**No. 21-16499**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

ROSEMARIE VARGAS; KISHA SKIPPER; JAZMINE SPENCER; DEILLO RICHARDS; and JENNY LIN, on behalf of themselves individually, and on behalf of all others similarly situated,

*Plaintiffs-Appellants,*

v.

FACEBOOK, INC.

*Defendant-Appellee.*

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On Appeal from the United States District Court
for the Northern District of California, San Francisco
No. 3:19-cv-050810-WHO
Honorable William H. Orrick

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# APPELLANTS' OPENING BRIEF

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## INTRODUCTION

Plaintiffs (on behalf of themselves and a class of individuals similarly situated) seek to hold Facebook, Inc. accountable for housing discrimination. Facebook mined demographic and other data from its online users, then used that data to create its own algorithms to divide the data into categories (including categories based on protected classes), and then created the content for its advertising platform that enabled housing advertisers to exclude those Facebook users in protected classes from seeing housing ads. All the while, Facebook amassed huge profits from this housing discrimination. This is a high-tech form of redlining, and, though different from the original form of redlining, it remains illegal.

Plaintiffs allege that Facebook violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"), by creating and maintaining a discriminatory website Ad Platform that enabled housing advertisers to exclude members of protected classes as recipients of housing ads.[1] Indeed, shortly before this case was filed in 2019, the United States Department of Housing and Urban Development (the agency charged with enforcing the Fair Housing Act), filed a formal Charge of Discrimination against Facebook, alleging that the specific actions alleged here violated the Fair Housing Act. 2-ER-296, ¶ 23.

[1] Plaintiffs (who are residents of New York or California) also allege that these acts violated New York and California state statutes.

On August 20, 2021, the District Court dismissed this case on the pleadings, holding that Plaintiffs "failed to plead facts supporting a plausible injury in fact sufficient to confer standing on any plaintiff," 1-ER-8,[2] and that if "plaintiffs had alleged sufficient facts to plausibly state an injury from Facebook's discontinued provision of Targeting Ad tools for paid advertisers, their claims would still be barred by Section 230 of the Communications Decency Act." 1-ER-10. Despite Plaintiffs' repeated requests to conduct limited jurisdictional discovery on standing issues, the District Court did not permit such discovery. The Court also did not address Plaintiffs' state-law claims.

The decision below should be reversed because Plaintiffs have alleged that they did suffer injury in fact as a result of Facebook's creation of an online segregated housing market which denied them the ability to see housing advertisements that Facebook made available to other users who were not members of protected classes. Moreover, because Facebook actively assisted in the creation of advertising content, the District Court erred in finding that Facebook was immune under Section 230. Finally, in the event this Court determines that additional allegations regarding injury in fact are required, the case should be remanded to allow Plaintiffs to conduct jurisdictional discovery to obtain information solely within Facebook's possession about which housing ads were denied to Plaintiffs.

[2] "ER" refers to Appellants' Excerpts of Record.

## STATEMENT OF JURISDICTION

The District Court exercised jurisdiction pursuant to 28 U.S.C. § 1331 because the principal claims by Plaintiffs alleged violations of the Fair Housing Act (including 42 U.S.C. § 3613(a)(1)(A) and civil rights violations under 28 U.S.C. § 1343(a)(4)). Pursuant to 28 U.S.C. § 1367(a), the District Court exercised supplemental jurisdiction over the state-law claims based on the same facts.

On August 20, 2021, the District Court granted Defendant's motion to dismiss Plaintiffs' Third Amended Complaint with prejudice, 1-ER-3, and entered judgment in favor of Defendant. 1-ER-2.

On September 10, 2021, Plaintiffs-Appellants timely filed their Notice of Appeal. 3-ER-299. Jurisdiction in this Court is appropriate pursuant to 28 U.S.C. § 1291.

## STATUTORY AUTHORITIES

All relevant statutory authorities appear in the Addendum.

## ISSUES PRESENTED

I. Whether the District Court erred by dismissing Plaintiffs' case for lack of standing based on its conclusion that Plaintiffs failed to sufficiently allege injury-in-fact where Plaintiffs pleaded that they were injured by Facebook's exclusion of them from the same online housing market and opportunities that Facebook offered to members of non-protected categories, in violation of the nondiscrimination provisions of the Fair Housing Act.

II. [In the event this Court were to resolve Issue I against Plaintiffs] Whether the District Court erred by denying Plaintiffs' requests for limited jurisdictional discovery, where the principal basis the Court relied on to conclude that Plaintiffs lacked standing was their inability to identify any specific advertisement that Facebook precluded Plaintiffs from viewing, and where this specific jurisdictional evidence was in the sole possession of Facebook and unavailable to Plaintiffs.

III. Whether the District Court also erred by concluding that, even if Plaintiffs had standing, their claims were barred by the Communications Decency Act, where Facebook in this instance

was not a "publisher or speaker" of someone else's content, and the tools it provided were not "neutral"—rather, Facebook actively created discriminatory content and participated in the challenged discriminatory acts by carrying out the discriminatory exclusions of its customers.

## STATEMENT OF THE CASE

This is a Fair Housing Act suit (42 U.S.C. § 3601 *et seq.*) ("FHA") against Facebook, Inc., arising out of its creation and operation of a discriminatory online advertising platform that enabled housing advertisers to exclude Facebook users who are members of protected classes from seeing certain ads. Prior to December 31, 2019, Facebook pulled data from its users' self-postings on Facebook (and elsewhere on the internet) and made certain assumptions about this data based on its users' interests and membership in protected classes (e.g., race, sex, age, etc.) Facebook then used this data as part of its ad platform offered to advertisers. The ad platform enabled each housing advertiser to join Facebook's discrimination by targeting its advertisements only to certain Facebook users and by excluding other Facebook users (including those in protected classes) from access to the same ads. This exclusionary advertising is called "redlining." Plaintiffs also assert claims against Facebook for violation of analogous New York and California state statutes prohibiting housing discrimination.

Because the matter was dismissed on the pleadings, the factual allegations here are taken from the Third Amended Complaint. 2-ER-232.

## I. The Parties

### A. Facebook, Inc.

Facebook owns and operates the world's largest social media platform, which includes Facebook, Instagram, and Messenger. Facebook is a website that allows individual users who sign up for free profiles to connect online with friends, colleagues, and people they do not know. It allows users to share pictures, music, videos, articles, and their narrative thoughts and opinions by uploading these items to Facebook's website for others to see. Facebook also owns and develops software and technology. 2-ER-242, ¶ 33.

Facebook collects vast amounts of data about each of its users, including information:

(1) provided when the initial account is created;

(2) about when the user signs in, what they share on Facebook, and what they say in their messaging to others on Facebook;

(3) about people, pages, accounts, and groups that users connect with and how users interact with them;

(4) about how users use Facebook, including the types of content a user views and the duration of a user's activity on Facebook;

(5) about transactions made on Facebook, including purchases; and

(6) that other users provide about a particular user through communications and interactions. 2-ER-242-43, ¶¶ 36, 37.

As explained below, Facebook stores and uses this data about its users in various ways, including to create advertisements and to enable advertisers to target or exclude recipients of ads. 2-ER-243, ¶¶ 37, 39. Thus, unlike a traditional advertising scenario (where an advertiser posts its ads to be viewed by the world as a whole), Facebook created a platform which enabled advertisers to selectively exclude members of protected classes from ever seeing an advertisement.

**B. Plaintiffs**

Plaintiff Rosemarie Vargas is a disabled female of Hispanic descent and a single parent with minor children who resides in New York City. 2-ER-255, ¶ 79. Plaintiff Kisha Skipper is a female of African American descent and a single parent with minor children who resides in Yonkers, New York. 2-ER-258, ¶ 102. Plaintiff Jazmine Spencer is a female of both African American and Hispanic descent, and a single parent with minor children who resides in New York City. 2-ER-260, ¶ 115. Plaintiff Deillo Richards is an African American male and a single parent with minor children who resides in Yonkers, New York. 2-ER-261, ¶ 128. Plaintiff Jenny Lin is an Asian American female who resides in San Francisco, California. 2-ER-263, ¶ 140.

All five Plaintiffs were Facebook users during the relevant time, who used Facebook to search for housing. [Vargas: 2-ER-255, ¶ 80; Skipper: 2-ER-258, ¶ 102; Spencer: 2-ER-260, ¶ 116; Richards: 2-ER-261, ¶ 128; Lin: 2-ER-263, ¶ 140.]

## II. How Facebook Violated the Fair Housing Act ("FHA")

The primary way Facebook makes money is by selling advertising. 2-ER-243-44, ¶ 40. However, Facebook does not merely publish advertisements on its websites for a fee. Rather, Facebook is integrally involved in the creation, publication and targeting of advertisements on its websites. 2-ER-244, ¶ 41. Facebook collects millions of data points about each of its users, draws inferences about each user based on this data, and then charges advertisers for the ability to use its ad platform to target ads based on Facebook's inferences. 2-ER-245, ¶ 42. Prior to December 31, 2019,[3] Facebook created and maintained lists of demographics, behaviors and interests of its users that allowed housing advertisers to exclude certain Facebook users from ever seeing their ads for housing. 2-ER-234, ¶2.

More specifically, Facebook's inferences are assumptions about classes of individuals (including protected classes). Based in significant part on these

[3] The National Fair Housing Alliance and others previously challenged Facebook's illegal advertising practices under the Fair Housing Act; that challenge resulted in a settlement in which Facebook agreed to cease those housing advertising practices by the end of 2019. However, Facebook has not compensated its users who were subjected to its discriminatory segregated housing market. 2-ER-234-35, ¶¶ 3, 4.

assumptions, Facebook created an advertising platform, Ads Manager that enables each advertiser to select which classes of Facebook users the advertiser desires to view its ads. Facebook's assumptions permitted ads to be viewed only by certain users—thereby encouraging housing advertisers to exclude some Facebook users based on their demographic and behavioral characteristics, including their membership in protected classes. 2-ER-237, ¶¶ 14, 16; 2-ER-239, ¶18; 2-ER-243, ¶¶ 37, 39. Facebook and its advertisers thereby collaborated to create and publish ads that excluded users categorized as members of protected classes, including sex, age, race, geographic boundaries, and other discriminatory characteristics. 2-ER-252, ¶¶ 64-67. As recently as 2019, Facebook mined user data to create categories of users defined by race or skin color *other than White* (thereby enabling housing advertisers to exclude users in those categories). 2-ER-252, ¶ 66. It also approved and published housing ads that excluded Blacks from its audiences. 2-ER-252, ¶ 67.

