S282529

No. S_____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAMANTHA LIAPES,
Plaintiff and Respondent,

v.

FACEBOOK, INC.,
Defendant and Petitioner.

From a Decision by the Court of Appeal,
First Appellate District, Division 3 (No. A164880)

On Appeal from the Superior Court for the
State of California for the County of San Mateo (Dept. 23)
Hon. V. Raymond Swope, Judge Presiding (No. 20CIV01712)

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

ISSUES PRESENTED

1. Does targeted advertising—the longstanding practice of directing ads to the people advertisers believe are likely to be interested in them—violate the Unruh Act?

2. Does an interactive computer service lose the protections of section 230 of the Communications Decency Act by using algorithms and giving third-party advertisers tools to select the audience for ads?

REASONS FOR GRANTING REVIEW

In a sweeping published opinion in this closely watched case,[1] the Court of Appeal held not only that targeted advertising violates the Unruh Act, but also that section 230 of the Communications Decency Act does not protect Facebook from claims based on ads that third parties placed on its service. That decision threatens to unsettle widespread advertising practices, on the internet and in general, and creates stark conflicts with case law from California and federal appellate courts.

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[1] E.g., Egelko, *'Watershed Decision' Says Facebook Can Be Sued for Steering Ads Away from Women, Older Users* (Sept. 22, 2023) S.F. Chronicle <https://tinyurl.com/hek3huea>; Flores, *Facebook Can Be Sued over Discriminatory Advertising Algorithm, Appeals Court Says* (Sept. 26, 2023) Tech Times <https://tinyurl.com/4jh6hesb>; Roth, *Facebook Can Be Sued Over Biased Ad Algorithm, Says Court* (Sept. 25, 2023) Verge <https://tinyurl.com/5bx72yvk>.

Targeted advertising is central to *all* advertising. Advertisers direct messages to potential customers based on various considerations, such as income, geography, and basic demographics, including age and gender. That is why ads shown during cartoons look different from those shown during *60 Minutes* and why ads in car magazines look nothing like those in fashion magazines. Ad targeting has existed for decades, and it's never been held to violate general antidiscrimination laws like the Unruh Act—until now.

Plaintiff says that the Unruh Act prohibits defining the audience for ads even in part by reference to age or gender. Under this view, an advertiser seeking to reach senior citizens (say, the AARP or a retirement community) would violate the Unruh Act by targeting messages to people over 65. The same would be true of a company offering maternity dresses, which would be forced to send ads to both women and men or else face liability for unlawful discrimination.

The Court of Appeal agreed with plaintiff's novel interpretation of the Unruh Act, holding that plaintiff's claim against Facebook could survive a demurrer. And even though plaintiff's claim is premised on Facebook's delivery of ads that third-party advertisers posted to the service, the court held that section 230—a statute enacted to protect services like Facebook from liability for displaying and disseminating third-party

content—doesn't bar the suit. Both rulings defy precedent, put the Unruh Act on a collision course with the First Amendment and the California Constitution's liberty-of-speech clause, and threaten to radically transform the advertising industry.

The Court of Appeal's novel Unruh Act holding disregards decades of judicial consensus that the Act does not prohibit longstanding practices that are "justified by 'legitimate business interests'" (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 851), particularly when holding a practice unlawful under the Act would produce substantial "adverse consequences" across the state (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1166). But it is hard to understate the consequences that will follow from the Court of Appeal's view of the Unruh Act. Long before the internet, advertisers were targeting messages to particular audiences. Those practices continued with the advent of the internet, and today ads aimed at potential customers account for much of communication online. The decision below invites litigation challenging those practices.

The Court of Appeal's Unruh Act ruling also invites needless conflict with federal and state constitutional rights of speakers to speak to an audience of their choosing. The Court of Appeal's decision will force advertisers to refrain from speaking altogether, or to waste scarce resources directing their message to a broader audience than they'd prefer.

Even if plaintiff's theory of the Unruh Act were viable, section 230 would shield Facebook from suit. Section 230's "broad" protections bar claims seeking to hold online services like Facebook liable "as intermediaries" for third-party content. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 44.) And appellate courts across the country, including in California, have rejected efforts by plaintiffs to plead around section 230 by reframing claims based on third-party content as claims based on a service's "features." (E.g., *Prager University v. Google LLC* (2022) 85 Cal.App.5th 1022, 1034.) Services remain protected under section 230, for instance, if they use algorithms to make "decisions regarding the audience to which [content] would be published." (*Id.* at p. 1033.) Services likewise are shielded from suit when they provide neutral tools that users can employ to craft and share their content. (E.g., *Kimzey v. Yelp! Inc.* (9th Cir. 2016) 836 F.3d 1263, 1270.)

The Court of Appeal here accepted plaintiff's efforts to evade the statute. It first created a conflict with *Prager* and other decisions by holding that plaintiff's claims were based not on third-party ads, but on the algorithm Facebook uses to decide which users should receive which ads. The court then created another conflict, this time with *Kimzey* and similar cases, by holding that Facebook could be sued because it provided tools that *allowed*, but did not *require*, advertisers to narrow their target

audience. The decision below will have far-reaching consequences, undermining the protections of section 230 that are vital to the modern internet.

In short, the court below concluded that an old law forbids what it believed is a new practice. But there's nothing new about targeted advertising, and the court's decision has no limiting principle. If the Unruh Act renders advertising targeted on the basis of any protected characteristic unlawful, then California—alone among the states—will be an inhospitable forum for a wide range of historically commonplace and valuable speech. As a leading expert on internet law has observed, the Court of Appeal's decision threatens "devastating effects [for] the entire Internet ecosystem." (Goldman, *Does California's Anti-Discrimination Law Ban Ad Targeting?* (Oct. 9, 2023) Technology & Marketing Law Blog <https://tinyurl.com/3pc2aewa>.) This Court should grant review.

BACKGROUND

I. Facebook's Advertising Tools

Facebook is a widely used social-media service. (2CT388 ¶ 30.) One way it generates revenue is by publishing ads created by third-party advertisers. (2CT382 ¶¶ 1-2.) To use Facebook's advertising service, an advertiser first "determines the image and text of the ad" it wants to run. (2CT391 ¶ 41.) The advertiser

then pays a fee that depends on the number of "impressions" (times the ad is shown to users) or "clicks" (times users click on the ad) it wants to buy—the more impressions or clicks, the higher the fee. (*Ibid.*) Any advertiser who wants to use Facebook's service must agree to abide by Facebook's policies, which prohibit discrimination in advertising. (2CT442, 450.)

All live ads on Facebook's service can be searched for and viewed at any time by any user using Facebook's Ad Library. (2CT466.) But because there are "hundreds of millions of Facebook users, including tens of millions in California" (2CT382 ¶ 2), the question becomes which users will be shown which of the many ads available on Facebook on their individual News Feeds at any particular time. Facebook gives advertisers tools they can use to reach people they think are most likely to be interested in what they're offering. For instance, advertisers may "specify the parameters of the target audience of Facebook users who will be eligible to receive the advertisement." (2CT391 ¶ 41.) If advertisers choose to use those audience-selection tools, they can narrow their target audience "based on tens of thousands" of considerations, including age, gender, and location. (2CT382 ¶ 3, 2CT391-392 ¶ 41.)

Facebook's audience-selection tools are optional; only if an advertiser chooses to select narrower parameters will Facebook direct an ad to that target audience. (2CT391-392 ¶¶ 41-48.) And

Facebook's "default setting" for all ads covers all of the millions of adult users on its service. (2CT393 ¶¶ 46-47.)

Another way advertisers can reach people likely to be interested in their ads is through "Lookalike Audiences." To use that tool, advertisers give Facebook a list of users they think are potential customers. From that list, Facebook analyzes thousands of considerations, including age and gender, "to identify a larger audience that resembles the seed audience." (2CT398 ¶ 64.) As with the other audience-selection tools, the Lookalike Audience feature applies only if individual advertisers choose to use it. (2CT398-400 ¶¶ 64-65, 67-69.)

Whether an advertiser selects a narrower target audience or leaves in place the default of all adults, Facebook must determine which users will be shown which ads. (2CT400 ¶ 71.) For instance, an advertiser may select a target audience of 500,000 users but pay for only 100,000 impressions. (2CT400 ¶ 72.) "[T]o increase the likelihood that Facebook users will click on each advertisement," Facebook uses an algorithm considering "tens of thousands of data points," including age and gender, to deliver ads to users likely to be interested in them. (2CT400 ¶¶ 72-73.)

II. Plaintiff's Unruh Act Claims

Plaintiff, a 49-year-old woman, claims that Facebook's advertising tools violate the Unruh Act by enabling ads to be

delivered to users "based on protected characteristics." (2CT387 ¶ 25, 2CT402 ¶ 77.) Specifically, plaintiff alleges that she was "denied advertisements and information about insurance opportunities on Facebook due to her age and/or gender" (2CT387 ¶ 25) because third-party advertisers "routinely and systematically excluded older persons and women from [their] business services by . . . excluding [them] from audience selections for thousands of advertisements related to financial services opportunities" (2CT403 ¶ 82). Plaintiff claims that Facebook's audience-selection tools and delivery algorithm, by supposedly excluding older people and women from receiving insurance ads, violates the Unruh Act. (2CT432 ¶ 153.)

The trial court sustained Facebook's demurrer on two independent grounds. (3CT719-724.) The court first concluded that plaintiff hadn't stated any viable Unruh Act claim, observing that Facebook's advertising tools do not require discrimination and that the algorithm it uses to deliver ads to particular users' News Feeds serves "'to optimize an advertisement's audience and the advertiser's goals.'" (3CT721-723.) It also ruled that plaintiff's claims would be barred by section 230 because they sought to hold Facebook liable for the neutral tools it gave third-party advertisers and the way it disseminated third-party ads. (2CT723.)

III. The Court of Appeal's Decision

The Court of Appeal reversed in a published opinion.

First, the court embraced plaintiff's argument that certain of Facebook's optional advertising tools violate the Unruh Act because they "make distinctions based on gender and age" in selecting the audience for ads. (Op. at p. 13.) In the court's view, by alleging that Facebook had delivered any "ad that includes age- or gender-based restrictions," plaintiff had stated a viable Unruh Act claim. (*Id.* at pp. 14-17.) Although the court highlighted plaintiff's allegations that Facebook's advertising tools can "expressly rely" on age and gender, it also emphasized that "nothing precludes" an Unruh Act claim based on facially *neutral* criteria, because "'evidence of disparate impact'"—such as "a significant skew in delivery [of ads] along gender lines"—"'may be probative of intentional discrimination'" that the Act forbids. (*Id.* at p. 17.)

