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2 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
3 **SAN FRANCISCO DIVISION**

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NEUHTAH OPIOTENNIONE, on behalf
of herself and others similarly situated

Plaintiff,

v.

FACEBOOK, INC.

Defendant.

Case No. 3:19-CV-07185-JSC

BRIEF OF *AMICUS CURIAE*
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER
LAW IN SUPPORT OF
PLAINTIFF'S OPPOSITION
TO FACEBOOK'S MOTION
TO DISMISS FIRST
AMENDED COMPLAINT

Date: July 30, 2020

Time: 9:00 a.m.

Judge: Hon. Jacqueline S. Corley

Courtroom: E

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INTRODUCTION¹

Facebook engages in online segregation. It profiles its users on the basis of their protected characteristics—explicitly in the case of gender and age, by proxy in the case of race and other traits—and then provides different service to these users and excludes them from economic opportunities based on those protected characteristics. That is *de jure* segregation by gender and age, and at a minimum *de facto* segregation by race. Facebook claims that it provides every user equal, if different, service. But “discrimination itself, by perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group . . . can cause serious non-economic injuries.” *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984). Allowing Facebook’s conduct to continue will open the door for online commerce in this generation to be tainted by the segregation and redlining that tarnished previous generations.

Facebook claims that it is just giving the user what they want. Def. Br. at 1 (“[Facebook] determines which of the millions of ads . . . are likely to be most interesting to that user.”). However, this argument assumes away the fundamental allegation in this case: that the algorithmic processes that Facebook employs to infer a user’s preferences and deliver different advertisements to users discriminate

¹ Amicus certifies that no person or entity, other than Amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief, in whole or in part.

1 on the basis of the user’s characteristics, including race, gender, and age. Facebook
2 is not giving the user what the user wants—Facebook is giving the user what it
3 thinks a demographic stereotype wants.

4 When one strips away the sleight of hand from Facebook’s complex
5 technologies, it makes arguments seeking to justify redlining: that Facebook knows
6 what is best for its users better than they do, Def. Br. at 2 (“the only plausible
7 inference from these allegations is that the algorithm determined that *other ads*
8 would be *more* interesting to Plaintiff”); that if discrimination occurs, it is someone
9 else’s fault even though Facebook designed, built, and operates the system, Def.
10 Br. at 24 (Facebook ads “result in discrimination *only if advertisers, not Facebook,*
11 chose to use them in allegedly discriminatory ways”); that discriminated-against
12 users should just work harder to find the same opportunities, Def. Br. at 2 (“In any
13 event, Facebook posts *all* active ads in its Ad Library, which *any* user can access
14 and search, regardless of whether the ads were shown in their News Feeds.”); and
15 that it is just algorithmic happenstance that some users may be disadvantaged. Def.
16 Br. at 2 (“there are millions of ads . . . competing for limited space, which means
17 that only a fraction of all content, including ads, that *could* be shown in user News
18 Feeds actually *is* shown.”). Facebook’s positions echo those made to support
19 discrimination in the past: the system in aggregate can theoretically discriminate in
20 multiple directions against everyone—Black, white, female, male, old, young—so

1 the system as a whole is neutral and not unjust. These arguments were fallacious in
2 the Jim Crow era, *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (“Equal protection of
3 the laws is not achieved through indiscriminate imposition of inequalities.”), and
4 they are fallacious today. *Bostock v. Clayton County*, ___ U.S. ___, No. 17-1618, slip
5 op. at 6 (June 15, 2020) (“Nor is it a defense for an employer to say it discriminates
6 against both men and women because of sex. . . . Instead of avoiding Title VII
7 exposure, this employer doubles it.”).

8 The bargain a user makes with Facebook is fundamentally a barter: the user
9 pays Facebook with their personal data and in exchange Facebook gives the user a
10 social media service and advertisements it personalizes using that data. Those
11 personalized advertisements are supposed “to be as interesting and useful to you as
12 possible.” *How does Facebook decide which ads to show me?*, Facebook Help
13 Center.² But this tailoring will fail if a user’s preferences do not align with
14 Facebook’s demographic stereotyping. If Facebook, on the basis of users’ race,
15 gender, or age, causes some users to see fewer opportunities that they would find
16 valuable, then Facebook is providing those users an inferior product for the same
17 price.

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21 ² <https://www.facebook.com/help/562973647153813> (last visited June 10, 2020).

1 **ARGUMENT**

2 **I. FACEBOOK SEGREGATES ITS USERS ON THE BASIS OF THEIR**
3 **PROTECTED CHARACTERISTICS.**

4 Facebook designed its advertising system to segregate and discriminate.
5 Discriminating between one user and another when determining who should
6 receive Ad #1 versus Ad #2 is at the core of the system. Facebook cannot show
7 every opportunity to every user; it has to triage who gets what. As a society, we
8 decided long ago that it is unjust and unlawful to conduct such triage on the basis
9 of race, gender, age, and other protected characteristics. *E.g., Burks v. Poppy*
10 *Const. Co.*, 57 Cal.2d 463 (1962) (Unlawful to use race to determine with whom to
11 do business because “[d]iscrimination on the basis of race or color is contrary to
12 the public policy of the United States and of this state.”); *see also White v. Square*,
13 7 Cal.5th 1019 (2019) (Unruh Act applies to online businesses). And yet, Facebook
14 conducts such triage on the basis of race, gender, age, and other protected
15 characteristics. *See Am. Compl.* at ¶¶ 33–37.

