No. 21-1919

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Neuhtah Opiotennione,

Plaintiff–Appellant,

v.

Bozzuto Management Company, et al.,

Defendants–Appellees.

On Appeal from a Final Order of the
United States District Court for the District of Maryland
Case No. 20-cv-1956, Hon. Peter J. Messitte

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL FAIR HOUSING ALLIANCE, AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

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INTERESTS OF THE AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonpartisan, non-profit, national racial justice organization founded at the request of President John F. Kennedy in 1963 to enlist the private bar's leadership and resources in combatting racial discrimination and vindicating the civil rights of Black Americans and other racial and ethnic minorities. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law; the organization frequently participates as *amicus curiae* to protect the interests of these communities.

The National Fair Housing Alliance ("NFHA") is a consortium of approximately 167 private, non-profit, fair housing organizations, state and local civil rights groups, and other organizations dedicated to fair housing. NFHA strives to eliminate housing discrimination and ensure equal housing opportunities for all people through leadership, homeownership, credit access, tech equity, education, member services, public policy, community development, and enforcement initiatives. Relying on the Fair Housing Act and other civil rights laws, NFHA undertakes important enforcement initiatives in cities and states across the country and participates as amici to further its goal of achieving equal housing opportunities for all.

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, non-partisan organization dedicated to defending and preserving the Constitution and civil rights. The ACLU has litigated numerous cases aimed at ending segregation and eradicating barriers to fair housing and employment across the country, particularly

through its Racial Justice Program and Women's Rights Project. The ACLU has appeared frequently as *amicus curiae* in cases implicating the issues raised in this case.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Washington Lawyers' Committee") was founded in 1968 to fight civil rights violations, racial injustice, and poverty in the greater Washington, D.C. community through litigation and advocacy, enlisting the *pro bono* resources of the private bar. For decades, the Washington Lawyers' Committee has fought for fair and equal housing opportunity and combatted housing discrimination on behalf of its clients regionally and nationally. The Washington Lawyers' Committee brings extensive civil rights experience and housing justice expertise to this amicus brief.[1]

ARGUMENT

This case involves advertising practices that violate fundamental civil rights protections requiring equal access to economic opportunities for everyone. Appellee housing advertisers have provided some people streamlined access to housing opportunities while making others work much harder to reach the same opportunities—if they are able to reach them at all—on the basis of age, a protected characteristic. In doing so, they used a tool designed to allow advertisers to discriminate on the basis of other protected characteristics, including race and sex.

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[1] *Amici* file this brief with Appellant's consent. Appellees do not consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Discrimination in advertisements for housing, jobs, loans, and other key parts of American life has a long history, as do civil rights laws curtailing it. That such discrimination happens on the Internet does not make Appellees' discriminatory advertisements different in kind from discriminatory offline ads of the past that have been found to violate civil rights laws.

Digital redlining has become the new frontier of discrimination. "Digital redlining is the creation and maintenance of technology practices that further entrench discriminatory practices against already marginalized groups" such as using ad targeting tools "to prevent Black people from seeing ads for housing." *Banking on Your Data: the Role of Big Data in Financial Services*: Hearing before Task Force on Fin. Tech. of the House Comm. on Fin. Serv., 116th Cong., at 9 (Nov. 21, 2019) (statement of Dr. Christopher Gilliard).[2] In practice, this kind of redlining allows and promotes social media advertising that intentionally targets, or excludes information and opportunities from, members of certain protected classes. Here, the District Court failed to recognize that digital redlining through discriminatory housing advertisements violates civil rights statutes, and causes harm, in a similar manner as conventional offline discrimination. When a defendant makes it more difficult for some people to access jobs, housing, or other opportunities than for other people on the basis of a protected characteristic, the additional time, money, effort, or humiliation to overcome that hurdle is an injury that confers standing—just as where a restaurant serves Black patrons at the kitchen window while white patrons are

[2] https://financialservices.house.gov/uploadedfiles/chrg-116hhrg42477.pdf.

waited upon. *See Newman v. Piggie Park Enter., Inc.*, 377 F.2d 433, 434 n.3 (4th Cir. 1967). Just because two people can patronize the same business does not mean that it is irrelevant whether they receive the same quality of service. *See Flemming v. South Carolina Elec. & Gas Co.*, 224 F.2d 752 (4th Cir. 1955) (repudiating the "separate but equal" doctrine and holding bus segregation is unlawful).

