No. 21-16499

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rosemarie Vargas, et al.,

Plaintiffs–Appellants,

v.

Facebook, Inc.,

Defendant–Appellee.

On Appeal from a Final Order of the
United States District Court for the Northern District of California
Case No. 3:19-cv-05081, Hon. William H. Orrick

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

Jon Greenbaum
Thomas Silverstein
David Brody
Adonne Washington*
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K St. NW, Suite 900
Washington, DC 20005
(202) 662-8600

*Admitted in Michigan only. Practice limited to matters before federal courts.

Jim Davy
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org

Counsel for Amici Curiae

Jan. 26, 2022

CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Regulations

INTERESTS OF THE AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), the National Fair Housing Alliance ("NFHA"), Free Press, and the American Civil Liberties Union Foundation ("ACLU") are nonpartisan, non-profit, nationwide civil rights organizations. For decades, they have engaged in litigation and advocacy to protect civil rights, including specifically to eliminate housing discrimination. *Amici* have particular expertise with the Fair Housing Act and other civil rights laws, and regularly participate as *amici curiae* in cases involving civil rights in digital contexts.[1]

ARGUMENT

This case involves an advertising platform that violates fundamental civil rights protections requiring equal access to economic opportunities. Appellee Facebook created and maintained a tool that discriminates in advertising based on certain protected characteristics, including race and gender. Discrimination in advertisements for housing, jobs, and other key aspects of American life has a long history, as do civil rights laws curtailing it. That such discrimination happens on the Internet does not make Facebook's practices different in kind from discriminatory offline conduct that has been found to violate civil rights laws.

Digital redlining—the new frontier of discrimination—is "the creation and maintenance of technology practices that further entrench discriminatory practices

---

[1] *Amici* file this brief with Appellants' consent. Appellee has not taken a position in response to inquiries. 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.

against already marginalized groups," such as 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] Digital redlining includes social media advertising that intentionally targets, or excludes information and opportunities from, members of protected classes.[3] 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 offline discrimination.

When a defendant imposes greater burdens on some people to access jobs, housing, or other opportunities because of protected characteristics, the additional time, money, effort, or humiliation to overcome that hurdle is an injury that confers standing—like a restaurant that serves Black patrons at the kitchen window while white patrons are waited upon. *See Newman v. Piggie Park Enter., Inc.*, 377 F.2d 433, 434 n.3 (4th Cir. 1967), *aff'd* 390 U.S. 400 (1968). Just because two people can patronize the same business does not mean that it is irrelevant whether they receive the same quality of service—segregated access to the same product is still unlawful. *See McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640-42 (1950) (holding segregation unlawful even when segregated student used "the same

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

[3] Digital redlining may have other meanings in different contexts. Here, *amici* use the term—similar to what experts also call "algorithmic redlining" or "algorithmic discrimination"—to describe the digital practice of segregating online users and, hence, affecting the experience and opportunities users have based on their identity.

classroom, library, and cafeteria as students of other races" without indication of "any disadvantage"); *Henderson v. United States*, 339 U.S. 816, 818 (1950) (dining car segregation unlawful when railway had ten whites-only tables and one table for Black passengers, even though railway offered alternative dinner service to excluded Black patron for no extra charge); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938) ("The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it."); *Jones v. Kehrlein*, 49 Cal.App. 646 (Calif. Ct. App. 1920) (segregated theater seating violated California law despite access to same show). Nor can the "indiscriminate imposition of inequalities," *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), or "the comparative volume of traffic," *Mitchell v. United States*, 313 U.S. 80, 97 (1941), justify discriminatory treatment.

In dismissing the complaint, the District Court made several key errors. First, the District Court mischaracterized longstanding precedent regarding the application of anti-discrimination statutes. Civil rights laws have long proscribed discriminatory advertising that makes it harder for some classes to access economic opportunities. Such discrimination causes both economic and stigmatic harms, each of which confers standing. Injury in fact exists when "the imposition of a barrier" 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 online advertising systems at issue. As the complaint alleged, Facebook's platform offered tools that allowed advertisers to target ads based upon demographic characteristics (or proxies thereof) protected by civil

rights laws. ER250. Instead of crediting allegations in the record, the District Court discounted the extent to which Facebook's alleged practices deny equal opportunity to people who do not see platform ads by imposing additional burdens on users' ability to find housing. ER237. Finally, failing to follow binding precedent from *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc), the District Court erroneously concluded that Facebook is protected by Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"). Here, Facebook put its users into cohorts based on protected characteristics or proxies thereof, designed drop down menus that enabled advertisers to exclude some users from seeing ads on those bases, created ad audiences based on those selections, and used its ad algorithm to discriminate in the delivery the ads. Facebook is liable not for third-party content, but for its own conduct in causing or materially contributing to civil rights violations—a distinction that makes Section 230 protection inapplicable to Facebook. *See Roommates*, 521 F.3d at 1168; *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091-93 (9th Cir. 2021).