16 Facebook collects large amounts of personal data from a user. Facebook
17 requires the user to disclose their age and gender when they create their account.
18 *Am. Compl.* at ¶ 28. A user can disclose additional data through their Facebook
19 profile, including where they live; where they work or have worked; the schools
20 they attended; their hometown; their family members; their relationships;

1 significant life events; their pop culture preferences; a profile photo; and photos
2 and videos of their life experiences. *See Your Profile and Settings*, Facebook Help
3 Center;³ *United States v. Facebook*, __ F. Supp. 3d __, 2020 WL 1975785, *1
4 (D.D.C. April 23, 2020) (approving settlement of unfair and deceptive practices
5 claims under the FTC Act). In addition to tracking a user's activity and interactions
6 on the platform, Facebook also collects personal data that the user does not directly
7 volunteer, including precise location data, the user's activity on websites other than
8 Facebook, and offline data about the user, such as credit reports. *How do*
9 *Facebook's Location Settings work?*, Facebook Help Center;⁴ *What is off-*
10 *Facebook activity?*, Facebook Help Center;⁵ *Reply All, #109 Is Facebook Spying*
11 *on You?*, Gimlet Media (Nov. 2, 2017).⁶ Additionally, Facebook collects data from
12 the user's friends and family, as well as the user's interactions with other users,
13 from which Facebook can model the user's associations and interests. *See Reply*
14 *All, #109 Is Facebook Spying on You?*; Kashmir Hill, *How Facebook Figures Out*
15 *Everyone You've Ever Met*, Gizmodo (Nov. 7, 2017);⁷ Kevin Morris, *Facebook*
16 *Shadow Profiles: What You Need to Know*, Mashable (June 26, 2013);⁸ *How does*

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18 ³ <https://www.facebook.com/help/239070709801747> (last visited June 10, 2020).

19 ⁴ <https://www.facebook.com/help/278928889350358> (last visited June 10, 2020).

20 ⁵ <https://www.facebook.com/help/2207256696182627> (last visited June 10, 2020).

21 ⁶ <https://gimletmedia.com/shows/reply-all/z3hlwr>.

22 ⁷ <https://gizmodo.com/how-facebook-figures-out-everyone-youve-ever-met-1819822691>.

⁸ <https://mashable.com/2013/06/26/facebook-shadow-profiles/>.

1 *Facebook decide which ads to show me?*, Facebook Help Center.⁹ Facebook runs
2 all of this data through algorithms it designed to infer the user’s patterns,
3 preferences, and traits, all for the purpose of recommending additional content and
4 advertisements. Am. Compl. at ¶¶ 29–31, 58–60.

5 Much of the data that Facebook collects, especially when aggregated into a
6 mosaic, function as proxies for race and other protected characteristics. “Just as
7 neighborhoods can serve as a proxy for racial or ethnic identity, there are new
8 worries that big data technologies could be used to ‘digitally redline’ unwanted
9 groups, either as customers, employees, tenants, or recipients of credit.” *Big Data:*
10 *Seizing Opportunities, Preserving Values*, The White House, at 53 (May 2014);¹⁰
11 *see also, generally, Big Data: A Tool for Inclusion or Exclusion?*, FTC (Jan.
12 2016).¹¹ Facebook has not only allowed advertisers to use such data in a
13 discriminatory fashion, *see* Julia Angwin and Terry Parris Jr., *Facebook Lets*
14 *Advertisers Exclude Users by Race*, ProPublica (Oct. 28, 2016),¹² it directly,
15 through its own actions and design choices for its algorithms, causes

17 ⁹ <https://www.facebook.com/help/562973647153813> (last visited June 10, 2020).

18 ¹⁰ Available at

[https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_re
port_may_1_2014.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf).

19 ¹¹ Available at [https://www.ftc.gov/system/files/documents/reports/big-data-tool-
inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf](https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf).

20 ¹² [https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-
race](https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race).

1 discrimination in advertising. *See* Louise Matsakis, *Facebook’s Ad System Might*
2 *Be Hard-Coded for Discrimination*, WIRED (April 6, 2019);¹³ Brakkton Booker,
3 *Housing Department Slaps Facebook With Discrimination Charge*, NPR (March
4 28, 2019);¹⁴ Ava Kofman and Ariana Tobin, *Facebook Ads Can Still Discriminate*
5 *Against Women and Older Workers, Despite a Civil Rights Settlement*, ProPublica
6 (Dec. 13, 2019).¹⁵

7 Facebook’s advertising system has two stages: targeting and delivery. At
8 both stages, Facebook’s has intentionally built a system that excludes protected
9 groups from being shown particular advertisements. *See Help your ads find the*
10 *people who will love your business*, Facebook for Business (“Choose your
11 audience based on age, gender, education, job title and more.”);¹⁶ Muhammad Ali,
12 et al, *Discrimination through optimization: How Facebook’s ad delivery can lead*
13 *to skewed outcomes*, Proc. of the ACM on Human-Computer Interaction, No. 199,
14 at 3 (Nov. 2019) (“Our results show Facebook’s integral role in shaping the
15 delivery mechanism”);¹⁷ Am. Compl. ¶¶ 31–32. In the targeting stage, both
16 Facebook and the advertiser play a role in defining an audience of users for the ad.

