Case No. A164880

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

SAMANTHA LIAPES,
Plaintiff-Appellant,

v.

FACEBOOK, INC.,
Defendant-Respondent.

Appeal from the Superior Court of California
for the County of San Mateo, Honorable V. Raymond Swope
Case No. 20CIV01712

PLAINTIFF-APPELLANT'S OPENING BRIEF

MATTHEW W.H. WESSLER
(admitted pro hac vice)
PETER ROMER-FRIEDMAN
(admitted pro hac vice)
LINNET DAVIS-STERMITZ
(admitted pro hac vice)
GUPTA WESSLER PLLC
2001 K Street NW, Suite 850 N
Washington, DC 20006
(202) 888-1741
linnet@guptawessler.com

WILLIAM BROCK MOST
(SBN 279100)
LAW OFFICES OF WILLIAM MOST
201 St. Charles Avenue, Suite 114
New Orleans, LA 70170

JASON R. FLANDERS
(SBN 238007)
AQUA TERRA AERIS LAW GROUP
4030 Martin Luther King Jr. Way
Oakland, CA 94609

*JAHAN C. SAGAFI
(SBN 224887)
OUTTEN & GOLDEN LLP
1 California Street, Suite 1250
San Francisco, CA 94111
(415) 879-9324
jsagafi@outtengolden.com

ADAM T. KLEIN
(admitted pro hac vice)
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017

POOJA SHETHJI
(admitted pro hac vice)
OUTTEN & GOLDEN LLP
1225 New York Avenue NW,
Suite 1220B
Washington, DC 20005

Counsel for Plaintiff-Appellant

January 11, 2023

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with Rules 8.208 and 8.488 of the California Rules of Court, I certify, as counsel of record for the Plaintiff-Appellant, Samantha Liapes, that she knows of no entity that must be listed under Rule 8.208(e)(1) and (2).

Dated: January 11, 2023

/s/ Linnet Davis-Stermitz
Linnet Davis-Stermitz

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

INTRODUCTION

When people sign up for Facebook, they are required to input their age and gender. That might seem like a small thing. But for Facebook, it results in conduct that would never be tolerated if done by a traditional brick-and-mortar business. What most users don't know is that the company treats them differently depending on what they say.

Take the advertising Facebook supplies to each user. Although Facebook possesses thousands of data points of information about each user that it could use to decide what ads to show them, Facebook has decided to rely heavily on gender and age. For instance, Facebook offers advertisers the option to exclude whole age or gender categories from receiving any advertising campaign. And even when advertisers don't choose that option, Facebook employs its own age and gender stereotypes to decide which users will actually receive each advertisement.

Facebook applies these methods to all sorts of advertisements—including advertisements for insurance products. As plaintiff Samantha Liapes experienced, the company systematically steers ads for life, car, and auto insurance away from women and older users, and towards men and younger ones.

California has long required businesses to treat each person as an individual, without regard to their membership in a particular class. Under the Unruh Civil Rights Act, businesses can't rely on "irrelevant and artificially created distinctions" like age or gender when they decide how to allocate their goods or services. A brick-and-mortar store thus could never get away with offering special discounts to male customers. Nor could it bar customers over the age of 45. Precisely the same rules apply to companies that operate on the internet.

But when Ms. Liapes brought an Unruh Act claim against Facebook over its practice of steering insurance ads away from women and older

users, the superior court sustained the company's demurrer. It did not explain how it reconciled Facebook's practices with the Unruh Act's nondiscriminatory command. Instead, it fixated on the possibility that insurance advertisers might not take the company up on its offer to exclude women and older users from their ad campaigns. But in doing so, it disregarded the complaint's well-pleaded allegations that Facebook *did* treat Ms. Liapes differently on a routine basis—both at its advertisers' request and on its own accord.

Similar problems infect the superior court's conclusion that Section 230 immunized Facebook against Ms. Liapes's claims. Again ignoring most of the complaint's allegations, the superior court decided that each of Facebook's ad-targeting functions was a "neutral tool" that Section 230 immunizes from claims that Facebook violated anti-discrimination laws. That is wrong. Facebook's tools aren't neutral at all, but rather intentionally classify, weigh, and exclude users from Facebook's services based on their age and gender. And regardless, Section 230 only immunizes Facebook against claims that seek to hold it liable for information provided by somebody else—and even then, only when those claims impose duties that would require monitoring third-party content. Ms. Liapes's claims do neither.

BACKGROUND

I. Statutory background

A. For more than a century, California has prohibited arbitrary class-based discrimination in public accommodations. The proscription initially arose out of the common law—businesses that hold themselves out to the community have a "duty to serve all customers on reasonable terms without discrimination." (*In re Cox* (1970) 3 Cal.3d 205, 212 (*Cox*), citing Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State* (1967) 55 Cal.L.Rev. 1247, 1250.) In 1897, that proscription was

enacted into statute. (*Id.* at p. 213; Stats. 1897, ch. 108, § 1, p. 137.) But over time, the legislature grew concerned that it didn't go far enough. (See Klein, *The California Equal Rights Statutes in Practice* (1958) 10 Stan.L.Rev. 253; see also *Cox*, *supra*, at p. 214 [noting the concern that courts' restrictive interpretations were "improperly curtailing" the statute's reach].) So to "broaden[] its scope," the legislature enacted a new public accommodations law known as the Unruh Civil Rights Act. (*Cox*, *supra*, at p. 214.)

The statute has evolved slightly over time, but it currently entitles every person in the state to "the full and equal accommodations, advantages, privileges, or services in all business establishments of every kind whatsoever," "no matter what their sex, race, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status" may be. (Civ. Code § 51; see also *id.* § 51.5 ["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 [protected] characteristic."].)

B. The "consistent pattern" of this provision, the Supreme Court has explained, is its "wide applicability." (*Cox*, *supra*, 3 Cal.3d at p. 216.) The statute "stands as a bulwark protecting *each person's* inherent right to 'full and equal' access to 'all business establishments.' " (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167 (*Angelucci*), italics added.) It thus "precludes treatment of individuals as simply components of a racial, religious, sexual or national class." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 740 (*Marina Point*).) Instead, each person must be treated as an individual—without regard to their membership in a particular class or any of the stereotypes or common traits that might be associated with that class. (See *ibid.*)

Take the gender-based price discounts offered at so-called "Ladies Night" events. Some states have no objection to these practices; in Washington, for instance, the Supreme Court once held that a "Ladies Night" hosted by the Seattle Supersonics was "reasonable" on the ground that "women do not manifest the same interest in basketball that men do." (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 35 (*Koire*), citing *MacLean v. First Northwest Industries of America, Inc.* (1981) 96 Wash.2d 338.)

But "[w]ith all due respect," the California Supreme Court has dismissed that logic as impermissible "sexual stereotyping." (*Koire*, *supra*, 40 Cal.3d at p. 35.) The Unruh Act, it has explained, "prohibits *all* forms of stereotypical discrimination"—and that includes allocating goods or services on the basis of "irrelevant and artificially created distinctions." (*Id.* at pp. 35–36, italics added.) In the Court's view, when these sorts of distinctions are employed, they " 'cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes.' " (*Id.* at pp. 34–35.) That means " 'the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote.' " (*Ibid.*) And it thus undermines the Act's core "[p]ublic policy" of "strongly support[ing]" the "eradication of discrimination based on sex"—or any other protected characteristic. (*Id.* at 36.) Accordingly, the Act requires that discounts "must be applicable alike to persons of every sex, color, race, etc.' [citation], instead of being contingent on some arbitrary, class-based generalization." (*Ibid.*)

The Unruh Act does not stop at prohibiting biased pricing. It requires "equal treatment of patrons in *all aspects*" of California businesses. (*Koire*, *supra*, 40 Cal.3d at p. 29, italics added; see also *Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th 1171, 1174 (*Pizarro*) [the Act applies "not merely in situations where businesses exclude individuals altogether, but also where

treatment is unequal"].) It thus prohibits practices that, while allowing a person to "enter" a business establishment, subsequently rely on their membership in a class to restrict them "to certain portions of the premises" or to subject them "to 'abusive language' " and " 'discriminative sales and leasing policies.' " (*Koire*, *supra*, at 29; see, e.g., *Jones v. Kehrlein* (1920) 49 Cal.App. 646, 651 [black ticketholders admitted to theater but restricted to segregated section]; *People v. McKale* (1979) 25 Cal.3d 626, 637 [mobile-home park employed abusive language, and discriminatory policies, on the basis of religion and ancestry].) And it likewise bars restricting how many members of a particular class to permit into a facility at a time, how many hours those class members could patronize the facility, or what minimum charges they must pay to do so. (See *Koire*, *supra*, at pp. 29–30 [approving attorney general's judgment that imposing such limits on student patrons was unlawful].) In other words, an establishment cannot withhold its services from certain customers or offer different levels of service because of customers' protected characteristics.