Second, the court held section 230 does not shield Facebook from plaintiff's Unruh Act claim. The court recognized that "third parties, not Facebook, create[d] the allegedly illegal content"—i.e., ad campaigns that they allegedly chose to target on the basis of age and gender. (Op. at p. 24.) But it held that Facebook could be sued notwithstanding section 230 on the theory that it had acted not as the publisher, but as the *co-developer*, of those ads. (*Id.* at p. 21.) Facebook was deprived of section 230's protections, the

court reasoned, because it "designed and created" tools that third-party advertisers could use "to target their ads based on certain characteristics" (*id.* at pp. 20-22) and uses its own tools "to determine what specific people will receive ads" (*id.* at pp. 23-24).

ARGUMENT

This Court's review is warranted "to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) This case presents two issues worthy of review. The first is the Court of Appeal's first-of-its-kind holding that targeted advertising violates the Unruh Act. The second is the court's holding, in conflict with decisions of both California and federal courts, that Facebook is not protected under section 230 of the Communications Decency Act, on the theory that it is responsible as a co-developer of allegedly unlawful ad campaigns that third parties may have run on its service.

I. Review Is Warranted to Address Whether the Unruh Act Makes Targeted Advertising Unlawful.

The Court of Appeal embraced plaintiff's unprecedented view of the Unruh Act, under which any advertising targeted based on any protected characteristic is unlawful. That stunningly broad holding conflicts with longstanding precedent outlining the Act's scope, and it will have harmful effects far beyond Facebook—not least because it will chill speech or compel advertisers to speak to a wider audience than they'd prefer.

A. The Court of Appeal's Novel Interpretation of the Unruh Act Conflicts with Precedent and Will Transform the Advertising Industry.

Courts have always understood that the Unruh Act isn't meant to make established and legitimate business practices unlawful. Yet the Court of Appeal endorsed a limitless view of liability for targeted advertising whose effects will be as widespread as they are serious.

1. The Act Does Not Prohibit Longstanding, Widespread, and Beneficial Practices.

The Unruh Act provides that regardless of certain protected characteristics, all people in California "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) The Act's "'fundamental purpose . . . is the elimination of *antisocial* discriminatory practices—not the elimination of socially beneficial ones.'" (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1394-1395.)

Given the variety of business establishments the Act reaches (Civ. Code, § 51, subd. (b); *id.* § 51.5, subd. (a)) and the substantial civil penalties to which violators are exposed (*id.* § 52, subd. (a)), courts have emphasized that "the Act renders unlawful 'only *arbitrary, invidious or unreasonable discrimination*,'" not "disparate treatment of patrons in all circumstances." (*Javorsky*, 242 Cal.App.4th at pp. 1394-1395.)

Courts have reinforced the Unruh Act's limits not to diminish the Act, but to protect it. The Act "provides a safeguard against the many real harms that so often accompany discrimination," so "it is imperative [that courts] not denigrate its power and efficacy by applying it to manufactured injuries." (*Cohn v. Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523, 526.) Pushing the Act too far, courts have cautioned, "would only serve to pervert [its] good intentions" (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1049)—and make it vulnerable to legislative retraction.

California courts have developed multiple checks to ensure the Act retains those vital limits.

First, courts have "recognized that legitimate business interests may justify limitations on consumer access" to a business's services. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162.) As this Court explained decades ago, the Unruh Act's "broad interdiction . . . is not absolute," and businesses retain flexibility to act in ways "that are rationally related to the services [they] perform[] and facilities [they] provide[]." (*In re Cox* (1970) 3 Cal.3d 205, 212.) So if a practice is "justified by 'legitimate business interests,'" it is unlikely to violate the Act. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 851; accord, e.g., *Javorsky*, 242 Cal.App.4th at

p. 1395; *Howe v. Bank of America N.A.* (2009) 179 Cal.App.4th 1443, 1451.)

Second, applying the precept that "the Legislature intend[s] reasonable results consistent with [the Act's] expressed purpose," courts have cautiously examined the "adverse consequences that would likely follow" from novel interpretations of the Act. (*Harris*, 52 Cal.3d at pp. 1165-1166.) Courts are skeptical, for instance, when a plaintiff's view of liability under the Act "is not readily confined" to the case's factual circumstances. (*Id.* at p. 1167.) They are likewise reluctant to construe the Act in a way that would make longstanding and widespread business practices unlawful. (*Sargoy*, 8 Cal.App.4th at p. 1049.)

To be sure, just as the Unruh Act is subject to limits, so too are there limits on how businesses can justify challenged practices. "[T]he quest for profit maximization," for instance, is not enough to excuse a discriminatory practice. (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1153.) And because the Act forbids "unreasonable, arbitrary, or invidious" discrimination, a business practice cannot rest on harmful, "irrational stereotypes." (*Cohn*, 169 Cal.App.4th at p. 528.)

But in all cases, that the Unruh Act *might* be read to prohibit a business practice is not enough to hold that it does. Before concluding that the Act gives rise to liability, a court must consider not just the Act's text, but also the nature and history of

the challenged practice, the interests that underlie it, and the consequences of accepting the plaintiff's theory.

2. Targeted Advertising Is a Common Practice That Benefits Advertisers and Consumers Alike.

Targeted advertising is as old as advertising itself. Yet the Court of Appeal embraced a limitless view of the Unruh Act that will expose those who use targeted advertising to costly litigation and potentially hefty penalties. It did so without considering the "'significant adverse consequences'" that would follow from its ruling (*Koebke*, 36 Cal.4th at p. 841), which will extend far beyond Facebook.

"The concept of gathering information about one's intended market and attempting to customize the information then provided is as old as the saying, 'know your audience.'" (*OpenTV, Inc. v. Netflix Inc.* (N.D.Cal. 2014) 76 F.Supp.3d 886, 893.) Advertisers have long sought to run ads where their best customers will see them. Consider toymakers. Children aren't reading *The New Yorker* or watching a drama series on NBC; they are reading *Nat Geo Kids* and watching cartoons. So toymakers run ads in children's magazines and during Saturday mornings on Nickelodeon.

Advertisers have historically targeted customers based on not just age, but also other considerations, including gender.

That's why magazines tell potential advertisers the demographics of their readership; *Car and Driver*'s readers, for example, are 88% male and typically younger, whereas the readers of *Better Homes & Garden* are 77% female and older. (*Audience: Demographics* (visited Oct. 30, 2023) Car & Driver <https://tinyurl.com/33b9t5ce>; *Research: Adult Readers* (visited Oct. 30, 2023) Better Homes & Gardens <https://tinyurl.com/3r26u8k6>.) It's also why Omega and Aston Martin pay for product placement in James Bond films, whose audience skews male. (Barber, *Does Bond's Product Placement Go Too Far?* (Oct. 1, 2015) BBC <https://tinyurl.com/bdcrtxt2>.)

Targeted advertising extends beyond ads for products like toys, watches, and cars. Public-health organizations direct ads at groups most likely to suffer from a particular health issue. Political campaigns run ads hoping to reach the groups who are most likely to support their cause. Literacy groups design campaigns to reach parents of younger children. No matter where you look in the advertising industry, you will find advertisers—businesses and nonprofits alike—directing messages to groups whose members are most likely to react favorably.

One reason targeted advertising has remained so prevalent is that both advertisers and consumers benefit from it. Advertisers can disseminate their messages in a tailored, cost-

effective way. And consumers are informed about the products and services that better match their interests.

Facebook and other internet services may be especially good at connecting advertisers to their best customers, but traditional media outlets have been doing the same thing for decades. And that practice has never been understood to violate general-purpose antidiscrimination statutes.

Initially, plaintiff argued she was *not* challenging targeted advertising writ large. Her lawsuit, she explained, addressed only "insurance ads" and did not "seek to stop gender or age targeting of other types of advertisements such as consumer electronics, sports equipment, or medical products." (2CT385 ¶ 14.) Plaintiff likewise took no issue with "parallel advertising"—in which advertisers run similar ads at once, each directed to different groups—alleging only (on information and belief) that age- or gender-targeted insurance ads are generally not part of parallel-advertising campaigns. (2CT425 ¶ 124.)

But plaintiff later abandoned those limits, explaining at oral argument that her theory applied equally to goods or services of all kinds. (Oral Argument, https://tinyurl.com/bdf8xpve, at 1:41:25-1:42:18 [dresses]; *id.* at 1:42:19-1:42:37 [arts-and-crafts stores]; 1:44:33-1:45:04 [shaving kits].) She likewise maintained that *any* targeted advertising using any protected characteristic violates the Unruh Act—so companies selling floral dresses can't

try to reach women and companies selling shaving kits can't try to reach men. (*Id.* at 1:41:25-1:42:18, 1:44:33-1:45:04.) Plaintiff reversed course on parallel advertising, too, arguing that if a company runs two similar ads, one for younger people and another for older people, it has *twice* violated the Act. (*Id.* at 1:47:13-1:48:01, 2:16:57-2:17:16.)

The Court of Appeal embraced plaintiff's boundless theory of liability. In its view, so long as the intended or actual audience for ads depends in any way on age or gender, an Unruh Act claim challenging those ads can survive a demurrer. (Op. at pp. 14-18.)

That holding is the first of its kind. Although targeted advertising predates the Unruh Act, plaintiff never identified any case holding that it violates the Act. Nor did plaintiff or the Court of Appeal cite any case *anywhere* holding that targeted advertising violates a general antidiscrimination statute.

3. The Court of Appeal's Ruling Has No Meaningful Limiting Principle.

The theory the Court of Appeal embraced will subject those who use targeted advertising to disruptive and costly litigation. Plaintiff, her amici below, and the Court of Appeal identified only two potential checks on the rule the court adopted—neither of which will prevent that dramatic outcome.

First, plaintiff's amici suggested targeted advertising on Facebook is uniquely "exclusionary"—i.e., that whereas

traditional targeted advertising makes it more *unlikely* that certain groups would see ads, Facebook's tools make it *impossible*. (Lawyers' Com. Amicus Br. at p. 11.) The Court of Appeal picked up that thread, emphasizing that plaintiff had alleged that groups were "categorically excluded" from seeing ads. (Op. at p. 12.)