17 _____
18 ¹³ <https://www.wired.com/story/facebooks-ad-system-discrimination/>.

19 ¹⁴ <https://www.npr.org/2019/03/28/707614254/hud-slaps-facebook-with-housing-discrimination-charge>.

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

21 ¹⁶ <https://www.facebook.com/business/ads/ad-targeting> (last visited July 9, 2020).

22 ¹⁷ Available at <https://dl.acm.org/doi/10.1145/3359301>.

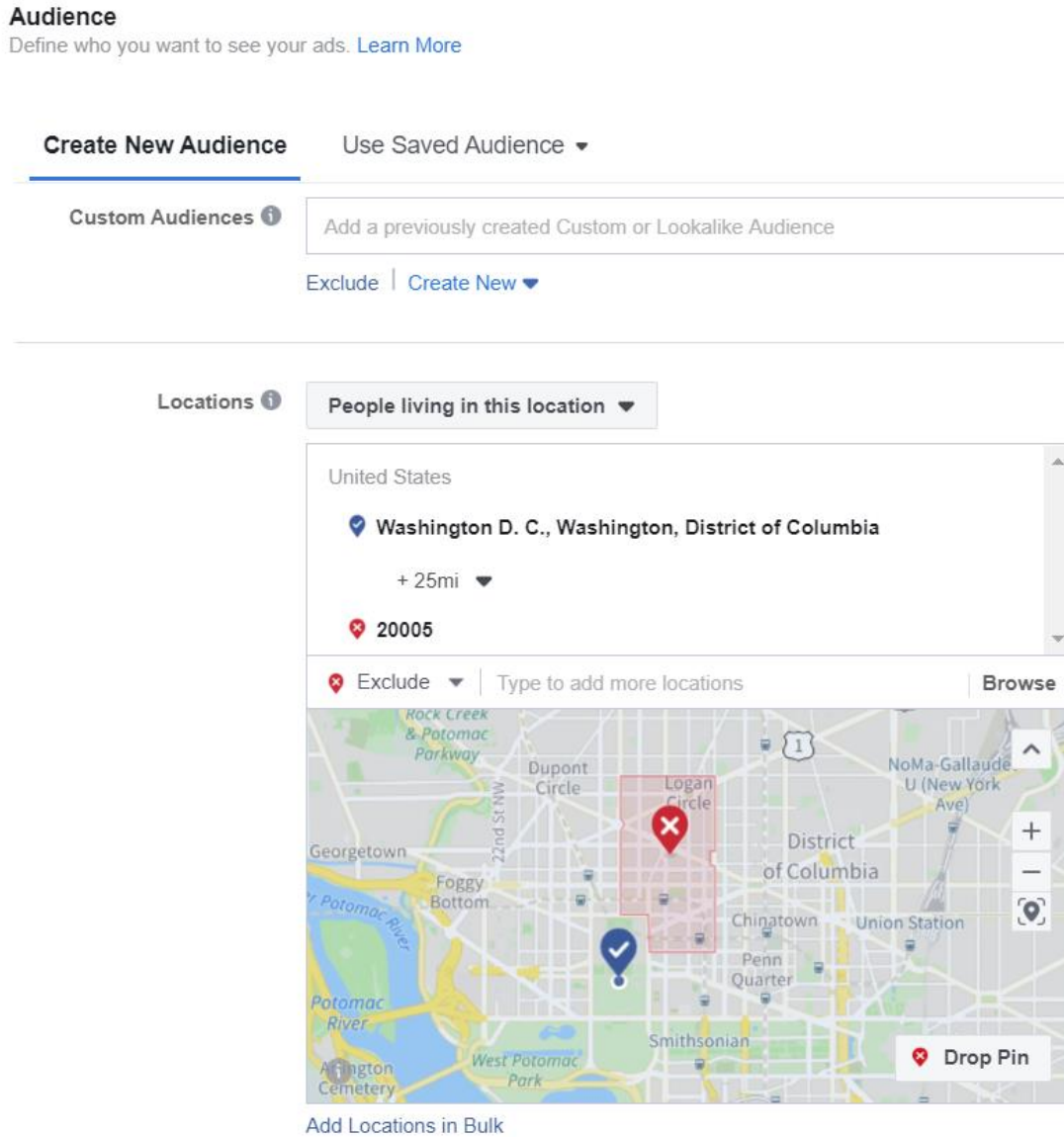
1 See, e.g., Mary Lister, *All of Facebook's Ad Targeting Options (in One Epic*
2 *Infographic)*, WordStream (Feb. 26, 2020).¹⁸ Facebook creates and provides
3 targeting tools that are exclusionary. “[Facebook] has provided a toggle button that
4 enables advertisers to exclude men or women from seeing an ad, a search-box to
5 exclude people who do not speak a specific language from seeing an ad, and a map
6 tool to exclude people who live in a specified area from seeing an ad by drawing a
7 red line around that area.” Charge of Discrimination, *U.S. Dept. of Hous. and*
8 *Urban Dev. v. Facebook, Inc.*, FHEO No. 01-18-0323-8 at 4 (March 28, 2019).¹⁹
9 Facebook’s location targeting tools—which enable both inclusion and exclusion of
10 locations—are particularly potent due to their ability to hone in on narrow
11 geographies that can be close proxies for race or other protected characteristics.
12 See, e.g., Lucas Elliott, *Facebook Location Targeting: A Detailed Guide*, Jon
13 Loomer (Aug. 29, 2018).²⁰ Here is a screenshot of Facebook’s advertising system,