The Act is broad in other ways as well. It applies to "all business establishments of every kind whatsoever" (Civ. Code §§ 51, 51.5; see also *Angelucci*, *supra*, 41 Cal.4th at p. 167), including those that operate on the internet, regardless of how "essential" they may be. (See, e.g., *Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1152–1154 (*Candelore*); *White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1023.) And the Act's protections likewise extend beyond the specific enumerated classes identified in the statute. That list, the Supreme Court has long held, is "illustrative, rather than restrictive." (*Cox*, *supra*, 3 Cal.3d at p. 212.) "[B]oth" the Act's "history and its language disclose a clear and large design to interdict *all* arbitrary discrimination by a business enterprise," and the Act has been "construed liberally to carry out [this] purpose." (*Ibid.*, italics added; *Angelucci*, *supra*, 41 Cal.4th at p. 167; see also *Marina Point*, *supra*, 30 Cal.3d at p. 736.) As a result, the Act's protections

extend to "forms of discrimination based on characteristics similar to the statutory classifications"—including "a person's geographical origin" or their age. (*Candelore*, *supra*, 19 Cal.App.5th at p. 1145; see also *Pizarro*, *supra*, 135 Cal.App.4th at p. 1176.)

C. That said, the "broad interdiction of the act is not absolute." (*Cox*, *supra*, 3 Cal.3d at p. 212.) A discriminatory practice can be "upheld as reasonable, and therefore not arbitrary" under the Unruh Act, "when there is a strong public policy in favor of such treatment." (*Candelore*, *supra*, 19 Cal.App.4th at p. 1153.) For example, the Unruh Act "does not prevent a business enterprise from promulgating 'reasonable deportment regulations,' " such as barring customers " ' " 'who damage property, injure others, or otherwise disrupt [] business.' " ' " (*Koire*, 40 Cal.3d at p. 30, quoting *O'Connor v. Village Green Owners Association* (1983) 33 Cal.3d 790, 794.) And the Act likewise allows businesses "to exclude children from bars or adult bookstores" because "it is illegal to serve alcoholic beverages or to distribute ' "harmful matter" ' to minors." (*Id.* at p. 31.) But this allowance is narrow. (See *id.* at 30 ["few cases" have approved this sort of exception]; *Marina Point*, *supra*, 30 Cal.3d at pp. 736–740 [cautioning against basing policies on generalizations about a class].) To be permissible under the Act, this "sort of discrimination" must be "based on a 'compelling societal interest.' " (*Koire*, *supra*, at p. 31, quoting *Marina Point*, *supra*, at p. 743.)

II. Factual background

A. In today's society, Facebook functions as a key source of information, including information about economic opportunities like insurance.

1. Facebook, Inc. (now known as Meta Platforms, Inc.) is a social-media corporation that operates the popular social networking service Facebook. (C.T. 387.) With over two billion users every month, Facebook is one of the most frequently used businesses on the internet. (See C.T. 388–389.) Facebook gives users multiple ways to interact with one another and

its services, but, for many people, the most prominent is the "News Feed," a page each user can scroll through to view posts and information provided by people and businesses they follow, as well as "sponsored" posts that advertisers pay Facebook to show users. (C.T. 389.)

For users, Facebook's ubiquity has made the platform a key source of information in today's society. It's the place that many people go to read the news, find out about community events, or learn about economic opportunities like insurance or jobs. (C.T. 382–383; Shearer & Mitchell, *News Use Across Social Media Platforms in 2020* (Jan. 12, 2021) Pew Research Center <https://perma.cc/BB7H-VND8> [Facebook is the primary source of news for over one-third of Americans].) And it's where a lot of people go to follow not just friends or family, but also celebrities, brands, and products that interest them. (C.T. 422; see also, e.g., *Why Do People Use Facebook?* (2022) Oberlo <https://perma.cc/YE9G-6ZUF>; see also *Essential Facebook statistics and trends for 2022* (Aug. 15, 2022) Datareportal <https://perma.cc/F3D6-QHCT> [the average user clicks on 8-20 advertisements per month].)

Given Facebook's remarkable popularity, it is not surprising that the company's primary business model is advertising. 98.5% of Facebook, Inc.'s revenue comes from advertisers, who together pay the company tens of billions of dollars each year to place advertisements on each user's News Feed—for everything from cooking to sporting events to home, auto, and life insurance. (C.T. 389, 392 [stating that $69.66 billion of Facebook's $70.70 billion in revenue in 2019 came from placing advertisements].)

The value that Facebook offers these advertisers is twofold. It promises a massive audience. And it offers optimization: Facebook collects tens of thousands of data points about each of its users, based on their activity on the site and around the internet. (C.T. 382, 384, 393–395.) And it harnesses those data points to deliver targeted advertisements to users who

Facebook thinks are likely to be interested in particular things. (*Ibid.*) For example, a sporting-goods store in Oakland could send its ads to people in Alameda County who Facebook thinks are interested in things like baseball, Little League, the Oakland Athletics, and the Golden State Warriors. (C.T. 393.) A culinary school in Los Angeles could send its ads to users in their area who Facebook thinks are interested in baking. (See *ibid.*) Or a national insurance company could send its ads to people who Facebook thinks are interested in home insurance, vehicle insurance, or life insurance throughout the country. (*Ibid.*)

Because of these features, Facebook has become one of the leading platforms in the world for companies to reach potential customers with their advertisements, especially for insurance products and services. (C.T. 382.)

B. Facebook's targeting practices skew what information users have access to depending on their age and gender.

But Facebook has structured its business so that its users don't all have the same experience. Despite having access to hyper-specific information about each user's actual interests, Facebook turns to crude gender- and age-based stereotypes to decide which advertisements will be shown to which users.

When users sign up for the service, Facebook requires them to supply their age and gender. (C.T. 390.) The company then classifies its users according to those characteristics. (*Ibid.*) And it proceeds to rely heavily on them, presenting users with different advertisements based on generalizations about whether their age and gender make them more or less likely to be interested in a particular product or service. (*Ibid.*)

The company accomplishes this result in two ways—first by selecting the audience for an ad, and second by deciding who in that audience will receive it.

1. Audience selection. *First*, Facebook's "audience selection" process relies heavily on age and gender. (C.T. 391–394.) For one thing, it requires advertisers to identify a preferred gender and age range for the audience that will be eligible to receive each ad, out of a set of options in a drop-down menu. (C.T. 391–393.) The default option, which advertisers can stick with if they want, allows ads to be sent to users of all genders who are 18 and older. (C.T. 392–393.) But Facebook offers advertisers the opportunity to select a narrower preference—such as an audience of men between the ages of 18 and 40—and it encourages them to do so. (C.T. 391–393.) Facebook's marketing materials for advertisers emphasize the benefit of targeting their ads based on age and gender. *Ibid.* And while advertisers *may* select an audience based on thousands of possible targeting categories—like users' interests in baking, baseball, or insurance—advertisers are only *required* to make a selection in three: age, gender, and location. (C.T. 393–396.)

Once advertisers select the eligible audience, Facebook can easily implement their age and gender preferences because it has carefully classified and segregated its users on these bases. (C.T. 393.) So if an advertiser chooses an audience selection of men who are 18 to 40, Facebook will never show that advertisement to a woman or a person who is older than 40. (C.T. 391.) And Facebook continues to encourage advertisers to employ this option, supplying them with real-time information about the gender and age breakdown of the users who engage with their advertisements. (C.T. 397.) For example, Facebook might tell an insurance company that 90% of the people who click on their ads are 44 years old or younger, and that 65% of those people are men—leading the insurer to respond by deciding to send *all* of its future ads only to men who are 44 years old or younger. (C.T. 391.)

Facebook also offers advertisers an option to make an audience selection using its "Lookalike Audiences" tool. For that tool, advertisers provide Facebook with a seed audience of people whom they view as desirable customers. (C.T. 398.) Facebook then uses an algorithm to identify what are, in its view, "common qualities" among the people in the seed audience, and then identifies a larger group of people whom Facebook deems "similar" to the seed audience. (*Ibid.*) Among the "common qualities" that Facebook employs in that algorithm are "demographic information" like age and gender. (C.T. 398–400.) And the company's Lookalike Audiences algorithm weights those qualities heavily. (*Ibid.*) So if an advertiser—even one who has no interest at all in age- or gender-targeting—submits a seed audience that is disproportionately male, the larger Lookalike Audience for its ad will be too. (C.T. 399.)

Whatever method is used, an audience is exclusive—the point is to generate a universe of users who could receive an ad, and to exclude everyone else from ever doing so. (C.T. 391–392.)

