

1 Jim Davy (Pa. #321631)*
2 ALL RISE TRIAL & APPELLATE
3 P.O. Box 15216
4 Philadelphia, PA 19125
5 Tel: 609-273-5008
6 Email: jimdavy@allriselaw.org
7 *Pro Hac Vice Application Forthcoming

Lindsay Nako (SBN 239090)
IMPACT FUND
2080 Addison Street, Suite 5
Berkeley, CA 94704
Tel: 510-845-3473
Email: lnako@impactfund.org

Attorneys for Amicus Curiae Upturn

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF SAN MATEO**

10 SAMANTHA LIAPES, on behalf of herself
11 and others similarly situated,

12 Plaintiff,

13 vs.

14 FACEBOOK, INC.,

15 Defendant.

) Case No. 20-CIV-01712

) **APPLICATION FOR LEAVE TO FILE**
) **BRIEF OF AMICUS CURIAE UPTURN**
) **IN SUPPORT OF PLAINTIFF'S**
) **OPPOSITION TO DEFENDANT'S**
) **DEMURRER TO FIRST AMENDED**
) **COMPLAINT**

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

) Date: March 12, 2021
) Time: 9:00 a.m.
) Date Action Filed: April 3, 2020

19
20
21
22 TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

23 Proposed amicus curiae Upturn respectfully submits this application for leave to file the
24 accompanying amicus brief in support of Plaintiff's Opposition to Defendant Facebook, Inc.'s
25 Demurrer to First Amended Complaint. The proposed amicus curiae brief is attached hereto as
26 Exhibit A. Upturn submits the proposed brief in advance of the hearing in this action currently
27 scheduled for March 12, 2021 at 9:00 a.m. in Department 25 and in advance of the due date for
28 Defendant's reply in support of demurrer.

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

13 Counsel for Upturn requested the parties' consent to the filing of the attached proposed
14 amicus brief. Plaintiff consents to the filing; Defendant does not take a position with respect to
15 Upturn's filing.

16 17 **STATEMENT OF INTEREST**

18 Upturn is a nonprofit organization based in Washington, D.C. that works in partnership
19 with many of the nation's leading civil rights and public interest organizations to promote equity
20 and justice in the design, governance, and use of digital technology. One of Upturn's key priorities
21 is to advance economic opportunity, especially for people in protected classes who have
22 historically suffered discrimination on those bases. Many of those people have had difficulty
23 accessing financial services, in particular, because of discrimination on those bases.

24 Upturn has an interest in this case because it concerns how digital advertising will affect
25 gender and economic equity. Upturn has unique expertise related to digital advertising and can
26 assist the Court by addressing facts relevant to a core issue of this case without duplicating the
27 arguments of the parties. Moreover, in order to effectively pursue its mission, Upturn has an
28 interest in understanding Section 230's application to the practices at issue in this litigation.

1 Importantly, the underlying tension between Section 230 and the applicability of civil rights laws
2 that regulate marketing bears directly on many major ad platforms.

3 Facebook’s Ad Platform is complex. Upturn’s proposed *amicus* brief provides the
4 perspective of uniquely situated technical experts. More specifically, the brief describes how
5 underappreciated technical features of Facebook’s Ad Platform protection – its Lookalike
6 Audiences and ad delivery procedures – can contribute to unlawfulness under relevant California
7 statutes. These descriptions are critical to proper analysis of Section 230 immunity in this case.

8 *Amicus* has spent years researching how digital advertising, and Facebook’s Ad Platform
9 more specifically, impacts core civil rights protections, especially those related to financial
10 services and housing that depends on access to those services. In the past, Facebook has noted
11 that *amicus* has contributed to a “constructive dialogue” on these matters.¹

12 *Amicus* recognizes that the intersection of Section 230 and civil rights law presents
13 difficult and important questions. *Amicus* hopes to equip the Court with the best technical
14 understanding of how Facebook’s Lookalike Audiences and ad delivery work in practice. These
15 matters are directly relevant to the disposition of the issues before the Court.

16 For the foregoing reasons, Upturn asks the Court to exercise its discretion and grant this
17 Application for Leave, allow the proposed *amicus* brief to be filed, and consider the brief in
18 connection with the upcoming hearing on Defendant’s Demurrer to Plaintiff’s First Amended
19 Complaint.