That distinction is wrong as a factual matter; every user on Facebook can see every ad on the service using Facebook's Ad Library (2CT466), so the question here, just as with all traditional forms of advertising, is which people are more or less likely to see particular ads. Equally important, though, is that the distinction plaintiff's amici offered makes no difference *under the Unruh Act*. The Act entitles people not just to *access*, but "to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments." (Civ. Code, § 51, subd. (b).)

In other words, as plaintiff views the Act, if traditional advertising makes it less likely (if still possible) that a member of a certain group would see ads, that is no less a violation than if the practices excluded the member entirely. That's why plaintiff herself disclaimed the distinction, arguing that the result under the Act would be the same whether she was "exclud[ed] from an ad's audience altogether" or was simply "less likely [to] receive" the ad. (Reply Br. at p. 8; accord Oral Argument, *supra*, at 2:17:18-2:17:49 [arguing that a "reduced opportunity" suffices to

show lack of access under the Unruh Act].) Put plainly: if Facebook's targeted-advertising tools are vulnerable to suit under the Unruh Act, so are run-of-the-mill advertising tools that existed long before the internet.

Even if the Court of Appeal's decision could be limited to online advertising, its effects would remain devastating. Digital advertising accounts for over 67% of all ads, and that figure is projected to climb to nearly 75% over the next five years. (*Share of Digital in Advertising Revenue Worldwide from 2018 to 2020* (visited Oct. 30, 2023) Statista <https://tinyurl.com/5n835k93>.) The internet is a "modern public square" (*Packingham v. North Carolina* (2017) 582 U.S. 98, 107), and online advertising on services like Facebook is what businesses and organizations use to get their messages out to the public.

Second, plaintiff has suggested Facebook or advertisers could use "thousands of other data points" to direct their ads to customers, so long as they did not expressly consider protected characteristics. (2CT384 ¶ 10.) That supposed limiting principle is just as illusory.

Suppose a shaving-kit business runs ads in the pages of *GQ* and on ESPN.com. As plaintiff views the Unruh Act, if the business did so to reach men, that's unlawful discrimination. (Oral Argument, *supra*, at 1:44:33-1:45:04.) But the business is not out of the woods even if it points to a facially neutral

explanation—for instance, that it believed readers of *GQ* and ESPN.com are especially interested in grooming products. As the Court of Appeal recognized, "'evidence of disparate impact,'" though not enough itself to support liability under the Act, "'may be probative of intentional discrimination.'" (Op. at p. 17, quoting *Harris*, 52 Cal.3d at p. 1175.) So plaintiffs could still assert Unruh Act claims merely by pointing to the "significant skew . . . along gender lines" (*ibid.*) in the readership of *GQ* and ESPN.com.

Below, Plaintiff's amici proved the point. As they put it, consumers could sue under the Unruh Act not just when advertisers directly consider "protected characteristics," but also when "additional categories of interests, characteristics, behaviors and more . . . serve as *proxies* for protected characteristics." (Lawyers' Com. Amicus Br. at p. 17 & fn. 6, italics added.)

When asked whether a company would violate the Unruh Act by advertising only in forums skewed heavily toward men, plaintiff's counsel responded that such cases would present "difficult question[s]." (Oral Argument, *supra*, at 1:43:26-1:44:32.) That is putting it lightly. Even routine targeted ads would become vulnerable to suit. And those suits would be difficult to dispose of via demurrer, or even summary judgment, given the fact-intensive nature of the question what advertisers intended. Did manufacturers of arthritis medicine run an ad in *Golf Digest* because golfers care about joint heath, or because *Golf Digest*'s

readership skews toward older people? Did a shoe company run an ad for men's cross-trainers on NFL.com because NFL viewers care about fitness, or because they tend to be male? Did a cosmetics company run an ad for makeup in *Marie Claire* because its readers are conscious about aesthetics, or because they tend to be women? Questions like these will keep meritless cases in court—and, given the Unruh Act's penalty scheme, will expose defendants to considerable settlement pressure.

Never in the Unruh Act's long history has it been interpreted to make targeted advertising illegal. So courts have nowhere to look when they ask how much of a demographic skew in an ad's audience suggests intentional discrimination, what considerations could be immune from scrutiny, or what sorts of policy justifications might permit targeted ads. (Op. at p. 16, fn. 8.)

The breadth of the Court of Appeal's ruling only underscores why changes to the Unruh Act to address new frontiers should come from the Legislature. Legislation to address targeted advertising is complicated and controversial; early attempts have been unsuccessful. (See, e.g., H.R. 6416, 117th Cong. (2022) [bill that would have restricted certain targeted advertising never made it out of committee].) Only the Legislature can weigh the relevant interests and craft detailed solutions to perceived problems. The Court of Appeal's unprecedented ruling short-

circuits that legislative process and leaves businesses throughout the state vulnerable to novel claims.

B. The Decision Below Raises Serious First Amendment Concerns.

As the Court of Appeal interpreted it, the Unruh Act prohibits advertisers from directing messages to audiences defined in any part by a protected characteristic. That interpretation would place California courts on a collision course with the First Amendment, which protects the right to speak to an audience of the speaker's choosing, and the California Constitution's liberty-of-speech clause, which is even "broader and more protective" than its federal counterpart (*San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 842).

Facebook is in the speech business. Users and advertisers alike express themselves, and Facebook disseminates their expression, in accordance with its policies. Both acts qualify as "speech within the meaning of the First Amendment." (*Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 570.) Some ads on Facebook fit within the narrow confines of "commercial speech," while others feature content entitled to the highest order of constitutional protection from government interference (see *id.* at pp. 578-579)—but either way, neither state nor federal law can restrict the speech except in extraordinary circumstances. (See,

e.g., *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481 [commercial speech warrants substantial protection because it "is 'indispensable to the proper allocation of resources in a free enterprise system'"].) The Court of Appeal's interpretation of the Unruh Act seriously threatens that protected speech.

One likely effect of the decision is suppression of valuable speech. Even if a law doesn't outright "prevent[] [a business] from saying anything [it] wishe[s]," it still violates the First Amendment if it pressures the speaker to "conclude that the safe course is to avoid controversy" by not speaking. (*Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 256-257.) If targeted advertising were unlawful, then anyone who had hoped to target messages might decide to say nothing at all.

Imagine an advocacy group that encourages college-aged women and minorities to explore careers in STEM. The group might normally turn to Facebook and direct ads for online counseling sessions to the groups it seeks to assist. But given the Court of Appeal's decision, the group might choose to forgo its campaign—perhaps because its limited resources make an untailored campaign too inefficient to be worthwhile or because it is concerned the message might not reach its intended audience. Whatever the reason, the result would be a marketplace deprived of that valuable speech.

Alternatively, advertisers worried about the risks of potential liability generated by suits like plaintiff's might conclude that their only real option is to speak to an audience much broader than they'd prefer. But because the audience for speech affects the nature of the speech itself (e.g., *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 145), that too violates the First Amendment. And because an advertisement crafted for one group might not work for the general public, advertisers forced to speak to everyone might feel compelled to change the message they're sending, too. The government can no more compel people to *change* their speech than it can prohibit their preferred speech. (E.g., *303 Creative LLC v. Elenis* (2023) 600 U.S. 570, 586; *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 568-570.)

Forcing advertisers to confront the choice of saying nothing or saying something other than what they wanted clashes with the First Amendment, which guarantees the right to speak one's mind to the audience of one's choice. The U.S. Supreme Court, for example, subjected to First Amendment scrutiny a Florida Bar rule prohibiting lawyers from soliciting personal-injury clients within 30 days of an accident. (*Fla. Bar v. Went For It, Inc.* (1995) 515 U.S. 618, 623.) That a lawyer had the option of sending an "untargeted letter . . . to society at large" (*id.* at p. 630) didn't mean the law escaped First Amendment scrutiny. In other words,

the Court recognized that prohibiting targeted ads might well be unconstitutional.

In fact, courts have repeatedly held that it is. For example, the Fourth Circuit struck down a prohibition on targeted advertising to criminal defendants within 30 days of arrest (*Ficker v. Curran* (4th Cir. 1997) 119 F.3d 1150, 1153-1155), and the Tenth Circuit struck down regulations prohibiting telecommunications companies from using certain information to target customers (*U.S. West, Inc. v. FCC* (10th Cir. 1999) 182 F.3d 1224, 1232-1240). The Tenth Circuit explained that the regulations implicated the First Amendment even though they didn't prohibit communications with customers generally or require the telecommunications companies to say anything in particular. (*U.S. West*, 182 F.3d at p. 1232.) The reason: "[e]ffective speech" requires both "a speaker and an audience," and "[a] restriction on either of these components is a restriction on speech." (*Ibid.*) And "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'" (*Ibid.*)

Courts are understandably "reluctant to foreclose . . . avenue[s] of communication" by ruling that advertisers must choose more expensive and less effective means of communication. (*Project 80's, Inc. v. City of Pocatello* (9th Cir. 1991) 942 F.2d 635,

639 [overturning ban on door-to-door sales].) Doing so with targeted advertising will affect not just businesses like insurance companies, but also the full range of people and organizations who advertise. There is little sense in a rule that would require all groups to broadcast messages properly tailored for specific demographics to everyone.

At a minimum, the uncertainty created by the Court of Appeal's novel decision will have a harmful chilling effect. So long as advertisers remain "unsure about the side of [the] line on which [their] speech falls" or whether courts might mistakenly "count speech that is permissible as instead not," they are likely to self-censor—a "'cautious and restrictive exercise' of First Amendment freedoms" that deprives the marketplace of protected speech. (*Counterman v. Colorado* (2023) 600 U.S. 66, 75.)

Statutes shouldn't be construed to create "'serious constitutional question[s].'" (*People v. Chandler* (2014) 60 Cal.4th 508, 524.) But the Court of Appeal's decision produces immediate, far-reaching concerns about government interference with speech rights. Without this Court's review, the decision will chill speech and compel advertisers to address a needlessly broad audience, likely with a different message than they intended.

II. The Decision Below Conflicts with Precedent Holding That Section 230 Protects the Dissemination of Third-Party Content.

Section 230 protects online services from being sued based on what their users say or how they disseminate their users' content. Yet the Court of Appeal held that Facebook lost section 230's protections because it gave advertisers optional tools they could theoretically use to discriminate, and because of how Facebook delivered ads the advertisers created. That decision conflicts with appellate decisions from California and federal courts.