I. Digital redlining, like offline discrimination, violates civil rights laws.

Landlords, real estate brokers, employers, and others have long sought to place ads 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, Facebook developed and used a system that enabled advertisers to exclude some prospective renters, on the basis of several protected characteristics, from receiving their advertisements.[4] ER249. In doing so, Facebook created and maintained a segregated market for housing advertising. ER249-50. Such practices cause economic and stigmatic injuries in fact and violate civil rights protections.

A. Discriminatory advertisements for jobs, housing, and other aspects of American life have a long history.

Discriminatory advertisements have long been used to segregate unlawfully, either through ads containing explicit discriminatory limitations or 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 "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*

[4] 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* ER 12. And that settlement did not address algorithmic delivery of ads, discussed *infra* at 14-17. *See* Laura W. Murphy & Megan Cacace, Facebook's Civil Rights Audit – Final Report, Facebook, at 74 (Jul. 8, 2020), https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf.

and Federal Housing Policy In The Eisenhower Administration, 1953-1960, Civil Rights Research (Mar. 2005).[5] 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 to developers and homebuyers 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 support the origination of mortgages to Black people or insure any project where developers had not taken adequate steps to ensure that no 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.

As developers built homes using federal dollars conditioned on selling to white families, they solicited white buyers. *See, e.g.*, Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 20 (1993). Targeted advertising to prospective white buyers played a key role in creating and perpetuating the segregated housing system. The consequences of redlining for communities of color were broad, deep, and persistent. "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

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

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, newspapers and periodicals routinely segregated job advertisements, in separate columns, for men and women. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376 (1973) (upholding ordinance prohibiting segregated employment ads);[6] Laura Tanenbaum & Mark Engler, *Help Wanted - Female*, The New Republic (Aug. 30, 2017).[7] Jobs advertised to men and women differed in ways that reflected and reinforced longstanding stereotypes about gender roles in American life. Jobs targeted to men often emphasized intellectual acumen 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. *See* Tanenbaum & Engler. Segregated advertising 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." *Id.*

---

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

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

Internet ads have likewise played a significant role in perpetuating that legacy of discrimination. "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);[8] *see also, generally*, FTC, *Big Data: A Tool for Inclusion or Exclusion?* (Jan. 2016).[9] The Federal Trade Commission (FTC), analyzing data practices of the six largest Internet service providers, recently 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).[10] The FTC says that digital redlining, such as the use of "racially biased algorithms," constitutes an unlawful unfair or deceptive practice. Elisa Jillson, *Aiming for truth, fairness, and equity in your company's use of AI*, FTC (Apr. 19, 2021).[11]

---

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

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

[10] 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.

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

B. Facebook's advertising system discriminates unlawfully.

The complaint in this case alleges Facebook's practices amounted to and materially contributed to discrimination. Appellants alleged that Facebook created and operated an advertising system that offered housing advertisers the option to exclude certain users from seeing their ads based on various demographic characteristics, including those protected by civil rights law. ER235-36. Appellants are not the only people to note that Facebook has a long history of engaging in discriminatory advertising. For example, the federal government has an ongoing complaint against Facebook for discriminatory housing advertisements targeting features that it alleges violate the Fair Housing Act. ER291-97; *U.S. Dept. of Hous. and Urban Dev. v. Facebook, Inc.*, Charge of Discrimination, FHEO No. 01-18-0323-8 (Mar. 28, 2019).[12] Facebook used protected categories (or proxies) such as gender, race, ethnicity, age, and religion, to target and deliver ads for housing, employment, and credit. *See, e.g.*, Julia Angwin and Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, ProPublica (Oct. 28, 2016);[13] Louise Matsakis, *Facebook's Ad System Might Be Hard-Coded for Discrimination*, WIRED (Apr. 6, 2019);[14] Ava Kofman and Ariana Tobin, *Facebook Ads Can Still Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement*, ProPublica (Dec. 13, 2019);[15] Jeremy B. Merrill, *Does Facebook Still Sell Discriminatory Ads?*, The Markup (Aug.