In dismissing the operative complaint in this case, the District Court made several key errors. First, the District Court ignored longstanding precedent regarding the application of anti-discrimination statutes. Civil rights laws have long proscribed discrimination in advertising that makes it harder for people in protected classes to access economic opportunities. Such discriminatory advertising causes both economic and stigmatic harms, each of which confer standing. Injury in fact exists when there is "the imposition of a barrier" that creates "the inability to compete on equal footing." *Northeastern Florida Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). Second, the District Court misunderstood the operation of the social media advertising systems at issue. As the complaint alleged, Facebook's advertising platform offers tools that allow advertisers to target ads based upon demographic characteristics (or proxies thereof) protected by civil rights laws. Instead of taking the complaint at face value, the District Court improperly made assumptions based on facts not in the record about the extent to which people obtain housing via the Internet and social media. This error led the Court to draw improper and unsupported conclusions about the extent to which Appellees' alleged practices deny equal opportunity to people who do not see their ads by imposing additional burdens on their ability to rent homes in Appellees' properties.

Amici offer this context to aid the Court in its consideration of this appeal, and they urge the Court to reverse and reinstate the complaint.

I. Digital redlining violates civil rights laws in a similar manner as traditional offline discrimination.

American landlords, real estate brokers, retailers, employers, and others have long sought to place advertisements that directly or indirectly discriminate on the basis of protected characteristics. Although courts eventually repudiated such practices in common forms of media, that rejection has not stopped media companies and ad platforms from routinely attempting to characterize new types of discriminatory advertisements as somehow different. Yet discrimination online is no more legal than discrimination in other venues.

As alleged in the complaint, Appellee landlords exclude some prospective renters, on the basis of age, from receiving their advertisements. This constitutes digital redlining. These practices cause economic and stigmatic injuries in fact and violate longstanding civil rights protections.

A. Discrimination has a long history in advertisements concerning jobs, housing, commerce, and other aspects of American life.

Discriminatory advertisements have long been used to segregate unlawfully in various contexts, either through ads that contained explicit discriminatory preferences or limitations, or through ads with neutral content published in a discriminatory manner.

In the context of housing, discriminatory ads fit into a larger system of racial segregation. Prior to the passage of the Civil Rights Act, the Housing Act of 1954 had

"empowered local authorities to adopt [urban] renewal plans that guaranteed continued separate and unequal development." Arnold R. Hirsch, *"The Last and Most Difficult Barrier": Segregation and Federal Housing Policy In The Eisenhower Administration, 1953-1960*, Civil Rights Research (Mar. 2005).[3] Even previously, beginning before World War II and continuing thereafter, government agencies including the Home Owners Loan Corporation, Fannie Mae, and the Federal Housing Administration fueled the creation of suburban America through low-cost mortgage loans at the developer and individual homebuyer levels in a manner that excluded people of color. The Home Owners' Loan Corporation specifically mapped out America's racial geography, drawing redlines around Black neighborhoods marking them as off limits for the government-insured mortgages. Both the Federal Housing Administration and Fannie Mae refused to provide mortgages to Black people and further refused to insure any development project where the developers had not taken adequate steps to ensure that none of the homes would be sold to Black buyers. *See* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, 18-24, 2017; *see also* Mehrsa Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap*, Chapter 4 ("The New Deal for White America"), 2017; Brian Thompson, *The Racial Wealth Gap: Addressing America's Most Pressing Epidemic*, Forbes, Feb. 18, 2018.

As developers built homes using federal dollars conditioned on selling those homes to white families, they solicited white buyers. *See, e.g.*, Douglas S. Massey & Nancy

[3] https://www.prrac.org/pdf/hirsch.pdf.

A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 20 (1993). Targeted advertising to prospective white buyers whom the Government and developers wanted to purchase homes played a key role in perpetuating the segregated housing system. The consequences of redlining and harms to communities of color were broad, deep, and persist to this day. "Many measures of resource distribution and public well-being now track the same geographic pattern: investment in construction; urban blight; real estate sales; household loans; small business lending; public school quality; access to transportation; access to banking; access to fresh food; life expectancy; asthma rates; lead paint exposure rates; diabetes rates; heart disease rates; and the list goes on." *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 349 (4th Cir. 2021) (en banc) (Gregory, C.J., concurring).