A. Section 230 Protects Online Services Like Facebook from Claims Like Plaintiff's.

Section 230 "shield[s] Internet intermediaries from the burdens associated with defending against state-law claims that treat them as the publisher or speaker of third party content." (*Hassell v. Bird* (2018) 5 Cal.5th 522, 544.) Section 230's "broad" scope covers claims that seek to hold online services liable "as intermediaries for other parties' potentially [unlawful] messages." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 44.) Those protections apply even when plaintiffs try to "plead around section 230 immunity," typically "by framing . . . website features as content." (*Prager University v. Google LLC* (2022) 85 Cal.App.5th 1022, 1033-1034.) And because Congress enacted section 230 to protect websites from "having to fight costly and protracted legal battles"

(*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1175 (en banc)), courts routinely rely on the statute to dismiss barred claims at the pleading stage. (E.g., *Hassell*, 5 Cal.5th at p. 544; *Prager*, 85 Cal.App.5th at pp. 1033-1034; *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 206.)

Courts have long held that section 230's protections apply not just when a service displays third-party content, but also with respect to a much broader array of activities. Two features of those cases are relevant here.

First, courts have emphasized that services cannot be sued for how they disseminate third-party content. For instance, in *Prager*, the plaintiff brought Unruh Act and other claims challenging YouTube policies restricting access to videos expressing certain political viewpoints. (85 Cal.App.5th at pp. 1028-1029.) When YouTube demurred on section 230 grounds, the plaintiff argued its claims should escape dismissal because they were based not on the third-party videos, but on YouTube's decisions to restrict access to them. (*Id.* at pp. 1033-1034.) The trial court sustained the demurrer, and the Court of Appeal affirmed. It held that under section 230, a website is not liable for "decisions regarding the audience to which videos would be published." (*Id.* at p. 1033.) And despite the plaintiff's creative "manner of framing its various causes of action," its claims sought

"to hold [the website] liable under state law for [its] editorial publication decisions." (*Ibid.*) Section 230 "forecloses relief" based on such decisions. (*Ibid.*)

Prager also held that YouTube remained only a publisher, and not a co-developer, of third-party videos even though it used "algorithms" that "examine[d] certain 'signals' like the video's metadata, title, and the language used" to determine how the videos would be delivered to users. (85 Cal.App.5th at p. 1034.) As the court explained, the "letter and spirit of section 230's promotion of content moderation" and other publishing activities requires that services be immune from claims challenging their "algorithmic restriction of user content." (*Ibid.*)

The Court of Appeal adopted the same view in *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561. There, plaintiffs who were sexually assaulted as minors by adults they met on MySpace sued the website, arguing that they were challenging not the site's publishing activity but its failure "'to provide reasonable safety measures to ensure that sexual predators did not gain otherwise unavailable access to minors.'" (*Id.* at p. 569.) The Court of Appeal rejected that argument. (*Id.* at pp. 569-573.) As it explained, the plaintiffs' claims ultimately depended on third-party content—the messages that had connected the plaintiffs to the adults who assaulted them. (*Id.* at p. 573.) That entitled MySpace to "full immunity" despite the plaintiffs' efforts to recast

their claims as challenging the "editing or selection process" the site had used to connect users and disseminate their messages. (*Id.* at p. 570.)

Second, some plaintiffs have tried to evade section 230 by focusing on services' provision of tools that third parties could use to develop or share their content. Courts have rejected those claims, too, as barred under section 230.

For instance, in *Kimzey v. Yelp! Inc.* (9th Cir. 2016) 836 F.3d 1263, a business sued Yelp, which hosts online reviews, for giving users a "star-rating function" to use in creating their reviews. (*Id.* at p. 1266.) Trying to avoid section 230, the plaintiff argued "that Yelp transformed [a user's review] into its own 'advertisement' or 'promotion'" because it "designed and created [the] signature star-rating system" the user used to write the review. (*Id.* at p. 1269.) The Ninth Circuit disagreed. It reasoned that a service cannot be sued merely because it gives users tools they could use to present their own content. (*Id.* at p. 1270, citing *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 834.) Put simply, "a 'website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing.'" (*Ibid.*, quoting *Klayman v. Zuckerberg* (D.C. Cir. 2014) 753 F.3d 1354, 1358.)

Kimzey explained that any narrower view would eviscerate section 230 and subject services to harmful uncertainty. After all,

"it is not difficult to allege in a complaint that a publisher of information engaged in creation by transformation." (836 F.3d at p. 1269.) If doing so were enough to sidestep the statute, then section 230's protections would be "meaningless." (*Ibid.*)

Many other decisions are in accord. For example, in *Dyroff v. Ultimate Software Group, Inc.* (9th Cir. 2019) 934 F.3d 1093, a plaintiff whose son fatally overdosed after buying drugs from a dealer he met online sued the website, claiming it had given its users tools to "post and share experiences, questions, and answers" in a way that had "steered users" toward drug-related transactions. (*Id.* at pp. 1099, 1095.) The Ninth Circuit rejected the plaintiff's efforts to plead around section 230 by focusing on "functions" of the website, "including recommendations and notifications," that third parties could use "to facilitate" their communication. (*Id.* at p. 1096.) As the court explained, because those tools did not "require[]" users to seek out drugs or themselves contribute "to the alleged unlawfulness of the content," they did not deprive the website of section 230's protections. (*Id.* at p. 1099, citing *Roommates*, 521 F.3d at p. 1175.)

As these decisions illustrate, "courts have rebuffed attempts to avoid section 230 through the 'creative pleading' of barred claims." (*Hassell*, 5 Cal.5th at p. 542.) The statute protects against claims that challenge the way online services display and

disseminate third-party content or that target the provision of tools that facilitate how users create and share content.

B. The Decision Below Conflicts with Precedent by Permitting Claims Based on Facebook's Publishing Activities and Tools.

The Court of Appeal departed from this case law in holding that "section 230 does not immunize Facebook from liability because it acted as a content provider." (Op. at p. 20.) As the court acknowledged, it is "third parties, not Facebook, [that] create the allegedly illegal content." (*Id.* at p. 24.) Yet the court embraced plaintiff's efforts to plead around section 230's broad protections. In so doing, the Court of Appeal created a split of authority that warrants this Court's intervention.

The Court of Appeal concluded Facebook is not protected under section 230 because of how it disseminates third-party ads to users. The algorithm Facebook uses to deliver ads to users, the court reasoned, "renders Facebook more akin to a content developer" because it "ascertains data about a user and then targets ads based on the users' characteristics." (Op. at pp. 23-24.)

That ruling conflicts with decisions of many appellate courts. When confronted with these arguments in *Prager*, for example, the Court of Appeal held the website was protected under section 230 because the plaintiff's claims sought to hold it

"liable under state law for [its] editorial publication decisions." (85 Cal.App.5th at p. 1033.) The website remained a publisher, rather than a co-developer, of content even when it used "algorithms" to determine how the videos would be delivered and to whom. (*Id.* at p. 1034.) *Prager* held as much even though the editorial decisions there prevented some users from seeing certain videos altogether. (*Id.* at p. 1029.)

According to the Court of Appeal, the facts here are "distinguishable" because "[t]here were no allegations" in *Prager* "that the defendant created a system that actively shaped the audience based on protected characteristics." (Op. at p. 23.) That's incorrect: the plaintiff in *Prager* alleged the website lost its protections under section 230 by using an "algorithm . . . embedded with discriminatory and anti-competitive animus-based code" that "restrict[ed] content based on the identity, viewpoint, or topic of the speaker." (85 Cal.App.5th at p. 1034.)

That distinction also misses the point. What matters is not the specific *reason* why plaintiffs claim algorithms or content-recommendation tools are unlawful; it is that plaintiffs "cannot plead around section 230 immunity by framing these website features as content." (*Prager*, 85 Cal.App.5th at p. 1034.)

The Court of Appeal's decision also conflicts with *Doe II*. In both cases, the plaintiff challenged the "specific editing or selection process" a site used to disseminate third-party content to

users. (175 Cal.App.4th at p. 570.) But whereas the Court of Appeal here held that such a claim was not subject to dismissal under section 230, *Doe II* held the website was entitled to "full immunity." (*Ibid.*) As the court explained in *Doe II*, a claim that seeks "to restrict or make available certain material" is "expressly covered by section 230" when that content is provided exclusively by third parties. (*Id.* at p. 573.)

Prager and *Doe II* are correct applications of section 230, yet the Court of Appeal here came to the opposite conclusion on the same issue. That conflict warrants review. (Cal. Rules of Court, rule 8.500(b)(1).)

The Court of Appeal exacerbated the conflict by embracing plaintiff's argument that Facebook is not protected under section 230 because of the optional audience-selection tools it gave third-party advertisers that "allowed" them "to target their ads based on certain characteristics." (Op. at p. 22.) In the court's view, by providing those optional tools, Facebook "materially contribut[ed] to the content's alleged unlawfulness." (*Id.* at p. 23.)

The Court of Appeal grounded its ruling in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157 (en banc). As the court saw it, "[t]here is little difference" between Facebook's service and the *Roommates* website, which the Ninth Circuit held was not shielded by section 230. (Op. at p. 22.) But there is every difference between

the two: whereas the service in *Roommates* depended in every way on protected characteristics, Facebook's audience-selection tools don't *require* advertisers to consider such characteristics in choosing a target audience.

Roommates involved an online housing service that "require[d]" all potential subscribers, as a condition of using the service, to "answer a series of questions" about their "preferences in roommates with respect to . . . sex, sexual orientation, and whether [they] would bring children to the household." (521 F.3d at p. 1161.) These compelled answers were then used in display, matching, and search functions on the website. (*Ibid.*) In holding that section 230 did not protect the website against the plaintiffs' Fair Housing Act claims, the Ninth Circuit emphasized that the website asked "discriminatory questions" and required users to respond to them as "a condition of doing business." (*Id.* at p. 1166.) That distinguished the website from others that "merely provide a framework that could be utilized for proper or improper purposes," which would be protected under section 230. (*Id.* at p. 1172.)