---

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

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

[14] https://www.wired.com/story/facebooks-ad-system-discrimination/.

[15] https://www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement.

25, 2020);[16] Corin Faife and Alfred Ng, *Credit Card Ads Were Targeted by Age, Violating Facebook's Anti-Discrimination Policy*, The Markup (Apr. 29, 2021);[17] Jon Keegan, *Facebook Got Rid of Racial Ad Categories. Or Did It?* (July 9, 2021).[18]

The District Court failed to credit those allegations in part because it 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, a TV program, 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.").[19] 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

---

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

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

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

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

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 location—likely see different advertisements, and 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. ER236-37. Consequently, the threat of invidious discrimination is much greater with targeted advertising than contextual advertising. "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).[20]

Facebook operates a targeted advertising platform that begins with the collection of data about its users. ER240. This can include information about a user's current and past location, employment, education history, family relationships, preferences

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

about music or movies or other media, and myriad other data, many of which can be proxies for protected characteristics. ER242-43; *see also Your Profile and Settings*, Facebook Help Center.[21] Besides information that users knowingly and voluntarily disclose, Facebook also 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. ER245; *How do Facebook's Location Settings work?*, Facebook Help Center;[22] *What is off-Facebook activity?*, Facebook Help Center.[23] Additionally, Facebook collects data from the user's friends and family, as well as the user's interactions with other users, from which Facebook can model the user's associations and interests. *See* Reply All, *#109 Is Facebook Spying on You?*, Gimlet Media (Nov. 2, 2017);[24] Kashmir Hill, *How Facebook Figures Out Everyone You've Ever Met*, Gizmodo (Nov. 7, 2017).[25] Facebook uses this data to profile and target users it believes will be most likely to purchase the advertiser's good or service. *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

---

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

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

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

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

[25] https://gizmodo.com/how-facebook-figures-out-everyone-youve-ever-met-1819822691.

who share common attributes based on Facebook's data analysis of their behaviors online.").[26]

Facebook's advertising system has two stages: targeting and delivery. Facebook has intentionally built a system that, at both stages, can exclude users from receiving particular ads based on their protected characteristics or close proxies thereof. ER250; Facebook, *Help your ads find the people who will love your business*, Facebook for Business ("Choose your audience based on age, gender, education, job title and more.");[27] Muhammad Ali, et al, *Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes*, Proc. of the ACM on Human-Computer Interaction, No. 199, at 3 (Nov. 2019) ("Our results show Facebook's integral role in shaping the delivery mechanism").[28]

In the targeting stage, both Facebook and the advertiser play a role in defining an audience of users for the ad. Facebook's ad targeting tools allows for both inclusionary and exclusionary targeting as a central feature. ER249. 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

---

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

[27] https://www.facebook.com/business/ads/ad-targeting (last visited Jan. 12, 2022).

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

seeing an ad by *drawing a red line around that area.*" ER294, *HUD v. Facebook*, at 4 (emphasis added). 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 also can 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).[29]

But Facebook's advertising infrastructure also includes its algorithmic delivery system, which contributes to discrimination regardless of any choices made by advertisers. ER248-49. The ad delivery stage occurs after targeting criteria are set. There is not enough virtual real estate for Facebook to show every ad to every user who may be within the target audience, so it uses the delivery system to triage what subset of targeted users will actually receive each ad. Facebook seeks to "deliver your ads to the right people" by making its own predictions about who "the right people"

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

are for any given ad. Facebook for Business, Business Help Ctr., *Optimizations for Ad Delivery Available by Objective*.[30] 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. *See id.*

Facebook's ad delivery decisions lead to significant bias based on gender, age, and other protected characteristics—even when advertisers do not use Facebook's tools to engage in discriminatory targeting. *See* Ali, *Discrimination through optimization*, at 13 ("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."). 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. Jeremy B. Merrill, *Does Facebook Still Sell Discriminatory Ads?*, The Markup (Aug. 25, 2020).[31] Another study found Facebook delivered truck driver ads 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. Nicolas Kayser-Bril, *Automated Discrimination: Facebook uses gross stereotypes to optimize ad delivery*, Algorithm Watch (Oct. 18, 2020).[32] Indeed, Facebook has said that if it

---

[30] https://www.facebook.com/business/help/416997652473726 (last visited Jan. 2, 2022).