With respect to employment, protesters demonstrated outside of the classified advertisements office of THE NEW YORK TIMES during the 1960s in opposition to the TIMES' practice of running segregated job advertisements, in separate columns, for men and women. *See* Laura Tanenbaum & Mark Engler, *Help Wanted - Female*, The New Republic (Aug. 30, 2017).[4] The TIMES was hardly alone—other newspapers and periodicals engaged in the same practice. *See id.*[5] Jobs advertised to men and women differed in key ways that reflected and reinforced longstanding stereotypes about

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

[5] Nor were the TIMES' discriminatory advertising practices limited to employment. *See Ragin v. N.Y. Times Co.*, 923 F.2d 995 (2d Cir. 1991) (holding that the Fair Housing Act reached the newspaper's use of models in advertisements as a medium for the expression of racial preferences).

men's and women's roles in American family and professional life. Jobs targeted to men often prioritized intellectual acumen, while jobs targeted to women prioritized physical appearance, for example. Jobs targeted to men often emphasized competitive pay that could support a family, while jobs targeted to women presumed that women would not need to earn family-supporting wages. *See id.* And advertisement segregation likewise reinforced discrimination at the intersection of race and gender: "[P]apers maintained separate sections for 'domestic female' help that were widely understood as targeting African-American women." *See id.*

Ads on the Internet have likewise played an important role in perpetuating that legacy of discrimination since the internet's infancy as a commercial platform. "Just as neighborhoods can serve as a proxy for racial or ethnic identity, there are new worries that big data technologies could be used to 'digitally redline' unwanted groups, either as customers, employees, tenants, or recipients of credit." The White House, *Big Data: Seizing Opportunities, Preserving Values*, at 53 (May 2014);[6] *see also, generally*, FTC, *Big Data: A Tool for Inclusion or Exclusion?* (Jan. 2016).[7] For example, a study published in 2006 using data from 2000—attempting to explain data showing robust discrimination in housing—attributed discrimination to "both brokers' prejudice and white customers' prejudice" and observed that "if a broker works in an agency using a multiple listing directory or the Internet to serve

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[6] https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

[7] https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

customers, she can employ these tools to steer minorities away from the neighborhood where the sale may offend hostile white clients." Bo Zhao et al., *Why Do Real Estate Brokers Continue to Discriminate? Evidence from the 2000 Housing Discrimination Study*, 59 J. Urb. Econ. 394 (2006), at 16-17, 21; *see also U.S. Dept. of Hous. and Urban Dev. v. Facebook, Inc.*, Charge of Discrimination, FHEO No. 01-18-0323-8 (Mar. 28, 2019) (alleging advertising practices violated the Fair Housing Act).[8] Similar findings exist with respect to advertisements for employment and credit, as online platforms, especially Facebook, have long permitted—and even promoted—targeting based on protected categories (or proxies) such as gender, race, ethnicity, age, and religion. *See, e.g.*, Julia Angwin and Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, ProPublica (Oct. 28, 2016);[9] Jeremy B. Merrill, *Does Facebook Still Sell Discriminatory Ads?*, The Markup (Aug. 25, 2020);[10] Corin Faife and Alfred Ng, *Credit Card Ads Were Targeted by Age, Violating Facebook's Anti-Discrimination Policy*, The Markup (Apr. 29, 2021);[11] Jon Keegan, *Facebook Got Rid of Racial Ad Categories. Or Did It?* (July 9, 2021).[12] The Federal Trade Commission, analyzing data practices of the six largest Internet service providers,

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[8] https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

[9] https://www.propublica.org/article/facebook-ads-age-discrimination-targeting.

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

[11] https://themarkup.org/citizen-browser/2021/04/29/credit-card-ads-were-targeted-by-age-violating-facebooks-anti-discrimination-policy.

[12] https://themarkup.org/citizen-browser/2021/07/09/facebook-got-rid-of-racial-ad-categories-or-did-it.

found that many "allo[w] advertisers to target consumers by their race, ethnicity, sexual orientation, economic status, political affiliations, or religious beliefs." FTC, *A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers*, at iii (Oct. 21, 2021).[13]

B. Appellees' discriminatory advertising causes economic harms that confer standing.

Discriminatory advertising causes actionable injuries in fact. 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, 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." *Jacksonville*, 508 U.S. at 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." *Id*. Courts routinely reject economic arguments seeking to justify such discrimination in the context of housing advertising. *See Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2d Cir. 1993); *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1053 (E.D. Va. 1987); *see also Ragin v. N.Y. Times*, 923 F.2d at 1005. Advertisements that "would indicate a racial preference" cause "injury in precisely the form the FHA was intended to guard against." *Ragin v. Macklowe*, 6 F.3d at 904. HUD regulations implementing the FHA make clear that