The Ninth Circuit drove the point home by distinguishing the *Roommates* website's discriminatory questions requiring discriminatory answers from its "Additional Comments" box, which "encourage[d] subscribers to provide *something*" about their preferences but did not "tell subscribers what kind of information

they should or must include." (521 F.3d at p. 1174.) Even though the plaintiff had alleged that the comment box "impliedly suggest[ed] that subscribers should make statements expressing a desire to discriminate on the basis of protected classifications," the Ninth Circuit made clear that section 230's protections would apply, reasoning that such a theory of "encouragement cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter." (*Ibid.*)

Roommates also emphasized the reason Congress crafted section 230 in broad terms: because "there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality" of third-party users. (521 F.3d at p. 1174.) Rather than subjecting websites to "death by ten thousand duck-bites, fighting off claims that they promoted or encouraged . . . the illegality of third parties," the Ninth Circuit adopted a clear rule: section 230's protections will not apply only if a website's tools *require* unlawful content. (*Id.* at pp. 1174-1175.)

That rule has been reinforced in later decisions of the Ninth Circuit (e.g., *Dyroff*, 934 F.3d at pp. 1098-1099); endorsed by other circuits (e.g., *Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 68-71); and adopted by California appellate courts (e.g., *Doe II*, 175 Cal.App.4th at pp. 574-575).

Under those principles, the section 230 analysis of Facebook's audience-selection tools should have been easy. Unlike the *Roommates* website, Facebook doesn't *require* advertisers to select particular users to target for ads. (2CT393 ¶ 46 [acknowledging "[t]he default setting for Facebook advertisements" is that "anyone who is 18 years old or older would receive the advertisement"].) So even as plaintiff reads the Unruh Act, those tools will be used toward discriminatory ends only if advertisers choose to do so. The Court of Appeal itself recognized as much, observing that it was "[i]nsurance advertisers [that] 'allegedly used the tools to exclude protected categories of persons from seeing some advertisements.'" (Op. at p. 22.) The consequences under longstanding precedent are clear: because Facebook "does not *require* the use of . . . discriminatory criteria," it cannot be sued as "a developer of [the] content." (*Dyroff*, 934 F.3d at p. 1099.)

Yet the Court of Appeal reached the opposite conclusion here. Misreading *Roommates* and the extensive precedent illustrating that decision's application, the court ruled that Facebook could be sued because it "*allowed* insurance companies to target their ads based on certain characteristics." (Op. at p. 22, italics added.) Of course, plaintiff here repeatedly ignores that Facebook's policies expressly prohibit discrimination by advertisers. (2CT442, 450.) And in any event, the relevant

question for purposes of section 230 isn't whether a website provides tools that may *allow* third parties to engage in unlawful conduct; it's whether the website "affirmatively require[s]" that conduct. (*Dyroff*, 934 F.3d at pp. 1098-1099.) On this issue, too, the Court of Appeal's sweeping rule creates a conflict warranting this Court's review.

C. The Court of Appeal's Decision Will Have Serious, Harmful Effects for Internet Services.

The decision below also merits review because, if left undisturbed, it may subject online services to precisely the "death by ten thousand duck bites" that section 230 was enacted to prevent. (*Roommates*, 521 F.3d at pp. 1174-1175.)

Consider the Court of Appeal's treatment of the tools Facebook uses to deliver third-party ads to users. The internet contains an overwhelming crush of information. The only way it works—and the reason services like Facebook, along with many others like YouTube, Google Search, Pinterest, and Yelp, are so valuable—is if the information is delivered in a manageable way. That requires judgment and (given the sheer quantity of data) algorithms. It's precisely those intermediary functions on which the "vibrant and competitive free market" of the internet depends, and to which Congress gave broad protections. (47 U.S.C. § 230, subds. (b)(2), (c)(1).) By calling those protections into doubt, the decision below puts services on the horns of a dilemma: cut back

on the tools that make the press of information online digestible, or face endless "costly and protracted legal battles." (*Roommates*, 521 F.3d at p. 1175.)

The same goes for the court's analysis of Facebook's audience-selection tools. For a decade and a half, "[t]he message to website operators" has been "clear": section 230's protections will be lost only if a website is designed "to require users to input illegal content," not "in cases of enhancement by implication or development by inference." (*Roommates*, 521 F.3d at pp. 1174-1175.) Now, the rules are anything but clear, and services will face the threat and distraction of lawsuits any time their tools "allow[]" third parties to break the law. (Op. at p. 22.) The consequence of the Court of Appeal's reasoning will be services' choosing to deprive their users of communicative tools that for years have fed into the diverse array of "political, educational, cultural, and entertainment" content that makes the internet valuable. (47 U.S.C. § 230, subd. (a)(5).)

CONCLUSION

The Court should grant review.

DATED: October 31, 2023

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous Jr.
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CERTIFICATION OF COMPLIANCE

Under rule 8.504(d)(1) of the California Rules of Court, I certify that this petition contains 8,329 words, excluding the cover page, tables of content and authorities, signature block, and this certification.

DATED: October 31, 2023 /s/ Theodore J. Boutrous Jr.
Theodore J. Boutrous Jr.

PROOF OF SERVICE

I, Matt Aidan Getz, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years, and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, California 90071-3197. On October 31, 2023, I served the following document:

PETITION FOR REVIEW

on those listed in the attached service list, by the following means:

☑ **BY MAIL SERVICE**: Today, I caused true and correct copies of the petition to be placed in sealed envelopes addressed to the trial court, Court of Appeal, and State Solicitor General, with the envelopes to be placed for collection and mailing, following our ordinary business practices. I am familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid.

☑ **BY ELECTRONIC SERVICE**: A true and correct copy of the petition was electronically served on counsel for plaintiff.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 31, 2023.

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SAMANTHA LIAPES et al., Plaintiffs and Appellants, v. FACEBOOK, INC., Defendant and Respondent.	A164880 (San Mateo County Super. Ct. No. 20CIV01712)

Samantha Liapes filed a class action against Facebook, Inc. (Facebook, now known as Meta Platforms, Inc.), alleging it does not provide women and older people equal access to insurance ads on its online platform in violation of the Unruh Civil Rights Act and Civil Code section 51.5 — both of which prohibit businesses from discriminating against people with protected characteristics, such as gender and age. (Civ. Code, §§ 51, 51.5, 52, subd. (a), undesignated statutory references are to this code.)[1] Liapes alleged Facebook requires all advertisers to choose the age and gender of its users who will receive ads, and companies offering insurance products routinely tell it to not send their ads to women or older people. She further alleged Facebook's ad-delivery algorithm, the system that determines which users will receive ads,

[1] Some courts have used "the Unruh Act" to refer collectively to sections 51 and 52. (E.g., *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 667–668.) Section 51, however, indicates that statute "shall be known, and may be cited, as the Unruh Civil Rights Act." (*Id.*, subd. (a).) We use Unruh Civil Rights Act accordingly.

discriminates against women and older people by relying heavily on the two key data points of age and gender. As a result, Liapes alleged, women and older people were excluded from receiving insurance ads.

The trial court sustained Facebook's demurrer, deciding Liapes did not plead sufficient facts to support her discrimination claims. It concluded Facebook's tools are neutral on their face and simply have a disproportionate impact on a protected class, rather than intentionally discriminating. The court further concluded Facebook was immune under section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230 (section 230)), which applies to interactive computer service providers acting as a "publisher or speaker" of content provided by others. Liapes appealed. We review de novo the ruling on the demurrer. (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558 (*Regents*).) Liberally construing the complaint and drawing all reasonable inferences in favor of Liapes's claims, we conclude the complaint alleges facts sufficient to state a cause of action and reverse. (*Ibid.*)

BACKGROUND[2]

Facebook is a popular social networking service with over two billion users every month. As a condition to joining, users must provide it with their birth dates and gender. Users cannot opt out of disclosing this information. Users engage with Facebook in various ways, including through its " 'News Feed,' " " 'Stories,' " " 'Marketplace,' " and " 'Watch.' " Companies use it to send ads, such as for insurance products and services, to consumers. They pay Facebook to place their ads on users' News Feeds.

Facebook provides advertisers with several tools to determine who receives ads. One is "Audience Selection," allowing advertisers "to specify the

[2] All facts are taken from Liapes's complaint.

parameters of the target audience of Facebook users who will be eligible to receive the advertisement." There are thousands of categories advertisers *may* select or exclude, such as interests and behaviors, when setting the audience. But advertisers are *required* to make three selections establishing basic target audience parameters: age, gender, and location. Each of these three categories has a drop-down menu indicating advertisers can include or exclude users by age or gender. The default setting is 18 to 65 years and older and all genders, meaning all users 18 years old or older would receive the ad.

Facebook, however, counsels against the broad default audience parameters. In "Facebook Blueprint," a training program for advertisers, Facebook strongly encourages them to narrow the age range and genders of users who will receive ads to make them more effective. It suggests, for example, " 'Let's start with gender. If you want, you can choose to reach out to only men or only women. If you have a bridal dress shop, women might be a better audience for you. But if you have a shaving and beard grooming business, maybe you'll want to reach out to men.' " Other tips include considering one's customer base: " '[t]hink about what [your customers] like, how old they are and the interests they have. This can help you identify audience options that will help you reach people like them on Facebook.' " Thus, if " 'the majority of your current customers are women, it might be a good idea to set your audience to reach women and exclude men.' "

Once the audience is selected, the advertiser determines the ad content and the Facebook page or other web page on which the ad will link. The advertiser purchases impressions — an event that occurs every time a user is shown an ad on Facebook — or clicks — an event that occurs every time a user clicks on an ad. Facebook then sends the ad to users within the

Audience Selection parameters. Users who are not within the selected audience will not receive the ad.

Facebook also allows advertisers to target their ads through a "Lookalike Audiences" tool. Advertisers provide Facebook with a list of users "whom they believe are the type of customers they want to reach." Facebook then applies its own analysis and algorithm to identify a larger audience resembling the sample audience. The resulting audience will be eligible to receive the ad. Facebook expressly uses age and gender to directly determine which users will be included in a Lookalike Audience. Thus, if an advertiser creates a sample audience that is disproportionately male or younger, the Lookalike Audience will disproportionately exclude women and older people.

Once the audience has been selected, Facebook thereafter uses an ad-delivery algorithm to further determine which users within a particular audience will receive ads. "For example, if an advertiser chooses an audience selection of 500,000 but purchases only 50,000 impressions to be sent to Facebook users within that audience selection, Facebook must determine which of the 500,000 Facebook users will actually receive the advertisement." The algorithm uses a variety of data points, such as data about each user and past and ongoing performance of certain types of ads to determine which users will receive the ad. In doing so, the algorithm relies heavily on age and gender to determine which users will actually receive the ad, *regardless of whether the advertiser directs Facebook to limit its Audience Selection based on those factors*.

