

1 JON GREENBAUM (Cal. Bar # 166733)
jgreenbaum@lawyerscommittee.org
2 DAVID BRODY (Cal. Bar # 288794)
dbrody@lawyerscommittee.org
3 NOAH BARON (Cal. Bar # 321960)
nbaron@lawyerscommittee.org
4 LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1500 K Street N.W., Suite 900
5 Washington, D.C. 20005
(202) 662-8300

6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
7 **COUNTY OF SAN MATEO**

8 SAMANTHA LIAPES, on behalf of herself and
9 others similarly situated,

10 *Plaintiff,*

11 v.

12 FACEBOOK, INC.

13 *Defendant.*

Case No. 30-CIV-01712

**APPLICATION FOR LEAVE TO FILE
BRIEF OF AMICUS CURIAE
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW IN SUPPORT
OF PLAINTIFF'S OPPOSITION TO
DEFENDANT'S DEMURRER TO
FIRST AMENDED COMPLAINT**

Assigned for All Purposes to:
Dept.: 25
Judge: Hon. Joseph C. Scott

Hearing Date: March 12, 2021
Time: 9:00 a.m.
Date Action Filed: April 3, 2020
Trial Date: Not set

17 TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

18 Proposed amicus curiae the Lawyers' Committee for Civil Rights Under Law ("Lawyers'
19 Committee") respectfully submits this application for leave to file the accompanying amicus

20 APP. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LAWYERS' COMMITTEE FOR CIVIL
21 RIGHTS UNDER LAW IN SUPPORT OF PL'S OPP. TO DEF'S DEMURRER TO FIRST AMENDED
COMPLAINT [CASE NO. 20-CIV-01712]

1 brief in support of Plaintiff's Opposition to Defendant Facebook, Inc's Demurrer to First
2 Amended Complaint. The proposed amicus curiae brief is attached hereto as Exhibit A.
3 Lawyers' Committee submits the proposed brief in advance of the hearing in this action currently
4 scheduled for March 12, 2021 at 9:00 a.m. in Department 25.

5 This application is submitted pursuant to Code of Civil Procedure section 128 and this
6 Court's inherent powers. *Amtower v. Photon Dynamics, Inc.*, 158 Cal.App.4th 1582, 1595 (2008)
7 ("Courts have inherent power, separate from any statutory authority, to control the litigation
8 before then and to adopt any suitable method of practice, even if the method is not specified by
9 statute or by the Rules of Court"). This Court has "broad discretion over the conduct of pending
10 litigation," including the ability to grant non-parties leave to file amicus curiae briefs. *See In re*
11 *Marriage Cases*, 43 Cal. 4th 757, 791 fn. 10 (2008) ("[T]he superior court, in exercising its
12 traditional broad discretion over the conduct of pending litigation, retained the authority to
13 determine the manner and extent of these entities' participation as amici curiae that would be of
14 most assistance to the court."). Previous trial courts have exercised their discretion to authorize
15 the filing of amici curiae briefs. *See, e.g., Cal. Attorneys v. Schwarzenegger*, 174 Cal.App.4th
16 424, 431 (2009); *Union Bank of Cal. v. Superior Court*, 130 Cal.App.4th 378, 386 (2005).

17 The Lawyers' Committee has expertise in civil rights law and digital advertising
18 technology, which are both directly relevant to the disposition of the issues before the Court. If
19 permitted to file, the Lawyers' Committee can offer the Court a unique perspective on the case.
20 Lawyers' Committee requested the parties' consent to the filing of the attached proposed amicus
21 brief. Plaintiff consents to the filing; Defendant has not consented.

22 APP. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW IN SUPPORT OF PL'S OPP. TO DEF'S DEMURRER TO FIRST AMENDED
COMPLAINT [CASE NO. 20-CIV-01712]

1 **STATEMENT OF INTEREST**

2 Lawyers’ Committee for Civil Rights Under law is a nonpartisan, non-profit, national
3 racial justice organization founded at the request of President John F. Kennedy in 1963 to enlist
4 the private bar’s leadership and resources in combatting racial discrimination and vindicating the
5 civil rights of Black Americans and other racial and ethnic minorities. The principal mission of
6 the Lawyers’ Committee is to secure equal justice for all through the rule of law; the
7 organization frequently participates as amicus curiae to protect the interests of these
8 communities. *See, e.g., Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Gill v. Whitford*, 138 S. Ct.
9 1916 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719
(2018);.