20 Date: February 12, 2021

21 Respectfully submitted,

22 By: /s/ Jim Davy

23
24
25
26
27
28

¹ In 2016, Upturn urged Facebook to begin automatically classifying ads for housing, credit, and employment in order to enable the adoption of new policies and enforcement mechanisms. In a blog post announcing its adoption of such a system, Facebook acknowledged the feedback of Upturn and other groups. Egan, Facebook, Inc., *Improving Enforcement and Promoting Diversity: Updates to Ethnic Affinity Marketing* (Nov. 11, 2016), available at <https://newsroom.fb.com/news/2016/11/updates-to-ethnic-affinity-marketing/>.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jim Davy (Pa. #321631)*
All Rise Trial & Appellate
P.O. Box 15216
Philadelphia, PA 19125
**Pro Hac Vice Application Forthcoming*

Lindsay Nako (SBN 239090)
Impact Fund
2080 Addison Street, Suite 5
Berkeley, CA 94704

Counsel for proposed amicus curiae Upturn

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

1 Jim Davy (Pa. #321631)*
2 ALL RISE TRIAL & APPELLATE
3 P.O. Box 15216
4 Philadelphia, PA 19125
5 Tel: 609-273-5008
6 Email: jimdavy@allriselaw.org
7 *Pro Hac Vice Application Forthcoming

Lindsay Nako (SBN 239090)
IMPACT FUND
2080 Addison Street, Suite 5
Berkeley, CA 94704
Tel: 510-845-3473
Email: lnako@impactfund.org

8 *Attorneys for Amicus Curiae Upturn*

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN MATEO**

12 SAMANTHA LIAPES, on behalf of herself
13 and others similarly situated,

14 Plaintiff,

15 vs.

16 FACEBOOK, INC.,

17 Defendant.

18 Case No. 20-CIV-01712

19 **BRIEF OF AMICUS CURIAE UPTURN**
20 **IN SUPPORT OF PLAINTIFF'S**
21 **OPPOSITION TO DEFENDANT'S**
22 **DEMURRER TO FIRST AMENDED**
23 **COMPLAINT**

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

27 Date: March 12, 2021
28 Time: 9:00 a.m.
Date Action Filed: April 3, 2020

TABLE OF CONTENTS

I. Preliminary Statement 5

II. Argument..... 6

 A. By operating an algorithm that withholds insurance ads from people based on their gender and age, Facebook faces liability arising from its own conduct — not the content of third-party advertisers. 6

 B. By creating Lookalike Audiences based on its users’ gender and age, Facebook creates and develops content that contributes materially to illegal conduct online. 12

 C. Section 230 immunity is not limitless and sustaining the demurrer would improperly hinder enforcement of anti-discrimination laws online. 16

III. Conclusion 17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Airbnb, Inc. v. City & County of San Francisco*,
4 217 F. Supp. 3d 1066 (N.D. Cal. 2016) 10

5 *Barnes v. Yahoo!, Inc.*,
6 570 F.3d 1096 (9th Cir. 2009) 9, 11

7 *Doe v. Internet Brands, Inc.*,
8 824 F.3d 846 (9th Cir. 2016) 11

9 *Dyroff v. Ultimate Software Grp., Inc.*,
10 934 F.3d 1093 (9th Cir. 2019) 9, 10

11 *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*,
12 521 F.3d 1157 (9th Cir. 2008) *passim*

13 *FTC v. Accusearch Inc.*,
14 570 F.3d 1187 (10th Cir. 2009) 5

15 *HomeAway.com, Inc. v. City of Santa Monica*,
16 918 F.3d 676 (9th Cir. 2019) 10, 11, 16

17 *Kimzey v. Yelp! Inc.*,
18 836 F.3d 1263 (9th Cir. 2016) 5

19 *Marshall’s Locksmith Serv., Inc. v. Google, LLC*,
20 925 F.3d 1263 (D.C. Cir. 2019) 16

21 *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,
22 591 F.3d 250 (4th Cir. 2009) 16

23 **STATUTES & REGULATIONS**

24 Cal. Civil Code § 51(b) 10, 11, 15

25 47 U.S.C. § 230 (2018) *passim*

26 **OTHER AUTHORITIES**

27 Facebook, Advertiser Help Center, *Ads Help – Desktop*, Avoid Common Ad Set
28 Mistakes 7

Facebook for Business, Business Help Center, *About Lookalike Audiences* 12

1	Facebook for Business, Business Help Center, <i>Optimizations for Ad Delivery Available</i>	
2	<i>By Objective</i>	6
3	Muhammad Ali et al., <i>Discrimination through Optimization: How Facebook’s Ad Delivery</i>	
4	<i>Can Lead to Biased Outcomes</i> , 3 Proceedings of the ACM on Human-Computer Interaction	
5	CSCW 199:1 (2019)	7, 8, 9
6	Settlement Agreement and Release, Exhibit A – Programmatic Relief, <i>National Fair</i>	
7	<i>Housing Alliance, et al., v. Facebook, Inc.</i> , No. 18-cv-02689-JGK (S.D.N.Y. Mar. 8,	
8	2019), Doc. 67-2	9
9	Piotr Sapiezynski et al., <i>Algorithms that “Don’t See Color”</i> : Comparing Biases in Lookalike	
10	<i>and Special Ad Audiences</i> , arXiv:1912.07579 (2019)	13, 14, 15
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. PRELIMINARY STATEMENT¹**

2 Facebook’s Ad Platform, as currently designed and operated and pled by Plaintiff,
3 perpetuates discrimination prohibited by California law.