On November 14, 2017, non-party ProPublica purchased dozens of rental housing ads on Facebook and requested that those ads not be shown to certain categories of users, such as African Americans, mothers of high school kids, people interested in wheelchair ramps, Jews, expats from Argentina, and Spanish speakers. 2-ER-252-53, ¶ 68. Facebook approved every ad within minutes. *Id.* An additional housing ad that sought to exclude potential renters "interested in Islam, Sunni Islam and Shia Islam" was approved in 22 minutes. *Id.* Facebook approved and published

housing ads for sale and rental properties that excluded African Americans; single parents; and various other protected classes (including sex and familial status), from the ad's target audience. 2-ER-253, ¶ 69.

Facebook's conduct resulted in certain users receiving ads about availability of housing for sale or rental, while other users in protected classes were excluded from receiving the ads and were thus deprived of access to Facebook's housing market. 2-ER-253, ¶ 70. By utilizing its users' protected characteristics in this manner, Facebook violated the FHA and analogous state laws by denying certain users in protected classes access to the full market of potential housing advertisements. *Id.*[4]

## III. How Facebook's Actions Impacted Plaintiffs

Facebook prevented Plaintiffs and putative class members from receiving ads for the rental and sale of available housing. 2-ER-253, ¶ 71. Facebook's ad platform and its targeting methods provided active tools to exclude persons of color, single parents, persons with disabilities, and persons with other protected attributes. 2-ER-

[4] Around 2016, Facebook integrated a "Marketplace" feature, enabling users to post and search for items–including housing for sale or rent. 2-ER-253-54, ¶ 74. The Marketplace facilitated consumer-to-consumer transactions by creating a free platform for users to create and search various categories of listings, including home sales and rentals. *Id.* In addition to these free, user-created ads, in June 2018 the Marketplace incorporated the discriminatory features above by allowing advertisers to place targeted ads in the Marketplace using Facebook's paid ad platform. 2-ER-253-54, ¶ 76.

257, ¶ 99. Facebook's actions prevented Plaintiffs and the putative class from the opportunity to view the same housing ads that other Facebook users, not in protected classes, received. 2-ER-257, ¶ 99. Facebook thereby created an unlawful barrier to equal access to the housing market for Plaintiffs, who are members of protected classes under the Federal Housing Act and analogous state statutes. 2-ER-257, ¶ 100.

## IV. Procedural History

### A. The Class Action Complaint

On August 16, 2019, four Plaintiffs filed a Class Action Complaint in the United States District Court for the Northern District of California, in San Francisco.

### B. The Second Amended Complaint

On August 10, 2020, all five Plaintiffs (and an additional Plaintiff, later removed) filed a Second Amended Class Action Complaint, asserting eight counts against Facebook: four counts alleging Fair Housing Act violations, one count alleging violations of the New York Human Rights Law as to New York Plaintiffs, and three counts alleging violations of California statutes as to California Plaintiffs.

In response, Facebook moved to dismiss all counts, asserting *inter alia* that Plaintiffs lacked standing under both Article III and state statutes, and that Plaintiffs' claims were barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1).

### C. Oral Argument on the Second Amended Complaint

On January 13, 2021, the District Court held a Zoom hearing on Facebook's motion to dismiss the *Second* Amended Complaint. 1-ER-23-37. Portions of that hearing are relevant to this appeal (from dismissal of the *Third* Amended Complaint):

> THE COURT: So, Mr. Mantese, I'm inclined to grant the Motion To Dismiss for lack of standing. In the Complaint there aren't facts alleged related to the nature of the search that the Plaintiff performed; the specific entries that were used, the ad targeting tools to place discriminatory ads that could have been seen by the Plaintiff; that the Plaintiff was actively looking for housing in a specific period and was ready, willing and able to secure it if she -- in the ads.
> So there is no showing of injury.

1-ER-25.

> THE COURT: … tell me whether you think that you have additional facts that you could add that would make amendment appropriate.
>
> MR. MANTESE: Your Honor, I would like to, of course, argue the point because I do believe *Havens* and other Supreme Court precedent requires a different result.
> But in terms of an amendment, Your Honor, we would like the opportunity to amend if the Court, even after argument, still believes there is a standing issue.
> **We do think that some discovery should be allowed prior to an amendment.** I would note that in *Bradley*, the Court in that case said that, quote, the Court recognizes the difficulty of identifying advertisements if the entire Plaintiff class was allegedly prevented from seeing. **Such information is not within Plaintiffs' possession** and difficult to obtain; thus, jurisdictional discovery would be helpful. * * * But **if the Court still thinks there is a standing issue, we would ask for jurisdictional discovery and the right to amend**.

> THE COURT: Well, part of the problem with the Complaint … that you didn't specify the time that your client was searching, the criteria that she was using to search it, what the results were, what the white male friend did, and what time period.
>
> All of those are facts that are directly in your control, and you don't need jurisdictional discovery to lay that out, so that -- to get to some sort of a concrete injury.
>
> MR. MANTESE: Your Honor, discovery -- **we believe Facebook has all this data**. It may be that some of our Plaintiffs -- maybe even all of them -- wouldn't have specific times recorded when they made these searches. But Facebook -- we believe discovery would allow us to pin any detail down that the Court believes is essential.

1-ER-26-27.[5]

> MR. MANTESE: Your Honor, **we would ask for just a short period of time for discovery**, just 90 days.
>
> THE COURT: Yeah, at the moment it is very unclear to me what your client did. … I can't figure out the -- the injury besides the sort of – the broad thing that all of us hate, which is the allegation of discrimination.
>
> I can't figure out what the marketplace is, what the difference is, what did the white guy see that the -- that your client did not?
>
> There is just a lot that you need to do in order to show me that we have got a real case here. So … **I'm not going to allow discovery at the moment. I want to see what you know and what your clients actually did.**
>
> And **then if there is a gap that I think you couldn't possibly know because all the information would be in Facebook's side, then maybe I will consider jurisdictional discovery but not at this point**.

1-ER-34-35.

> MR. MANTESE: Your Honor, **the difficulty here is that Plaintiffs don't know what they weren't shown. Facebook has that**

[5] Unless otherwise stated, all emphasis appearing in any quote herein, is added for emphasis.

> **information.** … But Facebook archives all of that information and has that information. And that's why discovery is important to show -- to show the detail that the Court would like here.
>
> THE COURT: I hear you, but you have a lot of detail that you can add that you haven't added yet to make me get to the threshold of requiring jurisdictional discovery.
>
> So look at the order that I send out. Address the deficiencies that I see, whether you think they are deficiencies or not.
>
> And then we will take another look at it.

1-ER-35-36.

### D. The District Court's Order on the Second Amended Complaint

On January 21, 2021, the Court issued its Order granting Facebook's Motion to Dismiss, and granting Plaintiffs leave to amend their Second Amended Complaint to plead additional factual details. In relevant part, that Order stated:

> I conclude that plaintiffs' failure to allege any specific facts regarding their use of Facebook to search for housing means, given the context of this case, that they have not adequately alleged plausible injury in fact and lack Article III standing. Plaintiffs are given leave to amend to attempt to allege the facts that are within their exclusive knowledge.

1-ER-11.

> The plaintiffs did not identify: (i) when and how often they used Facebook to search for housing ads; (ii) the parameters or selection criteria used for those searches; (iii) what specific ads they saw during those times as the result of their searches; or (iv) the numbers of ads that were returned by their searches, or any other details regarding their "use" of Facebook to "seek housing." They did not allege that they were denied access to housing ads that, had they had seen them, they were otherwise ready, able, and willing to accept during the specific time periods they were using Facebook to search for housing.

1-ER-13.

> **I recognize plaintiffs' concern that because they were allegedly denied access to housing ads, they cannot (absent evidence from a comparable "tester") identify ads that they were not shown as evidence of their actual injury in fact**. I am not reaching the question of whether plaintiffs in this sort of case need to plead facts showing that a specific, comparable testor (sic) received different specifically identified ads. What I am requiring plaintiffs to plead are the facts within their exclusive knowledge, explaining what they actually *did* with respect to their use of Facebook to look for housing, how they know their white compatriot saw different ads, and facts regarding their then-current intent and ability to secure housing had they been shown a full range of ads through Facebook. Those facts – which are wholly absent from the SAC – are necessary to raise a *plausible inference* that Vargas or the other plaintiffs were injured in fact by the potential use of the Facebook's discriminatory tools by housing advertisers.

1-ER-19-20 (footnote omitted).

## V. Plaintiffs' Third Amended Complaint

On March 3, 3021, Plaintiffs filed their Third Amended Class Action Complaint ("TAC"). 2-ER-232. The TAC asserted the same eight counts against Facebook that Plaintiffs had previously pled in the Second Amended Complaint:

Count I: 42 U.S.C. § 3604(a)[6] [Fair Housing Act]
Facebook discriminated by making unavailable or denying a dwelling to a person based on race or other protected classes. 2-ER-278, ¶ 205.

Count II: 42 U.S.C. § 3604(c) [Fair Housing Act]
Facebook discriminated by publishing notice regarding a dwelling that indicates a preference or limitation based on race, among other things. 2-ER-279, ¶ 210.

[6] All relevant statutes are included in the Addendum.

Count III: 42 U.S.C. § 3604(d) [Fair Housing Act]
Facebook discriminated by representing that, based on race among other things, a dwelling is unavailable when in fact it is available. 2-ER-279-80, ¶ 215.

Count IV: 42 U.S.C. § 3606 [Fair Housing Act]
Facebook created a segregated marketplace that denied Plaintiffs access to services relating to obtaining dwellings, and discriminated based on protected factors. 2-ER-280, ¶ 220.

Count V: N.Y. Exec. L. § 296(5) [New York Human Rights Law]
Facebook impermissibly denied the New York Plaintiffs housing accommodations. 2-ER-282, ¶ 230.

Count VI: Cal. Civ. Code §§ 51, 52(a) [California UNRAH Civil Rights Act]
Facebook precluded California Plaintiffs from being part of the pool of Facebook users eligible to see certain housing advertisements. 2-ER-283, ¶ 239.

Count VII: Cal. Civil Code §§ 51.5, 52(a) [California UNRAH Civil Rights Act]
Facebook violated the prohibitions against blacklisting or refusal to trade, based on protected categories, as to California Plaintiffs. 2-ER-284, ¶ 246.