10 Lawyers’ Committee’s Digital Justice Initiative works at the intersection of racial justice
11 and technology, data, and privacy. The Initiative combats the use of the Internet and commercial
12 data practices to discriminate against Black Americans and other communities of color. *See, e.g.,*
13 *Nat’l Coalition on Black Civic Participation v. Wohl*, __ F.Supp. 3d. __, 2020 WL 6305325
14 (S.D.N.Y. Oct. 28, 2020) (TRO blocking voter intimidation robocalls); *Dumpson v. Ade*, 2019
15 WL 3767171 (D.D.C. Aug. 9, 2019); Br. of *Amicus Curiae* Lawyers’ Comm. for Civil Rights
16 Under Law, *Freedom Watch v. Google, Inc.*, No. 19-7030, 816 Fed. Appx. 497 (D.C. Cir. 2020);
17 Br. of *Amicus Curiae* Lawyers’ Comm. for Civil Rights Under Law, *Opiotennione v. Facebook*,
18 No. 19-cv-7185, 2020 WL 5877667 (N.D. Cal. 2020); David Brody and Sean Bickford,

19
20 APP. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LAWYERS’ COMMITTEE FOR CIVIL
21 RIGHTS UNDER LAW IN SUPPORT OF PL’S OPP. TO DEF’S DEMURRER TO FIRST AMENDED
22 COMPLAINT [CASE NO. 20-CIV-01712]

1 Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online
2 Commerce, Lawyers' Comm. (Jan. 2020).¹

3 Lawyers' Committee has an interest in this case because it concerns online public
4 accommodations protections. Lawyers' Committee is committed to combatting and ending racial
5 discrimination wherever it occurs, online or offline. To that end, Lawyers' Committee has
6 always supported strong public accommodations protections. Public accommodations laws are
7 some of the most powerful civil rights statutes that exist; they were some of the primary vehicles
8 that ended Jim Crow segregation. These statutes are used in almost every state to prohibit
9 segregation and discrimination in housing, employment, retail, banking, insurance, education,
10 and many other sectors.

11 This case concerns how digital advertising on Facebook discriminates based on the
12 gender and age of its users. Lawyers' Committee has an interest in ending segregation in all its
13 forms and ensuring equity among Facebook's users, and thus has an interest in this case. In
14 particular, since this case addresses discrimination in an online forum, Lawyers' Committee's
15 Digital Justice Initiative has a strong interest to submit an amicus brief. The brief will discuss
16 how Facebook discriminates in its provision of services on the basis of protected characteristics
17 such as race, sex, and age, specifically in the *targeting* and *delivery* of advertisements. This
18 denies equal access to economic opportunities and violates the Unruh Act.

19 ¹ Available at <https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf>.

1 For the foregoing reasons, the Lawyers' Committee asks the Court to exercise its
2 discretion and grant this Application for Leave, allow the proposed amicus brief to be filed, and
3 consider the brief in connection with the upcoming hearing on Defendant's Demurrer to
4 Plaintiff's First Amended Complaint.

5
6 *Respectfully Submitted,*

7 /s/ David Brody

8 JON GREENBAUM (Cal. Bar # 166733)
9 jgreenbaum@lawyerscommittee.org
10 DAVID BRODY (Cal. Bar # 288794)
11 dbrody@lawyerscommittee.org
12 NOAH BARON (Cal. Bar # 321960)
13 nbaron@lawyerscommittee.org
14 LAWYERS' COMMITTEE FOR CIVIL
15 RIGHTS UNDER LAW
16 1500 K Street N.W., Suite 900
17 Washington, D.C. 20005
18 (202) 662-8300

19
20 March 5, 2021

21 APP. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LAWYERS' COMMITTEE FOR CIVIL
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EXHIBIT A

APP. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PL'S OPP. TO DEF'S DEMURRER TO FIRST AMENDED COMPLAINT [CASE NO. 20-CIV-01712]

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11 *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721 (1982)14

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18 *United States Department of Housing and Urban Development v. Facebook, Inc.*, FHEO No. 01-
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17 Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending As Housing
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18 *Big Data: A Tool for Inclusion or Exclusion?*, FTC (Jan. 2016).....4

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20 Braktkton Booker, *Housing Department Slaps Facebook With Discrimination Charge*, NPR
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13	Karen Hao, <i>What is machine learning?</i> , MIT Tech. Rev. (Nov. 17, 2018).....	8
14	Kashmir Hill, <i>How Facebook Figures Out Everyone You've Ever Met</i> , Gizmodo (Nov. 7, 2017).....	3
15	Laura W. Murphy & Megan Cacace, <i>Facebook's Civil Rights Audit – Final Report</i> , Facebook, at 72-82 (Jul. 8, 2020)	7-10
16	Louise Matsakis, <i>Facebook's Ad System Might Be Hard-Coded for Discrimination</i> , WIRED (Apr. 6, 2019).....	4
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1 interesting to her”) (emphasis in original); that if discrimination occurs, it is someone else’s fault
2 even though Facebook designed, built, and operates the system, Def. Br. at 22 (unequal treatment
3 occurred “only because third-party advertisers submitted [to the Lookalike tool] seed audiences
4 containing a disproportionate number of men and younger people.”); that Facebook cannot be
5 blamed if it created a system that discriminates in practice because they prohibit discrimination
6 on paper, Def. Br. at 13 (Facebook has policies prohibiting discriminatory advertisements); and
7 that discriminated-against users should just work harder to find the same opportunities, or leave
8 to patronize a different business altogether, Def. Br. at 15-16 (Plaintiff could have “research[ed]
9 insurance ads on Google; search[ed] for insurance ads in Facebook’s Ad Library ... or
10 consum[ed] other advertising-supported media, such as news sites or television shows.”).