[13] https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

"[d]iscriminatory … advertisements include, but are not limited to … selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities" based on protected characteristics. 24 C.F.R. § 100.75(c)(3). Failing to allow standing in such cases would "undermine other civil rights laws," including, as the Second Circuit has noted, Title VII. *Ragin v. N.Y. Times*, 923 F.2d at 1004. That case specifically rejected not only economic justifications, but the TIMES' First Amendment argument that an adverse ruling would "compromise the unique position of the free press," because there is "no disruption of the press's traditional role that will result from prohibiting the publication of real estate ads that, to the ordinary reader, indicate a racial preference." *Id.* at 1003.

The District Court erred because it simply ignored the alleged economic harm. The District Court believed that Appellant could still have obtained the information in other ways. JA100.[14] But Appellant has specifically alleged increased search costs that imposed economic harm. *See, e.g.*, JA34 ("defendants' discriminatory actions . . . increased the time it took for her to secure housing"); JA41 (alleging that discriminatory practices "caused Ms. Opiotennione to be deterred from applying to rent and secure housing at certain properties, which delayed and made more difficult

[14] This is one of several points where the District Court impermissibly drew inferences against the Plaintiff below. To the extent that the District Court imagines that a housing seeker could obtain the same knowledge through a search engine, for example, the District Court ignores that search engines are not neutral purveyors of information and may themselves produce biased results based on a user's online behavior and other traits. *See generally* Safiya Umoja Noble, Algorithms of Oppression: How Search Engines Reinforce Racism (NYU Press 2018).

her efforts to find and secure available housing"). That economic harm gives rise to standing. *Jacksonville*, 508 U.S. at 666.

The Supreme Court recognized that a more time-consuming housing search is a type of economic harm that gives rise to standing in *Havens Realty Corp. v. Coleman*. 455 U.S. 363, 379 (1982). In *Havens*, the plaintiff-fair housing organization alleged that the defendants' steering practices frustrated its provision of counseling and referral services for low- and moderate-income households—namely, its efforts to help such households find homes. Consequently, they caused the organization to spend more to counteract the effects of that discrimination, in part by devoting more time to helping households find places to live than it would have had to in a nondiscriminatory marketplace. *Id.* Similarly, in *Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. & Community Affairs*, the court held that an organization that helped Black households with Housing Choice Vouchers move to integrated or predominantly white parts of the Dallas-Fort Worth metropolitan area had standing to challenge policies relating to the disproportionate allocation of Low-Income Housing Tax Credits (LIHTC) to developments in predominantly Black neighborhoods, where the cost of providing services to households moving into LIHTC properties was less than half that of helping households secure other housing types that were more available in higher opportunity areas. 749 F. Supp. 2d 486, 496 (N.D. Tex. 2010). These courts' analysis of the economic harm of a more difficult and time-consuming housing search applies as well to individual standing as to organizational standing.

Appellee housing advertisers' other arguments are unavailing. Appellees have argued below on the merits that Appellant cannot state a claim because she challenged "only certain individual Facebook advertisements rather than any of the [advertisers'] overall advertising campaigns," and urged the District Court to consider "the full scope of Defendants' other social media advertising." Dist. Ct. Doc. 65-1 at 17, 19. But if Appellee landlords did target some other advertising at different protected classes in countervailing directions, such conduct compounds the problem rather than resolving it. Across civil rights contexts, and across eras, the Supreme Court has rejected the idea that discrimination in one direction can cancel out discrimination in the other direction. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). *Shelley* invalidated racially restrictive covenants even though proponents of those covenants argued that they also limited the economic opportunities of white people to sell housing to Black buyers. *Id.* at 22. More recently, *Bostock v. Clayton County* reemphasized that equal but sex-based adverse treatment—firing a woman for being insufficiently feminine and a man for being insufficiently masculine—does not "avoid[] Title VII exposure," but instead "doubles it." 140 S.Ct. 1731, 1741 (2020). And in any event, this case is different in kind because Appellant alleged below that the exclusion ran only in one direction—against individuals older than a certain age.