Count VIII: Cal. Bus. & Prof. Code § 17206 [California Unfair Business Practices]
Facebook's exclusion of certain classes of users from seeing housing advertisements is unfair business practice, as to California Plaintiffs. 2-ER-285, ¶ 251.

The significant changes to the TAC were the additions of specific facts that the District Court had ordered.

### A. Plaintiff Vargas

The TAC alleged that Rosemarie Vargas is a disabled female of Hispanic descent and a single parent with minor children who resides in New York City. 2-ER-255, ¶ 79. Prior to August 2018, she used Facebook for, *inter alia*, posting

photos of herself and her children. 2-ER-255, ¶ 80. In light of Facebook's practice of amassing detailed demographic data about each user, Vargas's status as a single parent, disabled, female of Hispanic descent was known to Facebook. 2-ER-257, ¶ 98.

From August 2018 to April 2019, Vargas used Facebook to look for housing. During that period, she searched for housing on Facebook four to five times per week. She was ready, willing, and able to move when she located suitable housing. 2-ER-255, ¶¶ 80, 81. During her search, Vargas logged into Facebook, then accessed the Marketplace from her Facebook home page and used the following search criteria: three-bedroom apartment located in lower Manhattan or Brooklyn in the rental price range of $1,700.00 per month. 2-ER-255-56, ¶¶ 83, 84, 85, 92.

In August 2018, Vargas accessed the Marketplace and included in her search criteria Section 8 housing voucher and her status as a veteran. 2-ER-256, ¶ 89. Her search based on these criteria yielded no housing ads. 2-ER-256, ¶ 89. She removed the Section 8 housing voucher from her search terms and received different search results. 2-ER-256, ¶ 90. During her Facebook searches for housing, she did not receive any ads for housing in Manhattan and received only ads for housing in predominately unsafe areas and/or Hispanic and Black residential neighborhoods outside of Manhattan, like the Bronx. 2-ER-256, ¶ 91. After receiving these results, Vargas modified her search criteria to include housing in Brooklyn, but the results

continued to generate ads for apartments in unsafe areas in predominately Hispanic and/or Black residential locations. 2-ER-256, ¶ 92. Also, during her multi-month search, she received no housing ads in her Facebook newsfeed. 2-ER-256, ¶ 97.

In February or March 2019, Vargas and a Caucasian friend, Chet Marcello sat side-by-side and searched for housing through Facebook's Marketplace, both using the ***same search*** criteria. 2-ER-257, ¶ 95. The parallel searches did not produce the same results: Marcello received more ads for housing in locations that were preferable to Vargas. *Id.* Vargas did not receive all the ads that Marcello received. *Id.*

Despite months of diligent searching, Vargas never located suitable housing through Facebook's Marketplace. 2-ER-257, ¶ 96.

**B. Plaintiff Skipper**

The TAC alleged that Kisha Skipper is a female of African American descent and a single parent with minor children residing in Yonkers, New York. 2-ER-258, ¶ 102. Prior to (and after) November 2016, Skipper used Facebook for a variety of reasons, including posting photos of herself and her children. 2-ER-258, ¶ 103). Facebook's practice of amassing detailed demographic data about users made it easy for Skipper's status as a female single parent of African American descent to be known to Facebook. 2-ER-259, ¶ 111.

Between November 2016 and May 2017, Skipper looked for housing nearly daily using Facebook's Marketplace because the house that she and her family were renting in Yonkers was in foreclosure. 2-ER-258, ¶¶ 102, 104, 105. During this entire period, she was gainfully employed and prepared to move. 2-ER-258, ¶ 105. Skipper used the following search criteria: a two-to-three-bedroom single-family home or apartment in Yonkers or Westchester County in the monthly rental range of $1,000 to $2,000. 2-ER-258-59, ¶¶ 106,107. Her searches located ads in the Marketplace for other New York locations like Great Neck, Mt. Vernon, and Long Island, but no ads for housing in Yonkers or Westchester County. Despite her searches, Skipper's Facebook newsfeed did not show any housing advertisements and she did not locate housing through Facebook. 2-ER-259, ¶¶ 108,109.

### C. Plaintiff Spencer

The TAC alleged that Jazmine Spencer is a female of African American and Hispanic descent, and a single parent with minor children, who lived in various shelters between 2016 and 2019. 2-ER-260, ¶¶ 115, 117. During this time, Spencer used Facebook for various reasons, including posting photos of herself and her children. 2-ER-260, ¶ 116. Facebook's practices permitted Facebook to know Spencer's status as a single parent female of African American and Hispanic descent. 2-ER-261, ¶ 124.

Between 2016 and 2019, Spencer used her Facebook account to look for housing. On a bi-weekly basis she searched for housing with the assistance of a housing specialist, and she also accessed Facebook's Marketplace using her cell phone four to five times a week to perform additional searches. 2-ER-260, ¶ 118. Spencer had an urgent need to locate housing and she was ready, willing, and able to move if she found suitable housing. 2-ER-260, ¶ 117.

Spencer's searches for housing on Marketplace used the following criteria: two-bedrooms, apartment or house, located in New York City or New Jersey in the range of $750-$1,450 per month. 2-ER-260, ¶¶ 119-120. In response, she received ads for housing in Newark, New Jersey, which has high crime rates. 2-ER-260, ¶ 121. Although she received approximately 20-30 ads each time she searched, the results did not match her search criteria. 2-ER-260, ¶ 121.

Despite years of diligent searching, Spencer never located suitable housing on the Marketplace, and she received no housing ads on her Facebook newsfeed. 2-ER-260, ¶ 122.

### D. Plaintiff Richards

The TAC alleged that Deillo Richards is a male of African American descent, and a single parent with two minor children living in Yonkers, New York. 2-ER-261, ¶¶ 128, 130. Prior to (and after) March 2019, Richards used Facebook for a variety of reasons, including posting photos of himself and his children; Richards'

Facebook profile notes his single marital status. 2-ER-262, ¶ 129. Due to Facebook's practices, Richards' status as a single parent of African American descent was known to Facebook. 2-ER-262, ¶ 136.

Between March 2019 through August 2019, Richards used Facebook to look for housing. 2-ER-261, ¶ 128. During this time, he searched Facebook's Marketplace two to three times a week for housing using criteria of: two or three-bedroom apartment, in Yonkers or the Bronx in a range of $1,000 to $1,250 monthly rent. 2-ER-262, ¶¶ 131,132. His searches resulted in ads for studio apartments that did not meet his housing needs. 2-ER-262, ¶ 133. He did not locate housing through the Marketplace. 2-ER-262, ¶ 134. During this time, he was prepared to move if he found suitable housing. 2-ER-262, ¶ 130. Richards never received housing ads on his Facebook News Feed despite his searches. 2-ER-262, ¶ 135.

**E. Plaintiff Lin**

The TAC alleged that Jenny Lin is a female of Asian descent residing in California. 2-ER-263, ¶ 140. Prior to (and after) May 2017, Lin used Facebook for various reasons, including posting photos of herself. 2-ER-263, ¶ 141. Facebook knew of Lin's status as an Asian American female because of its practices. 2-ER-264, ¶ 149.

From May to June 2017 Lin used her Facebook account to look for housing. 2-ER-263, ¶ 140. She searched for housing about 60 times through a Facebook

housing group "Inspired Women of L.A. Housing." 2-ER-263, ¶ 143. Lin was searching for a single room, a roommate situation, or a sublet, 2-ER-264, ¶ 145, in Mid-City or Culver City, at a monthly rent between $800 to $1,100. 2-ER-264, ¶ 146. If she had found an ad meeting her criteria, she was ready and able to move. 2-ER-264, ¶ 147. During this time, Lin received no housing ads on her News Feed despite her search for housing on Facebook. 2-ER-264, ¶ 148.

### F. Request for Discovery on Standing Issues

The Third Amended Complaint expressly stated, "**If the Court has doubts whether the requirements for Article III standing are met, Plaintiffs request discovery**." 2-ER-273, ¶ 184.

## VI. The District Court's Dismissal of the Third Amended Complaint

In response to Plaintiffs' TAC, Facebook moved for dismissal, again asserting that Plaintiffs lacked standing under both Article III and state statutes, and that Plaintiffs' claims were barred by Section 230 of the Communications Decency Act. 2-ER-188. Facebook also challenged the state-law statutory claims. As a facial attack on the TAC, the motion was treated as one for dismissal under Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction).

In Plaintiffs' Brief in Opposition to the dismissal motion, Plaintiffs again specifically requested discovery on the standing issues:

> Plaintiffs respectfully request that—**to the extent the Court requires greater detail in allegations** regarding advertisements and

> similar matters, all of which are *only* accessible to Facebook's massive servers—**the Court permit limited discovery** on the pertinent issues.

2-ER-111.

The District Court did not hold oral argument on Facebook's motion.

On August 20, 2021, that Court issued its Order Granting Motion to Dismiss with Prejudice, stating in relevant part:

> On March 3, 2021, plaintiffs filed the Third Amended Complaint ("TAC"). Dkt. No. 89. While plaintiffs have added additional details regarding the searches they performed, those additional details do not plausibly demonstrate that they were injured by any housing advertiser's possible use of Facebook's now-discontinued targeting criteria that could be used to direct paid ads at specific categories of persons. And even if plaintiffs had been able to allege facts plausibly supporting a harm to any of them sufficient to confer standing, the claims plaintiffs' assert are barred by the Communications Decency Act. The TAC is DISMISSED WITH PREJUDICE.

1-ER-3 (footnote omitted).

This appeal followed.

## SUMMARY OF THE ARGUMENTS

I.

The District Court erred by granting Facebook's Fed. R. Civ. P. 12(b)(1) motion to dismiss Plaintiffs' Third Amended Complaint for lack of standing, finding that Plaintiffs failed to plead a plausible injury in fact.

For Article III standing, Plaintiffs must allege facts supporting (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Each Plaintiff plausibly alleged injury in fact by pleading that s/he was injured by Facebook's exclusion of them from access to the same online housing that Facebook offered to members of non-protected classes, in violation of the Fair Housing Act. This injury is both an informational injury (a violation of Plaintiffs' statutory right to "truthful information concerning the availability of housing" under *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982)) and a denial of the opportunity to obtain a benefit (that is, denial of the chance to obtain the same housing that members of non-protected classes enjoy). Plaintiffs also pled injury in fact by alleging Facebook's actions denied them the social benefit of living in an integrated community. These injuries also satisfy the standing requirements for the state-law claims.

II.