11 Facebook’s arguments echo those made to support discrimination in the past: the system
12 in aggregate can theoretically discriminate in multiple directions against everyone—Black,
13 white, female, male, old, young—so the system as a whole must be neutral and not unjust. These
14 arguments were fallacious in the Jim Crow era, *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)
15 (“Equal protection of the laws is not achieved through indiscriminate imposition of
16 inequalities.”), and they are fallacious today. *Bostock v. Clayton County*, 140 S.Ct. 1731, 1741
17 (2020) (“Nor is it a defense for an employer to say it discriminates against both men and women
18 because of sex. . . . Instead of avoiding Title VII exposure, this employer doubles it.”).

19 ARGUMENT

20 I. FACEBOOK SEGREGATES ITS USERS ON THE BASIS OF THEIR 21 PROTECTED CHARACTERISTICS.

22 Facebook designed its advertising system to segregate and discriminate. Discriminating
between one user and another when determining who should receive Ad #1 versus Ad #2 is at

1 the core of the system. Facebook cannot show every opportunity to every user; it has to triage
2 who gets what. As a society, we decided long ago that it is unjust and unlawful to conduct that
3 triage on the basis of race, gender, age, and other protected characteristics. *E.g., Burks v. Poppy*
4 *Const. Co.*, 57 Cal.2d 463 (1962) (Unlawful to use race to determine with whom to do business
5 because “[d]iscrimination on the basis of race or color is contrary to the public policy of the
6 United States and of this state.”).

7 Facebook collects large amounts of personal data from a user. Facebook requires the user
8 to disclose their age and gender when they create their account. FAC at ¶ 36. A user can disclose
9 additional data through their Facebook profile, including where they live; where they work or
10 have worked; the schools they attended; their hometown; their family members; their
11 relationships; significant life events; their pop culture preferences; a profile photo; and photos
12 and videos of their life experiences. *See Your Profile and Settings*, Facebook Help Center.³ In
13 addition to tracking a user’s activity and interactions on the platform, Facebook also collects
14 personal data that the user does not directly volunteer, including precise location data, the user’s
15 activity on websites other than Facebook, and offline data about the user, such as credit reports.
16 *How do Facebook’s Location Settings work?*, Facebook Help Center;⁴ *What is off-Facebook*
17 *activity?*, Facebook Help Center;⁵ *Reply All, #109 Is Facebook Spying on You?*, Gimlet Media
18 (Nov. 2, 2017).⁶ Additionally, Facebook collects data from the user’s friends and family, as well
19 as the user’s interactions with other users, from which Facebook can model the user’s
20 associations and interests. *See Reply All, #109 Is Facebook Spying on You?*; Kashmir Hill, *How*

19 ³ <https://www.facebook.com/help/239070709801747> (last visited March 1, 2021).

20 ⁴ <https://www.facebook.com/help/278928889350358> (last visited March 1, 2021).

21 ⁵ <https://www.facebook.com/help/2207256696182627> (last visited March 1, 2021).

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

1 *Facebook Figures Out Everyone You've Ever Met*, Gizmodo (Nov. 7, 2017);⁷ *How does*
2 *Facebook decide which ads to show me?*, Facebook Help Center.⁸ Facebook runs all of this data
3 through algorithms it designed to infer the user's patterns, preferences, and traits, in order to
4 recommend additional content and advertisements. *See, e.g.*, FAC at ¶¶ 37-39, 41, 48, 54.

5 Much of the data that Facebook collects, especially when aggregated into a mosaic,
6 function as proxies for race, sex, and other protected characteristics. "Just as neighborhoods can
7 serve as a proxy for racial or ethnic identity, there are new worries that big data technologies
8 could be used to 'digitally redline' unwanted groups, either as customers, employees, tenants, or
9 recipients of credit." *Big Data: Seizing Opportunities, Preserving Values*, The White House, at
10 53 (May 2014);⁹ *see also, generally, Big Data: A Tool for Inclusion or Exclusion?*, FTC (Jan.
11 2016).¹⁰ Facebook has not only allowed advertisers to use such data in a discriminatory fashion,
12 *see* Julia Angwin and Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*,
13 ProPublica (Oct. 28, 2016),¹¹ it directly, through its own actions and design choices for its
14 algorithms, causes discrimination in advertising. *See* Louise Matsakis, *Facebook's Ad System*
15 *Might Be Hard-Coded for Discrimination*, WIRED (Apr. 6, 2019);¹² Brakkton Booker, *Housing*
16 *Department Slaps Facebook With Discrimination Charge*, NPR (Mar. 28, 2019);¹³ Ava Kofman
17 and Ariana Tobin, *Facebook Ads Can Still Discriminate Against Women and Older Workers*,

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

19 ⁸ <https://www.facebook.com/help/562973647153813> (last visited March 1, 2021).