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

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

detects a pattern of men interacting with a particular ad, it will automatically—without instruction from or notification to the advertiser—steer that ad toward a higher proportion of men in the future, excluding women. ER295, *HUD v. Facebook*, at 5.

At the root of Facebook's discrimination is its own conduct: the reckless application of algorithmic data analysis to information drawn from a society containing systemic inequities. What may appear to an algorithm as a personal preference may not be a preference at all, but instead the result from a lack of choice. These algorithms find hidden correlations in the data and use those correlations to create efficiencies. ER251. But the output is only as good as the input. The data fed into the algorithm—a user's neighborhood, employment history, credit history, education, associations, wealth, health—are themselves inextricably intertwined with generations of discrimination in housing, employment, education, banking, insurance, and criminal justice. *See Leaders of a Beautiful Struggle*, 2 F.4th at 349 (Gregory, C.J., concurring); *see also, e.g.*, Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025 (2018). When Facebook applies its algorithms to this data, the algorithms create efficiency by finding hidden correlations—they see that older Black women, for example, are less likely to be wealthy, to live in an expensive neighborhood, to have a graduate degree, to have job security, or to be adequately insured—and the algorithms mistake the *consequences* of historical discrimination for the *preferences* of older Black women. The algorithms segregate users based upon immutable traits or proxies thereof, and provide different service on that basis.

II. Facebook's discriminatory advertising system caused harms that have always conferred standing.

Discriminatory advertising practices like in this case cause actionable injuries in fact. 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." *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*. *See also McLaurin*, 339 U.S. at 640-41 ("It is said that the separations … are in form merely nominal. McLaurin uses the same classroom, library, and cafeteria as students of other races; there is no indication that the seats to which he is assigned in these rooms have any disadvantage of location." Nevertheless, "[s]uch restrictions impair and inhibit his ability … in general, to learn his profession."). This includes, in part, increased search costs occasioned by not competing on equal footing. But it also includes the stigma associated a group deemed to be less worthy of receiving the ads (or the goods or services they advertise). Both harms have historically conferred standing, and the District Court erred by discounting each harm.

A. Facebook's discriminatory advertising platform caused economic harms that confer standing.

Increased search costs are a recognized economic harm that confers standing. 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*, improperly dismissed by the District Court, ER7, 18, a 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, defendants 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.*; *see also 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"). Similarly, in *Inclusive Communities Project, Inc. v. Tex. Dep't of Hous. & Community Affairs*, the Court held that an organization helping low-income Black households secure housing had standing to challenge policies that restricted availability of affordable housing to households in integrated areas—i.e., that the policies increased the costs to helping others find housing. 749 F. Supp. 2d 486, 496 (N.D. Tex. 2010). These principles do not apply solely to housing organizations; this Court has held that other individual FHA plaintiffs have standing to challenge practices that impose greater burdens and costs during their housing search process. *E.g.*, *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (observing that "burdensome application procedures, and tactics of delay, hindrance, and special treatment must receive short shrift from the courts"). These Courts' analyses of the economic harm of a more difficult and time-consuming housing search, for both individual and organizational standing, apply to the allegations in this case.

The District Court erred because it did not credit the alleged economic harm or apply precedent. Appellants specifically alleged increased search costs that imposed economic harm. *See* ER259 ("Facebook's discriminatory Ad Platform and its discriminatory targeting of housing advertising caused and continue to cause . . . increased amount of time spent looking for housing"); ER261, 263-65 (same). That economic harm gives rise to standing. *Jacksonville*, 508 U.S. at 666. The Third Amended Complaint, alleging increased search costs because of Facebook's ad targeting, sets out economic injuries that confer standing based upon the Supreme Court citations that the District Court itself cited. ER236. In declining to credit Plaintiffs' argument that the FHA confers standing more broadly than other statutes, ER7, it ignored precedent of this Court that emphasizes that exact point.

B. Facebook's discriminatory advertising platform caused 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 than a woman to rely on his spouse for economic support. 465 U.S. 728 (1984). Regardless of the individual's underlying right or need, 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)). *See also Henderson*, 339 U.S. at 825 ("The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility."). This Court has repeatedly recognized the injury caused by stigmatic harms. *See, e.g.*, *Barnes-Wallace v. Diego*, 530 F.3d 776, 786 n.6 (9th Cir. 2008) (observing that plaintiffs' "psychological injury" came from "disapproval of plaintiffs and people like them," and later affirming that a stigmatic "injury that is generated by demeaning actions directed at the plaintiffs" confer standing); *see also Catholic League for Religious and Civil Rights v. San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) ("the psychological consequence was exclusion or denigration on a religious basis" giving rise to standing).