2. Advertising delivery. Once an audience selection is made, Facebook must decide which members of that audience to send a given ad to. Facebook prices its ads based on how many times they will be shown to users—in other words, based on how many "impressions" they will yield. (C.T. 391, 400.) And advertisers generally don't purchase enough impressions to send an ad to every member of the audience. Rather, they purchase a set number of impressions, and Facebook then decides which users in the audience selection will receive them, using another proprietary "ad delivery algorithm." (C.T. 400.) For example, an advertiser might choose an audience selection that has 500,000 users who are eligible to receive an ad, but purchase only 50,000 impressions, leaving Facebook to decide which of the 500,000 users will actually receive the ad. (*Ibid.*)

Facebook's ad-delivery algorithm heavily relies on the age and gender of users—more heavily than many other data points—to make this decision. (C.T. 400–402.) And it does this whether or not Facebook's advertisers ask or want it to. (See *ibid.*; see also C.T. 402–403 [advertisers who chose neutral audience-selection parameters nevertheless wound up with a "significant skew in delivery" along gender lines]; Kofman & Tobin, *Facebook Ads Can Still Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement* (Dec. 13, 2019) ProPublica <https://perma.cc/37XF-JT7L> [Facebook sent job ad to an audience that was 87% men although the advertiser chose an audience selection of all genders].) For example, even if an insurance advertiser wants its ads to reach people of all ages and genders on an equal basis, Facebook's ad-delivery algorithm will routinely send the ad disproportionately to men and younger people, and away from women and older people. (C.T. 401–403.)

The end result of these design choices is that users who are otherwise quite similar end up receiving very different information and opportunities—based solely on their age or gender. For example, one study found that Facebook usually sends credit ads to a disproportionately male audience. (C.T. 403.) Another found that employment ads on Facebook were skewed along gender lines. (C.T. 402). And there is evidence that Facebook's ad-delivery algorithm sends over 90% of its job advertisements in blue-collar industries like trucking and construction to men. (See Nix, *Female truckers group alleges Facebook's ad system is discriminatory* (Dec. 1, 2022) Wash. Post <https://perma.cc/H72L-RJ4M>.)

C. Facebook persists in employing discriminatory ad-targeting practices despite legal challenges.

Facebook's discriminatory ad-targeting practices are nothing new—and they have not gone without scrutiny. Facebook has been sued, by both civil rights groups and the federal government, over the company's

discriminatory audience-selection tools and ad-delivery algorithm in the housing context. (See Complaint, Doc. 1, *United States v. Meta Platforms, Inc.* (S.D.N.Y. No. 22 Civ. 5187 June 21, 2022); First Amended Complaint, Doc. 33, *National Fair Housing Alliance v. Facebook* (S.D.N.Y. No. 18-cv-2689 Aug. 17, 2018); see also Statement of Interest of the United States, Doc. 48, *National Fair Housing Alliance v. Facebook* (S.D.N.Y. No. 18-cv-2689 Aug. 17, 2018) (United States Statement of Interest) [statement of interest filed in fair-housing case]; see also Charge of Discrimination, *Secretary, U.S. Department of Housing & Urban Development v. Facebook, Inc.* (FHEO No. 01-18-0323-8 Mar. 28, 2019) <https://perma.cc/R2JN-RDRL> [administrative charge]; C.T. 386 & fn. 3 [discussing investigation by the Washington State Attorney General].)

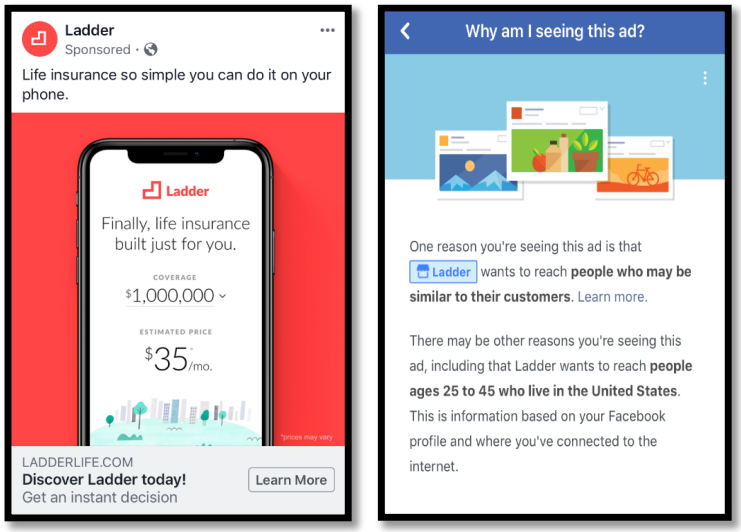
In response to this scrutiny, Facebook has agreed to make some changes to its advertising practices. For instance, it says it has stopped using most protected characteristics—including age and gender—to exclude users from the audience of job, housing and credit ads. (See, e.g., Jan & Dwoskin, *Facebook agrees to overhaul targeted advertising system for job, housing, and loan ads after discrimination complaints* (Mar. 19, 2019) Wash. Post <https://perma.cc/G9CA-P6NM>; Summary of Settlements Between Civil Rights Advocates and Facebook (Mar. 19, 2019) ACLU <https://perma.cc/6TY6-8TQX>; Settlement Agreement, Doc. 5-1, *United States v. Meta Platforms, Inc.* (S.D.N.Y. No. 22 Civ. 5187 June 21, 2022).) Similarly, for insurance advertising, the company no longer relies on *most* protected characteristics—like race or disability status—to target ads. (See C.T. 386.) But Facebook has refused to extend the same protections to age or gender, continuing to allocate insurance opportunities on these bases. (See *ibid.*)

D. Based on Ms. Liapes's age and gender, Facebook prevented her from seeing advertisements for insurance products she was interested in.

1. Plaintiff Samantha Liapes is a 48-year-old woman who lives in Alameda County. (C.T. 387.) She is a regular user of Facebook. (*Ibid.*) And over the last few years, as she used Facebook, she was interested in learning about insurance products through ads on her Facebook News Feed. (*Ibid.*)

But Facebook greatly reduced her chance of receiving those insurance ads. Through its audience-selection and ad-delivery methods, the company relied on Ms. Liapes's age and her gender to steer insurance advertisements away from her and towards similarly situated men and younger users. (C.T. 403.)

Sometimes Facebook excluded Ms. Liapes from seeing ads based on her age. For example, take the life insurance ad shown below to the left:

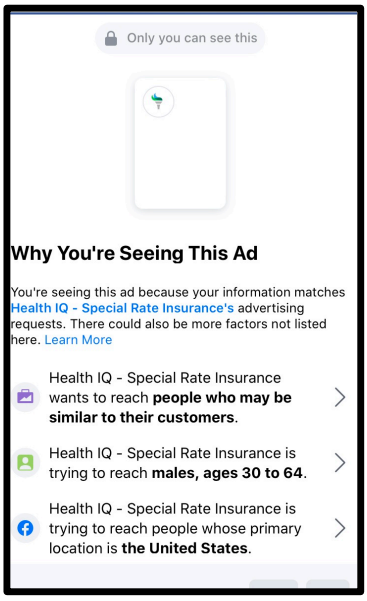


(C.T. 405.)

Solely because she was over 45, Ms. Liapes never saw this ad on her News Feed. And the "Why am I seeing this ad?" screen shot shown to the right explains why. Facebook includes this information as part of every ad it delivers so that it can inform the users who *do* see particular ad campaigns why they did—to encourage them to engage with a particular ad. (C.T.

418–420.) Here, it indicates that the advertiser, the life insurance provider Ladder, took Facebook up on its offer to discriminate and limited the audience of its ad to "people ages 25 to 45"—excluding people like Ms. Liapes. (See C.T. 405.)

At other times, Facebook did the same thing with respect to gender:



(C.T. 406.) Here too, Facebook ensured that Ms. Liapes could never have seen this life insurance ad, this time by offering an advertiser the ability to exclude all women from receiving the ad, and by delivering it accordingly. (See *ibid.*; see also C.T. 407 [another, similar example].)

And even when insurers didn't exclude Ms. Liapes from their audience selections based on her age or gender, Facebook itself steered insurance ads away from her—for insurance products and services she was interested in learning about and pursuing. Over and over again, the company's "Lookalike Audiences" and ad-delivery algorithms heavily weighted her age and gender to steer ads for life, car, and auto insurance policies and services away from Ms. Liapes and towards men and younger users—significantly lowering her chances of seeing any of these ads. (See C.T. 408–418, 420, 423.) The upshot was that men and younger Facebook

users who were interested in seeing insurance ads—and even some who weren't—routinely saw insurance ads that Ms. Liapes had next to no chance of seeing. (See *ibid.*)

Facebook's discrimination worked as intended: Ms. Liapes was denied the opportunity to receive thousands of insurance advertisements because of her age and gender. (C.T. 424.) And she was not alone—women and older users like her have all been subjected to the same discriminatory practices for years. (See C.T. 403–424.)

To be sure, in some cases advertisers could have run parallel ad campaigns in which an ad was shown only to men, and then the same or a similar ad was shown only to women—or in which the same ad was shown to a younger audience in one instance, and a separate older audience in another. But in the vast majority of cases, that didn't happen. (C.T. 425–426.) As a result, far fewer insurance advertisements were sent to women and older people than men and younger people. (*Ibid.*)

Nor was there a particular reason for Facebook to deploy insurance advertisements in this way. Few of these advertisements related to insurance opportunities that were restricted to men or younger users. (C.T. 425.) And that is unsurprising. California law prohibits insurance companies from refusing to provide insurance products or services to women or older people based on their age. (C.T. 419.) And when it comes to auto insurance, the state goes even further, barring insurers from using gender to set private auto insurance rates. (See Code Regs. tit. 10 § 2632.5; see also Leefeldt, *California bans gender in setting car insurance rates* (Jan. 8, 2019) CBS News <https://perma.cc/BB9R-2Y8W>.)