Appellee landlords also cannot rely on the argument that some members of protected classes nevertheless obtained housing with them through other channels. The District Court erred in part because it credited this argument—not only because it relied upon facts outside of the Complaint, but also because it is fundamentally

incorrect as a matter of law. *See* JA102-03. As a threshold manner, to tell a particular class that they should seek service elsewhere, or under different terms or conditions, is quintessential discrimination. *See, e.g., Piggie Park*, 377 F.2d at 434 n.3 (violation of Title II where a restaurant denied drive-in service to Black patrons or required them to use the kitchen window). As courts have recognized, to the extent that an individual does not receive an economic benefit because a company closed off an avenue of access to her, it matters little that other people from the same demographic managed to receive the benefit. *Henderson v. United States*, 339 U.S. 816, 825 (1950) (noting that "it is no answer" to an individual that "on the average" persons like them are served). And in other analogous civil rights contexts, the fact that an employer has not discriminated against all individuals of a protected group does not absolve it for discriminating against an individual. *Bostock*, 140 S.Ct. at 1740 ("The employer is liable for treating *this* woman worse in part because of her sex.") (emphasis in original); *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (rejecting a company's defense that it could not have discriminated against a particular woman because it favored women as a class); *Jacksonville*, 508 U.S. at 666 ("inability to compete on an equal footing" is a denial of equal treatment). Applied here, the Appellant has standing because she alleged Appellees offered housing opportunities more easily to other classes than to her, through its use of discriminatorily targeted ads.

C. Appellees' discriminatory advertising causes stigmatic harms that confer standing.

Discrimination itself imposes a stigmatic harm, which has always conferred standing independent of an accompanying economic injury. For example, the Supreme Court recognized in *Heckler v. Mathews* that the United States could not impose certain sex-based differences in processing pension benefits for spouses under Social Security based on archaic stereotypes that a man was less likely to rely on his wife for economic support than a woman to rely on her husband. 465 U.S. 728 (1984). Regardless of the individual's underlying right or need to benefit, the Court had "repeatedly emphasized, [that] discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior,' . . . can cause serious noneconomic injuries" that confers "standing to prosecute this action." *Id.* at 739-40 (quoting *University for Women v. Hogan*, 458 U.S. 718, 725 (1982)). This Court has repeatedly recognized the injury caused by stigmatic harms. *See, e.g.*, *Int'l Refugee Assistance Project, Inc. v. Trump*, 857 F.3d 554, 578, 582 (4th Cir. 2017) (en banc) (observing that plaintiffs suffered "feelings of disparagement and exclusion" because of statements about their religion, and later affirming that such "noneconomic or intangible injury may suffice" to confer standing); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 618 (4th Cir. 2020) ("The stigma of being forced to use a separate restroom is likewise sufficient to constitute harm"). In the Fair Housing Act context, most courts to have addressed the issue have held that stigmatic harm is sufficient to confer standing. *Ragin v.*

Macklowe, 6 F.3d at 903-04; *Saunders*, 659 F. Supp. at 1053; *but see Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 594-97 (10th Cir. 1996).[15]

As with its dismissal of economic injuries, the District Court's dismissal of stigmatic harm erred. The District Court appeared to distinguish between the Facebook ads at issue in this case and explicitly segregated print ads in past cases on the sole basis that "Facebook users would have had to click on a small three-dot symbol in the corner of the post" to learn that they had been targeted based upon their age or other protected characteristics. JA102. That analysis incorrectly focuses on those who *did* receive the ads, while completely discounting the harms to those who never receive the ads in the first place because of their protected characteristics—and who therefore do not even have access to the "three dots" on which to click. Advertisers alleged to discriminate through ad targeting cannot get the benefit of unsupported inferences to dismiss the claims about stigmatic injuries caused by their actions on this posture. But it is especially dangerous here, where the District Court's analysis would severely undermine civil rights statutes' applicability in the context of individually-targeted online ads. In the 1960s, newspapers could not print different individually-targeted ads in each newspaper and deliver them accordingly. Everyone reading the sports section saw the same ads even if they belonged to a demographic the advertiser did not want. But on Facebook, advertisers can pick and choose their viewers and exclude others entirely.

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[15] Although the Tenth Circuit declined to recognize standing on the basis of stigmatic harm alone in *Wilson*, that case concerned housing for which the plaintiffs were ineligible for unrelated, nondiscriminatory reasons—not the case here. *Id.* at 596.