20 ⁹ Available at https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

21 ¹⁰ Available at <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

22 ¹¹ <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>.

¹² <https://www.wired.com/story/facebooks-ad-system-discrimination/>.

¹³ <https://www.npr.org/2019/03/28/707614254/hud-slaps-facebook-with-housing-discrimination-charge>.

1 *Despite a Civil Rights Settlement*, ProPublica (Dec. 13, 2019);¹⁴ Jeremy B. Merrill, *Does*
2 *Facebook Still Sell Discriminatory Ads?*, The Markup (Aug. 25, 2020);¹⁵ Corin Faife and Dara
3 Kerr, *Official Information About COVID-19 is Reaching Fewer Black People on Facebook*, The
4 Markup (Mar. 4, 2021) (Black users received disproportionately fewer paid public service
5 announcements from the U.S. Department of Health and Human Services than other races).¹⁶

6 Facebook’s advertising system has two stages: targeting and delivery. Facebook has
7 intentionally built a system that, at both stages, excludes protected groups from being shown
8 particular advertisements. *See Help your ads find the people who will love your business*,
9 Facebook for Business (“Choose your audience based on age, gender, education, job title and
10 more.”);¹⁷ Muhammad Ali, et al, *Discrimination through optimization: How Facebook’s ad*
11 *delivery can lead to skewed outcomes*, Proc. of the ACM on Human-Computer Interaction, No.
12 199, at 3 (Nov. 2019) (Research paper: “Our results show Facebook’s integral role in shaping the
13 delivery mechanism”);¹⁸ FAC ¶¶ 39-40. In the targeting stage, both Facebook and the advertiser
14 play a role in defining an audience of users for the ad. *See, e.g., Mary Lister, All of Facebook’s*
15 *Ad Targeting Options (in One Epic Infographic)*, WordStream (Jul. 2, 2020).¹⁹ Facebook creates
16 and provides targeting tools that are exclusionary. “[Facebook] has provided a toggle button that
17 enables advertisers to exclude men or women from seeing an ad, a search-box to exclude people
18 who do not speak a specific language from seeing an ad, and a map tool to exclude people who
19 live in a specified area from seeing an ad by drawing a red line around that area.” Charge of

18 ¹⁴ <https://www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement>.

19 ¹⁵ <https://themarkup.org/ask-the-markup/2020/08/25/does-facebook-still-sell-discriminatory-ads>.

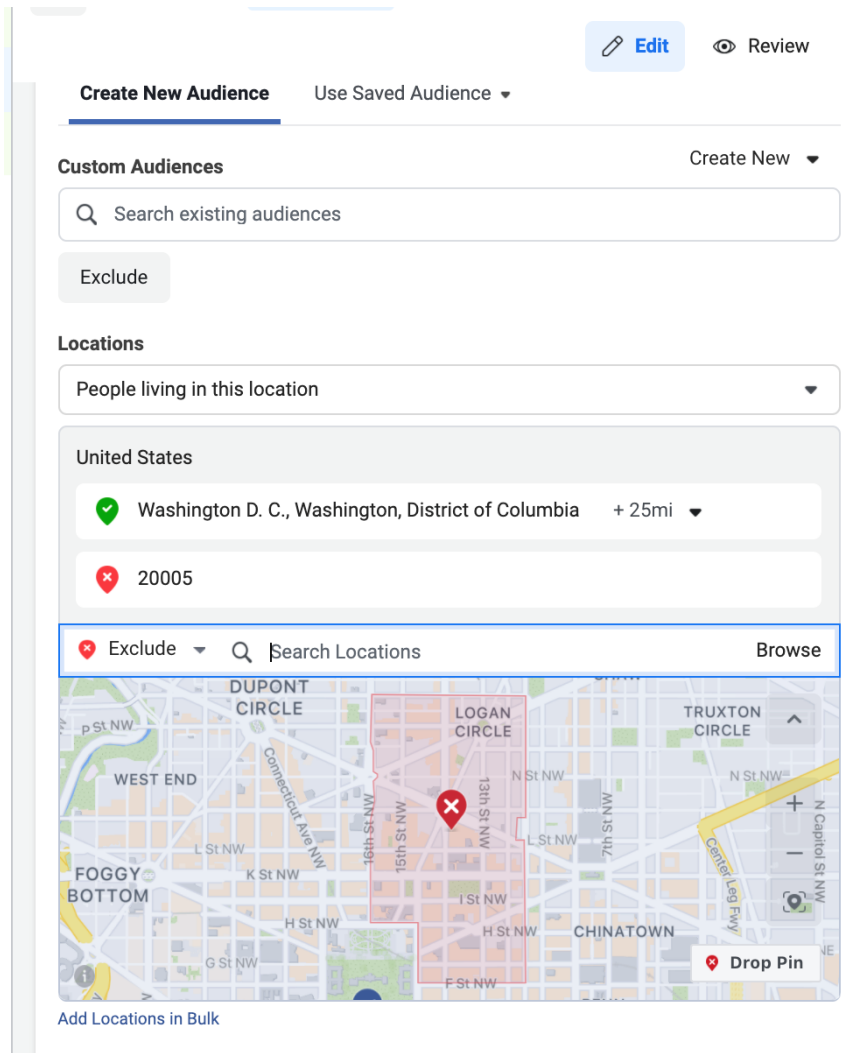
20 ¹⁶ <https://themarkup.org/citizen-browser/2021/03/04/official-information-about-covid-19-is-reaching-fewer-black-people-on-facebook>.