19 ¹⁸ [https://www.wordstream.com/blog/ws/2016/06/27/facebook-ad-targeting-
options-infographic](https://www.wordstream.com/blog/ws/2016/06/27/facebook-ad-targeting-options-infographic).

20 ¹⁹ https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

21 ²⁰ <https://www.jonloomer.com/2018/08/29/facebook-location-targeting/>.

1 taken on June 20, 2020, in which Facebook redlines, literally, around excluded
2 locations:



17 The ad delivery stage occurs after targeting criteria are set. Facebook’s
18 algorithm “decide[s] which users will see an ad” by “consider[ing] sex and close
19 proxies for the other protected classes. . . . [Facebook] alone, not the advertiser,
20 determines which users will constitute the ‘actual audience’ for each ad.” Charge

1 of Discrimination, *HUD v. Facebook*, at 5. “Even if an advertiser tries to target an
2 audience that broadly spans protected class groups, Respondent’s ad delivery
3 system will not show the ad to a diverse audience if the system considers users
4 with particular characteristics most likely to engage with the ad.” *Id.*; *concur* Ali,
5 et al, *Discrimination through optimization*, at 13 (“Facebook’s ad delivery process
6 can significantly alter the audience the ad is delivered to compared to the one
7 intended by the advertiser based on the content of the ad itself.”); Am. Compl. at
8 ¶¶ 63–68.

9 At the root of Facebook’s algorithmic discrimination is its reckless
10 application of machine learning techniques to data from a society infected by
11 systemic discrimination and inequality. What may appear to an algorithm as a
12 personal preference may not be a preference at all but instead the result from a lack
13 of choice. These algorithms sift through massive amount of data to find patterns:
14 “Machine-learning algorithms use statistics to find patterns in massive amounts of
15 data.” Karen Hao, *What is machine learning?*, MIT Tech. Rev. (Nov. 17, 2018).²¹
16 “[The] platform is collecting as much data about you as possible . . . and using
17 machine learning to make a highly educated guess about what you might want
18 next.” *Id.* These algorithms find hidden correlations in the data and use those

20 ²¹ <https://www.technologyreview.com/2018/11/17/103781/what-is-machine-learning-we-drew-you-another-flowchart/>.

1 correlations to create efficiencies. But the output is only as good as the input. The
2 data fed into the algorithm—a user’s neighborhood, their employment history,
3 their credit history, their education, their associations, their wealth, their health—
4 are themselves inextricably intertwined with generations of discrimination in
5 housing, employment, education, and criminal justice. *See, e.g.*, Girardeau A.
6 Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025 (2018); Benjamin
7 Howell, *Exploiting Race and Space: Concentrated Subprime Lending As Housing*
8 *Discrimination*, 94 CAL. L. REV. 101 (2006); William A. Darity Jr. & Patrick L.
9 Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of*
10 *Gender*, 12 J. ECON. PERSP., Spring 1998, at 63; Willy E. Rice, *Race, Gender,*
11 *"Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An*
12 *Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers*
13 *in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583
14 (1996); Jeremy E. Fiel, *Decomposing School Resegregation: Social Closure,*
15 *Racial Imbalance, and Racial Isolation*, 78 AM. SOC. REV., no. 5, 2013, at
16 828; Mark W. Honeycutt II & Van D. Turner, Jr., *Third-Party Associative*
17 *Discrimination Under Title VII*, 68 TENN. L. REV. 913 (2001); Thomas W.
18 Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849
19 (2013); Dayna Bowen Matthew, *Health Care, Title VI, and Racism's New Normal*,
20 6 GEO. J.L. & MOD. CRITICAL RACE PERSP. 3 (2014).

1 The through-line for this data is race, gender, age, and other immutable
2 characteristics upon which discrimination occurred. When Facebook applies its
3 algorithms to this data, the algorithms execute their mission of creating efficiency
4 by finding hidden correlations—they see that older Black women are less likely to
5 be wealthy, less likely to live in an expensive neighborhood, less likely to have an
6 advanced degree, less likely to have job security, less likely to be adequately
7 insured—and the algorithms mistake the consequences of *racial discrimination*
8 *and inequality* for the *preferences* of older Black women. The algorithms take in
9 data tainted by societal inequities and export discriminatory outcomes, and then
10 Facebook claims this result is what the users want. Def. Br. at 2 (“the only
11 plausible inference from these allegations is that the algorithm determined that
12 *other ads* would be *more* interesting to Plaintiff”) (emphasis in original).