II. The Appellee landlords' use of Facebook's ad platform is digital redlining.

In the context of searching for housing in the Internet age, the practices alleged in the complaint amount to digital redlining. Digital redlining is the act of using data about someone's protected class status to exclude or impair their ability to access economic opportunities. *See Banking on Your Data* (statement of Dr. Christopher Gilliard), at 9; Elisa Jillson, *Aiming for truth, fairness, and equity in your company's use of AI*, FTC (April 19, 2021) (digital redlining includes a company using algorithms to "targe[t] consumers most interested in buying their product … by considering race, color, religion, and sex").[16] Appellant alleges that the landlords show ads to audiences they select based on various demographic characteristics, including some protected by civil rights law. The District Court erred because it failed to credit Appellant's allegations that Appellees used Facebook to target and deliver their ads in a discriminatory manner. *See, e.g.*, JA37-38. In fact, Appellant alleged that her age-based demographic was excluded from receiving the advertisement entirely. *Id*.

Besides missing the important context about Appellees' ad targeting on Facebook, the District Court also discounted the effect of Appellees' discriminatory choices because it misapprehended the importance of the Internet and social media to obtain housing. Social media ads are a key part of reaching prospective buyers and renters. By steering housing ads away from certain categories of people, Appellees raise the

[16] https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai.

cost and effort necessary for those individuals to find Appellees' housing opportunities—which has long conferred standing.

A. Facebook's advertising platform offers advertisers precise targeting based upon numerous characteristics, including some protected by civil rights laws.

As a threshold matter, the District Court misapprehended how Facebook's advertising platform works. Advertisers use Facebook to engage in *targeted advertising*, which is fundamentally different from *contextual advertising* traditionally used in periodicals, radio, TV, and billboards. In contextual advertising, an ad is displayed in a specific *context*—such as a page in a newspaper or magazine, a TV program or timeslot, or a billboard at a given address. *See* Blase Ur *et al*, *Smart, Useful, Scary, Creepy: Perceptions of Online Behavioral Advertising*, Proc. SOUPS 2012, ACM Press, at 1 (2012) (Contextual advertising is when "advertising networks choose which ads to display on a webpage based on the contents of that page.").[17] Everyone who views that context sees the same advertisements, regardless of who they are or what they like. In contrast, targeted advertising—which is predominantly used on websites, apps, and streaming video—displays ads to *people* based on their personal traits, interests, location, or behavior. *Id.* at 2 ("Online advertisers track users as they traverse the Internet, constructing profiles of individuals to enable targeted advertising based on each user's interests."). This means that two people viewing the same post on Facebook—even at the same time and same location—will

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

likely see different advertisements, and that the same person looking at different websites may see similar ads across the different contexts.

The difference between contextual and targeted advertising informs the analysis of whether a specific ad practice is discriminatory. Contextual advertising is not fundamentally exclusionary—anyone who is interested in the context could view the ad, even if some people are more likely to see it than others. Targeted advertising is fundamentally exclusionary—if a person is not part of the target audience, they would never receive the ad and may not know they were missing out on that opportunity. Consequently, the threat of invidious discrimination is much greater with targeted advertising than contextual. "The potential for discrimination in targeted advertising arises from the ability of an advertiser to use the extensive personal (demographic, behavioral, and interests) data that ad platforms gather about their users to target their ads." Till Speicher *et al*, *Potential for Discrimination in Online Targeted Advertising*, Proc. of Machine Learning Res. 81:1-15, Conference on Fairness, Accountability, and Transparency, at 2 (2018).[18]

Facebook operates a targeted advertising platform that begins with the collection of data about its users. This can include information about a user's current and past location, employment, education history, family relationships, preferences about music or movies or other media, and myriad other data, many of which can proxy for protected characteristics. *See Your Profile and Settings*, Facebook Help Center.[19] Besides information that users knowingly and voluntarily disclose, Facebook also

[18] https://proceedings.mlr.press/v81/speicher18a/speicher18a.pdf.

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

collects information about its users' browsing histories across other websites, location data when they access Facebook via mobile phone, and financial history, among other pieces of information. *See How do Facebook's Location Settings work?*, Facebook Help Center;[20] *What is off-Facebook activity?*, Facebook Help Center;[21] Reply All, *#109 Is Facebook Spying on You?*, Gimlet Media (Nov. 2, 2017).[22] Facebook uses this data to profile its users and help advertisers to target users they believe will be most likely to purchase their good or service—or housing, for example. *See, e.g.,* Jinyan Zang, *Solving the problem of racially discriminatory advertising on Facebook*, Brookings Institution (Oct. 19, 2021) (Facebook provides "Detailed Targeting options" consisting of "prepackaged groups of Facebook users who share common attributes based on Facebook's data analysis of their behaviors online.").[23]

Facebook's ad targeting tools allow for both inclusionary and exclusionary targeting as a central feature. This means that an advertiser can use the tools to identify cohorts it wants to be *included* in the target audience and cohorts it wants to be *excluded* from the target audience. "[Facebook] has provided a toggle button that enables advertisers to exclude men or women from seeing an ad, a search-box to exclude people who do not speak a specific language from seeing an ad, and a map tool to exclude people who live in a specified area from seeing an ad by drawing a red

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[20] https://www.facebook.com/help/278928889350358.