Alternatively, the Court erred by dismissing the Third Amended Complaint without permitting the limited discovery on the jurisdictional (standing) issues that Plaintiffs repeatedly requested. Plaintiffs made clear that they could not identify specific ads that they were prevented from seeing without this discovery and that this information was solely in Facebook's possession.

III.

The District Court also erred by holding that, even if Plaintiffs had standing, their claims were nonetheless barred by section 230 of the Communications Decency Act. That section provides immunity to: (1) a "provider or user" of an "interactive computer service" (2) whom a plaintiff seeks to treat as a "publisher or speaker" (3) of information provided by another "information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009), as amended (Sept. 28, 2009). Facebook failed to satisfy the second and third prongs of this test. In the context of the allegations here, Facebook was not a "publisher or speaker" of *someone else's* content; it did not passively post information provided to it by another information content provider. Rather, Facebook actively mined the data posted by its users, used this data to create its own algorithms to divide the harvested data into categories based on groupings (including protected classes), and then promoted this ability to communicate advertising messages to only limited groups of individuals, all for

Facebook's profit. The District Court's conclusion that Facebook provided only "neutral" tools for use by third parties is wrong. Facebook was an active participant in creating content that excluded Plaintiffs from access to Facebook's housing ad market.

IV.

The District Court declined to address whether Plaintiffs' Third Amended Complaint stated a claim under any state statutes. If this Court remands for further proceedings, Plaintiffs request that the District Court be instructed to address these issues.

## ARGUMENTS

### I. The District Court Erred by Dismissing Plaintiffs' Third Amended Complaint for Lack of Standing

#### A. Standard of Review

This Court "review[s] de novo an order granting a motion to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1) and construe[s] all material allegations of fact in the complaint in favor of the plaintiffs." *Meland v. Weber,* 2 F.4th 838, 843 (9th Cir. 2021).

In a class action case, only one named plaintiff must have suffered injury. *Lierboe v. State Farm Mut. Auto. Ins. Co*., 350 F.3d 1018, 1022 (9th Cir. 2003).

### B. The Law of Standing Under the Fair Housing Act

For Article III standing, plaintiffs must allege facts supporting (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

The Fair Housing Act authorizes any "aggrieved person" to bring a housing-discrimination lawsuit. 42 U.S.C. § 3613(a). An "aggrieved person" includes "any person who claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i)(1).[7] Unlike the standing requirements for many other claims, FHA Plaintiffs need only allege the "Article III minima of injury in fact[.]" *Havens, supra,* 455 U.S. at 372. *See also Trafficante v. Metro. Life. Ins. Co.*, 409 U.S. 205, 209 (1972) (standing under the FHA is "as broad[] as is permitted by Article III of the Constitution"). FHA claims are thus subject to a "very liberal standing requirement." *Harris v. Itzhaki*, 183 F.3d 1043, 1049 (9th Cir. 1999). The

[7] The FHA provides a cause of action for persons who are not themselves subject to discrimination, but who allege deprivation of relationships with individuals who are. *See, e.g., Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017) (municipality had FHA standing based on allegations of tax revenue lost due to discrimination against third parties); *Trafficante*, *infra*, 409 U.S. at 209 (suit by white tenants alleging deprivation of benefits of interracial associations when discriminatory practices kept minorities out of their apartment complex); *Havens*, *supra*, 455 U.S. at 379.

"threshold for pleading discrimination claims under the [FHA] is low." *McGary v. City of Portland*, 386 F.3d 1259, 1262 (9th Cir. 2009).

### C. Overview of the District Court's Errors

Evaluating the August 20, 2021 Order requires understanding what the District Court ordered (and did not order) in January 2021 when it addressed the Plaintiffs' Second Amended Complaint, and how Plaintiffs responded to the January Order. In short:

[a] in January 2021:

[1] the Court found no injury in fact had been pleaded;[8]

[2] Plaintiffs requested limited discovery on standing issues so they could learn which specific ads were withheld from Plaintiffs;[9]

[3] the Court declined to permit such discovery, requiring instead that Plaintiffs first identify all facts within their knowledge (when and how they had performed searches, etc.).[10]

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[8] January 21, 2021 Order, 1-ER-11 (Plaintiffs "have not adequately alleged plausible injury in fact and lack Article III standing.")

[9] January 13, 2021 hearing transcript, 1-ER-26-27 ("… if the Court still thinks there is a standing issue, we would ask for jurisdictional discovery) and 1-ER-35 ("Plaintiffs don't know what they weren't shown. Facebook has that information.")

[10] January 21, 2021 Order, n. 5, 1-ER-20 ("Plaintiffs' request – made during the hearing on this motion – that they be provided 'jurisdictional discovery' by Facebook puts the cart before the horse. Plaintiffs must make a plausible showing of *their* injury in fact based on facts within their exclusive control before Facebook may be subject to discovery.")

[b] In March 2021, Plaintiffs filed their TAC, which provided details from their own knowledge exactly as the Court directed in January.[11]

[c] Yet in August 2021, the Court held that Plaintiffs still failed to sufficiently plead injury in fact—without ever permitting the requested discovery.[12]

Plaintiffs thus allege two alternative errors relating to standing. First, Plaintiffs allege that the District Court erred by not holding that the TAC sufficiently pleaded a plausible injury in fact. Second, in the event this Court were to disagree, Plaintiffs argue that the Court erred by not permitting Plaintiffs to conduct limited discovery on the standing (jurisdictional) issues, as they requested.

### D. Plaintiffs' Third Amended Complaint Sufficiently Alleged Standing

#### [1] Plaintiffs' Injury in Fact

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc., supra*, 578 U.S. at 339, *as revised* (May 24, 2016) quoting *Lujan, supra,* 504 U. S. at 559-60. A plaintiff does not automatically satisfy the injury-in-fact requirement whenever a

[11] TAC, 2-ER-232-297.

[12] August 20, 2021, Order, 1-ER-3 ("While plaintiffs have added additional details regarding the searches they performed, those additional details do not plausibly demonstrate that they were injured by any housing advertiser's possible use of Facebook's now-discontinued targeting criteria that could be used to direct paid ads at specific categories of persons.")

statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. *Spokeo*, 578 U.S. at 341. However, the "actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the *invasion of which creates* standing." *Havens*, *supra*, 455 U.S. at 373 *quoting Warth v. Seldin*, 422 U.S. 490 (1975). An intangible injury can be a concrete injury. *Spokeo*, 578 U.S. at 339.

Here, each Plaintiff alleges that they were injured by Facebook's **exclusion of them from the same online housing advertisements that Facebook offered to members of non-protected categories in violation of the nondiscrimination provisions of the Fair Housing Act**. By enabling housing advertisers to exclude members of a specific protected class(es) from its audience, Facebook ensured that not all members of protected classes had access to Facebook's entire online housing market. 2-ER-252, ¶ 65. As a result of Facebook's conduct, "users in certain protected classes [i.e. Plaintiffs and other members of protected classes who were actively searching Facebook for housing] were excluded from the target audience and thus deprived [of] access to the housing marketplace." 2-ER-253, ¶ 70. "By denying users access to the full market of potential housing advertisements based on the users' protected characteristics, Facebook violated the FHA." *Id.*[13]

[13] See the Plaintiffs' allegations: **Vargas** (Vargas and a Caucasian friend simultaneously searched using the same terms; white friend "received more ads for housing in locations that were preferable" and "Vargas did not receive the ads that"

The injury alleged by these Plaintiffs may be characterized in two different ways, either of which alone constitutes a cognizable injury in fact.[14]

**[A] Denial of Right to Truthful Information**

First, the injury pled violates Plaintiffs' statutory rights to receive "truthful information concerning the availability of housing." *Havens*, *supra*, 455 U.S. at 374. In *Havens*, the Court held that Black "tester" plaintiffs (who sought information about availability of defendant's housing, even though they had no intention to rent) had standing under the Fair Housing Act because they suffered an injury in fact when the defendant *failed to provide them the same information about availability that it provided the White applicant.* "[T]he tester possessed standing … simply because her 'statutorily created right to truthful housing information had been infringed.'" *Tourgeman v. Collins Financial Services, Inc.,* 755 F.3d 1109, 1115-1116 (9th Cir.

her friend did. 2-ER-257, ¶ 95; "… as a result of Facebook's actions, Plaintiff Vargas … [was] prevented from having the same opportunity to view ads for housing that other Facebook users, not in protected classes received." 2-ER-257, ¶ 99); **Skipper** ("Facebook prevented Plaintiff Skipper … from having the same opportunity to view ads for housing that other Facebook users, not in protected classes received." 2-ER-259, ¶ 112); **Spencer** (similar) 2-ER-261, ¶ 125); **Richards** (similar) 2-ER-262, ¶ 137; **Lin** (similar) 2-ER-264, ¶ 150.

[14] The District Court treated the standing analysis for Plaintiffs' four state-law claims the same way it treated the FHA claims. Plaintiffs see no meaningful distinctions between the FHA standing analysis and the standing analysis to be performed under the New York Human Rights Law (N.Y. Exec. L. § 296(5)), the California Unruh Civil Rights Act (Cal. Civ. Code §§ 51, 51.5, 52(a)), and the California Unfair Business Practices statute (Cal. Bus. & Prof. Code § 17206).

2014) (discussing *Havens*). Here, the information Facebook made available to Plaintiffs was a partial and inaccurate view of the housing available on Facebook. As in *Havens*, this constitutes an injury in fact to Plaintiffs' "statutorily created right to *truthful* housing information" under the FHA. 455 U.S. at 374.

**[B] Denial of the Chance or Possibility to Obtain a Benefit**

Plaintiffs also suffered an injury in fact because Facebook's exclusion of Plaintiffs from receiving all housing advertisements denied them the ***opportunity*** to obtain a benefit—that is, denial of access to the ***chance*** to obtain the same housing that members of non-protected classes enjoy. It is well-established that mere denial of the *opportunity* to obtain a benefit is itself an injury in fact. *See, e.g. O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1069 (9th Cir. 2015) quoting 13 A Wright & Miller, *Federal Practice and Procedure* § 3541.4 (3d ed 1998) ("Loss of an opportunity may constitute injury, even though it is not certain that any benefit would have been realized if the opportunity had been accorded."). *See also Robertson v. Allied Sols.*, LLC, 902 F.3d 690, 697 (7th Cir. 2018) ("Article III's strictures are met not only when a plaintiff complains of being deprived of some benefit, *but also when a plaintiff complains that she was deprived of a chance to obtain a benefit*."); *West Virginia Ass'n of Community Health Centers, Inc. v. Heckler*, 734 F.2d 1570, 1575 (D.C. Cir. 1984) ("plaintiff's injury was the denial of an opportunity to obtain housing for which he would otherwise be qualified.