21 ¹⁷ <https://www.facebook.com/business/ads/ad-targeting> (last visited March 1, 2021).

22 ¹⁸ Available at <https://dl.acm.org/doi/10.1145/3359301>.

¹⁹ <https://www.wordstream.com/blog/ws/2016/06/27/facebook-ad-targeting-options-infographic>.

1 Discrimination, *U.S. Dept. of Hous. and Urban Dev. v. Facebook, Inc.*, FHEO No. 01-18-0323-8
2 at 4 (Mar. 28, 2019).²⁰ Facebook’s location targeting tools—which enable both inclusion and
3 exclusion of locations—can home in on narrow geographies that can be close proxies for race or
4 other protected characteristics. *See, e.g., Lucas Elliott, Facebook Location Targeting: A Detailed*
5 *Guide*, Jon Loomer (Aug. 29, 2018).²¹ In this screenshot, taken on March 2, 2021, Facebook’s ad
6 system redlines, literally, around an excluded ZIP code while including the rest of the city:



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

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

1 The ad delivery stage occurs after targeting criteria are set. Facebook’s algorithm
2 “decide[s] which users will see an ad” by “consider[ing] sex and close proxies for the other
3 protected classes. . . . [Facebook] alone, not the advertiser, determines which users will constitute
4 the ‘actual audience’ for each ad.” Charge of Discrimination, *HUD v. Facebook*, at 5. “Even if
5 an advertiser tries to target an audience that broadly spans protected class groups, Respondent’s
6 ad delivery system will not show the ad to a diverse audience if the system considers users with
7 particular characteristics most likely to engage with the ad.” *Id.*; accord Ali, et al, *Discrimination*
8 *through optimization*, at 13 (Research paper: “Facebook’s ad delivery process can significantly
9 alter the audience the ad is delivered to compared to the one intended by the advertiser based on
10 the content of the ad itself.”); FAC at ¶¶ 71-78.

10 For example, in one test, Facebook’s algorithm delivered a job ad for mechanics to men
11 13 times as often as to women, but delivered an ad for summer jobs for high schoolers to women
12 9 times as often as to men—despite both ads being targeted to reach all genders. Jeremy B.
13 Merrill, *Does Facebook Still Sell Discriminatory Ads?*, The Markup (Aug. 25, 2020).²² Another
14 recent study found Facebook sent truck driver ads to men 13 times as often as women but sent
15 childcare worker ads to women 25 times as often as men—again, without any gender targeting
16 by the advertiser. Nicolas Kayser-Bril, *Automated Discrimination: Facebook uses gross*
17 *stereotypes to optimize ad delivery*, Algorithm Watch (Oct. 18, 2020).²³

17 In July 2020, Facebook’s own civil rights auditors released their final report, which
18 discusses discriminatory advertising and algorithmic bias on Facebook, among other matters.
19 Laura W. Murphy & Megan Cacace, *Facebook’s Civil Rights Audit – Final Report*, Facebook, at

20 ²² <https://themarkup.org/ask-the-markup/2020/08/25/does-facebook-still-sell-discriminatory-ads>.

21 ²³ <https://algorithmwatch.org/en/story/automated-discrimination-facebook-google/>.

1 72-82 (Jul. 8, 2020).²⁴ As part of a settlement in an anti-discrimination case, Facebook restricted
2 discriminatory ad targeting options for housing, employment, and credit ads—but *not* for
3 insurance ads. *Id.* at 72. The audit reported that, at least prior to this settlement, Facebook’s anti-
4 discrimination ad policies were “not widely known or well-enforced.” *Id.* While Facebook’s
5 settlement and policy changes sought to address ad targeting, they did not address algorithmic
6 delivery of ads. *Id.* at 74. As of July 2020, Facebook was just beginning limited pilot projects
7 aimed at assessing algorithmic fairness. *Id.* at 77-78. “The Auditors think Facebook needs to
8 approach these issues with a greater sense of urgency. There are steps it can take now ... that
9 would help reduce bias and discrimination concerns[.]” *Id.* at 81-82.