This extends to the FHA. Advertisements that "would indicate a racial preference" cause "injury in precisely the form the FHA was intended to guard against." *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2d Cir. 1993). Most courts to have addressed the issue have held that stigmatic harm is sufficient to confer standing. *See id.*; *see also Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1053 (E.D. Va. 1987); *but see Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 594-97 (10th Cir. 1996).[33] They do so because the prohibition on discriminatory advertising under the FHA was intended to prevent the "discouragement of minority

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

prospects from seeking housing to which they are entitled." *See* Robert Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 219 (2001). HUD regulations implementing the FHA make clear that "[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).

C. Because the Internet is an essential tool for finding housing, Facebook caused and exacerbated economic and stigmatic harms by discriminating in housing advertisements.

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 failed to credit Appellants' allegations about targeted advertising on the Internet in housing searches today. ER250. Federal regulators concur in the risks posed by digital redlining, such as Facebook's practices.

The Federal Reserve has paid attention to digital redlining particularly because of the increased use of online targeted ads in the housing space. 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*, Consumer Compliance Outlook: Third Issue 2019,

Federal Reserve Board (2019).[34] The Fed noted "increasingly sophisticated marketing strategies that aim to target certain consumer groups … eliminat[e] any possibility of a universal experience on the Internet." *Id*. This increased capacity to reach only specific cohorts 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 FTC has raised similar concerns. It said that using an algorithm that produces a racially disparate impact may violate the Fair Credit Reporting Act, the Equal Credit Opportunity Act, or the FTC Act. *See Aiming for truth, fairness, and equity in your company's use of AI*. In a major recent report, the FTC raised concerns about how some of the largest Internet service providers used sensitive personal characteristics, including race, for ad targeting. *Examining the Privacy Practices of Six Major Internet Service Providers*, at iii. Regulators care about this because the purported efficiencies from directing advertisements to certain consumers necessarily steers other individuals away from the advertisements or excludes them entirely, leaving them unaware of opportunities they might want to pursue.

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

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

the injury suffered by someone excluded from receiving such ads. The District Court distinguished cases about tester standing, including *Havens*, because the housing providers in those cases had affirmatively provided misinformation to testers who showed up to seek apartments, rather than declining to show ads to them at all. ER7; 17-18. The different injury-in-fact present in "testing" cases like *Havens* does not, however, discount Appellants' injuries in this case. A renter who seeks housing does not know the universe of choices available to them except through accessible information, which in today's 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 an agency failing to inform plaintiffs that they could use their housing subsidy outside of Buffalo limited their housing choices by lack of information, conferring standing). The injury to Appellants is the same—extra effort and time spent searching for rentals compared to someone who was not excluded from the Facebook ads.

III. Section 230's liability protections do not apply to Facebook's conduct.

Section 230 of the CDA codifies the principle that Internet intermediaries should not face liability for unlawful content created entirely by third parties. It does not protect companies from liability for their own conduct. *See Roommates*, 521 F.3d at 1167-68. "The prototypical service qualifying for [Section 230] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (citation omitted). But Section 230 does not immunize an online

platform when its own actions cause harm, such as claims of negligent design. *Lemmon*, 995 F.3d at 1085. This case differs from the paradigmatic Section 230 cases for two reasons. First, Appellants seek to hold Facebook liable for its own conduct—building cohorts of users based on protected characteristics or proxies thereof, creating discriminatory ad targeting options for advertisers, and running its algorithm and delivering ads in a discriminatory manner—that materially contributes to violation of civil rights laws. ER235; *see Lemmon*, 995 F.3d at 1094. Second, third-party content is almost entirely irrelevant to the unlawful conduct alleged by Appellants. Accordingly, the District Court erred by granting Facebook the protections under Section 230.

First, Appellants seek to hold Facebook liable for its own past conduct. Appellants' allegations related to Facebook's targeting, *see, e.g.*, ER249-50, demonstrate why Section 230 protections do not apply. Facebook itself created target audiences for advertisers that are biased based on gender and close proxies for other protected classes. ER250. Then, Facebook offered advertisers drop down menus and other tools to facilitate exclusion of some users on those bases. In creating these targeting tools, Facebook built a platform that invited advertisers to exclude users from housing, employment, and other opportunities solely because of their protected class status in violation of civil rights law. That alone would preclude protection from Section 230. But Facebook then created an initial target audience based upon advertiser choices, and, without advertiser input or knowledge, exacerbated the discrimination with its ad delivery system. Facebook's conduct in ad delivery independently precludes protection from Section 230.