*Certainty of success in seeking to exploit that opportunity was not required*."); *Appalachian Voices v. State Water Control Bd.,* 912 F.3d 746, 752 (4th Cir. 2019) ("We have previously held that *the denial of an opportunity* ... can constitute an injury-in-fact."); *Ecosystem Inv. Partners v. Crosby Dredging, L.L.C.*, 729 F. App'x 287, 292 (5th Cir. 2018), citing *N.J. Television Corp. v. FCC*, 393 F.3d 219, 221 (D.C. Cir. 2004) ("[A] plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* . . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity.").

**[C] Plaintiffs' Second Injury in Fact: Denial of Social Benefit of Living in Integrated Community**

In addition, Plaintiffs alleged a second injury in fact caused by Facebook's exclusion of protected classes from the housing market and the housing community.[15] *See Trafficante, supra,* 409 U.S. at 209 (standing injury in fact requirement satisfied where minorities were excluded from housing complex, thereby denying other tenants "the loss of important benefits from interracial associations"). "The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is … the whole community." *Trafficante,* 409

[15] See Plaintiffs' allegations at: 2-ER-255, ¶ 78 ("Facebook's discriminatory actions deprived Plaintiffs and those similarly situated of the social benefits and business and professional advantages of an integrated community giving rise to a legally cognizable injury.")

U.S. at 211. *See also Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 113 (1979) (injury in fact in FHA case satisfied based on allegations of societal injury to racial character of plaintiff's 12 x 13 block residential neighborhood). "[A]ny person harmed by discrimination, *whether or not the target of the discrimination*, can sue to recover for his or her own injury." *San Pedro Hotel v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998) (citing *Trafficante*, 409 U.S. at 212). The denial of an integrated community is independent injury sufficient to support standing.

The Supreme Court has repeatedly emphasized that stigmatic discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior" can cause serious injuries that confers standing. *Heckler v. Mathews,* 465 U.S. 728, 739 (1984), quoting *University for Women v. Hogan,* 458 U.S. 718, 725 (1982).

**[2] Plaintiffs' Injury is Fairly Traceable to Facebook's Conduct**

Plaintiffs pled that their injuries in fact are fairly traceable to Facebook's conduct. *See* TAC at 2-ER-242, ¶ 36 through 2-ER-255, ¶ 78 (detailing Facebook's creation and use of tools that injured Plaintiffs). Among many allegations:

> 42. Facebook collects millions of data points about its users, draws inferences about each user based on this data, and then charges advertisers for the ability to use its Ad Platform to micro target ads to users based on Facebook's inferences about them…. As Facebook explains, its Ad Platform enables advertisers to "[r]each people based on ... zip code ... age and gender ... specific languages ... the interests they've shared, their activities, the Pages they've like[d] ... [their] purchase behaviors or intents, device usage and more."

2-ER-245, ¶ 42 (footnotes omitted).

> 53. Facebook provided the housing advertiser with a variety of tools for selecting an ad's "*eligible* audience." … the housing advertiser was able to specify attributes that the users who were shown the ad must have and attributes that users who were shown the ad must not have. … in the ad delivery phase, *Facebook selected the ad's "actual audience," meaning Facebook chose the potential customers who were eligible to and/or did see the ad from among the pool of Facebook users, thereby creating a segregated market*.

2-ER-248-49, ¶ 53.

> 54. … Facebook provided a toggle button that enabled housing advertisers to exclude men or women from seeing an ad, a search box to exclude people who did not speak a specific language from seeing an ad, and a map tool to exclude people who lived in a specified area from seeing an ad by drawing a red line around the excluded geographic area. Facebook also provided drop-down menus and search boxes to exclude or include (i.e., limit the audience of an ad exclusively to) people who share specified attributes. Facebook has offered housing advertisers hundreds of thousands of attributes from which to choose, for example to exclude … "foreigners," "Puerto Rico Islanders," or people interested in "parenting," "accessibility," "service animal," "Hijab Fashion," or "Hispanic Culture."

2-ER-249, ¶ 54 (Footnote omitted).

> 57. Facebook enabled housing advertisers to exclude categories of people from viewing advertisements based on the categories Facebook created by extracting user data and making inferences about those users.

2-ER-250, ¶ 57.

Plaintiffs pled how Facebook structured and used its advertising platform, and that Plaintiffs' injuries in fact (exclusion from the full housing market) are fairly

traceable to Facebook's conduct. *See Lujan, supra,* 504 U.S. at 560 ("the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'").

**[3] Plaintiffs' Injury is Redressable**

As to the third element necessary for standing, Plaintiffs' injury as a result of FHA discrimination is "likely to be redressed by a favorable judicial decision." *Spokeo, Inc., supra,* 578 U.S at 338, *Lujan, supra,* 504 U.S. at 561. The FHA provides remedial relief even for inchoate discrimination. 42 U.S.C. § 3613(c) ("if [a] court finds that a discriminatory housing practice has occurred or about to occur, the court may award actual and punitive damages" and "may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order.") A favorable decision on Plaintiffs' claims will result in damages and an injunction, which would redress Facebook's conduct.

**[4] Summary**

Plaintiffs' TAC sufficiently pled injury in fact as to each Plaintiff, that the injuries in fact are fairly traceable to Facebook's conduct, and that the injuries are redressable by a favorable judicial decision. Reversal is required on all eight counts in the TAC.

## II. If this Court Finds the Factual Allegations Insufficient to Support Standing, Reversal and Remand are Still Required Because the District Court Erred by Dismissing on the Pleadings Rather Than Allowing Plaintiffs to Conduct Limited Jurisdictional Discovery as Repeatedly Requested

### A. Standard of Review

"A district court's decision to permit or deny jurisdictional discovery is reviewed for abuse of discretion." *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008).

### B. Law of Jurisdictional Discovery

"Although a refusal to grant discovery to establish jurisdiction is not an abuse of discretion when 'it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction,'" in the Ninth Circuit, "discovery should ordinarily be granted where pertinent acts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) *quoting Butcher's Union Local No. 498 v. SDC Inv., Inc.,* 788 F.2d 535, 540 (9th Cir.1986).

Other circuits are in accord. *See Nat'l Ass'n of the Deaf v. Fla.,* 980 F.3d 763, 776 (11th Cir. 2020) ("This circuit generally requires that plaintiffs have an opportunity to conduct jurisdictional discovery prior to dismissal."); *Urquhart-Bradley v. Mobley,* 964 F.3d 36, 48 (D.C. Cir. 2020) ("We have held many times

that, if a party demonstrates that it can supplement its jurisdictional allegations through discovery, then jurisdictional discovery is justified."); *Wyles v. Brady*, 822 F. App'x 690, 696 (10th Cir. 2020) *citing Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1189 (10th Cir. 2010). *See also Edmond v. U.S. Postal Service General Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991) (abuse of discretion to deny jurisdictional discovery in light of allegations suggesting jurisdiction).

The decision to deny discovery will be reversed on a clear showing that the denial results in "actual and substantial prejudice to the complaining litigant," and such prejudice "is established if there is a reasonable probability that the outcome would have been different had discovery been allowed." *Laub, supra,* 342 F.3d at 1093. *See also Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1236 (Fed. Cir. 2010) ("Prejudice is established if there is a reasonable probability that the outcome would have been different had discovery been allowed.")

### C. Preservation of Issue

Plaintiffs repeatedly requested the opportunity to conduct limited discovery relating to the injury in fact component of Plaintiffs' standing. Plaintiff's counsel first requested such jurisdictional discovery during the January 13, 2021 hearing on Facebook's motion to dismiss the Second Amended Complaint.

> MR. MANTESE: Your Honor, … We do think that some discovery should be allowed prior to an amendment. … if the Court

> still thinks there is a standing issue, we would ask for jurisdictional discovery.

1-ER-26-27.

> MR. MANTESE: … It may be that some of our Plaintiffs -- maybe even all of them -- wouldn't have specific times recorded when they made these searches. But Facebook -- we believe discovery would allow us to pin any detail down that the Court believes is essential.

1-ER-27.

> MR. MANTESE: Your Honor, we would ask for just a short period of time for discovery, just 90 days.

1-ER-34.

> MR. MANTESE: Your Honor, the difficulty here is that Plaintiffs don't know what they weren't shown. Facebook has that information. … Facebook archives all of that information and has that information. And that's why discovery is important to show -- to show the detail that the Court would like here.

1-ER-35.

Those requests were denied in the January 21, 2021 Order addressing the Second Amended Complaint. 1-ER-20, n. 5.

Next, in Plaintiffs' TAC, they again requested limited discovery on standing issues. 2-ER-273, ¶ 184 ("If the Court has doubts whether the requirements for Article III standing are met, Plaintiffs request discovery.")

Then, in Plaintiffs' opposition to Facebook's motion to dismiss the TAC, Plaintiffs again requested jurisdictional discovery. 2-ER-111: ("Plaintiffs respectfully request that—to the extent the Court requires greater detail in

allegations regarding advertisements and similar matters, all of which are *only* accessible to Facebook's massive servers—the Court permit limited discovery on the pertinent issues.")

Despite these repeated requests, the Court dismissed Plaintiffs' TAC in August 2021 without a hearing and without permitting Plaintiffs to conduct any discovery on standing/jurisdictional issues. 1-ER-3-10.

### D. Denial of Jurisdictional Discovery Was an Abuse of Discretion

In its August 20, 2021, Order, the District Court wrongly characterized Plaintiffs' allegations as a "generalized grievance," incapable of establishing standing:

> In sum, what the plaintiffs have alleged is that they each used Facebook to search for housing based on identified criteria and that no results were returned that met their criteria. They assume (but plead no facts to support) that no results were returned because unidentified advertisers theoretically used Facebook's Targeting Ad tools to exclude them based on their protected class statuses from seeing paid Ads for housing that they assume (again, with no facts alleged in support) were available and would have otherwise met their criteria. *Plaintiffs' claim that Facebook denied them access to unidentified Ads is the sort of* ***generalized grievance*** *that is insufficient to support standing*.

1-ER-7-8.

However, the District Court never addressed the foundational issue: Plaintiffs do not know what ads they *could* have seen; only Facebook knows. Moreover, it is impossible for Plaintiffs to provide specific factual allegations about ads that were

hidden from them because this information is in the possession of Facebook. The District Court therefore committed an egregious abuse of discretion: it dismissed the case on the ground that Plaintiffs failed to identify specific ads *that they never saw*, while simultaneously denying them jurisdictional discovery *so that they could identify specific ads*.