2. These practices negatively affected Ms. Liapes. She wanted information about, and access to, new insurance opportunities—and for her, the Facebook News Feed was an ideal source of both. (C.T. 387, 403.) But because Facebook steered ads away from her, she was denied thousands

of ads she otherwise could have received. (See C.T. 403–418.) Being excluded from advertisements for these sorts of opportunities made it more difficult for her to learn about them, and in many cases meant she never learned about products she would have wanted. (C.T. 386; see also C.T. 405–418, 426–427.)

Thanks to the success of Facebook's ad-targeting efforts, Ms. Liapes cannot know about every ad that Facebook steered away from her. But for those she was able to identify, she was interested in the opportunities offered. (C.T. 405–419.) Ms. Liapes didn't have life insurance and was interested in obtaining it. (See *ibid.*) And while she did have car and home insurance, she was interested in shopping around for better rates. (See *ibid.*) So if she had received the ads Facebook steered away from her, she would have clicked on them and pursued the services and opportunities they offered. (*Ibid.*) And that would have given her a greater chance of securing cheaper, better, or more appropriate insurance than she already had. (C.T. 426.)

Beyond this, when Ms. Liapes used Facebook's services, she wanted to be treated like anyone else—not excluded from information and opportunities she was interested in based on assumptions about her age or gender. (C.T. 387.) Instead, she was subjected to stigmatizing stereotypes. (See C.T. 427–428.)

III. Procedural background

A. Ms. Liapes sues Facebook in superior court.

To redress Facebook's discriminatory treatment of her and millions of other Californians, Ms. Liapes filed this putative class action challenging Facebook's conduct under the Unruh Act. (See C.T. 380–436.) On behalf of a class of similarly situated Californians, she alleged that by discriminating based on age and gender when providing users with ads for valuable insurance opportunities, Facebook violated the Unruh Act's proscriptions

on age and gender discrimination, and that the company aided, abetted, or incited insurance advertisers in doing the same. (See C.T. 422–423, 432–434.)

B. The superior court dismisses Ms. Liapes's complaint.

Facebook filed a demurrer. It did not dispute that the Unruh Act applies to online businesses, that advertisements for insurance are a benefit or advantage of Facebook's accommodations, or that Facebook routinely denied insurance advertisements to Ms. Liapes because of her age and gender. Instead, Facebook argued that expressly relying on the age and gender of its users to decide which insurance advertisements they receive does not constitute intentional discrimination.

The superior court agreed and sustained the demurrer on that ground. (See C.T. 468–502; 719–727.) It held that Facebook's audience-selection tool is not discriminatory at all because that tool offers advertisers a default option to deliver ads to all genders and age groups—even though the tool *also* enables advertisers to narrow their preferences to exclude all women and all people above certain ages from ad audiences. (C.T. 721–722.) It extended the same logic to the Lookalike Audiences tool, ignoring the complaint's plain allegations that Facebook explicitly used age and gender classifications when it applied that tool. (C.T. 722.) And when it came to the ad-delivery algorithm, the court decided to disregard altogether Ms. Liapes's allegations that that algorithm expressly discriminated on the basis of age and gender, even when advertisers indicated no interest in doing so. (C.T. 722–723.) The court justified that decision on the grounds that these allegations were, in its view, inconsistent with the allegation, made in an earlier pleading, that the purpose of the algorithm was to increase engagement with advertisements and to optimize advertisers' goals. (*Ibid.*)

The court rejected Ms. Liapes's aiding-and-abetting allegations on the grounds that there were not "sufficient facts" to show that Facebook

knew its advertisers' conduct violated the Unruh Act, or that Facebook had given substantial assistance to them in doing so. (C.T. 723.)

And finally, the court decided that, in any event, all of Ms. Liapes's claims were barred by Section 230 of the federal Communications Decency Act. (C.T. 723.) Here it repeated its logic on the merits: It again disregarded altogether Ms. Liapes's allegations concerning the ad-delivery algorithm. (*Ibid.*) And as to the company's audience-selection tools, it continued to insist they were "neutral" ones, with any "improper" decisions made solely by its advertisers. (*Ibid.*) That left Facebook immune from any challenge to its own conduct. (*Ibid.*)

The court entered a final judgment of dismissal with prejudice on January 25, 2022, and Ms. Liapes filed a notice of appeal on March 25, 2022. (C.T. 733–737.)

SUMMARY OF ARGUMENT

I. The Unruh Act prohibits businesses like Facebook from intentionally discriminating in any aspect of their businesses. That includes excluding people from a service that they offer, or providing them with an inferior one, on account of those people's age, gender, or other protected characteristics.

That is what Facebook does here: It classifies its users based on their age and gender, and it expressly relies on those classifications to decide which customers will receive its services, including advertisements for life, car, and automobile insurance. *First*, it offers insurance advertisers the opportunity to exclude users from the audience for their ads based on age or gender, and it executes whatever exclusions they ask for. And *second*, even if advertisers don't take them up on this offer, Facebook excludes women and older people from its insurance advertising services anyway: It relies heavily on the age and gender composition of a seed audience to generate a Lookalike Audience, and it weights both classifications heavily again when

it applies its ad-delivery algorithm to decide which eligible users may receive an ad. When Facebook employed these tools to exclude Ms. Liapes from its insurance advertising services, it violated the Unruh Act.

II. The superior court was wrong to conclude otherwise.

A. Facebook's ad-targeting tools cannot be defended on the ground that they are facially "neutral." The audience-selection tool relies on age and gender to allocate advertising benefits—first in making it possible for advertisers to exclude users from ads on those bases, and then by expressly relying on age and gender in implementing what they request. It is no excuse that Facebook was implementing its advertisers' discriminatory preferences, because the company cultivated them at every step, and companies cannot justify their discriminatory conduct based on the preferences of other people. Meanwhile, even though advertisers supplied the seed audience for the Lookalike Audiences tool, it was Facebook alone that treated the gender and age composition of that audience as significant. And even if Facebook's advertisers bear primary blame for their discriminatory ad campaigns, Facebook is still liable for aiding and abetting them in doing so.

B. The superior court erred in disregarding Ms. Liapes's allegations as to the ad-delivery algorithm. Its belief that those allegations contradicted an earlier pleading is false: In one respect the superior court identified, the pleadings were identical, and in the other, they are easily reconcilable.

III. The superior court likewise erred in finding Facebook immune from Ms. Liapes's claims under Section 230. Section 230 precludes liability only for claims that hold an internet company for "information provided by another information content provider." (47 U.S.C. § 230(c)(1).) But Ms. Liapes's claims do not do this.

A. For information to be "provided by *another* information content provider," it has to be provided by somebody other than the internet

company invoking immunity. The internet company cannot itself be responsible, in whole or in part, for the creation or development of the information—such as when it materially contributes to whatever makes the information illegal. Yet Facebook is directly responsible for creating its audience-selection tool and implementing advertisers' selections. And the company plays an even more active role in constructing its Lookalike Audiences and delivering its ads, because Facebook, and Facebook alone, designed those algorithms to rely heavily on age and gender. It thus materially contributed to what makes its advertising services illegal. The superior court only concluded otherwise based on its mistaken view that these tools were neutral.

And in any event, Ms. Liapes's claims don't hold Facebook liable for information at all. They hold it liable for its conduct in classifying users by age and gender.

B. Nor do Ms. Liapes's claims treat Facebook as a publisher. The company's asserted liability isn't based on the content of any speech it published, but rather on its own decisions to steer advertising services based on age and gender. And Ms. Liapes's claims don't impose on Facebook any duties to monitor third-party content at all. They simply ask the company to stop relying on users' age and gender to distribute insurance ads.

STANDARD OF REVIEW

A demurrer must be denied if a complaint alleges facts that, if proven, would entitle the plaintiff to some relief under any possible legal theory. (See *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 872.) In reviewing a demurrer, a court must "assume the truth of the properly pleaded factual allegations [and] facts that reasonably can be inferred from those expressly pleaded," and "liberally construe the pleading with a view to substantial justice between the parties." (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558.) And this Court "independently

review[s] the superior court's ruling on a demurrer," determining "de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense." (*Ibid.*)

ARGUMENT

I. When Facebook provides its customers with the benefit of insurance ads, it intentionally discriminates against women and older people in violation of the Unruh Act.