One research study of Facebook's ad platform " 'observe[d] significant skew in delivery along gender . . . despite neutral targeting parameters.' " This bias, the researchers concluded, was the result of the platform — not the advertisers — making choices about which users to show the ads. Another

study auditing over 100,000 ads published on Facebook determined credit ads were more likely to be sent to a larger share of men than women.

Liapes is a 48-year-old woman and regular Facebook user. She was interested in learning about insurance products via ads on her News Feed because she did not have life insurance at that time. But she could not view several life insurance ads posted on Facebook due to her age or gender; had she been able to view the ads, she would have qualified for the insurance, applied for a quote, and possibly obtain a policy. For example, a life insurance ad by Ladder was only sent to people age 25 to 45. She did not see a Health IQ Special Rate Insurance ad since it was only sent to males ages 30 to 64. Similarly, she did not see a National Family Assurance ad because it was only sent to males ages 30 to 49. In addition, she did not see four ads for auto insurance or four ads for services comparing auto insurance rates in her News Feed. As a result, she had a harder time learning about those products or services.

In 2020, Liapes filed a class action alleging Facebook violated the Unruh Civil Rights Act by engaging in age and gender discrimination when providing users with ads regarding insurance opportunities.[3] She alleged she and class members were harmed by being segregated, classified, and treated in an unequal, stereotypical, and arbitrary manner, and being denied information they have a right to receive on an equal basis because of their

[3] This is Liapes's first amended complaint. Her original complaint alleged Facebook's Audience Selection tools and delivery algorithm routinely and systematically excluded older persons and women from viewing thousands of ads regarding financial services opportunities. Facebook demurred and moved to stay the case in favor of a separate federal case filed by Liapes's counsel asserting the same claims. After the federal case was dismissed, Liapes filed the amended complaint.

age and/or gender.[4] In addition, Liapes alleged Facebook aided, abetted, and/or incited numerous insurance companies to publish the ads in a way that denied older persons and/or women full and equal accommodations, advantages, facilities, and services of their business establishments. (§ 51, subd. (b).) Based on the same allegations, Liapes further asserted Facebook violated section 51.5 by intentionally discriminating against, boycotting, and/or refusing to provide services to women and older people based on their age and gender.

The trial court sustained Facebook's demurrer. It determined Liapes failed to allege Facebook engaged in intentional discrimination because the default setting for the Audience Selection tool and Lookalike Audience is age and gender neutral. The court disregarded Liapes's allegations that the ad-delivery algorithm expressly discriminated on the basis of age and gender to increase the likelihood users would click on each ad and thus increase Facebook's revenue. The court explained these allegations were inconsistent with those in the original complaint — that the purpose of the algorithm was "to optimize an advertisement's audience and the advertiser's goals by showing the advertisement preferentially to the users Facebook believes will maximize" views, engagement with the ad, and sales. The court also rejected Liapes's aiding and abetting claim, concluding there were insufficient facts indicating Facebook knew the advertisers engaged in discrimination or substantially assisted them. Finally, the court determined Liapes's claims were barred by section 230 because the Audience Selection and Lookalike

[4] In 2018, Facebook entered into a settlement with the Washington State Attorney General, prohibiting Facebook from excluding users from receiving insurance ads based on race, creed, color, national origin, veteran or military status, sexual orientation, or disability.

Audience tools were neutral. Liapes appealed the order rather than amending her complaint.

DISCUSSION

Liapes contends the trial court erroneously sustained Facebook's demurrer. When reviewing a ruling on a demurrer, we examine de novo whether the complaint alleges facts sufficient to state a cause of action. (*Regents*, *supra*, 220 Cal.App.4th at p. 558.) "We assume the truth of the properly pleaded factual allegations, [and] facts that reasonably can be inferred from those expressly pleaded." (*Ibid*.) But we do not assume the truth of "contentions, deductions, or conclusions of law." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 440.) We liberally construe the complaint "with a view to substantial justice between the parties," drawing "all reasonable inferences in favor of the asserted claims." (*Regents*, at p. 558; *Candelore v. Tinder, Inc*. (2018) 19 Cal.App.5th 1138, 1143 (*Candelore*).) The plaintiff must demonstrate the court erroneously sustained the demurrer and "must show the complaint alleges facts sufficient to establish every element of each cause of action." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) Having engaged in that review, we agree the demurrer should not have been sustained.

I.

The Unruh Civil Rights Act's purpose is "to secure to all persons equal access to public accommodations 'no matter' " the personal characteristics. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1169.) It is intended to eradicate arbitrary, invidious discrimination in business establishments, and stand "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*).) Under the

statute, all persons "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (§ 51, subd. (b).) The statute lists 14 types of prohibited discrimination, such as sex, race, and religion. (*Ibid*.) But the list is "illustrative, rather than restrictive" — the statute forbids discrimination beyond these enumerated categories. (*In re Cox* (1970) 3 Cal.3d 205, 212.) Thus, while not expressly identified, the Unruh Civil Rights Act prohibits arbitrary discrimination based on a person's age — "a personal characteristic similar to the classifications enumerated in the Act." (*Candelore*, *supra*, 19 Cal.App.5th at p. 1145.) Courts liberally construe the Unruh Civil Rights Act to achieve its remedial purpose of deterring discriminatory business practices. (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025 (*White*).)

Section 51.5 similarly provides "[n]o business establishment . . . 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" the Unruh Civil Rights Act. (§ 51.5, subd. (a).)

A.

Facebook argues Liapes lacks standing to litigate her Unruh Civil Rights Act claim[5] because she was not injured by Facebook's ad-targeting methods that excluded women and older people from viewing insurance ads. Since challenges to standing are jurisdictional and may be raised at any time in the proceeding, including for the first time on appeal as here, Facebook has

[5] Because the analysis of the Unruh Civil Rights Act claim is the same as the section 51.5 analysis, we refer only to the Unruh Civil Rights Act for ease of reference. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1404.) But our conclusions apply equally to the Unruh Civil Rights Act and section 51.5 claims.

not forfeited this argument. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 751.) Its argument nonetheless fails.

"Standing under the Unruh Civil Rights Act is broad."[6] (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1127.) When "any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights" under the Unruh Civil Rights Act, "any person aggrieved by the conduct may bring a civil action." (§ 52, subd. (c).) Plaintiffs, however, may not sue for discrimination in the abstract; they " 'must actually suffer the discriminatory conduct.' " (*Angelucci*, *supra*, 41 Cal.4th at p. 175.) Thus, only plaintiffs who have transacted with a defendant and have been subject to discrimination have standing under the Unruh Civil Rights Act. (*White*, *supra*, 7 Cal.5th at p. 1026.)

Liapes satisfied these requirements. (*Regents*, *supra*, 220 Cal.App.4th at p. 558.) As a Facebook user, she has transacted with it. (*White*, *supra*, 7 Cal.5th at p. 1026.) It knows her age and gender because all users must provide such information as a condition of joining Facebook. Liapes was interested in insurance ads available on Facebook. In particular, she was interested in obtaining life insurance because she did not have a policy at the time. Moreover, she was qualified to obtain the insurance. But Facebook, Liapes alleged, used its Audience Selection tool, Lookalike Audience feature,

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[6] *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377 does not hold otherwise. There, the Court of Appeal determined a fair housing organization was not an aggrieved person under the Unruh Civil Rights Act merely because the defendants' allegedly discriminatory rental policy drained the organization's limited financial resources from its educational and counseling services and diverted them toward investigating discrimination claims made against the defendants — which might have been a basis for standing in federal court. (*Midpeninsula*, at pp. 1382, 1385.) Organizational standing based on diversion of resources is not at issue here.

and ad-delivery algorithm to exclude her from receiving certain insurance ads because of her gender and/or age.

The alleged injury is not conjectural or hypothetical. (*Osborne v. Yasmeh*, *supra*, 1 Cal.App.5th at p. 1127.) Liapes identified a life insurance ad that was only sent to males ages 30 to 49 because the advertiser used the Audience Selection tool. In another instance, a life insurance ad was not shown to her because it was only sent to people ages 25 to 45 — based on the advertiser's use of the Audience Selection tool — and because the advertiser wanted to reach people similar to its customers — based on the advertiser's use of the Lookalike Audience tool. Liapes further alleged, upon information and belief, that Facebook created thousands of Lookalike Audiences for insurance ads using age and gender to place users in the Lookalike Audiences. Because Liapes did not share characteristics with those Lookalike Audiences, she was less likely to receive the insurance ads or denied ads based on her gender and/or age. Moreover, she alleged the ad-delivery algorithm heavily weighted age and gender in advertising, thus skewing ads towards men rather than women. According to Liapes, it is important to immediately apply for and secure insurance offers because they often change or may expire. By excluding women and older people from ads, men and younger people obtained an advantage in the limited opportunities for securing insurance policies. Accepting her factual allegations as true, Liapes actually suffered discrimination — she was deprived of information regarding insurance opportunities despite being ready and able to pursue those opportunities. (*Angelucci*, *supra*, 41 Cal.4th at pp. 165, 175.)

Relying on general notions about effective advertising not appearing in the complaint, Facebook argues Liapes is not aggrieved because advertisers *may* have and often do run different versions of ads, such as different copy or

graphics, targeted to women and older people. Facebook further faults Liapes for failing to identify insurance ads she actually received, noting they may have been more valuable to her than those to which she was denied access. Such inferences are not appropriate at this stage of the litigation — a demurrer is not "the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn where competing inferences are possible." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635.) Moreover, according to the complaint, upon information and belief, the age- and gender-restricted insurance ads were not part of a parallel ad campaign whereby Facebook delivered the same or similar ads to women and older people.[7] Liapes further identified several ads that did not appear to her on Facebook — she had to be "informed that she was denied such ads because of her age and/or gender." Because she did not receive these ads, she independently sought information about the insurance companies and services through the advertisers' websites, not Facebook. Her allegations sufficiently alleged an injury for standing purposes. (*Angelucci*, *supra*, 41 Cal.4th at p. 167.)

B.