Although the District Court characterizes what happened here as "theoretical," what occurred is well documented. Facebook designed a system that intentionally used its users' own data to allow ads to be specifically—and unlawfully—targeted at some demographics, while excluding others. As described in detail in the TAC, housing advertisers did not "theoretically" exploit Facebook's unlawful mechanism to discriminate—they *actually* did so.

In the TAC, Plaintiffs detailed the vast amounts of data obtained and retained by Facebook about its customers. See 2-ER-243-246, ¶¶ 37, 42, 45-47.[16] Facebook

[16] *See also, In re Facebook, Inc. Internet Tracking Litig.,* 956 F.3d 589, 596 (9th Cir. 2020), *cert. denied sub nom. Facebook, Inc. v. Davis*, 141 S. Ct. 1684 (2021) ("Facebook uses plug-ins to track users' browsing histories when they visit third-party websites, and then compiles these browsing histories into personal profiles which are sold to advertisers to generate revenue.") (footnote omitted); *Bass v. Facebook, Inc.,* 394 F. Supp. 3d 1024, 1031 (N.D. Cal. 2019) (hackers "obtained the username, gender, date of birth, and (if users had chosen to share it) workplace, education, relationship status, religious views, hometown, self-reported current city, website, the user's locale/language, the types of devices used to access Facebook, the last ten places the user 'checked into' or was 'tagged' in on Facebook, the people or pages that the user 'followed' on Facebook, and the user's fifteen most recent searches using the Facebook search bar.")

alone had the information on its advertising customers' discriminatory preferences and how they excluded protected classes.

The District Court's denial of the requested jurisdictional discovery established "actual and substantial prejudice" to Plaintiffs because there is a "reasonable probability that the outcome would have been different had discovery been allowed." *Laub*, 342 F.3d at 1093; *see also Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (jurisdictional discovery request appropriate on a clear showing "that denial of discovery results in *actual and substantial prejudice to the complaining litigant*").

The prejudice to Plaintiffs here is especially strong because ***these Plaintiffs have no other way to acquire the evidence the District Court required.*** In such a situation, reversal is required, as other Circuit Courts across the country have held. *See e.g. Finn v. Great Plains Lending, LLC*, 689 F. App'x 608, 611 (10th Cir. 2017) (dismissal reversed where "practically speaking, Finn has no way to secure evidence to verify—or disprove—his belief about Great Plains' lack of tribal control or benefit without engaging in the jurisdictional discovery that the district court disallowed."); *Intercontinental Indus. Corp. v. Wuhan State Owned Indus. Holdings Co.*, 619 F. App'x 592, 595 (9th Cir. 2015), *as amended on clarification* (Aug. 19, 2015) (reversing dismissal and authorizing limited jurisdictional discovery on remand, where plaintiff claimed that defendants may possess documents necessary

for plaintiff to establish applicability of specific exception to the Foreign Sovereign Immunities Act); *Rocke v. Pebble Beach Co.*, 541 F. App'x 208, 212–13 (3d Cir. 2013) (reversing order denying request for jurisdictional discovery of material in the sole possession of defendant, because "such an imbalance in access to information exists here."); *Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) (reversing denial of limited jurisdictional discovery, where plaintiff suspected the existence of policies relevant to sovereign immunity but had no way to know if such policies actually existed absent discovery).

The District Court's denial of jurisdictional discovery was a clear abuse of discretion. The August 20, 2021 Order—which explicitly faulted Plaintiffs for alleging a generalized grievance on the basis of "unidentified Ads"—reveals that limited jurisdictional discovery (addressing what ads were withheld from Plaintiffs) has a reasonable probability of providing a basis on which the injury-in-fact component of standing could be established (or further established). Reversal is required.

## III. The District Court Also Erred in Its Alternative Ruling that the Communications Decency Act Barred Plaintiffs' Claims

### A. Standard of Review

This Court reviews *de novo* a District Court's determination that this case is barred by the Communications Decency Act. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 849–50 (9th Cir. 2016) ("We review de novo a district court's decision to grant a motion to dismiss. We also review de novo questions of statutory interpretation.") (Citations omitted). At the motion to dismiss stage, this Court assumes the factual allegations stated in the Complaint are true. *Internet Brands, Inc.*, 824 F.3d at 848.

### B. Overview

The District Court erred by holding that Facebook is entitled to protection of the Communications Decency Act. The wrongdoing at issue was not Facebook's passive posting of users' discriminatory housing advertisements. Rather, Facebook deliberately created an ad platform with content that enabled housing advertisers to exclude protected class members from receipt of ads, based on Facebook's own mining of its users' data. The District Court's conclusion that Facebook is entitled to immunity under the CDA is error warranting reversal.

### C. Section 230 of the Communications Decency Act

#### [1] Generally

Title 47 U.S.C. § 230 of the Communications Decency Act ("CDA") immunizes providers of interactive computer services against liability arising from

publishing certain content created by third parties. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (*en banc*). Read as a whole, § 230 of the CDA grants immunity from liability to: (1) a "provider or user" of an "interactive computer service" (2) whom a plaintiff seeks to treat as a "publisher or speaker" (3) of information provided by another "information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009), as amended (Sept. 28, 2009). The third element has two subcomponents: (a) the information at issue must come from an "information content provider" and (b) the information must be "provided by" the information contention provider. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016).

"The prototypical service qualifying for [CDA] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761(2020) *quoting Kimzey*, 836 F.3d at 1266. Thus, a provider of interactive computer service (such as Yelp!, which invites users to submit online reviews) is entitled to CDA immunity for content posted on its website by another "information content provider" (i.e. a user who submits a review). *Kimzey*, 836 F.3d at 1268-69.

Communications Decency Act immunity applies, however, only where the interactive computer service provider is not also *itself* an "information content

provider," which is defined as someone who is "responsible, in whole or in part, for the creation or development of" the offending content. *Roommates.com, LLC*, 521 F.3d at 1162, citing § 230(f)(3). "A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content." *Roommates.com, LLC*, 521 F.3d at 1162. "*But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider.*" *Id.* "Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content." *Roommates.com, LLC*, 521 F.3d at 1162-63.

Thus, the critical issue in many cases, including this appeal, is whether the interactive computer service provider displayed content on its website that was created or developed entirely by third parties, or content that the defendant is responsible, in whole or in part, for creating or developing itself.

**[2] *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC***

This Court's analysis in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (*en banc*) is instructive because it examined whether section 230 of the CDA provided immunity in the context of a Fair Housing Act claim. The defendant in *Roommates* operated a website designed to match people renting out spare rooms with people looking for a

place to live. *Roommates.com*, 521 F.3d at 1161. Before a subscriber could search for listings on that website, s/he had to create a profile which required him/her to disclose his/her sex, sexual orientation, and whether he/she would bring children to a household. *Id.* The subscriber was also required to describe his/her preference in roommates concerning the same criteria: sex, sexual orientation, and children. *Id.* Plaintiffs sued, alleging that Roommates (which the Court referred to as "Roommate") violated the Fair Housing Act, claiming that Roommate was a housing broker doing online what it was prohibited from doing off-line. *Id.* at 1162. The District Court held that the defendant was immune under section 230(c).

On appeal, the *Roommates.com* plaintiffs challenged three separate aspects of the defendant's activities, and in a thoughtful and well-reasoned opinion, this Court held that two of defendant's three activities were not entitled to section 230 immunity.

*First*, plaintiffs challenged Roommate's creation and use of a form requiring each subscriber to use drop-down boxes to identify subscriber's own sex, sexual orientation, children, and subscriber's desires regarding the same issues in the room to be rented. *Roommates.com*, 521 F.3d at 1164. The Court easily concluded that the CDA provided no immunity to Roommate for these activities because it was not the publisher of information provided to it by another information content provider. *See* CDA, § 230(c)(1). "Roommate's **own acts**—posting the questionnaire and

requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity." 521 F.3d at 1165. "*The CDA does not grant immunity for inducing third parties to express illegal preferences*." *Id.*

*Second*, Plaintiffs challenged Roommate's retrieval of each subscriber's responses to its questionnaire and display of those preferences on each subscriber's "profile page," and on Roommate's search system which filters such listings. *Roommates.com*, 521 F.3d at 1165, 1167. Each subscriber's profile page shows the client's personal information (sex, sexual orientation, existence of children) as well as attributes of the housing situation sought. *Id.* The relevant question was whether Roommate was the publisher of this information provided to it by another information content provider or not:

> Roommate then displays these answers, along with other information, on the subscriber's profile page. This information is obviously included to help subscribers decide which housing opportunities to pursue and which to bypass. In addition, Roommate itself uses this information to channel subscribers away from listings where the individual offering housing has expressed preferences that aren't compatible with the subscriber's answers.
> * * * [**T]he fact that users are information content providers does not preclude Roommate from *also* being an information content provider by helping "develop" at least "in part" the information in the profiles**. As we explained in *Batzel,* the party responsible for putting information online may be subject to liability, even if the information originated with a user. *See Batzel v. Smith,* 333 F.3d 1018, 1033 (9th Cir. 2003).
>
> Here, the part of the profile that is alleged to offend the Fair Housing Act and state housing discrimination laws—the information

> about sex, family status and sexual orientation—is provided by subscribers in response to Roommate's questions, which they cannot refuse to answer if they want to use defendant's services. By requiring subscribers to provide the information as a condition of accessing its service, and **by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information**. And section 230 provides immunity only if the interactive computer service does not "creat[e] or develop[ ]" the information "in whole or in part." *See* 47 U.S.C. § 230(f)(3).

*Roommates.com, LLC*, 521 F.3d at 1165–66.

The Court likewise concluded that Roommate was not entitled to CDA immunity for operation of its search system, which filters the listings, or of its email notification system, which directs emails to subscribers according to discriminatory criteria. *Roommates.com, LLC*, 521 F.3d at 1167. "Roommate designed its search system so it would steer users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose." *Id.* Thus, "[i]f Roommate has no immunity for asking the discriminatory questions, as we concluded above … it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing." *Id.* The Court thus held that Roommate was not entitled to immunity for "the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal." *Roommates.com, LLC*, 521 F.3d at 1170.