The Unruh Act prohibits businesses from intentionally discriminating in any aspect of their businesses, including by excluding people from a service that they offer, or providing them with an inferior one, on account of age, gender, or other protected characteristics. (*Koire*, *supra*, 40 Cal.3d at p. 29; *Candelore*, *supra*, 19 Cal.App.5th at pp. 1144–1146.) Its fundamental rule is that each business establishment must treat each person in California as an individual—not as a member of a particular class. (*Marina Point*, *supra*, 30 Cal.3d at p. 740.) When a business intentionally relies on a protected trait to treat an individual differently, it violates the Act. (*Koire*, *supra*, at p. 31.) So it is that carwashes and nightclubs can't offer different prices to customers based on their gender. (*Ibid.*; *Angelucci*, *supra*, 41 Cal.4th at pp. 164–165.) And the same goes for online services; they can't price their services differently because of a customer's age or gender (*Candelore*, *supra*, at p. 1145), or deny particular benefits based on membership in such classes.

Facebook is no different. The company cannot treat its users differently based on their age or gender when providing its services. Yet that is exactly what the complaint alleges it does. Facebook classifies its users based on their age and gender and it then expressly relies on those classifications, over and over again, in deciding which customers will receive insurance ads—and which customers won't. (C.T. 391–428.) And it does so even though those ads—and the information contained in them—are one

of the benefits or advantages that Facebook provides users when they frequent its accommodations. (C.T. 422.)

It is no accident that Facebook engages in this sort of discrimination. Each of the company's tools is intentionally designed to classify users based on their age and gender, and then to rely on those classifications in deciding whether to deliver them particular ads, including insurance ads. (C.T. 390, 392, 427, 432–433.) *First*, Facebook relies on age and gender to formulate the audience for an ad. It requires advertisers to identify their age or gender preferences for the audience their ads will reach, giving them the option to omit whole groups. (C.T. 391–397.) And then it executes those preferences, relying on users' age or gender to decide who will receive an ad and who will not. (*Ibid.*) And *second*, even when its advertisers decline Facebook's invitation to exclude users of a particular age or gender from their audience, Facebook discriminates based on age and gender anyway—sometimes when formulating a Lookalike Audience for an ad, and always when applying its ad-delivery algorithm to decide which eligible users to deliver the ad to. (C.T. 398–404.) When Facebook applies all of these tools, it employs age and gender stereotypes to intentionally steer insurance and other advertisements away from women and older users and towards men and younger users. (C.T. 403–428.)

Facebook does this all the time. It's exactly what Ms. Liapes experienced: Despite being interested in insurance, she routinely didn't receive insurance ads that were shown to similarly situated men and younger people. (C.T. 424–425.) She thus wound up receiving far fewer insurance ads than they did—just because she was an older woman. (*Ibid.*) Her complaint even identifies examples of specific advertisements she never received for this very reason. (See C.T. 405–418.)

This sort of facially discriminatory business practice is the quintessential Unruh Act violation: denying or providing an inferior service

to a customer based on their membership in a protected class. (See *Koire*, *supra*, 40 Cal.3d at p. 29; *Candelore*, *supra*, 19 Cal.App.5th at pp. 1144–1146; see also, e.g., *Minton v. Dignity Health* (2019) 39 Cal.App.5th 1155, 1163 (*Minton*) [hospital violated Unruh Act when it expressly relied on a patient's gender identity to deny a service].)

Of course, merely classifying customers and treating them differently based on their age or gender does not in every instance violate the Unruh Act. Discriminatory practices may be "upheld as reasonable, and therefore not arbitrary, 'when there is a strong public policy' " that justifies treating people differently based on their membership in a particular class. (*Candelore*, *supra*, 19 Cal.App.5th at p. 1153, quoting *Koire*, *supra*, 40 Cal.3d at p. 31.)

But Facebook has never argued that it has a valid basis for treating users differently based on their age or gender, let alone a strong public policy for denying its services to tens of millions of Californians. And regardless, it is difficult to imagine what justification could prevail. The mere "quest for profit maximization can never serve as an excuse for prohibited discrimination among potential customers." (*Candelore*, *supra*, 19 Cal.App.5th at p. 1153; see also *Koire*, *supra*, 40 Cal.3d at p. 32; *Marina Point*, *supra*, 30 Cal.3d at p. 740, fn.9.) While a business may "employ[] rational *economic* distinctions" in the service of greater profits, "those distinctions must be drawn in such a way that they could conceivably be met by *any* customer, regardless of the customer's [] personal characteristics." (*Candelore*, *supra*, at p. 1154, second italics added.) "The key" is that whatever policy the business employs, it must "be 'applicable alike to persons of every sex, color, race, and age, etc.' " (*Ibid.*, quoting *Koire*, *supra*, at p. 36].) It cannot be " 'contingent on some arbitrary, class-based generalization.' " (*Ibid.*, quoting *Koire*, *supra*, at p. 36.)

II. The superior court's conclusions to the contrary are wrong.

The superior court dodged this straightforward conclusion in two ways. *First*, it said that the complaint's allegations demonstrated no intentional discrimination in Facebook's audience-selection functions because those tools were "neutral" on their face—and it was only the conduct of advertisers that rendered them discriminatory. *Second*, it said that the complaint failed to allege intentional discrimination in the company's ad-delivery algorithm because its allegations on this front impermissibly contradicted an earlier pleading. In both respects, the court was wrong.

A. Facebook's audience-selection functions are intentionally discriminatory.

To begin with, Facebook's audience-selection functions cannot avoid Unruh Act liability on the grounds that they are "neutral on [their] face." (C.T. 721.) Neither is neutral at all, and even if they were, Facebook still would be liable under the plaintiffs' aiding-and-abetting theory.

1. Start with the audience-selection tool. Although the tool offers a default option that doesn't discriminate based on age or gender, Facebook designed it to permit advertisers to instead request that Facebook exclude users from an ad's audience based expressly on their age or gender. It carefully designed its interface to make that exclusion possible—requiring all users to disclose their age and gender and classifying all users accordingly. And it executes whatever age or gender exclusions an advertiser opted for, intentionally relying on users' age or gender to include or exclude them from an ad.

Those audience-selection decisions are not neutral—they can't be. That's because they expressly rely on age and gender to allocate the advertising benefits Facebook provides its users. And it is black-letter law that expressly relying on a protected status to deny someone a benefit without a compelling justification is considered facial and intentional discrimination

that violates the Unruh Act. (See *Minton*, *supra*, 39 Cal.App.5th at p. 1163 (facially discriminatory policy violated Unruh Act where hospital refused to perform a medical procedure because of the patient's gender identity); *Iniestra v. Cliff Warren Investments, Inc.* (C.D. Cal. 2012) 886 F.Supp.2d 1161, 1163–1164 ("facially discriminatory [regulations] against families with children" violated Unruh Act); *Evenchik v. Avis Rent a Car System, LLC* (S.D. Cal., Sept. 17, 2012, No. 12-cv-61 BEN) [2012 WL 4111382], at *5) (denying motion to dismiss where plaintiff alleged under Unruh Act that "[g]ay and lesbian renters were given discounts because of their sexual orientation" while "[p]laintiff was not given a discount because she was . . . of a different sexual orientation"); see also *EEOC v. Borden's, Inc.* (9th Cir. 1984) 724 F.2d 1390, 1393 ("[F]acially discriminatory policies are intentional discrimination.")[1]

The superior court seems to have concluded that Facebook doesn't engage in intentional discrimination because the company wasn't *solely* responsible for the unequal treatment that Ms. Liapes suffered; rather, that treatment also required insurance advertisers to adopt discriminatory preferences. But there are several problems with that argument.

For one thing, the Unruh Act doesn't require that a company have sole responsibility for a discriminatory act. A plaintiff's unequal treatment must simply be "the result of" the defendant's business practice. (See *Koire*, *supra*, 40 Cal.3d at p. 29.) In other words, that practice must be a "substantial factor in causing" the harm the plaintiff suffered. (*Thurston v.*

---

[1] It also makes no difference that Facebook theoretically could use its tools to discriminate against younger people and men when delivering insurance ads. Civil rights laws like the Unruh Act and the federal Civil Rights Act "focus[] on individuals rather than groups"; thus, it is not "a defense for [a defendant] to say it discriminates against both men and women because of sex" when the "statute works to protect individuals of both sexes from discrimination, and does so equally." (*Bostock v. Clayton County* (2020) 140 S.Ct. 1731, 1741.)

Omni Hotels Management Corporation (2021) 69 Cal.App.5th 299, 344, fn.5; see also, e.g., *Nkwuo v. MetroPCS, Inc.* (N.D. Cal., Aug. 21, 2015, No. 14 Civ. 05027) [2015 WL 4999978], at p. *2, fn. 11). But the defendant's conduct need not be the only cause.