Facebook cannot claim Section 230 protection when its practices materially contributed to alleged illegality. This Court has held that companies designing tools that "steer users based on discriminatory criteria," engage in conduct that does not fall within Section 230. *Roommates*, 521 F.3d at 1167. In *Roommates*, the website was "not entitled to [Section 230] immunity for the operation of its search system . . . which directs emails to subscribers according to discriminatory criteria." *Id.* (finding that Roommates.com "steer[s] users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose"). District Courts have repeatedly applied *Roommates* to deny 230 protection when a platform's own conduct is at issue. *See Lemmon*, 995 F.3d at 1094; *Airbnb, Inc. v. City & Cnty. of San Francisco*, 217 F. Supp. 3d 1066, 1073 (N.D. Cal. 2016).

Here, the District Court erred by wrongly distinguishing this case from *Roommates*, reasoning that the use of Facebook's ad tools "was neither mandated nor inherently discriminatory given the design of the tools for use by a wide variety of advertisers." ER7. But that reasoning ignored that, as with Roommates.com, Facebook sorted its users on the bases of protected characteristics, and offered advertisers drop-down menus to discriminate on those bases. Facebook goes even further by *independently* creating and offering tools to select demographically skewed audiences, rather than working as "co-developers." *Roommates*, 521 F.3d at 1167. And unlike in *Roommates*, Facebook's ad delivery algorithm—entirely separate from the choices or even knowledge of advertisers—independently caused or exacerbated discrimination.

Second, Section 230 immunity does not apply because Appellants' suit would not hold Facebook liable as a publisher or speaker based upon the content of any third party's ads, which is what Section 230 prohibits. The suit challenges Facebook's own actions in delivering ads in a discriminatory manner, and designing and selling advertising tools entirely separate from any content of any advertisement. Section 230 protections apply when plaintiffs challenge the underlying content of third-party advertisements. *See Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (rejecting plaintiffs' challenge to underlying dangerous content that a forum had not actively censored). Unlike *Dyroff*, Appellants' claims in this case do not arise from harmful or unlawful third-party content. Here, the third-party content is the underlying housing ads—not only do Appellants not object to the ads, but Appellants actively wanted to see them. In other words, Appellants would not hold Facebook liable for the *content* of the advertisements it runs; rather, liability arises from Facebook's *conduct* in discriminatory delivery. *See Lemmon*, 995 F.3d at 1094; *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019) (Section 230 does not immunize product liability claims). Facebook could modify its own conduct without having to remove, filter, or edit any third-party content. *See HomeAway, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019).

Of course, Facebook's ad platform does not operate in complete isolation from third-party content. However, the link between that content and the illegality alleged in this case is tenuous at best. Section 230 "was not meant to create a lawless no-man's-land on the Internet," *Roommates*, 521 F.3d at 1164, and "does not provide a general immunity against all claims derived from third-party content." *Doe v. Internet*

Brands, Inc., 824 F.3d 846, 853 (9th Cir. 2016). Such a broad sweep would "exceed the scope of the immunity provided by Congress." *Id.* (quoting *Roommates*, 521 F.3d at 1164 n.15). Accordingly, this Court "rejected the use of a 'but-for' test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content." *HomeAway*, 918 F.3d at 682. Facebook has made a business decision to use stereotypes to segregate users. The third-party content is not to blame, and Appellants have not alleged that it is.

CONCLUSION

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

Respectfully submitted,

/s/ Jim Davy

Jim Davy
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579

Jon Greenbaum
Thomas Silverstein
David Brody
Adonne Washington*
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K St. NW, Suite 900
Washington, DC 20005
(202) 662-8600

**Admitted in Michigan only. Practice limited to matters before federal courts.*

Counsel for Amici Curiae

Jan. 26, 2022

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 Circuit Rule 32-1 because it contains 6,661 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f);

(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;

(iii) contains text that is identical to the text in the hard copies that will be filed with the Clerk of Court; and

(iv) was scanned for viruses prior to transmission.

/s/ Jim Davy

Jim Davy

CERTIFICATE OF SERVICE

I certify that on Jan. 26, 2022, 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.

/s/ Jim Davy
Jim Davy
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579