13 Facebook’s algorithmic discrimination is fundamentally different from a
14 women’s clothing designer choosing to “advertise in *Vogue* . . . but not in *Sports*
15 *Illustrated*,” Def. Br. at 1, although Facebook does engage in similarly crude
16 gender-based stereotyping. What Facebook describes in this example involving
17 magazines is not its own demographic-targeted advertising system, but *contextual*
18 advertising—“an automated process where a promotional message is matched to
19 relevant digital content.” James Chen, *Contextual Advertising*, Investopedia (May
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1 9, 2019).²² If Facebook used contextual advertising, it would match ads to content
2 posted on its website, such that every user viewing the same piece of content
3 would see the same ad. If Facebook used contextual advertising, its users would
4 have more control over what ads they receive because they would have more
5 control over what content they choose to view. *Vogue* does not exclude men from
6 subscribing to, or otherwise reading, its magazine and its ads. Instead of delivering
7 ads based on what content they run alongside—as TV, radio, and newspapers have
8 done for decades—Facebook delivers ads based on the personal traits of its users,
9 including their protected characteristics, like a realtor that steers Black and white
10 home buyers toward different properties.

11 Facebook’s algorithms—which the company intentionally wrote to operate
12 this way—segregate Facebook users based on their immutable traits or proxies for
13 such traits, and then provide different service based on this segregation. *See*
14 *generally* Charge of Discrimination, *U.S. Dept. of Hous. and Urban Dev. v.*
15 *Facebook, Inc.*, FHEO No. 01-18-0323-8 (March 28, 2019);²³ Muhammad Ali, et
16 al, *Discrimination through optimization: How Facebook’s ad delivery can lead to*
17 *skewed outcomes*, Proc. of the ACM on Human-Computer Interaction, No. 199
18 (Nov. 2019);²⁴ Ava Kofman and Ariana Tobin, *Facebook Ads Can Still*

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20 ²² <https://www.investopedia.com/terms/c/contextual-advertising.asp>.

²³ https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

²⁴ Available at <https://dl.acm.org/doi/10.1145/3359301>.

1 *Discriminate Against Women and Older Workers, Despite a Civil Rights*
2 *Settlement*, ProPublica (Dec. 13, 2019).²⁵ This is precisely the sort of
3 discrimination the Unruh Act and other anti-discrimination laws prohibit.

4 **II. ONLINE AND OFFLINE, REDLINING IS DISCRIMINATORY AND**
5 **UNJUST.**

6 Facebook contends that “[t]here is nothing ‘unreasonable, arbitrary, or
7 invidious’ or ‘malicious, hostile, or damaging’” about its particular form of
8 segregation, so its behavior is permissible under the Unruh Act. Def. Br. at 24.

9 By insisting that its conduct is lawful and non-discriminatory because there
10 was nothing “malicious” or “invidious,” Facebook ignores the stigmatic harm of
11 segregation. In essence, Facebook is suggesting that Plaintiffs are wrong to feel
12 that Facebook’s practice is denigrating. But that is beside the point—
13 discrimination is *per se* harmful. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625
14 (1984) (discrimination causes “stigmatizing injury”). We have seen Facebook’s
15 line of argument before and seen where it leads. In *Plessy v. Ferguson*, 163 U.S.
16 537 (1896), the Supreme Court upheld segregated railway cars on the grounds that
17 if “the enforced separation of the two races stamps the colored race with a badge of
18 inferiority . . . it is not by reason of anything found in the act [requiring

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20 ²⁵ <https://www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement>.

1 segregation], but solely because the colored race chooses to put that construction
2 upon it.” *Id.* at 551. Facebook’s point follows the same reasoning—that any feeling
3 that there is a “stamp of inferiority” is not a reflection of anything wrong with its
4 segregation of users but rather with those who object to the policy.

5 Nor is Facebook’s discriminatory advertising system vindicated by the fact
6 that it theoretically and in the aggregate may discriminate against all types of
7 people in different ways. The old admonition that “two wrongs don’t make a right”
8 is more than a childhood lesson—it is also a legal principle: harming both men *and*
9 women, white users *and* Black users, old users *and* young users, does not erase the
10 harm of discrimination but rather “doubles it.” *Bostock v. Clayton County*, ___ U.S.
11 ___, No. 17-1618, slip op. at 6 (June 15, 2020) (“Nor is it a defense for an employer
12 to say it discriminates against both men and women because of sex. . . . Instead of
13 avoiding Title VII exposure, this employer doubles it.”). In *Shelley v. Kraemer*,
14 334 U.S. 1 (1948), for example, segregationists defended racially restrictive
15 covenants as not in violation of the Equal Protection Clause on the grounds that
16 they covenants harmed whites as well as non-whites—it prevented white owners
17 from selling *and* Black buyers from buying. *Shelley* rejected that approach: “Equal
18 protection of the laws is not achieved through indiscriminate imposition of
19 inequalities.” *Id.* at 22. The principle applies with equal force here: Unruh’s
20 purpose of “creat[ing] and preserv[ing] a nondiscriminatory environment” is not
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1 advanced by permitting discrimination when it is directed against *more* people.
2 *Angelucci v. Century Supper Club*, 41 Cal.4th 160, 167 (2007).