Facebook's conduct here easily meets this standard. Facebook, not its advertisers, classifies and segregates its users based on their age and gender. (C.T. 389–391.) Facebook, not its advertisers, designs and maintains an audience-selection tool that enables those advertisers to exclude users from their advertising campaigns based on these protected characteristics. (C.T. 391–398.) And Facebook additionally encourages advertisers to exploit the option to target advertisements based on age and gender, suggesting strategies to do so in its marketing materials and providing real-time updates that inform advertisers about the age- and gender-breakdown of the users who engage with their advertisements. (C.T. 393–396, 397.)[2] While the advertisers decide whether to take Facebook up on that offer, Facebook decided to put that discriminatory choice in front of them. And Facebook knowingly implements whatever exclusions advertisers ask for when delivering insurance ads—even though it retains the "complete right" to approve or disapprove them. (C.T. 392.) Facebook's role is not just a

---

[2] The superior court disregarded this point because it said (at C.T. 722) that the "encouragement" Facebook supplied in this case is distinguishable from what the Ninth Circuit discussed in its opinion in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157 (en banc) (*Roommates*). But it didn't say why, and its point doesn't make much sense. For starters, *Roommates* addressed Section 230 immunity—not what amounts to unlawful discrimination. And in any event, as we discuss further below (see *supra* Part III), *Roommates* looks just like this case. There, as here, users were given the option to choose between non-discriminatory and discriminatory preferences, and the Ninth Circuit nevertheless held that the defendant there could bear responsibility for the steering that followed. (See *Roommates*, *supra*, at p. 1167.)

"substantial factor" in its advertisers' discriminatory ad-targeting campaigns, it is an integral one.

Nor can Facebook somehow rely on the defense that all it was doing was implementing its advertisers' discriminatory preferences. In the first place, Facebook took it upon itself to classify its users based on age and gender. And it took it upon itself to make age and gender two of only three targeting parameters advertisers were required to fill in. So Facebook isn't simply responding to customers' demands. It is cultivating them.

And in any event, it is by now "widely accepted" that companies can't justify their own discriminatory practices based on other people's discriminatory preferences. (See *Chaney v. Plainfield Healthcare Center* (7th Cir. 2010) 612 F.3d 908, 913.) This concept is particularly widespread in the Title VII context. (See, e.g., *ibid.*; *Fernandez v. Wynn Oil Co.* (9th Cir. 1981) 653 F.2d 1273, 1276–1277 [employers may not adopt sexually or racially discriminatory practices on the grounds that their customers have "stereotyped" preferences].) But the logic applies with equal force here, where the California courts have long held that the Unruh Act permits discriminatory practices only when they are based on the most "compelling societal interest[s]." (*Koire*, *supra*, 40 Cal.3d at p. 30, quoting *Marina Point*, *supra*, 30 Cal.3d at p. 743.)

2. Whatever the merits of the superior court's logic in the context of the audience-selection tool, it makes no sense at all as applied to the Lookalike Audiences tool. The superior court's view appears to be that, because advertisers supply the seed audience for the tool, Facebook has no control over what its own algorithm does to create a larger audience.

That makes no sense. Advertisers may be the ones who supply a seed audience, but it is Facebook alone that decides how to transform that seed audience into the Lookalike Audience that becomes the audience for an ad. (C.T. 398–400.) Facebook has thousands of data points about each

individual's *actual* preferences, and there is no reason the company needs to rely on generalizations about their age or gender to figure out what those might be. (See C.T. 382, 384; see also C.T. 422.) Nevertheless, the company decided to design its Lookalike Audiences algorithm to parse each seed audience by age and gender, to treat the age and gender composition of that pool as significant, and to generate a new, larger audience by placing heavy weight on those characteristics. (C.T. 398–400.) And Facebook gave advertisers no control over this choice; indeed, even if they would prefer *not* to have their seed audience parsed in this way, Facebook gives them no choice in the matter. (See *ibid.*)

3. And even if one could lay the primary blame for a given discriminatory ad campaign on one of Facebook's advertisers, Facebook still would be liable under an aiding and abetting theory.

Aiding and abetting liability attaches when a defendant " '(a) knows the other's conduct constitutes a breach of duty and gives substantial assistance to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.' " (*Casey v. U.S. Bank National Association* (2005) 127 Cal.App.4th 1138, 1144, quoting *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.)

The amended complaint included ample allegations supporting such a theory. For instance, it alleges that Facebook has known for years that insurance advertisers were taking it up on its invitation to intentionally target the company's users based on their age and gender. (See C.T. 390–391.) Yet the company maintained the audience-selection functions that made that targeting possible—and each time an advertiser made a discriminatory targeting decision, Facebook knowingly and intentionally executed that request. (C.T. 421.) These allegations easily suffice to show Facebook's knowledge of its advertisers' conduct and its substantial

assistance in the same. (See *Schultz v. Neovi Data Corporation* (2007) 152 Cal.App.4th 86, 94 [defendant was liable for aiding and abetting where it knew of illegal conduct but nevertheless continued to facilitate orders for and profit from it].) Not only did the company provide every tool its advertisers needed to target their advertisements on the basis of age and gender, but it was Facebook, not its advertisers, who turned the key.

B. Ms. Liapes's allegations regarding Facebook's ad-targeting algorithm may not be disregarded.

The superior court also erred in disregarding Ms. Liapes's allegations about Facebook's ad-targeting algorithm. To justify its decision that the algorithm's reliance on age and gender to steer insurance ads away from older people and women does not violate the Unruh Act, the superior court relied heavily on the sham pleading rule, deciding that some of the allegations in the operative complaint had to be disregarded because they were inconsistent with the initial complaint Ms. Liapes first filed in this matter. (See C.T. 722.) Specifically, the superior court said, it was required to disregard the amended complaint's allegations on two points—(1) that Facebook applies its ad-delivery algorithm, and itself discriminates against users based on age and gender, even when advertisers have not themselves indicated an interest in doing so, and (2) that the purpose of Facebook's algorithm was to increase the likelihood that users would click on each advertisement. (*Ibid.*) But in both respects Ms. Liapes's allegations are perfectly consistent.

In the first, they are identical: *Both* complaints allege that Facebook applies its ad-delivery algorithm, and itself discriminates against users based on their age and gender, even when advertisers have not indicated an interest in doing so. (Compare C.T. 26 ["Facebook uses both the age and gender of its users to determine who will actually receive advertisements *regardless* of whether the advertiser directs Facebook to limit the age or

gender of its audience selection. This means that even when advertisers do not want to discriminate based on age or gender" in the delivery of advertisements, "Facebook itself decides" to do so.] with C.T. 401 [same].)

And when it comes to the "purpose" of the algorithm, the allegations in the amended complaint are easily reconcilable with those in the initial one. The initial complaint alleged that Facebook's algorithm is designed to deliver ads to the people Facebook thinks will optimize an advertiser's audience. (See C.T. 26.) The amended complaint instead makes the point that Facebook earns more money when its ads are engaged with. (See C.T. 400.) These things can both be true—if Facebook makes more money when users engage with advertisements, it has the incentive to optimize the audience for those ads. In any event, *whatever* Facebook's general purposes were in designing and operating its ad-delivery services, Unruh Act liability doesn't hinge on whether a business's motivations are financial or exclusionary, or benign or malign. That is why the Supreme Court has repeatedly held that "proceeding from a motive of rational self-interest" cannot "justify discrimination." (*Koire*, *supra*, 40 Cal.3d at p. 32; *Marina Point*, *supra*, 30 Cal.3d at p. 740, fn. 9.)

For that same reason, the superior court's hangups are totally beside the point. Regardless of the ultimate purpose of Facebook's ad-targeting algorithm, its practice of expressly and intentionally excluding users from receiving insurance ads based on age and gender is enough to show that it engaged in a discriminatory practice that violates the Unruh Act.

III. Facebook is not entitled to Section 230 immunity.

The superior court was just as mistaken when it comes to Section 230 immunity. All the court said on this score was that it was "persuaded by" an unpublished federal district-court decision that found Facebook immune from similar claims. (See C.T. 723.) Specifically, the superior court agreed with that decision's conclusion that Facebook's audience-selection and

Lookalike Audiences tools were immune from suit because they were themselves "neutral." (*Ibid.*, quoting *Vargas v. Facebook* (N.D. Cal., Aug. 20, 2021, No. 19-cv-5081) [2021 WL 3709083], at *1, 4–5, appeal filed, *Vargas v. Facebook* (9th Cir. No. 21-16499).)[3] For the court, that was enough to confer Section 230 immunity. But it was mistaken. Not only is there nothing neutral about Facebook's audience-selection functions (as we explained above), but the superior court's conclusion rests on a fundamental misunderstanding of longstanding Section 230 caselaw. Courts routinely reject the immunity arguments Facebook has made here, and this Court should do the same.

A. Section 230 immunity only applies if a plaintiff seeks to treat an internet service like Facebook as the publisher of content provided by other parties.

A defendant seeking to avoid liability by invoking Section 230 immunity must show three things: (1) that it is a "provider or user of an interactive computer service"; (2) that the plaintiff's claims hold it liable for "information provided by another information content provider"; and (3) that, in doing so, the claims treat the defendant as the "publisher or speaker" of that information. (47 U.S.C. § 230(c)(1).) Facebook is the provider of an interactive computer service. But under longstanding Section 230 caselaw, Facebook can't show that Ms. Liapes's claims satisfy either of the other elements.