9 At the root of Facebook’s algorithmic discrimination is its reckless application of
10 machine learning techniques to data drawn from a society infected by systemic discrimination
11 and inequality. What may appear to an algorithm as a personal preference may not be a
12 preference at all but instead the result from a lack of choice. Facebook’s systems sift through
13 large amount of data to find patterns: “Machine-learning algorithms use statistics to find patterns
14 in massive amounts of data.” Karen Hao, *What is machine learning?*, MIT Tech. Rev. (Nov. 17,
15 2018).²⁵ “[The] platform is collecting as much data about you as possible . . . and using machine
16 learning to make a highly educated guess about what you might want next.” *Id.* These algorithms
17 find hidden correlations in the data and use those correlations to create efficiencies. But the
18 output is only as good as the input. The data fed into the algorithm—a user’s neighborhood, their
19 employment history, their credit history, their education, their associations, their wealth, their
20 health—are themselves inextricably intertwined with generations of discrimination in housing,

21 _____
22 ²⁴ <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>.

²⁵ <https://www.technologyreview.com/2018/11/17/103781/what-is-machine-learning-we-drew-you-another-flowchart/>.

1 employment, education, banking, insurance, and criminal justice. *See, e.g.*, Girardeau A.
2 Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025 (2018); Benjamin Howell, *Exploiting*
3 *Race and Space: Concentrated Subprime Lending As Housing Discrimination*, 94 CAL. L. REV.
4 101 (2006); William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in*
5 *Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP., Spring 1998, at 63; Willy E.
6 Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and*
7 *Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers*
8 *in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583 (1996); Jeremy E.
9 Fiel, *Decomposing School Resegregation: Social Closure, Racial Imbalance, and Racial*
10 *Isolation*, 78 AM. SOC. REV., no. 5, 2013, at 828; Mark W. Honeycutt II & Van D. Turner,
11 Jr., *Third-Party Associative Discrimination Under Title VII*, 68 TENN. L. REV. 913
12 (2001); Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849
13 (2013); Dayna Bowen Matthew, *Health Care, Title VI, and Racism's New Normal*, 6 GEO. J.L. &
14 MOD. CRITICAL RACE PERSP. 3 (2014).

15 The through-line for this data is race, gender, age, and other immutable characteristics
16 upon which discrimination occurred. When Facebook applies its algorithms to this data, the
17 algorithms execute their mission of creating efficiency by finding hidden correlations—they see
18 that older Black women, for example, are less likely to be wealthy, less likely to live in an
19 expensive neighborhood, less likely to have an advanced degree, less likely to have job security,
20 less likely to be adequately insured—and the algorithms mistake the consequences of *racial*
21 *discrimination and inequality* for the *preferences* of older Black women. Facebook then uses
22 those “preferences” to target and deliver ads. The algorithms take in data tainted by societal
inequities and export discriminatory outcomes, and then Facebook claims this result is what the

1 users want. Def. Br. at 11 (“the more plausible inference is that ... the delivery algorithm
2 determined that other insurance ads and/or ads for other products and services would be *more*
3 interesting to her”) (emphasis in original). Facebook’s civil rights auditors summed it up well:

4 AI is often presented as objective, scientific and accurate, but in many cases it is
5 not. Algorithms are created by people who inevitably have biases and assumptions,
6 and those biases can be injected into algorithms through decisions about what data
7 is important or how the algorithm is structured, and by trusting data that reflects
8 past practices, existing or historic inequalities, assumptions, or stereotypes.
9 Algorithms can also drive and exacerbate unnecessary adverse disparities.
10 Oftentimes by repeating past patterns, inequality can be automated, obfuscating and
11 perpetuating inequalities.

12 Murphy & Cacace at 76.

13 Facebook’s algorithmic discrimination is fundamentally different from an advertiser
14 choosing “to place ads for women’s clothing in *Vogue* ... or place ads for men’s athletic shoes in
15 *Sports Illustrated*.” Def. Br. at 10. What Facebook describes in this example is not its own
16 personalized advertising system, but *contextual* advertising—“an automated process where a
17 promotional message is matched to relevant digital content.” James Chen, *Contextual*
18 *Advertising*, Investopedia (May 9, 2019).²⁶ If Facebook used contextual advertising, it would
19 match ads to content posted on its website such that every user viewing the same piece of content
20 would see the same ad. If Facebook used contextual advertising, its users would have more
21 control over what ads they receive because they have more control over what content they
22 choose to view. *Vogue* does not exclude men from subscribing to, or otherwise reading, its
magazine and its ads. Facebook claims “[a]dvertising on Facebook is no different” but that just is
not accurate. Def. Br. at 10. Instead of merely delivering ads based on what content they run
alongside—as TV, radio, and newspapers have done for decades—Facebook delivers ads based

²⁶ <https://www.investopedia.com/terms/c/contextual-advertising.asp>.

1 on the personal traits of its users, including their protected characteristics. Facebook’s system is
2 more akin to a realtor that steers Black and white home buyers toward different properties, or a
3 career counselor that steers women to different jobs than men because it “suits them better.”