*Third*, Plaintiffs asserted that Roommate should be held liable for discriminatory statements displayed in the "Additional Comments" section of their

profile pages. *Roommates.com, LLC*, 521 F.3d at 1173. This claim arose from a portion of the website where the subscriber is presented with a blank text box, and an invitation to complete it with as much or as little information about him/her as desired. "Roommate publishes these comments as written. This Court concluded that this "simple, generic prompt does not make it a developer of the information posted" as to the gratuitous discriminatory content in these text boxes. *Roommates.com, LLC*, 521 F.3d at 1174 (e.g., "[p]ref[er] white Male roommates"; "[t]he person applying for the room MUST be a BLACK GAY MALE"; "NOT looking for black muslims" etc.)

Here, denial of CDA immunity is even clearer than in *Roommates.com.* Facebook not only created the discriminatory platform with "exclude" choices; it then carried out the discriminatory selections by delivering ads only to the included classes. See TAC at 2-ER-248-249, ¶ 53; 2-ER-250, ¶ 59.

**[3] Other Section 230 Cases Support Plaintiffs' Position**

In *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020), the Court examined whether a website operator was immune from liability for the death of an individual who had posted a request to purchase heroin on Defendant's website. The Court upheld a finding of CDA immunity on the basis that the website did not create or develop its own content. Even though the website "used features and functions, including

algorithms, to analyze user posts on Experience Project and recommended other user groups" to users, the website was "acting as a publisher of others' content. "[A] website does not become a developer of content when it provides **neutral tools** that a user exploits to create a profile or perform a search using criteria that constitutes a protected class." *Id*. at 1099. But **where a website "directly participates in developing the alleged illegality, immunity will be lost**." *Id.* (citing *Roommates*).[17]

In *Lemmon v. Snap, Inc*., 995 F.3d 1085 (9th Cir. 2021), this Court reversed a dismissal based on immunity, in a negligent design case. There, parents of teens who died while speeding in a car sued a social media provider alleging that defendant's smartphone app incentivized the teens to drive over 100 mph and "post" photos of their quest online. The Court examined the three-prong test for CDA immunity and held that defendant satisfied the first prong (Snap was a provider of interactive computer services) but failed to satisfy the second two prongs. Defendant's immunity defense failed the second prong because plaintiffs' claim was

[17] The District Court's reliance on *Dyroff* is misplaced. There, "users were given something along the lines of blank text boxes in which they could post and share experiences, questions, and answers." 934 F.3d at 1099. Based on that factor, the Court concluded that defendant was a mere publisher of content created by third parties. In contrast, here Facebook's own ad platform did not involve blank text boxes—it actively enabled advertisers to "exclude" users by protected classes, thereby authorizing Facebook to present the resulting ads to less than the entire Facebook housing market. This is not merely posting an ad in a blank text box. The tools Facebook brought to the table were not neutral, and Facebook "direct[ly] participat[ed] in developing the alleged illegality." *See Dyroff,* 934 F.3d at 1099.

not one seeking to hold defendant liable as a "publisher or speaker" of content; rather it was a claim seeking to hold defendant liable for negligent design. *Snap*, 995 F.3d at 1092. Although publishing content is "a but-for cause of just about everything" Snap is involved in, that does not mean that the parents' claim, specifically, seeks to hold Snap responsible in its capacity as a "publisher or speaker." *Id.*, at 1093.

Finally, the *Snap* defendant failed to satisfy the third factor because there was no showing that plaintiffs' claim was based on information provided by another information content provider: "[t]his case presents a clear example of a claim that simply does not rest on third-party content. **Snap indisputably designed Snapchat's reward system and Speed Filter and made those aspects of Snapchat available to users through the internet**." *Id.*, at 1093. The Court summed up:

> … while providing content-neutral tools does not render an internet company a "creator or developer" of the downstream content that its users produce with those tools, our case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools. To the contrary, "[t]he [CDA] was not meant to create a lawless no-man's-land on the Internet."

*Snap*, 995 F.3d at 1094 (citations omitted).

Plaintiffs' position that Facebook's housing ad platform is not entitled to § 230 immunity has been supported by the U.S. Department of Justice. *See* Statement of Interest of the United States of America in *National Fair Housing Alliance et al v Facebook, Inc.*, U.S. District for the Southern District of New York, No. 18 Civ. 2689 (JGK), Dkt. # 48 at p. 22. ("Facebook is not entitled to CDA immunity …

because … Facebook mines user data, some of which users must provide, and then actively classifies users based on that data.").

As the Department of Justice noted in its brief:

> Facebook allegedly seizes upon benign content posted by its users — not merely sex and location but also personal interests, demographic information, and browsing history – to actively classify its users into categories that, according to Plaintiffs, enable landlords, developers, and housing service providers to discriminate more efficiently. Facebook markets the availability, ease of use, and effect of these classifications to potential advertisers without regard to the possible illegality of these classifications under federal fair housing laws. Moreover, Facebook specifically markets its ad targeting platform as a useful tool for providers of housing-related services covered by the FHA.

*Id*. at p. 23.[18]

### D. The District Court's Errors

The key to addressing section 230 of the Communications Decency Act here is understanding precisely the challenged wrongdoing in this case. The wrongdoing is not Facebook's passive posting of users' discriminatory housing advertisements. Rather, Plaintiffs challenge Facebook's creation of content in its ad platform, its active mining of users' data, imposing assumptions based on the data, using the data

[18] This Court may take Judicial Notice of the Department of Justice's position that Facebook's housing ad platform is not entitled to § 230 immunity. *See* Fed. R. Evid. 201. Indeed, this Court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'" *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

to create its own algorithms to divide the data into categories based on protected classes, and then promoting that packaging to housing advertisers, all for Facebook's profit.

As stated, the CDA grants immunity from liability to: (1) a "provider or user" of an "interactive computer service" (2) whom a plaintiff seeks to treat as a "publisher or speaker" (3) of information provided by another "information content provider." *Barnes, supra,* 570 F.3d at 1100–01. The District Court erred by holding that Plaintiffs' claims against Facebook were barred by the CDA section 230, because Facebook's actions here fail to satisfy two of these three prongs.

First, Plaintiffs' claims are not based on Facebook's status as a "publisher" of others' content (but rather on its own actions in mining Facebook users' information, feeding that information into its own algorithms to divide the world according to prohibited categories, and then marketing its advertising to housing providers to use those prohibited categories). Second, although the third-party advertisers are indeed "information content providers" the actions challenged here do not originate from these "information content providers," but from Facebook's own illegal activities.

Plaintiffs' Third Amended Complaint alleges that Facebook's impermissible actions were as follows:

> 6. *Facebook created*, developed, implemented, marketed, and utilized an advertising platform … that created, utilized, published, disseminated, circulated and/or targeted advertisements for housing. The *Ad Platform allowed and facilitated the exclusion of certain*

> *Facebook users based on their real or perceived personal characteristics (which included several protected classes), by creating, developing, and/or offering the "Exclude People" feature*. The Ad Platform also permitted housing advertisers to include only certain users with certain demographic characteristics (which included several protected classes), thereby excluding users who lacked those characteristics (the "Include People" feature).

2-ER-235, ¶6.

> 7. Facebook *created, utilized, published, circulated and developed its Ad Platform* to enable housing advertisers to exclude men or women from seeing an ad, a search box to exclude people who do not speak a specific language from seeing an ad, and a map tool to exclude people who live in a specified area from seeing an ad by drawing a red line around that ad.

2-ER-235, ¶7.

> 8. Facebook *also created, utilized, published, circulated and developed the Multicultural Affinity groups for use on its Ad Platform*. For example, Multicultural Affinity groups comprised people whose activities on Facebook suggested they may be interested in ads related to African American, Hispanic American, or Asian American communities.

2-ER-236, ¶8.

> 11. Throughout 2017 until about March 2018, four nonprofit organizations … *investigated Facebook's conduct* related to housing discrimination [and] created dozens of housing advertisements and completed Facebook's full ad submission and review process….

2-ER-236, ¶11.

> 12. The … investigation confirmed that Facebook *provided housing advertisers options to exclude the following categories of Facebook users* from receiving advertisements: (a) families with children; (b) women; (c) users with interests based on disability; and/or (d) users with interests based on national origin.

2-ER-236-37, ¶12.

> 15. *By intentionally creating, developing, and/or using both (1) the "Exclude People" feature, and (2) the "Include People" feature,* Facebook knowingly and intentionally prevented housing ads and the information and content therein from being published, provided, circulated or sent to users who did not match certain protected class characteristics.

2-ER-237, ¶15.

> 16. Facebook, through its *creation, utilization, development, implementation, promotion, targeting and/or marketing of its Multicultural Affinity, Exclude People, or Include People tools,* permitted its housing advertisers to select illegal preferences for its ads to Facebook users.

2-ER-237, ¶16.

> 21. *Facebook [itself] is an information content provider* for its Ad Platform, screening tools, and ads that were published, provided, circulated, targeted, utilized, disseminated and/or sent to Facebook users based on those users' actual or perceived protected class characteristics, compiled by Facebook ….

2-ER-240, ¶21.

> 54. During the ad targeting phase, *Facebook provided housing advertisers with tools to define which users, or which types of users, the advertisers wanted* to target with their ads. *Facebook provided a toggle button that enabled housing advertisers to exclude men or women* from seeing an ad, *a search box to exclude people who did not speak a specific language* from seeing an ad, and a *map tool to exclude people who lived in a specified area* from seeing an ad by drawing a red line around the excluded geographic area. Facebook also *provided drop-down menus and search boxes to exclude or include* (i.e., limit the audience of an ad exclusively to) people who share specified attributes. Facebook has *offered housing advertisers hundreds of thousands of attributes from which to choose*, ... Facebook also has offered housing

> advertisers the ability to limit the audience of an ad by selecting to include only those classified as, for example, "Christian" or "Childfree."

2-ER-249, ¶54.

> 57. Facebook enabled housing advertisers to exclude categories of people from viewing advertisements *based on the categories Facebook created by extracting user data and making inferences about those users*.

2-ER-250, ¶57.

Despite these detailed allegations about how Facebook's ad platform works, the District Court erred by finding that Facebook's Ad Platform tools were "neutral." 1-ER-10. Plaintiffs sufficiently alleged that Facebook's tools go well-beyond "neutral" assistance because the ad platform directs advertisements away from protected classes of people using discriminatory preferences and an ad delivery algorithm created by Facebook, not the third parties. Facebook was not neutral in this process—it actively participated in illegal conduct. As this Court held in *Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021) (citations omitted):

> A "material contribution" does not refer to "merely ... augmenting the content generally, but to materially contributing *to its alleged unlawfulness*." This test "draw[s] the line at the 'crucial distinction between, on the one hand, taking actions" to display "actionable content and, on the other hand, responsibility for what makes the displayed content [itself] illegal or actionable."