[21] https://www.facebook.com/help/2207256696182627.

[22] https://gimletmedia.com/shows/reply-all/z3hlwr.

[23] https://www.brookings.edu/research/solving-the-problem-of-racially-discriminatory-advertising-on-facebook/.

line around that area." *HUD. v. Facebook*, Charge of Discrimination, FHEO No. 01-18-0323-8 at 4.[24] When advertisers pick cohorts of Facebook users to target, they can engage in discrimination against protected classes. *Id*. Even when not engaging in such explicit discrimination, advertisers can also target based upon characteristics that individually or in the aggregate serve as proxies for race and other protected characteristics. *See Speicher*, at 14. This includes the ability to use "custom audiences," which are cohorts of users that Facebook infers have a common interest, such as "NAACP," "Hispanic culture," or "Korean language." *Facebook Got Rid of Racial Ad Categories. Or Did It?*. "Just as neighborhoods can serve as a proxy for racial or ethnic identity, there are new worries that big data technologies could be used to 'digitally redline' unwanted groups [by relying on such proxies] either as customers, employees, tenants, or recipients of credit." *Big Data: Seizing Opportunities, Preserving Values*, at 53; *see also* Lucas Elliott, *Facebook Location Targeting: A Detailed Guide*, Jon Loomer (Aug. 29, 2018).[25] And as Appellant alleged below, Facebook's algorithm only magnified Appellees' discriminatory targeting choices. *See* JA39 ("by using Facebook's ad-delivery algorithm," Appellees "have

[24] In 2019, Facebook changed some of its targeting tools for housing, employment, and credit ads as part of a settlement of civil rights litigation. ACLU, *Summary of Settlements Between Civil Rights Advocates and Facebook* (Mar. 19, 2019), https://www.aclu.org/other/summary-settlements-between-civil-rights-advocates-and-facebook. However, the conduct at issue in this case predates those changes. *See* JA14-15.

[25] https://www.jonloomer.com/2018/08/29/facebook-location-targeting/

compounded the discrimination that [Appellees] caused by expressly excluding persons above a certain age from receiving their ads").[26]

B. Today, people obtain housing via the Internet and social media; Appellees' alleged practices impose a higher burden to obtain housing opportunities on those who are not included in the audience for their ads.

The nature of the modern housing market underscores why discrimination on Facebook's ad platform is so harmful. The District Court erred below in part because it dismissed the importance of targeted advertising on the Internet in housing searches today, noting other available ways to obtain information. JA100. That analysis is wrong as a matter of law, *see* Section I, *supra*. But the inappropriate factual assumptions underpinning it are contrary to how the housing marketplace actually works—as specifically acknowledged by regulators, including by the Federal Reserve and Federal Trade Commission.

The Federal Reserve has paid attention to digital redlining particularly because of the increased use of online targeted ads in the housing space. In discussing the sort of discrimination at issue here, the Fed observed that "increased use of Internet-based marketing practices" in the context of steering and redlining raised "a range of consumer protection and financial concerns." Carol Evans and Westra Miller, *From Catalogs to Clicks: The Fair Lending Implications of Targeted, Internet Marketing*,

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[26] *See also* Muhammad Ali, et al., *Discrimination through Optimization: How Facebook's Ad Delivery Can Lead to Biased Outcomes*, 3 Proceedings of the ACM on Human-Computer Interaction No. 199 (demonstrating significant bias in Facebook's ad delivery on the basis of gender, age, and other protected characteristics as a result of the algorithm).

Consumer Compliance Outlook: Third Issue 2019, Federal Reserve Board (2019).[27] While this would violate fair housing laws even if digital ads were posted in the same manner as old newspaper classified ads, digital and online advertising have not only increased in prevalence, but in sophistication. *Id.* (referring to "increasingly sophisticated marketing strategies that aim to target certain consumer groups").