Facebook next contends Liapes failed to state a claim under the Unruh Civil Rights Act. Facebook argues it does not engage in intentional discrimination; rather, it has neutral practices that, at most, have a disparate negative impact on the protected classes of gender and age. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854

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[7] We do not disregard these allegations, as Facebook urges, simply because they are based "upon information and belief." Allegations concerning matters " 'peculiarly within the knowledge of the adverse party,' " as is the case here, may be pleaded in this manner. (*Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 725, fn. 1.)

(*Koebke*).) Because the Unruh Civil Rights Act only reaches business practices that constitute intentional, invidious discrimination — not neutral practices that disparately impact protected groups — Facebook argues Liapes's claim is fatally flawed. (*Ibid.*) We disagree.

To state a claim under the Unruh Civil Rights Act, a plaintiff must allege the defendant is a business establishment that intentionally discriminates against and/or denies plaintiff full and equal treatment of a service, advantage, or accommodation based on plaintiff's protected status. (§§ 51, subd. (b), 51.5; *Candelore*, *supra*, 19 Cal.App.5th at pp. 1144–1146; *Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1036 ["Unless an Unruh Civil Rights Act claim is based on an [Americans with Disabilities Act of 1990] violation," a plaintiff must prove intentional discrimination].) Intentional discrimination requires " 'willful, affirmative misconduct.' " (*Koebke*, *supra*, 36 Cal.4th at p. 853.) And plaintiffs must allege more than the disparate impact of a facially neutral policy on a particular protected group. (*Id.* at p. 854.)

Construing the complaint liberally and drawing all reasonable inferences in favor of the asserted claims, Liapes has stated an Unruh Civil Rights Act claim. (*Regents*, *supra*, 220 Cal.App.4th at p. 558.) Facebook qualifies as a business establishment. (*White*, *supra*, 7 Cal.5th at p. 1032 [Unruh Civil Rights Act prohibits discrimination by online businesses].) And it does not dispute women and older people were categorically excluded from receiving various insurance ads — an admitted service of Facebook — on its platform. (*Candelore*, *supra*, 19 Cal.App.5th at p. 1152 [people are entitled to full and equal accommodations and services in all business establishments of every kind, including less essential commercial services].)

Liapes further alleged Facebook engaged in intentional discrimination by designing and employing ad tools that expressly make distinctions based on gender and age when creating the target audience for insurance ads. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 35–36 [discount program for women violated Unruh Civil Rights Act because it singled-out customers based on protected class status, without any compelling societal interest].) Facebook, not the advertisers, classifies users based on their age and gender. Advertisers using the Audience Selection tool are *required* to identify the age and gender preferences for their target audience. While the default audience setting is 18 to 65 years of age and older and all genders, Facebook provides advertisers with the option of easily including or excluding entire groups from the target audience by checking categories on a drop-down menu. Moreover, Facebook encourages advertisers to target users based on age and gender. It urges advertisers to " '[t]hink about what [your customers] like, how old they are and the interests they have. This can help you identify audience options that will help you reach people like them on Facebook.' " Facebook explains, if " 'the majority of your current customers are women, it might be a good idea to set your audience to reach women and exclude men.' " And insurance advertisers allegedly excluded protected categories of persons — Liapes identified several insurance ads she did not receive because she was expressly outside the Audience Selection parameters for age or gender, thus requiring her to independently search for insurance opportunities. (See, e.g., *Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 151 [allegation that employee made three racist comments to plaintiff was sufficient to allege intentional discrimination under Unruh Civil Rights Act].)

To the extent Facebook argues it was not responsible for any unequal treatment Liapes experienced because it merely followed the advertisers' selections, we disagree. The complaint alleged Facebook presents advertisers the opportunity to discriminate based on gender and age. (Cf. *Fair Housing Coun., San Fernando v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1164, 1167 (*Roommates*) [website could violate nondiscrimination laws by providing users the option to choose between nondiscriminatory and discriminatory preferences when searching for housing].) Facebook, rather than the advertisers, sends the ads to users within the Audience Selection parameters. Facebook retains the discretion and ability to approve and send an ad that includes age- or gender-based restrictions. Thus, Liapes alleged, whenever Facebook delivers an age- or gender-restricted ad, Facebook knowingly sends or publishes an ad that discriminates.

Allegations regarding the Lookalike Audience tool further indicate Facebook intentionally uses gender and age when targeting ads. For example, it is Facebook that creates the Lookalike Audience resembling the advertiser's sample audience. When analyzing the characteristics of the sample audience to determine the larger Lookalike Audience, Facebook directly relies on the users' age and gender. This occurs regardless of whether the advertiser has created a sample audience with age or gender exclusions. Thus, while an advertiser provides Facebook with the sample audience, "the rest of the work to create the Lookalike Audience is done entirely by Facebook," and it is that work that ultimately results in ad denial.

After the audience is selected, the ad-delivery algorithm — determining which users within a particular audience will receive ads — is no different. According to the complaint, both age and gender are weighted more heavily than other characteristics or data points. More importantly, Facebook uses

age and gender to determine who will receive the ads, regardless of whether the advertiser directs Facebook to limit the age or gender of recipients. Thus, even if advertisers do not limit their audience to a specific gender or age, *Facebook* makes those distinctions on behalf of advertisers via the ad-delivery algorithm. As a result, Liapes was unable to view several insurance ads, even when advertisers did not expressly exclude women and older people.

We agree with Liapes that the trial court erred when it disregarded her allegations about the algorithm. We discern no inconsistency between her allegations in the original complaint regarding the purpose of the ad-delivery algorithm — to optimize both the ad's audience and the advertiser's goals — and those in her first amended complaint — to increase the likelihood Facebook users will click on each ad because revenue increases when users click more often on ads. These allegations reinforce each other. Over 98 percent of Facebook's revenue comes from advertisers who pay to publish ads. According to the complaint, Facebook wants ads to be as " 'relevant' " as possible to ensure users spend more time on Facebook and allow it to sell and place more ads. Because Facebook increases its revenue when users engage with ads, it has the incentive to optimize the audience for those ads. These are not conflicting factual allegations and did not warrant the court's disregard. (*Panterra GP, Inc. v. Superior Court* (2022) 74 Cal.App.5th 697, 730 [if an amended complaint contains facts contradicting an earlier complaint in the same lawsuit, a court can take judicial notice of the inconsistent statements and disregard the conflicting factual allegations].)

More importantly, that the ad-delivery algorithm may serve a legitimate business interest, such as optimizing an ad's audience or connecting users to ads, is not fatal to Liapes's Unruh Civil Rights Act claim. "[L]egitimate business interests may justify limitations on consumer access to

public accommodations." (*Harris v. Capital Growth Investors XIV*, *supra*, 52 Cal.3d at p. 1162.) But while businesses can make economic distinctions in serving customers, those distinctions must be based on characteristics that "could conceivably be met by any customer" — not personal characteristics. (*Id*. at p. 1163.) For example, discounts based on gender violate the Unruh Civil Rights Act, but discounts "to any customer who meets a condition which any patron could satisfy (e.g., presenting a coupon, or sporting a certain color shirt or a particular bumper sticker)" are permissible. (*Koire v. Metro Car Wash*, *supra*, 40 Cal.3d at p. 36.) The "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.) Thus, a defendant who pursues discriminatory practices motivated by " 'rational self-interest,' " such as economic gain, nonetheless violates the Unruh Civil Rights Act.[8] (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 740–741, fn. 9.) On demurrer, the critical issue here is whether Liapes sufficiently alleged Facebook's ad platform discriminates against a protected class, such

[8] Distinctions, such as those based on age, are unlawful if they constitute " 'arbitrary, invidious or unreasonable discrimination.' " (*Javorsky v. Western Athletic Clubs, Inc*. (2015) 242 Cal.App.4th 1386, 1398.) Differential treatment is reasonable and nonarbitrary if there is a strong public policy in favor of the distinctions. (*Ibid*; *Sargoy v. Resolution Trust Corp*. (1992) 8 Cal.App.4th 1039, 1044 [bank offering older people savings accounts with higher interest rates was not arbitrary discrimination because it served policy considerations such as elderly people having limited incomes, inability to work due to health problems as articulated in a myriad of statutes].) Facebook does not argue its allegedly discriminatory ad platform is justified by any public policy.

as women and older people, even if in pursuit of those legitimate business goals. We conclude she has.[9]

The foregoing makes clear that Liapes alleged intentional discrimination, not disparate impact as Facebook asserts. Disparate impact analysis "relies on the *effects* of a facially neutral policy on a particular group." (*Koebke*, *supra*, 36 Cal.4th at p. 854.) Specifically, it requires inferring discriminatory intent solely from those effects. (*Ibid.*) Here, by contrast, Liapes alleged Facebook crafted tools such as the Lookalike Audience and ad-delivery algorithm that expressly rely on users' age and gender; i.e., they are not facially neutral. Those characteristics are then used to exclude women and older people from receiving insurance ads. Finally, while a disparate impact analysis does not apply to Unruh Civil Rights Act claims, nothing precludes "the admission of relevant evidence of disparate impact in Unruh Act cases" because it "may be probative of intentional discrimination." (*Harris v. Capital Growth Investors XIV*, *supra*, 52 Cal.3d at p. 1175.) Such evidence exists here — Liapes alleged Facebook's ad platform has a significant skew in delivery along gender lines. Combined with allegations that Facebook expressly relies on gender and age to determine the

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[9] In disputing this conclusion, Facebook refers repeatedly to information outside the pleadings. For example, Facebook asserts its policies expressly forbid advertisers from discriminating based on protected attributes. And it further suggests that Liapes might have received parallel ads that "may well" have been "more 'valuable' " to her. Finally, Facebook asserts Liapes's references to its training materials have been taken out of context. Whatever the merits of these arguments may be, Facebook ignores that, on demurrer, we test the pleadings alone. (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905.) The only issue "is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (*Ibid.*) Facebook should rest assured it will be able to develop the record and its arguments further — just not at this stage of the litigation.

audience for its ads, the complaint raises a plausible inference Facebook treated Liapes unequally because of her gender and age — a valid Unruh Civil Rights Act claim of intentional discrimination by a business establishment. (*Doheny Park Terrace Homeowners Assn., Inc.* v. *Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.)

C.

Facebook also contends Liapes failed to state an Unruh Civil Rights Act claim under an aiding and abetting theory of liability because she does not adequately allege it acted with an intent to facilitate discriminatory conduct. We disagree.

A person who aids and abets the commission of an offense, such as an intentional tort, may be liable if the person " 'knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act' " or " '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.' " (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325–1326.) A person can be liable for aiding and abetting violations of civil rights laws. (Cf. *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 389 [aiding and abetting theory of liability applies to Fair Employment and Housing Act claims].)