4 Facebook’s algorithms—which the company intentionally wrote to operate this way—
5 segregate Facebook users based on their immutable traits or proxies for such traits, and then
6 provide different service based on this segregation. *See generally* Charge of Discrimination, U.S.
7 *Dept. of Hous. and Urban Dev. v. Facebook, Inc.*, FHEO No. 01-18-0323-8 (Mar. 28, 2019);²⁷
8 Muhammad Ali, et al, *Discrimination through optimization: How Facebook’s ad delivery can*
9 *lead to skewed outcomes*, Proc. of the ACM on Human-Computer Interaction, No. 199 (Nov.
10 2019);²⁸ Ava Kofman and Ariana Tobin, *Facebook Ads Can Still Discriminate Against Women*
11 *and Older Workers, Despite a Civil Rights Settlement*, ProPublica (Dec. 13, 2019).²⁹ This is
12 precisely the sort of discrimination the Unruh Act and other anti-discrimination laws prohibit.

11 **II. ONLINE AND OFFLINE, REDLINING IS DISCRIMINATORY AND UNJUST.**

12 Facebook concedes that it allows advertisers to discriminate based on age and gender and
13 that Facebook itself discriminates based on age and gender in its delivery of advertisements. Def.
14 Br. at 10. Its defense is that the discrimination is legitimate. Tellingly, many of Facebook’s
15 defenses are not new: they are reprises of defenses raised in aid of offline race and sex
16 discrimination in years past. Facebook has merely updated them for the Internet age.

17 For example, Facebook feigns innocence by claiming that it is just following the orders
18 of its advertisers: it offers them the *ability* to discriminate in ad targeting but, Facebook claims,

19 ²⁷ https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf.

20 ²⁸ Available at <https://dl.acm.org/doi/10.1145/3359301>.

21 ²⁹ <https://www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement>.

1 certainly does not force or encourage them to. That defense failed in *Pittsburgh Press Co. v.*
2 *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) and it should fail here. In
3 *Pittsburgh Press*, a newspaper ran a gender-segregated classifieds section. While the paper
4 “defer[red] in every case to the advertiser’s wishes regarding the [gender] column in which a
5 want ad should be placed,” it had made the judgment in the first instance as to “whether or not to
6 allow the advertiser to select the column.” *Id.* at 386. The Supreme Court explained that this
7 practice was unlawful discrimination: it “aid[ed]’ employers to indicate illegal sex preferences.”
8 *Id.* at 388. Like the newspaper, Facebook “defers in every case to the advertiser’s wishes”
9 regarding audience discrimination—but Facebook in the first instance created the ability to
10 discriminate.³⁰

11 That Facebook has policies against discriminatory advertising, Def. Br. at 13, is irrelevant
12 so long as it participates in that very behavior. In *Pittsburgh Press* the newspaper did something
13 similar—it provided a disclaimer stating “[v]arious laws and ordinances . . . prohibit
14 discrimination in employment because of sex,” even as it segregated job advertisements by sex.
15 413 U.S. at 381 n.7. But the Supreme Court and the court below did not accept that argument.
16 The lower court said an entity cannot frustrate the purpose of an anti-discrimination law through
17 a disclaimer and by insisting that “any recourse to be had by women lies against those employers
18 who do in fact discriminate.” *Pgh. Press Employ. Ad. Dis. Appeal*, 4 Pa. Commw. 448, 461 (Pa.
19 Cmmw. Ct. 1972). The same result should obtain here. Facebook should not be permitted to
20 escape liability for discrimination because it offers the offending tools with a wink and a nudge.

21 ³⁰ Moreover, as discussed above in Section I, in addition to offering discriminatory targeting tools, Facebook itself
22 algorithmically profiles users and algorithmically delivers advertisements in a discriminatory manner.

1 Nor is Facebook’s discriminatory advertising system vindicated by the fact that it
2 theoretically and in the aggregate may discriminate against all types of people in different ways.
3 The old admonition that “two wrongs don’t make a right” is more than a childhood lesson—it is
4 also a legal principle: harming both men *and* women, white users *and* Black users, old users *and*
5 young users, does not erase the harm of discrimination but rather “doubles it.” *Bostock v.*
6 *Clayton County*, 140 S. Ct. 1731, 1741 (2020) (“Nor is it a defense for an employer to say it
7 discriminates against both men and women because of sex. . . . Instead of avoiding Title VII
8 exposure, this employer doubles it.”). In *Shelley v. Kraemer*, 334 U.S. 1 (1948), for example,
9 segregationists defended racially restrictive real property covenants on the grounds that the
10 covenants harmed whites as well as non-whites—it prevented white owners from selling *and*
11 Black buyers from buying. *Shelley* rejected that approach: “Equal protection of the laws is not
12 achieved through indiscriminate imposition of inequalities.” *Id.* at 22. The principle applies with
13 equal force here: the Unruh Act’s purpose of “creat[ing] and preserv[ing] a nondiscriminatory
14 environment” is not advanced by permitting discrimination when it is directed against *more*
15 people. *Angelucci v. Century Supper Club*, 41 Cal.4th 160, 167 (2007).