3 Facebook’s implication that its discriminatory practices are “socially
4 beneficial,” Def. Br. at 24, and that they help it deliver ads “likely to be most
5 interesting to that user,” Def. Br. at 1, also parallels those made by discriminatory
6 actors of the past. For example, in *Henderson v. United States*, 339 U.S. 816
7 (1950) the Southern Railway Company defended its practice of railway dining car
8 segregation by asserting that “[t]he separation of the races is based upon
9 considerations of the safety, comfort, and general satisfaction of travelers of both
10 races.” Southern Railway Br., 1949 WL 50329, at *26. Facebook makes the same
11 analytic move here by saying that its redlining practices optimize the user
12 experience and so everyone is better off.

13 The railway company in *Henderson* defended itself by invoking efficiency.
14 That defense also failed: “It is argued that the limited demand for dining-car
15 facilities by Negro passengers justifies the regulations. But it is no answer to the
16 particular passenger who is denied service at an unoccupied place in the dining car
17 that, on the average, persons like him are served.” 339 U.S. at 825. Facebook
18 advances a similar argument—that “on the average” its algorithm accurately
19 determines the interests of users and delivers relevant advertisements to users, and
20 so is efficient and lawful. But as in *Henderson*, it is “no answer” to the Plaintiff,

1 and others like her, who were denied access to opportunities that would have been
2 available to them if they were another race, age, or gender, that “on the average,
3 persons like [her] are” shown relevant advertisements. Each member of the class
4 has a statutory right under the Unruh Act to equal treatment. The “essence” of the
5 Unruh Act’s guarantee of equality is “a personal one.” *Koire v. Metro Car Wash*,
6 40 Cal. 3d 24, 34 (1985) (discussing the “individual nature of a cause of action
7 under the Unruh Act”); *O’Connor v. Vill. Green Owners Assn.*, 33 Cal. 3d 790, 794
8 (1983) (“Exclusion of persons based on a generalization about the class to which
9 they belong is not permissible.”); *San Jose Country Club Apartments v. Cty. of*
10 *Santa Clara*, 137 Cal. App. 3d 948, 952 (1982) (“the Unruh Civil Rights Act
11 prohibits all forms of stereotypical discrimination.”); *Marina Point, Ltd. v.*
12 *Wolfson*, 30 Cal. 3d 721, 740 (1982) (“The statute’s focus on the individual ...
13 precludes treatment of individuals as simply components of a racial, religious,
14 sexual or national class.” (quoting *Los Angeles Dept. of Water & Power v.*
15 *Manhart*, 435 U.S. 702, 708 (1978))).

16 Facebook also suggests that its practices are not harmful because its platform
17 simply “deliver[s] ads based on user interests” and “provide[s] tools that allow
18 [advertisers] to select audiences based on their own market experience.” Def. Br. at
19 24. Because Facebook targets and delivers ads based on immutable characteristics,
20 this boils down to an appeal to stereotypes—e.g., “women’s clothing designers
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1 might advertise in *Vogue*, during daytime talk shows, and on fashion blogs, but not
2 in *Sports Illustrated*, during Monday Night Football, or on fantasy football
3 websites,” Def. Br. at 1—and these distinctions are supposedly rendered harmless
4 because the advertisements to each user are alleged to be equally valuable. The
5 value of the services, however, is not dispositive. Discrimination in provision of
6 goods or services on the basis of a protected characteristic is inherently harmful
7 independently of economic harm. *See, e.g., Heckler v. Mathews*, 465 U.S. 728,
8 739–740 (1984) (explaining that “discrimination itself” is harmful because it
9 “perpetuat[es] ‘archaic and stereotypic notions’”).

10 Facebook contends that it has not harmed Plaintiff in particular because
11 Facebook did not deprive her of “the opportunity to learn about . . . financial
12 services” because Plaintiff could have found the information elsewhere, Def. Br. at
13 2, and because she could have located the “active ads” in Facebook’s “Ad
14 Library.” *Id.* Facebook’s argument that Plaintiff could have found the information
15 elsewhere calls to mind the defense that legal “equality” is met so long as access is
16 provided, even if the services are unequal. But in several early California cases, the
17 state courts found segregation unlawful under predecessors to the Unruh Act even
18 where Black patrons could enter the premises. *E.g., Jones v. Kehrlein*, 49 Cal. App.
19 646 (1920) (finding segregation of Black theatre-goers to specific section
20 unlawful); *Suttles v. Hollywood Turf Club*, 45 Cal. App. 2d 283, 287 (1941)

1 (finding violation where Black racetrack attendees were admitted to track but
2 excluded from clubhouse). It was the fact that the patrons were denied “full and
3 equal treatment” that gave rise to the violation. *Jones*, 49 Cal. App. at 651. Here,
4 Plaintiff has been denied that “full and equal treatment” because while these
5 advertisements may be technically available to her in Facebook’s “Ad Library”
6 they are not available to her on the same basis and with the same ease of access as
7 they are to others because of her protected characteristics.

8 In short, discriminating on the basis of immutable characteristics in
9 economic opportunities, such as financial services, is *always* “unreasonable,
10 arbitrary, or invidious” and “malicious, hostile, or damaging,” and therefore in
11 violation of the Unruh Act.