The dropdown menus and other tools in Facebook's ad platform are themselves content (in that they are material existing on the internet). Facebook

alone developed this content and is responsible for the composition of these tools. Facebook's own acts are inherently discriminatory and entirely Facebook's doing, and thus section 230 of the CDA does not apply. *See Roommates*, 521 F.3d at 1167–68. Further, the case against Facebook is even stronger than in *Roommates*. Not only did Facebook author the discriminatory choices in its ad platform, it effectuated the discrimination by delivering, or not delivering, ads to those selected – or excluded – by its paying customers.

## CONCLUSION

Plaintiffs respectfully ask this Court to reverse the August 20, 2021, Order and Judgment dismissing Plaintiffs' Third Amended Complaint, and to remand for further proceedings on all claims, including the state-law claims not previously addressed.

Date: January 19, 2022

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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## CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2022, I electronically filed the foregoing document APPELLANTS' OPENING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: January 19, 2022 By: *s/ Michael D. Seplow*

# ADDENDUM

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**42 U.S.C. § 3602: Definitions**

As used in this subchapter--

**(a)** "Secretary" means the Secretary of Housing and Urban Development.

**(b)** "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

**(c)** "Family" includes a single individual.

**(d)** "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, receivers, and fiduciaries.

**(e)** "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

**(f)** "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.

**(g)** "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

**(h)** "Handicap" means, with respect to a person--

**(1)** a physical or mental impairment which substantially limits one or more of such person's major life activities,

**(2)** a record of having such an impairment, or

**(3)** being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

**(i)** "Aggrieved person" includes any person who--

**(1)** claims to have been injured by a discriminatory housing practice; or

**(2)** believes that such person will be injured by a discriminatory housing practice that is about to occur.

**(j)** "Complainant" means the person (including the Secretary) who files a complaint under section 3610 of this title.

**(k)** "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with--

**(1)** a parent or another person having legal custody of such individual or individuals; or

**(2)** the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

**(l)** "Conciliation" means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

**(m)** "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.

**(n)** "Respondent" means--

**(1)** the person or other entity accused in a complaint of an unfair housing practice; and

**(2)** any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 3610(a) of this title.

**(o)** "Prevailing party" has the same meaning as such term has in section 1988 of this title.

## 42 U.S.C. § 3604: Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful--

**(a)** To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

**(b)** To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

**(c)** To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

**(d)** To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

**(e)** For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

**(f)(1)** To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

**(A)** that buyer or renter,

**(B)** a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

**(C)** any person associated with that buyer or renter.

**(2)** To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

**(A)** that person; or

**(B)** a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

**(C)** any person associated with that person.

**(3)** For purposes of this subsection, discrimination includes--

**(A)** a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment

of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

**(B)** a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

**(C)** in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that--

**(i)** the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

**(ii)** all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

**(iii)** all premises within such dwellings contain the following features of adaptive design:

**(I)** an accessible route into and through the dwelling;

**(II)** light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

**(III)** reinforcements in bathroom walls to allow later installation of grab bars; and

**(IV)** usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

**(4)** Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

**(5)(A)** If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

**(B)** A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

**(C)** The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent

with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

**(D)** Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

**(6)** **(A)** Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

**(B)** Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

**(7)** As used in this subsection, the term "covered multifamily dwellings" means--

**(A)** buildings consisting of 4 or more units if such buildings have one or more elevators; and

**(B)** ground floor units in other buildings consisting of 4 or more units.

**(8)** Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

**(9)** Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

**[footnotes omitted]**

**42 U.S.C. § 3606: Discrimination in the provision of brokerage services**

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.

## 42 U.S.C. § 3613. Enforcement by private persons

**(a) Civil action**

**(1)** **(A)** An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

**(B)** The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

**(2)** An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

**(3)** An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

**(b) Appointment of attorney by court**

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may--

**(1)** appoint an attorney for such person; or

**(2)** authorize the commencement or continuation of a civil action under subsection (a) without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

**(c) Relief which may be granted**

**(1)** In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to

subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

**(2)** In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

**(d) Effect on certain sales, encumbrances, and rentals**

Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

**(e) Intervention by Attorney General**

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 3614(e) of this title in a civil action to which such section applies.

## 47 U.S.C. § 230: Protection for private blocking and screening of offensive Material

**(a) Findings**

The Congress finds the following:

**(1)** The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

**(2)** These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

**(3)** The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

**(4)** The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

**(5)** Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

**(b) Policy**

It is the policy of the United States--

**(1)** to promote the continued development of the Internet and other interactive computer services and other interactive media;

**(2)** to preserve the vibrant and competitive free market . . .

**(3)** to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

**(4)** to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

**(5)** to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

**(c) Protection for "Good Samaritan" blocking and screening of offensive material**

**(1) Treatment of publisher or speaker**

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

**(2) Civil liability**

No provider or user of an interactive computer service shall be held liable on account of--

**(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

**(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

**(d) Obligations of interactive computer service**

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

**(e) Effect on other laws**

**(1) No effect on criminal law**

* * *

**(2) No effect on intellectual property law**

* * *

**(3) State law**

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

**(4) No effect on communications privacy law**

* * *.

**(5) No effect on sex trafficking law**

* * *

**(f) Definitions**

As used in this section:

**(1) Internet**

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

**(2) Interactive computer service**

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

**(3) Information content provider**

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

**(4) Access software provider**

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

**(A)** filter, screen, allow, or disallow content;

**(B)** pick, choose, analyze, or digest content; or

**(C)** transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

**N.Y. Exec. Law § 296. Unlawful discriminatory practices**

* * *

2-a. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations:

(a) To refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, creed, color, disability, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(b) To discriminate against any person because of his or her race, creed, color, disability, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, lawful source of income or familial status in the terms, conditions or privileges of any publicly-assisted housing accommodations or in the furnishing of facilities or services in connection therewith.

(c) To cause to be made any written or oral inquiry or record concerning the race, creed, color, disability, national origin, sexual orientation, gender identity or expression, membership in the reserve armed forces of the United States or in the organized militia of the state, age, sex, marital status, lawful source of income or familial status of a person seeking to rent or lease any publicly-assisted housing accommodation; provided, however, that nothing in this subdivision shall prohibit a member of the reserve armed forces of the United States or in the organized militia of the state from voluntarily disclosing such membership.

(c-1) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.

(d)(1) To refuse to permit, at the expense of the person with a disability ....

(e) Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the division grants an exemption based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups.
(f) Nothing in this subdivision shall be deemed to restrict the rental of rooms in school or college dormitories to individuals of the same sex.

* * *

5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.
(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.
(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.
(4) (i) The provisions of subparagraphs one and two of this paragraph shall not apply (1) to the rental of a housing

accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner resides in one of such housing accommodations, (2) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex or (3) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner resides in such housing accommodation or (4) solely with respect to age and familial status to the restriction of the sale, rental or lease of housing accommodations exclusively to persons sixty-two years of age or older and the spouse of any such person, or for housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply. However, such rental property shall no longer be exempt from the provisions of subparagraphs one and two of this paragraph if there is unlawful discriminatory conduct pursuant to subparagraph three of this paragraph.

(ii) The provisions of subparagraphs one, two, and three of this paragraph shall not apply (1) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex, (2) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner resides in such housing accommodation, or (3) solely with respect to age and familial status to the restriction of the sale, rental or lease of housing accommodations exclusively to persons sixty-two years of age or older and the spouse of any such person, or for housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(b) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, or managing agent of, or other person having the right of

ownership or possession of or the right to sell, rent or lease, land or commercial space:

(1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available;

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space; or in the furnishing of facilities or services in connection therewith;

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status; or any intent to make any such limitation, specification or discrimination.

(4) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of land or commercial space exclusively to persons fifty-five years of age or older . . . .

(c) It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space to any person or group of persons because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation, land or commercial space is not available for inspection, sale, rental or lease

when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or any facilities of any housing accommodation, land or commercial space from any person or group of persons because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status; or any intent to make any such limitation, specification or discrimination.

(3) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of any housing accommodation, land or commercial space exclusively to persons fifty-five years of age or older . . . .

(d) It shall be an unlawful discriminatory practice for any real estate board, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, disability, marital status, lawful source of income or familial status of any individual who is otherwise qualified for membership, to exclude or expel such individual from membership, or to discriminate against such individual in the terms, conditions and privileges of membership in such board.

(e) It shall be an unlawful discriminatory practice for the owner, proprietor or managing agent of, or other person having the right to provide care and services in, a private proprietary nursing home . …

(f) The provisions of this subdivision, as they relate to age, shall not apply to persons under the age of eighteen years.

(g) It shall be an unlawful discriminatory practice for any person offering or providing housing accommodations, land or commercial space as described in paragraphs (a), (b), and (c) of this subdivision to make or cause to be made any written or oral inquiry or record concerning membership of any person in the state organized militia in relation to the purchase, rental or lease of such housing accommodation, land, or commercial space, provided, however, that

nothing in this subdivision shall prohibit a member of the state organized militia from voluntarily disclosing such membership.

**N.Y. Exec. Law § 297: Procedure**

* * *

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of employment discrimination related to private employers and housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. …

10. With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party….

**Cal. Civ. Code § 51. Unruh Civil Rights Act; equal rights; business establishments; violations of federal Americans with Disabilities Act**

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.
(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.
(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information.
(d) * * *
(e) For purposes of this section:
* * *

(4) "Religion" includes all aspects of religious belief, observance, and practice.
(5) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.
(6) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status" includes a perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.
(7) "Sexual orientation" has the same meaning as defined in subdivision (s) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336)[1] shall also constitute a violation of this section.
(g) Verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section.

(h) Nothing in this section shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law, including Section 1632.

**Cal. Civ. Code § 51.5. Discrimination, boycott, blacklist, etc.; business establishments; equal rights**

(a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.
(b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.
(c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

**Cal. Civ. Code § 52. Denial of civil rights or discrimination; damages; civil action by persons aggrieved; intervention; unlawful practice complaint; waiver of rights by contract**

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

* * *

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney. An action for that penalty brought pursuant to Section 51.7 shall be commenced within three years of the alleged practice.

(3) Attorney's fees as may be determined by the court.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

(2) The facts pertaining to the conduct.

(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national

origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

**Cal. Bus. & Prof. Code § 17206. Civil Penalty for Violation of Chapter**

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

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