16 Facebook defends its discriminatory practices by trying to place a patina of efficiency
17 over a reality of paternalistic stereotyping. It says that if a user receives an advertisement, then
18 that advertisement is what is best for the user. *See* Def. Br. at 11, 23. Facebook’s argument
19 parallels those made by discriminatory actors of the past. For example, in *Henderson v. United*
20 *States*, 339 U.S. 816 (1950), the Southern Railway Company defended its practice of dining car
21 segregation by asserting that “[t]he separation of the races is based upon considerations of the
22 safety, comfort, and general satisfaction of travelers of both races.” Southern Railway Br., 1949
WL 50329, at *26. Likewise, in *Pittsburgh Press*, the newspaper defended its sex-segregated

1 classifieds section on the grounds that the segregation was “for the convenience of its readers” as
2 “most jobs generally appeal more to persons of one sex than the other.” *Pittsburgh Press Co.*,
3 413 U.S. at 381 n.7. The Supreme Court found this defense so unpersuasive it relegated it to a
4 footnote. Facebook makes the same argument here by saying that its redlining practices optimize
5 the user experience and so everyone is better off. Just as in *Henderson* and *Pittsburgh Press*, the
6 Court should reject the notion that vague invocations of “convenience” or “general satisfaction”
7 can justify discrimination.

8 Facebook also objects that it does not discriminate “in the aggregate.” Def. Br. at 11, 19.
9 The railway company in *Henderson* defended itself in similar terms, a defense that also failed:
10 “It is argued that the limited demand for dining-car facilities by Negro passengers justifies the
11 regulations. But it is no answer to the particular passenger who is denied service at an
12 unoccupied place in the dining car that, on the average, persons like him are served.” 339 U.S. at
13 825. Facebook’s argument is no different—it claims that “on the average” its algorithm
14 accurately determines the interests of users and delivers relevant advertisements to users, and so
15 is efficient and lawful. But as in *Henderson*, it is “no answer” to the Plaintiff, and others like her,
16 who were denied access to opportunities that would have been available to them if they were
17 another age or gender, that “on the average, persons like [her] are” shown relevant
18 advertisements. Each member of the class has a statutory right under the Unruh Act to equal
19 treatment. The “essence” of the Unruh Act’s guarantee of equality is “a personal one.” *Koire v.*
20 *Metro Car Wash*, 40 Cal. 3d 24, 34 (1985); *O’Connor v. Vill. Green Owners Assn.*, 33 Cal. 3d
21 790, 794 (1983); *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 740 (1982) (“The statute’s focus
22 on the individual ... precludes treatment of individuals as simply components of a racial,

1 religious, sexual or national class.” (quoting *Los Angeles Dept. of Water & Power v. Manhart*,
2 435 U.S. 702, 708 (1978)).

3 Facebook contends that it has not harmed Plaintiff because she could have learned about
4 the advertised opportunities elsewhere, “such as by researching insurance on Google” or by
5 “consuming other advertising-supported media, such as news sites or television shows.” Def. Br.
6 at 15-16. As an initial matter, telling a particular group that they can, and should, seek services
7 elsewhere is quintessential discrimination in public accommodations.

8 Forcing some categories of users to overcome artificial hurdles to access the same
9 information as others definitionally is not “full and equal” treatment. Cal. Civ. Code § 51(b).
10 Facebook’s argument that Plaintiff could have found the information elsewhere revives the
11 defense that legal “equality” is met so long as access is provided, even if the services are
12 ultimately unequal. We have seen Facebook’s line of argument before and seen where it leads. In
13 *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court upheld segregated railcars on the
14 grounds that if “the enforced separation of the two races stamps the colored race with a badge of
15 inferiority ... it is not by reason of anything found in the act [requiring segregation], but solely
16 because the colored race chooses to put that construction upon it.” *Id.* at 551.

17 For a century, it has been the law in California that equality requires access on the same
18 terms: as early as 1920, state courts found segregation unlawful under predecessors to the Unruh
19 Act even where Black patrons could enter the premises, if they were denied “full and equal
20 treatment.” *Jones v. Kehrlein*, 49 Cal. App. 646, 651 (1920); *see also Suttles v. Hollywood Turf*
21 *Club*, 45 Cal. App. 2d 283, 287 (1941). Here, Plaintiff has been denied that “full and equal
22 treatment” because while these advertisements may be technically available to her in Facebook’s

1 “Ad Library” or from other media outlets, they are not available to her on the same basis and
2 with the same ease of access as they are to others because of her protected characteristics.

3 **CONCLUSION**

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

6 *Respectfully Submitted,*

March 5, 2021

7 _____
8 */s/ David Brody*

9 Jon Greenbaum (Cal. Bar # 166733)
10 David Brody (Cal. Bar # 288794)
11 Noah Baron (Cal. Bar # 321960)
12 LAWYERS’ COMMITTEE FOR CIVIL
13 RIGHTS UNDER LAW
14 1500 K Street N.W., Suite 900
15 Washington, D.C. 20005
16
17
18
19
20
21
22