As an initial matter, Facebook failed to show that it met the second element of Section 230 immunity, that Ms. Liapes's claims would hold it liable for information provided by another information content provider.

---

[3] This decision is now on appeal in the Ninth Circuit. It has been argued, but submission of the matter was withdrawn and deferred pending the outcome of the United States Supreme Court's decision in *Gonzalez v. Google LLC* (9th Cir. 2021) 2 F.4th 871, cert. granted Oct. 3, 2022, No. 21-1333. (See Order, Doc. 64, *Vargas v. Facebook* (9th Cir., Jan. 9, 2023, No. 21-16499).)

That is for two reasons. First, to the extent that Ms. Liapes's claims make Facebook liable for "information," that is information *Facebook itself* created and developed—not information provided by another information content provider. But Ms. Liapes's claims don't hold Facebook liable for information—they hold it liable for its own conduct in classifying, stereotyping, and excluding its own users from receiving insurance ads.

1. To start, it is axiomatic that, for information to qualify as "provided by *another* information content provider" (47 U.S.C. § 230(c)(1), italics added), it cannot be provided by the interactive computer service that is itself invoking immunity. (*People v. Bollaert* (2016) 248 Cal.App.4th 699, 709–710 (*Bollaert*).) Put differently, a computer service like Facebook "loses its immunity" if the service *itself* "functions as an information content provider" with respect to the offending content (*ibid.*)—that is, if it functions as an entity that is " 'responsible, in whole or in part, for the creation or development of' " that content. (*Roommates*, *supra*, 521 F.3d at p. 1162, quoting 47 U.S.C. § 230(f)(3).) That means companies like Facebook can't claim immunity for information they have created or developed themselves. (*Ibid.*) And they can't claim immunity for information they have *helped* to create or develop, either—including where they have "materially contribut[ed]" to whatever makes that information (or conduct related to the information) illegal. (*Id.* at pp. 1167–1168; see also *Bollaert*, *supra*, at pp. 709–710, 718–722 [approving this test].)

In *Roommates*, the Ninth Circuit explained what this sort of "development" can look like. That case involved a website that was designed to match people renting out spare rooms with other people looking for a place to live. (*Roommates*, *supra*, 521 F.3d at p. 1161.) Users seeking housing were required to answer a series of questions using drop-down menus, including supplying their sex, sexual orientation, and whether they would bring children to the household. (*Ibid.*) They were also required to

disclose their own housing preferences based on the same protected traits, and were given the option either to indicate a discriminatory preference (such as an unwillingness to live with people who had children or with gay people) or an unbiased one (such as a willingness to live with either straight or gay people or people with or without children). (*Id.* at pp. 1161, 1165.) And users offering housing were likewise required to make similar disclosures—identifying, for instance, whether a given home would allow children, gay or straight people, or males or females. (*Id.* at p. 1165.) The site then applied users' personal characteristics and preferences to decide which users' profiles to share with other users. (*Ibid.*) And it allowed users to search one another's profiles on the same bases. (*Id.* at pp. 1162, 1167.)

When fair-housing advocates sued over these practices, Roommates argued that Section 230 immunized it from suit. But the Ninth Circuit explained that the company was not immune for asking users whether they wanted to engage in discrimination regarding those with whom they would live, for posting the discriminatory answers to those questions on each user's profile, or for the operation of its search system.

First, Roommates had no immunity for causing users to express discriminatory preferences, because "[t]he CDA does not grant immunity for inducing third parties to express illegal preferences," and "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." (*Roommates*, *supra*, 521 F.3d at p. 1165.)

Next, the Ninth Circuit held that Roommates could not claim immunity for the "development and display of subscribers' discriminatory preferences" on their profile pages. (*Roommates*, *supra*, 521 F.3d at p. 1165.) "By requiring subscribers" to provide this sort of information "as a condition of accessing its service, and by providing a limited set of pre-populated answers," Roommates had become "much more than a passive transmitter

of information provided by others." (*Id.* at p. 1166.) It had instead "become[] the developer, at least in part, of that information." (*Ibid.*) That was true because the company had "ask[ed] discriminatory questions" of its users; made "answering the discriminatory questions a condition of doing business," and ultimately constructed each user page in a "collaborative effort" between Roommates and each user. (*Id.* at pp. 1166–1167.) In this way, the company had thus "materially contribut[ed]" to the illegality of the content on each profile page. (See *id.* at p. 1166–1168.)

The same was true for the company's search function. Roommates had "designed" that system to "steer users based on the preferences and personal characteristics" that the company "itself force[d]" them "to disclose." (*Roommates*, *supra*, 521 F.3d at p. 1167.) The company's "connection to the discriminatory filtering process" was therefore "direct and palpable"; it had "designed its search" and profile distribution systems to "limit the listings available to subscribers based on" protected characteristics it required users to specify. (*Id.* at p. 1169.) This, too, the Ninth Circuit held, qualified as development of information—again by materially contributing to its illegality. (*Id.* at pp. 1167–1169.)

Although *Roommates* could not obtain immunity for facilitating its users' discriminatory preferences and segregating its search-engine functions, the Ninth Circuit emphasized that not all search engines and social-networking websites would face the same result. For example, when users are allowed to write whatever they want in a blank text box, and the website publishes that text "as written," without "any specific guidance as to what" the user should write, the website may claim immunity. (*Roommates*, *supra*, 521 F.3d at pp. 1173–1174.) As the Court explained, when web services supply such "*neutral* tools" for their users to employ for their own ends, they do not meaningfully contribute to "any alleged unlawfulness" that might result. (*Id.* at p. 1169.) For instance, if a user types a query for a "white

roommate" into a search engine, or uses a blank text box to express a defamatory thought, the user is responsible for the content and its actions—not the site. (See *ibid.*; *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.* (7th Cir. 2008) 519 F.3d 666, 671–672 [section 230 immunizes websites from being held liable for information users may include in open text prompts]; see also *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085, 1094 (*Lemmon*) ("[P]roviding content-neutral tools does not render an internet company a 'creator or developer' of the downstream content that its users produce with those tools."].)

The test articulated by the Ninth Circuit in *Roommates* has been widely adopted elsewhere, including in this state. (See, e.g., *Kimzey v. Yelp! Inc.* (9th Cir. 2016) 836 F.3d 1236, 1269, fn. 4 [collecting cases from other circuits]; *Henderson v. Source for Public Data, L.P.* (4th Cir. 2022) 53 F.4th 110, 128); *Bollaert*, *supra*, 248 Cal.App.4th at pp. 718–722.) The Fourth District, for instance, has applied *Roommates*'s basic principles to explain that a site that "forced users to answer a series of questions" that violated other people's privacy rights had materially contributed to the illegality of the resulting privacy invasions and was, as a result, unable to shield itself from liability under Section 230. (*Bollaert*, *supra*, at pp. 718–722.)

2. The same conclusion is warranted here. As to Facebook's audience-selection tool, this case is indistinguishable from *Roommates*. Here, as there, Facebook requires users to disclose their protected characteristics (age and sex) as a condition of using the internet service. (Compare C.T. 391–393 with *Roommates*, *supra*, 521 F.3d at p. 1161.) Here, as there, the object of doing so was to enable others who used the service to employ the disclosed demographic information to discriminate based on protected characteristics. (Compare C.T. 390 with *Roommates*, *supra*, at p. 1166, fn. 19.) Here, as there, the service required advertisers (or users) to supply either a discriminatory or a nondiscriminatory preference—and offered to execute

any discriminatory ones. (Compare C.T. 391–393 with *Roommates*, *supra*, at p. 1165; see also *id.* at p. 1181 & fn. 9 (McKeown, J., dissenting).) Here, as there, discrimination—that is, classifying users based on a protected characteristic and treating them differently as a result—is "a central feature" of the website's business model. (Compare C.T. 389 with *Roommates*, *supra*, at p. 1172.) And here, as there, the end result was that the website employed users' protected statuses to deny to some users information about opportunities that were provided to others. In each respect, Facebook encourages, implements, and materially contributes to the discriminatory preferences its advertisers indicate—and to the denial of equal opportunity to Facebook's users. So here, as in *Roommates*, the company isn't entitled to immunity.

And Facebook plays an even more active role in constructing its Lookalike Audiences and delivering its ads. In the former case, the *only* role advertisers play is to provide Facebook with an initial seed audience. Facebook then applies its own stereotypes to parse that audience by its age and gender, whether or not its advertisers even want it to do so. When Facebook then constructs larger Lookalike Audiences that are disproportionately male and younger, Facebook does so because of its "own acts"—specifically, its decision to design its algorithm to behave that way. (*Roommates*, *supra*, 521 F.3d at p. 1165; see also *Lemmon*, *supra*, 995 F.3d at pp. 1093–1094.) In this context, Facebook is the only entity that has even sought to classify and exclude users on protected bases. It "materially contribut[es]" to that result. (*Roommates*, *supra*, at p. 1169.)