The stakes here are higher than ever because of the sophistication of individualized delivery in targeted advertising compared to contextual advertising. Companies can measure user interaction with targeted ads, can track users as they move from one website or app to another, and can catalog people's browsing histories and location—among other data—to identify exactly the customers they want. *See id.* This increased capacity for sophistication helps explain why targeted advertising has become a prime method for housing advertisers, and a corresponding concern of regulators. The Fed observed that "[i]t appears that it may be most efficient to show advertisements to consumers who are the most likely to want a certain product or job because revenue is generated when consumers click on advertisements. But efficiency in this context may be at cross purposes with bedrock principles of nondiscrimination." *Id.*

The Federal Trade Commission has raised similar concerns. It has said that using an algorithm in commerce that produces a racially disparate impact may violate the Fair Credit Reporting Act or the Equal Credit Opportunity Act, or may constitute an unfair or deceptive trade practice in violation of the FTC Act. *See Aiming for truth,*

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[27] https://consumercomplianceoutlook.org/2019/third-issue/from-catalogs-to-clicks-the-fair-lending-implications-of-targeted-internet-marketing/.

fairness, and equity in your company's use of AI. In another recent report, the FTC studied how some of the largest Internet service providers used sensitive personal characteristics for ad targeting. *Examining the Privacy Practices of Six Major Internet Service Providers*, at iii.

Regulators care about this because the effectiveness of these methods of advertising makes them a prime way to access the best economic opportunities—and excluding people from those ads correspondingly harms those people by making the opportunities harder to access. *See From Catalogs to Clicks*. This is because purported efficiencies generated in directing advertisements to consumers presumed to want a product necessarily steers other individuals away from the advertisements, leaving them unaware of opportunities they might want to pursue. More to the point, courts have found such steering to be unlawful whether the practice is steering people of different races to different housing, *Havens*, 455 U.S. at 376, or steering individuals away from and withholding their access to an opportunity, as is the case here, *see Comer v. Cisneros*, 37 F.3d 775, 790-91 (2d Cir. 1994) (concluding plaintiffs had standing because the defendant had "ma[de] it more difficult for" [Black subsidy holders] to obtain a housing benefit"—potentially using their subsidy outside the city limits). A perceived notion that younger renters might be more inclined to want to live at Appellees' properties should not result in older renters being steered away from Facebook advertisements that might otherwise be the only avenue through which these older renters learn of such rentals.

The District Court here erred because it discounted how important targeted advertising is to finding housing opportunities, and consequently failed to recognize

the injury suffered by someone excluded from receiving such ads. The District Court distinguished *Havens*, a case about tester standing, because the housing providers in that case had provided affirmative misinformation to housing testers who showed up to seek apartments, rather than declining to show ads to them at all. JA99. The different injury-in-fact present in *Havens* does not, however, discount Appellant's injury in this case. A renter like Appellant who seeks housing does not know the universe of choices available to them except through available information, which in today's online world often includes social media and, specifically, Facebook. The Second Circuit has recognized as much. *See Comer*, 37 F.3d at 790-91 (holding that a government agency failing to inform plaintiffs that they could use their housing subsidy to secure housing outside of the City of Buffalo limited their housing choices by lack of information, conferring standing).

Appellees' argument below, that people can obtain the same information by going to their websites or making general searches, JA87, demonstrates this problem. By way of example, a renter may look at JBG Smith properties in Montgomery County because they know of JBG Smith as a landlord, but they may not even know Bozzuto exists. There is no guarantee Bozzuto would be prominent in the renter's search results either. *See generally*, Algorithms of Oppression (examining biases in search engine results); Megan Graham and Jennifer Elias, *How Google's $150 billion advertising business works*, CNBC (May 18, 2021) ("Advertisers using Google products can bid on search keywords—specific words and phrases that lead their ads

to show up to relevant users in search results.").[28] And yet, Bozzuto properties may offer certain features, amenities, or pricing preferable to the renter, but this renter would not find these rental opportunities on their own. The injury to this renter, and to Appellant, is one and the same—extra effort and time spent searching for apartment rentals compared to a similarly situated renter who was not excluded from the Facebook ads.

CONCLUSION

Amici urge this Court to reverse the judgment of the District Court.

Respectfully submitted,

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[28] https://www.cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html.

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32 and Local Rule 32, I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Local Rule 32(b) because it contains 6,470 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word version 16.53, set in Century Schoolbook font in 12-point type.

/s/ Jim Davy

Jim Davy

CERTIFICATE OF SERVICE

I certify that on Dec. 17, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

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