to pursue Unruh Civil Rights Act claim against school whose "inadequate action" to address peer sexual harassment allowed the harassers to continue causing harm and allegedly constituted intentional gender-based discrimination]; see also *Pittsburgh Press*, *supra*, 413 U.S. at p. 381 fn.7 [discounting disclaimer published alongside gender-segregated employment ads].) Here, the company's admonition to advertisers not to use audience-sorting tools to violate discrimination laws in fact illustrates that it knows the tools can serve as instruments of illegal discrimination. (See also *Toward*

Fairness in Personalized Ads, Meta (January 2023) [35] [detailing steps the company has taken to prevent discriminatory targeting and delivery for employment, housing, and credit ads, but has not taken for other types of advertising].) The Ninth Circuit in *Vargas* rejected this same argument from Facebook. "Facebook emphasizes that its tools do not *require* an advertiser to discriminate with respect to a protected ground." (*Vargas*, *supra*, 2023 WL 4145434 at p. *7.) "The manner of discrimination offered by Facebook may be less direct in some respects, but as in *Roommates.com*, Facebook identified persons in protected categories and offered tools that directly and easily allowed advertisers to exclude all persons of a protected category (or several protected categories)." (*Id*. at p. *8.) Plaintiff has sufficiently alleged disparate treatment by Facebook and the record, taken in the light most favorable to Plaintiff, does not establish that Facebook has mitigated such discrimination.

Finally, Facebook is mistaken that failure to provide equal access to ads for protected opportunities does not constitute an injury in fact. (Resp. Br. at p. 32.) The Ninth Circuit in *Vargas* rejected Facebook's standing arguments, holding that "deprivation of truthful information and housing opportunities" through advertising discrimination constitutes "a concrete and

[35] https://about.fb.com/wp-content/uploads/2023/01/Toward_fairness_in_personalized_ads.pdf.

particularized injury." (*Vargas*, *supra*, 2023 WL 4145434 at p. *5.) Where there is a "barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." (*Northeastern Florida*, *supra*, 508 U.S. at p. 666.). "The 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . . [T]he 'injury in fact' is the inability to compete on an equal footing." (*Ibid*.; see also, e.g., *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 379 [holding a more time-consuming housing search is a type of economic harm giving rise to standing].) Here, one set of users gets ads for valuable opportunities served up to them without effort, while another set of users must go to substantial effort to affirmatively search for the same opportunities. That extra effort to reach the same outcome is an injury giving rise to standing. Nor must a plaintiff allege with precision which ads were denied to them. "[N]othing in the case law requires that a plaintiff identify specific ads that she could not see when she alleges that an ad-delivery algorithm restricted her access to housing ads in the first place." (*Vargas*, 2023 WL 4145434 at p. *4.)

IV. Conclusion

For the foregoing reasons, the Court should reverse the trial court's erroneous decision.

Sincerely,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of the Court 8.204(c)(1), I certify that the text in the attached Amicus Brief was prepared in Microsoft Word, is proportionally spaced, and contains 10,587 words, including footnotes but not the caption, the table of contents, the table of authorities, signature blocks, or the application.

Dated: June 29, 2023

By: */s/David Brody*
David Brody