The complaint satisfied these elements. It adequately alleged Facebook knew insurance advertisers intentionally targeted its ads based on users' ages and gender — as explained above, a violation of the Unruh Civil Rights Act. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1149 [requiring plaintiff to first identify the violation for which plaintiff seeks to hold defendant liable].) According to Liapes, the coding in Facebook's platform identifies each type of business, including insurance advertisers,

that purchases ads. In addition, Facebook is aware of the ad's subject matter, including insurance ads. Facebook was aware ads contained age- or gender-based restrictions because it alone approved and sent the ads to the target audience. (*Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 94 [allegation defendant knew they were facilitating orders for unlawful pyramid scheme satisfied knowledge requirement for aiding and abetting claim].) Thus, Liapes alleged, Facebook knew older people and women were being discriminated against with regard to the provision of insurance ads. (*Casey v. U.S. Bank Nat. Assn.*, *supra*, 127 Cal.App.4th at p. 1145 [liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted].)

The complaint also sufficiently alleged the element of substantial assistance or encouragement. (*Fiol v. Doellstedt*, *supra*, 50 Cal.App.4th at p. 1326.) Each time an advertiser used the Audience Selection tool and made a discriminatory targeting decision based on age or gender, Facebook followed the selected audience parameters. Indeed, this occurred despite Facebook retaining the discretion to reject ads that include age- or gender-based restrictions. Facebook further maintained the age and gender Audience Selection criteria despite its awareness advertisers were making discriminatory advertising choices. (*Schulz v. Neovi Data Corp.*, *supra*, 152 Cal.App.4th at p. 94 [defendant substantially assisted and encouraged illegal conduct by allowing configuring of website to authorize processing of credit card payments].) Although the default setting for the Audience Selection tool is for all genders and people over the age of 18, Facebook encourages advertisers to narrow the gender of the users who will receive ads to make them more effective. In one instance, Facebook stated if " 'the

majority of your current customers are women, it might be a good idea to set your audience to reach women and exclude men.' "

Facebook nonetheless argues Liapes must also plead it had the *specific intent* to facilitate the advertisers' Unruh Civil Rights Act violations. (See, e.g., *Gerard v. Ross* (1988) 204 Cal.App.3d 968, 983.) We need not decide whether this is a required element for aiding and abetting liability — read liberally, the complaint alleges Facebook intended to assist the insurance advertisers in excluding women and older people from receiving their ads. (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 345.) Liapes alleged Facebook encourages, facilitates, expects, and wants advertisers to routinely exclude older persons and women from their Audience Selections so they will not receive ads on insurance opportunities. "Fairly read, that allegation indicates intent to participate" in the illegal activity. (*Ibid.*)

In sum, the trial court erred in sustaining Facebook's demurrer to Liapes's complaint.

II.

Liapes contends section 230 does not immunize Facebook from liability because it acted as a content provider. We agree.

Section 230 "immunizes providers of interactive computer services against liability arising from content created by third parties." (*Roommates*, *supra*, 521 F.3d at p. 1162, fn. omitted.) It states, in relevant part, "[n]o provider or user of an interactive computer service" — meaning "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server" — shall "be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230, subds. (c)(1), (f)(2).) These provisions convey "an intent to shield Internet intermediaries from the

burdens associated with defending against state law claims that treat them as the publisher or speaker of third party content." (*Hassell v. Bird* (2018) 5 Cal.5th 522, 544.) " '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 Group, Inc.* (9th Cir. 2019) 934 F.3d 1093, 1097, brackets in original.)

But an interactive computer service provider only has immunity if it is *not* also the information content provider — that is, someone "responsible, in whole or in part, for the creation or development" of the content at issue. (47 U.S.C. § 230, subd. (f)(3); *Roommates*, *supra*, 521 F.3d at p. 1162.) Passively displaying content "created entirely by third parties" renders the operator only a service provider "with respect to that content." (*Roommates*, at p. 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." (*Ibid.*) "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." (*Id.* at pp. 1162–1163.)

Roommates — concluding a website matching people renting spare rooms with others seeking housing was not entitled to section 230 immunity — is instructive. (*Roommates*, *supra*, 521 F.3d at p. 1165.) The website required users to state the gender, sexual orientation, and familial status of their desired tenants. (*Id.* at p. 1161.) The website operator then used those preferences to determine which postings were shown to other users based on their selections from drop-down menus and pre-populated lists. (*Id.* at pp. 1161–1162, 1165.) By eliciting information about protected characteristics and thereafter using that information to

determine postings other users could view, the website operator was partially responsible for the development of allegedly illegal content. (*Id.* at pp. 1165, 1167.) The court concluded section 230 "does not grant immunity for inducing third parties to express illegal preferences." (*Roommates*, at p. 1165.)

There is little difference with Facebook's ad tools. Like the website at issue in *Roommates*, Facebook requires users to disclose their age and gender before they can use its services. (*Roommates*, *supra*, 521 F.3d at p. 1161.) It designed and created an advertising system, including the Audience Selection tool, that allowed insurance companies to target their ads based on certain characteristics, such as gender and age. (*Vargas v. Facebook, Inc.* (9th Cir., June 23, 2023, No. 21-16499) 2023 U.S.App. Lexis 15796 (*Vargas*); *Roommates*, at p. 1161; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 64, fn. 4 [authorizing citation and reliance on unpublished federal court decisions as persuasive authority].) Although there are thousands of characteristics advertisers may choose to identify their target audiences, Facebook *requires* advertisers to select age and gender parameters. Each category includes "simple drop-down menus and toggle buttons to allow" insurance advertisers "to exclude protected categories of persons." (*Vargas,* 2023 U.S.App. Lexis 15796, p *7; *Roommates*, at p. 1161.) Insurance advertisers then "allegedly used the tools to exclude protected categories of persons from seeing some advertisements." (*Vargas,* 2023 U.S.App. Lexis 15796, p. *7.) Facebook "identified persons in protected categories and offered tools that directly and easily allowed advertisers to exclude all persons of a protected category (or several protected categories)." (*Vargas,* 2023 U.S.App. Lexis 15796, p. *9.) In doing so, Facebook does not merely proliferate and disseminate content as a publisher. (*Kimzey v. Yelp! Inc.* (9th

Cir. 2016) 836 F.3d 1263, 1271.) It creates, shapes, or develops content "by materially contributing" to the content's alleged unlawfulness. (*Roommates*, at pp. 1167–1168.)

These circumstances are distinguishable from those in *Prager University v. Google LLC* (2022) 85 Cal.App.5th 1022. In that case, the defendant video sharing website restricted access to videos based on certain criteria regarding the content, such as talking about drug use or abuse, overly detailed conversations or depictions of sexual activity, and inappropriate language. (*Id.* at p. 1029.) The plaintiff alleged defendant violated the Unruh Civil Rights Act, among other statutes, by restricting access to the plaintiff's generally politically conservative videos based on its political viewpoint rather than the content falling into any restricted categories. (*Prager*, at p. 1033.) The court determined the plaintiffs were challenging the defendants' editorial decisions regarding restricting, restraining, and censoring content — all traditional publication decisions to which section 230 immunity attached. (*Prager*, at p. 1033.) There were no allegations, as here, that the defendant created a system that actively shaped the audience based on protected characteristics.

Facebook's Lookalike Audience tool and ad-delivery algorithm underscore its role as a content developer. According to the complaint, Facebook uses its internal data and analysis to determine what specific people will receive ads. The algorithm relies heavily on age and gender to determine which users will actually receive any given ad. This occurs even if an advertiser did not expressly exclude certain genders or older people. The algorithm then sends or excludes users from viewing ads based on protected characteristics such as age and gender. Because the algorithm ascertains data about a user and then targets ads based on the users' characteristics,

the algorithm renders Facebook more akin to a content developer. (*Vargas*, *supra*, 2023 U.S.App. Lexis 15796, p. *8.) Facebook is not entitled to section 230 immunity for the claims here.

Disputing this conclusion, Facebook argues its ad tools are neutral because third parties, not Facebook, create the allegedly illegal content. True, providing neutral tools to users to make illegal or unlawful searches does not constitute " 'development' " for immunity purposes. (*Roommates*, *supra*, 521 F.3d at p. 1169.) But the system must do " 'absolutely nothing to enhance' " the unlawful message at issue "beyond the words offered by the user." (*Kimzey v. Yelp! Inc.*, *supra*, 836 F.3d at p. 1270.) For example, "a housing website that allows users to specify whether they will or will not receive emails by means of *user-defined* criteria might help some users exclude email from other users of a particular race or sex." (*Roommates*, at p. 1169.) "However, that website would be immune, so long as it does not *require* the use of discriminatory criteria." (*Ibid*., italics added.) Here, Liapes alleged Facebook "does not merely provide a framework that could be utilized for proper or improper purposes." (*Roommates*, at p. 1172.) Rather, Facebook, after requiring users to disclose protected characteristics of age and gender, relied on "unlawful criteria" and developed an ad targeting and delivery system "directly related to the alleged illegality" — a system that makes it more difficult for individuals with certain protected characteristics to find or access insurance ads on Facebook. (*Id*. at pp. 1167, 1172; compare with *Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1125 [website operator was not involved with user's decision to enter a fake profile in a dating service, the illegal activity at issue]; *Dyroff v. Ultimate Software Group, Inc.*, *supra*, 934 F.3d at p. 1099 [website entitled to § 230 immunity from claims it permitted trafficking illegal narcotics where recommendation

and notification functions were based off of information users provided in blank text boxes rather than a requirement that users disclose certain characteristics].) That third-party advertisers are the content providers does not preclude Facebook "from *also* being an information content provider by helping 'develop' at least 'in part' the information" at issue here, contrary to Facebook's assertions. (*Roommates*, at p. 1165 ["the party responsible for putting information online may be subject to liability, even if the information originated with a user"].)

DISPOSITION

We conclude, liberally construing the complaint and drawing all reasonable inferences in favor of its claims, Liapes alleged facts sufficient to state a cause of action. The judgment is reversed. Liapes is entitled to her costs on appeal.

Rodríguez, J.

WE CONCUR:

Tucher, P. J.

Fujisaki, J.

A164880

Trial Court: San Mateo County Superior Court

Trial Judge: Hon. V. Raymond Swope

Counsel:

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