All the more so with respect to its ad-delivery algorithm—where Facebook doesn't even have the seed audience to hide behind. There too, Facebook's algorithm treats users differently based on their age and gender because—and only because—the company designed it to do so. Indeed, even when advertisers direct Facebook to send their ads to people of all genders and ages and have no interest in discriminating, Facebook itself

routinely does so anyway. If that is not material contribution, it is difficult to say what is. Facebook thus cannot claim Section 230 immunity as to the intentionally discriminatory decisions of its own algorithms. (See *Roommates*, *supra*, 521 F.3d at p. 1165; *Lemmon*, *supra*, 995 F.3d at pp. 1093–1094.)[4]

3. In nevertheless finding Facebook immune here, the superior court misunderstood these fundamental principles. Doubling down on its misunderstanding of the audience-selection tool and the Lookalike Audiences algorithm, the superior court insisted that both were "neutral" because it was Facebook's advertisers, not the company itself, who used those tools for improper purposes.[5]

But as we have just explained, that misunderstands both the complaint's allegations and what it means for a tool to be neutral. There is nothing neutral about the Lookalike Audiences algorithm, which Facebook has programmed to weight the age and gender of a particular audience, whether advertisers wish it to or not. And the audience-selection tool is non-neutral for the very same reasons the tool in Roommates was. Even though advertisers *could* select a nondiscriminatory option, Facebook also supplies, facilitates, and encourages the use of a discriminatory one.

4. Even if *Roommates* did not resolve the Section 230 immunity issue, Facebook fails to show that Ms. Liapes's claims hold it liable for information "provided by another content provider" because Ms. Liapes's

---

[4] For similar reasons, the United States has repeatedly argued in statements of interest that Facebook is not entitled to Section 230 immunity for claims regarding its discriminatory targeting functions. (See, e.g., United States Statement of Interest, *supra*, at p. 19–20 ["Facebook's involuntary [] characterization and classification of users according to protected characteristics renders Facebook a content developer."])

[5] The superior court entirely ignored the ad-delivery algorithm, relying on the same flawed understanding of Ms. Liapes's initial complaint that we discussed above. (See *supra* at pp. 37–38.)

claims don't hold it liable for information at all. They hold it liable for its own conduct—forcing users to disclose protected characteristics, classifying users on those bases, creating tools that rely on those characteristics to decide who gets to use the services the company offers, and employing those tools to deny services to women and older people. Where claims hold a company liable for its own design choices, and do not "turn on" the content a third party makes as it interacts with those design choices, they are not entitled to Section 230 immunity. (See *Lemmon*, *supra*, 995 F.3d at pp. 1093–1094.)

B. Facebook did not show that Ms. Liapes's claims treated it as a publisher of information.

Facebook's Section 230 defense fell short for yet a further reason as well. Ms. Liapes's claims do not treat the website as the "publisher or speaker" of information at all.

To be sure, on some level, "[p]ublishing activity is a but-for cause of just about everything" a website like Facebook does. (See *Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 853.) But Section 230 immunity has never hinged on whether a company's operating practices involve publishing activities like disseminating information to others. (*Henderson*, *supra*, 53 F.4th at p. 122.) What matters is the relationship between the plaintiff's claim and the defendant's conduct. (See *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 207 (*Cross*).)

As this District has put it, " 'courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' " (*Cross*, *supra*, 14 Cal.App.5th at p. 207, quoting *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1102.) That happens when "liability under the claim" is "based on the *content of the speech*" the defendant published (*Henderson*, *supra*, 53 F.4th at p. 122), or, perhaps, when the plaintiff's claims impose a duty that "would necessarily require" that

defendant "to monitor third-party content." (*HomeAway.com, Inc. v. City of Santa Monica* (9th Cir. 2019) 918 F.3d 676, 682 (*HomeAway*).)

Ms. Liapes's claims fail that test. They aren't based on the content of anyone's speech—they are based on the company's decisions to illicitly classify its users and offer them different services depending on their age or gender. (See *Henderson*, *supra*, 53 F.4th at pp. 123–126; see also *Lemmon*, *supra*, 995 F.3d at pp. 1092–1093.) Here, the content of the insurance advertising is not what Ms. Liapes alleges is illegal. Instead, what's illegal is Facebook's decision to steer those ads away from women and older people.

Similarly, none of the duties that Ms. Liapes's claims impose on the company require it to do anything to monitor or examine its advertisers' ads at all. (See *HomeAway*, *supra*, 918 F.3d at p. 682; *Lemmon*, *supra*, at pp. 1092–1093.) All it must do is change its *own* behavior: removing gender and age from its audience-selection tool, and Lookalike Audience and ad-delivery algorithms, for the company's insurance ads—the same types of adjustments the company has already made to housing, employment, and credit ads for nearly all protected traits (including age and gender) and to insurance ads for most protected characteristics *besides* age and gender. (See *supra* at p. 20.) And that is little surprise, because Ms. Liapes's claims don't ask its advertisers to do anything different. They ask *Facebook* to stop relying on age and gender to distribute insurance advertising to its users—whether by excluding users altogether, or by making it far less likely that they will see a particular ad.

CONCLUSION

This Court should reverse the trial court's order sustaining Facebook's demurrer.

January 11, 2023

Respectfully submitted,

/s/ Linnet Davis-Stermitz
LINNET DAVIS-STERMITZ
(*admitted pro hac vice*)
MATTHEW W.H. WESSLER
(*admitted pro hac vice*)
PETER ROMER-FRIEDMAN
(*admitted pro hac vice*)
GUPTA WESSLER PLLC
2001 K Street, Suite 850 N
Washington, DC 20006
(202) 888-1741
linnet@guptawessler.com

JASON R. FLANDERS
(SBN 238007)
AQUA TERRA AERIS LAW GROUP
4030 Martin Luther King Jr. Way
Oakland, CA 94609

JAHAN C. SAGAFI
(SBN 224887)
OUTTEN & GOLDEN LLP
1 California Street, Suite 1250
San Francisco, CA 94111

ADAM T. KLEIN
(*admitted pro hac vice)*
OUTTEN & GOLDEN LLP
685 Third Avenue, 25th Floor
New York, NY 10017

WILLIAM BROCK MOST
(SBN 279100)
LAW OFFICES OF WILLIAM MOST
201 St. Charles Avenue, Suite 114, #101
New Orleans, LA 70170

POOJA SHETHJI
(*admitted pro hac vice)*
OUTTEN & GOLDEN LLP
1225 New York Avenue NW,

Suite 1220B
Washington, DC 20005

Counsel for Plaintiff-Appellant

CERTIFICATE OF WORD COUNT

This petition complies with the type-volume limitation of California Rules of Court rule 8.204(c)(1) and 8.486(a)(6) because this petition contains 12,041 words as counted by Microsoft Word, excluding the parts of the petition exempted by Rule 8.504(d)(3). The brief complies with the typeface, type-style, page alignment, spacing, and margin requirements of Rule 8.74(b) because it has been prepared in proportionally left-aligned 1.5 spaced typeface using Microsoft Word in 13-point Baskerville font.

/s/ Linnet Davis-Stermitz
Linnet Davis-Stermitz

PROOF OF SERVICE

I, Mahek Ahmad, hereby certify that at the time of service, I was at least 18 years of age and not a party to this action. My business address is Gupta Wessler PLLC, 2001 K Street NW, Washington, DC 20006, and my email address used to e-serve is mahek@guptawessler.com. I certify that on January 11, 2023, I served this Plaintiff-Appellant's Opening Brief on the below interested parties via the First District Court of Appeal's TrueFiling system:

JASON R. FLANDERS
AQUA TERRA AERIS LAW GROUP
4030 Martin Luther King Jr. Way
Oakland, CA 94609
(916) 202-3018
jrf@atalawgroup.com

JAHAN C. SAGAFI
OUTTEN & GOLDEN LLP
1 California Street, Suite 1250
San Francisco, CA 94111
(415) 991-8514
jsagafi@outtengolden.com

ADAM T. KLEIN
OUTTEN & GOLDEN LLP
685 Third Avenue
25th Floor
New York, NY 10017
(212) 404-0307
atk@outtengolden.com

POOJA SHETHJI
OUTTEN & GOLDEN LLP
1225 New York Avenue, Suite 1220I
Washington, DC 20005
(202) 918-5476
pshethji@outtengolden.com

WILLIAM BROCK MOST
LAW OFFICES OF WILLIAM MOST
201 St. Charles Avenue,
Suite 114, #101
New Orleans, LA 70170
(504) 509-5023
williammost@gmail.com

Counsel for Plaintiff-Appellant

ROSEMARIE THERESA RING
MUNGER TOLLES & OLSON LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105
(415) 393-8247
rring@gibsondunn.com

THEODORE JOSEPH BOUTROUS
BRADLEY JOSEPH HAMBURGER
MATT AIDAN GETZ
GIBSON DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7804
tboutrous@gibsondunn.com
bhamburger@gibsondunn.com
mgetz@gibsondunn.com

Counsel for Defendant-Respondent

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 11, 2023

/s/ Mahek Ahmad
Mahek Ahmad