12 **III. FACEBOOK’S DISCRIMINATION IS INEFFICIENT AND** 13 **HARMFUL FOR SOCIETY AS A WHOLE.**

14 Decades of research have demonstrated the economic benefits of integration
15 and inclusivity. In contrast, Facebook lacks empirical support for the assumption
16 that its discriminatory advertising practices are efficient or beneficial. The data
17 show that the value of targeted advertising is questionable. Advertisers have
18 expressed frustration with Facebook’s lack of transparency on the effectiveness of
19 its discriminatory ad targeting system. When Facebook only displays ads to certain
20 demographics, it prevents other audiences the opportunity to benefit from those

1 ads. Limiting opportunities for certain classes of people necessarily reduces the
2 diversity of the audience which in turn can hamper socioeconomic opportunities
3 for excluded communities, for which Facebook fails to account. Even if a
4 discriminatory practice is narrowly profitable for Facebook and its shareholders,
5 the harmful negative externalities on society outweigh such parochial interest.

6 There are serious doubts about the efficiency of targeted advertising. Recent
7 evidence suggests that metrics used to assess the effectiveness of targeted
8 advertising are deeply flawed, often overvaluing their influence on audiences. Last
9 year, Comscore, one of the core companies responsible for measuring the
10 effectiveness of online advertising, was charged with fraud by the Securities and
11 Exchange Commission for misreporting customer numbers. Adi Robertson,
12 *Comscore, The Internet's Traffic Judge, Settles Fraud Charges For \$5 Million,*
13 *The Verge* (Sep. 24, 2019).²⁶ Facebook itself was recently accused of inflating the
14 time that users spent watching video ads before agreeing to pay a settlement of \$40
15 million to advertising agencies. Sahil Patel, *Facebook Reaches Proposed*
16 *Settlement in Video Measurement Lawsuit*, *The Wall Street Journal* (Oct. 7,

20 ²⁶ [https://www.theverge.com/2019/9/24/20882240/comscore-sec-serge-matta-](https://www.theverge.com/2019/9/24/20882240/comscore-sec-serge-matta-financial-fraud-charges-settlement)
21 [financial-fraud-charges-settlement.](https://www.theverge.com/2019/9/24/20882240/comscore-sec-serge-matta-financial-fraud-charges-settlement)

1 2019).²⁷ In both cases, advertisers were intentionally misled about the inefficiency
2 of targeted advertising.

3 Advertisers have begun to doubt the effectiveness of targeted ads as well.
4 The New York Times stopped using targeted advertising when the European
5 Union’s new privacy law came into effect last year and found that there was no
6 drop in its advertising revenue. Jessica Davies, *After GDPR, The New York Times*
7 *Cut Off Ad Exchanges In Europe—And Kept Growing Ad Revenue*, Digiday (Jan.
8 16, 2019).²⁸ Other companies have concluded that targeted advertising on
9 Facebook is less effective than other forms of online advertising. See Salvador
10 Rodriguez, *Some Advertisers Are Quitting Facebook, Chiding the Company’s*
11 *‘Despicable Business Model’*, CNBC (Mar. 6, 2019) (“Approyo . . . stopped
12 advertising on Facebook last year . . . after growing discontent with the
13 performance of the targeted ads it ran on the social network.”).²⁹

14 Doubt about the efficiency of targeted advertising is aggravated by a lack of
15 transparency from Facebook about how it measures and reports advertising data. In
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18 ²⁷ <https://www.wsj.com/articles/facebook-reaches-proposed-settlement-in-video-measurement-lawsuit-11570482031>.

19 ²⁸ <https://digiday.com/media/gumgumtest-new-york-times-gdpr-cut-off-ad-exchanges-europe-ad-revenue/>.

20 ²⁹ <https://www.cnbc.com/2019/03/06/some-advertisers-are-quitting-facebook-after-privacy-scandals.html>.

1 May 2020, the Media Rating Council³⁰ threatened to deny accreditation to
2 Facebook because the company failed to address concerns about how it reported ad
3 measurement data to advertisers. Jeff Horowitz & Suzanne Vranica, *Facebook*
4 *Warned That It May Lose a Key Seal of Approval for Ad Measurement*, The Wall
5 Street Journal (May 1, 2020).³¹

6 There is a lack of transparency concerning how Facebook's algorithms
7 operate, as well. Ostensibly, Facebook provides users with an explanation of why a
8 particular advertisement is algorithmically chosen to be displayed to them,
9 however its explanations are often incomplete. Athanasios Andreou, et al.,
10 *Measuring the Facebook Advertising Ecosystem*, Network and Distributed Systems
11 Security Symposium (Feb. 24, 2019).³² Indeed, even advertisers cannot pierce the
12 algorithmic veil. "Facebook's ad explanations sometimes offer reasons that were
13 never specified by the advertiser." Oana Goga, *Facebook's 'transparency' efforts*
14 *hide key reasons for showing ads*, The Conversation (May 15, 2019).³³

16 ³⁰ The Media Rating Council is an industry self-regulatory organization that "seeks
17 to improve the quality of audience measurement by rating services and to provide a
18 better understanding of the applications (and limitations) of rating information."
History and Mission of the MRC, Media Rating Council,
<http://mediaratingcouncil.org/History.htm> (last visited June 14, 2020).

19 ³¹ <https://www.wsj.com/articles/facebook-warned-that-it-may-lose-a-key-seal-of-approval-for-ad-measurement-11588350494>.

20 ³² <https://dx.doi.org/10.14722/ndss.2019.23280>.

21 ³³ <https://theconversation.com/facebooks-transparency-efforts-hide-key-reasons-for-showing-ads-115790>.

1 In contrast to the dubious value of Facebook’s discriminatory advertising
2 system, it is well-established that inclusivity in many contexts is highly beneficial
3 for society as a whole. In the workplace, diverse companies are more likely to have
4 financial returns above their national industry medians, and market share will
5 likely shift toward more diverse companies over time. Vivian Hunt, Dennis
6 Layton, & Sara Prince, *Why Diversity Matters*, McKinsey & Company (Jan.
7 2015).³⁴ The Supreme Court has repeatedly recognized the benefits of student
8 diversity and the resulting long-term gains from diverse graduates. *See, e.g.*,
9 *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“[N]umerous studies show that
10 student body diversity promotes learning outcomes, and better prepares students
11 for an increasingly diverse workforce and society, and better prepares them as
12 professionals.”). Diversity promotes better outcomes in problem solving than
13 homogenous groups in many settings. Willemien Kets & Alvaro Sandroni,
14 *Challenging Conformity: A Case for Diversity* (November 12, 2015).³⁵ A
15 nondiscriminatory advertising system could advance integration and inclusivity by
16 expanding socioeconomic opportunities to historically marginalized communities,
17 thus adding value to society as a whole.

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19 _____
20 ³⁴ <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>.

21 ³⁵ http://wkets.org/wp-content/uploads/2015/11/KetsSandroni_Diversity4.pdf.

1 Inclusionary advertising has meaningful benefits. Advertisers that achieve
2 diversity in their ads not only increase revenue, they see a boost in public
3 perception. Robert Williams, *Study: Diversity In Ads Correlates To Gains In*
4 *Revenue, Brand Perception*, Marketing Dive (Oct. 2, 2019).³⁶ A heavily-cited
5 industry study found that brands with the most representative ads saw an average
6 stock gain of 44 percent for the studied period; those with the highest diversity
7 scores showed a higher consumer preference of 83 percent. *Id.* On the other hand,
8 targeted advertising can lead to market segmentation which reinforces boundaries
9 between social groups—including groups defined by gender, race, class,
10 nationality, and sexuality. Robert Bodle, *A Critical Theory of Advertising as*
11 *Surveillance*, in *Explorations in Critical Studies of Advertising*, 138, 148 (James F.
12 Hamilton, Robert Bodle & Ezequiel Korin eds., 2016). Reinforcing boundaries
13 through targeted advertising can result in increased disparities between such
14 groups. *Id.*

15 When discriminatory advertising concerns financial services, as Plaintiff
16 asserts, the harm is especially significant. When racial or socioeconomic groups
17 are denied access to capital and credit, persistent unemployment within the group
18 is likely to develop. Willy E. Rice, *Race, Gender, "Redlining," and the*

20 ³⁶ [https://www.marketingdive.com/news/study-diversity-in-ads-correlates-to-gains-](https://www.marketingdive.com/news/study-diversity-in-ads-correlates-to-gains-in-revenue-brand-perception/564153/)
21 [in-revenue-brand-perception/564153/](https://www.marketingdive.com/news/study-diversity-in-ads-correlates-to-gains-in-revenue-brand-perception/564153/).

1 *Discriminatory Access to Loans, Credit, and Insurance: An Historical and*
2 *Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and*
3 *State Courts, 1950–1995, 33 San Diego L. Rev. 583, 583–84 (1996). Small*
4 businesses are more likely to close or relocate which further reduces economic
5 opportunities, increases the likelihood of long-term unemployment, and promotes
6 more disinvestment in their communities. *Id.*

7 Facebook makes the implicit claim that discriminatory advertisements are
8 merely an unfortunate side effect of efficient advertising, but there are serious
9 doubts about whether their advertising system is efficient in the first place.
10 Facebook claims without support that its algorithms increase efficiency for
11 advertisers by excluding groups based on age, gender, and other protected
12 characteristics by proxy, but they fail to account for the myriad benefits of
13 including underrepresented communities—reducing disparities between social
14 groups, ensuring access to critical financial services, and facilitating inclusion in
15 schools and the workplace. When Facebook ignores the full scope of benefits from
16 ensuring that a diverse cross-section of its users receive opportunities, its
17 efficiency calculus is flawed. Additionally, the lack of transparency about how
18 Facebook provides advertisements to users further shrouds their argument in
19 suspicion. Ultimately, even if Facebook’s advertising were economically efficient
20 for its shareholders—for which there is no verifiable support—the value of
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1 reducing discrimination and exclusion in society as a whole would still far
2 outweigh the marginal increase in Facebook's profits.

3 **CONCLUSION**

4 For the reasons discussed above, *amicus curiae* Lawyers' Committee for
5 Civil Rights Under Law urge this Court to deny Defendant's Motion to Dismiss.

6 *Respectfully Submitted,*

7 _____
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on July 10, 2020. I further certify that counsel of record for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.

Executed July 10, 2020.

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