4 Plaintiff has pleaded ample facts to allow this Court to conclude that Facebook’s Ad
5 Platform is not fully immunized by 47 U.S.C. § 230 (2018) (“Section 230”), relying in part on
6 Amicus Curiae Upturn’s research on digital advertising, which is discussed in greater detail in
7 this brief. Section 230 is critical to people’s ability to speak freely on the internet. At the same
8 time, Section 230 does not — and should not — condone violations of civil rights solely because
9 an entity is an interactive computer service.

10 This is not the paradigmatic Section 230 case. At the heart of Section 230 is the principle
11 that internet intermediaries should not absorb liability for unlawful content created entirely by
12 another. “The prototypical service qualifying for [Section 230] immunity is an online messaging
13 board (or bulletin board) on which Internet subscribers post comments and respond to comments
14 posted by others.” *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (quoting *FTC v.*
15 *Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009)).

16 This case is different for two important reasons. First, with respect to Facebook’s ad
17 delivery algorithm, third-party content is almost entirely irrelevant to the unlawful conduct
18 alleged by the Plaintiff. As a result, this Court should not treat Facebook as the publisher or
19 speaker of third-party content. Second, with respect to Facebook’s Lookalike Audience tool,
20 Facebook itself creates and develops content that materially contributes to violation of state
21 antidiscrimination law. Empirical research conducted by Amicus supports both arguments.

22 This Court can analyze Facebook’s Ad Platform as distinct from its social network,
23 extending Section 230 immunity to certain aspects of Facebook’s operations and not others. *Fair*
24 *Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc). Were
25

26 ¹ Amicus certifies that no person or entity, other than Amicus’s own staff or its counsel, made a
27 monetary contribution to the preparation or submission of this brief or authored this brief, in
28 whole or in part.

1 this Court to overrule Facebook’s Demurrer, it would not jeopardize Facebook’s broad and well-
2 established immunity to host and moderate user-generated content.

3 Accordingly, Amicus asks the Court to overrule Facebook’s Demurrer.

4 **II. ARGUMENT**

5 **A. By operating an algorithm that withholds insurance services ads from people** 6 **based on their gender and age, Facebook faces liability arising from its own** 7 **conduct — not the content of third-party advertisers.**

8 It is well understood that Facebook provides advertisers with a variety of ways to target
9 their ads. *See generally* First Am. Compl. (FAC) at 9-10. What is less well understood is how
10 Facebook plays a central role, *independent from the choices made by advertisers*, in deciding
11 which of its users will ultimately see — and not see — a given ad.

12 Facebook makes ad delivery decisions using an algorithm that runs billions of automated
13 “auctions” each day — one each time an ad is displayed — rapidly filling available ad space as
14 users scroll through its site. These auctions are not standard “highest bidder” auctions, decided
15 neutrally on the basis of price. Rather, Facebook seeks to “deliver your ads to the right people”
16 by making its own predictions about who “the right people” are for any given ad.² These
17 predictions are based on the content of a particular ad, Facebook’s own knowledge of that user’s
18 characteristics and past behavior, the behavior of other users, and whether similar users have
19 interacted with the ads competing in that auction. *See* n.2, *supra*, and n.5, *infra*. Facebook does
20 not share with advertisers the reasoning behind its ad delivery decisions.

21 Facebook’s ad delivery decisions lead to significant demographic skews on the basis of
22 gender, age, and other protected factors. Facebook has said as much in its own
23 technical documentation. In explaining the ad delivery process to advertisers, Facebook says that
24 if it detects a pattern of men interacting with a particular ad, it will automatically — and without
25

26 ² Facebook for Business, Business Help Center, *Optimizations for Ad Delivery Available by*
27 *Objective*, Engagement, <https://www.facebook.com/business/help/416997652473726> (last visited
28 Feb. 11, 2021).

1 instruction from or notification to the advertiser — steer that ad toward a higher proportion of
2 other men in the future, to the exclusion of women.³

3 Amicus has published peer-reviewed empirical research, together with academic
4 coauthors at Northeastern University and the University of Southern California,⁴ that
5 demonstrates significant bias in Facebook’s ad delivery decisions on the basis of gender, age,
6 and other protected characteristics.⁵ This bias occurs *even when an advertiser chooses to target*
7 *their ad towards all gender and age groups.*

8 In one experiment, Amicus examined how Facebook perpetuates gender bias by
9 delivering two ads targeted broadly toward all Facebook users over the age of 18 in the United
10 States.⁶ Amicus created one ad focused on bodybuilding and another on cosmetics. Amicus ran
11 each of these ads at the same time and with the same bidding strategy and budget. Facebook
12 delivered these ads to dramatically gender-skewed audiences: It delivered the ad for
13 bodybuilding to over 75% men on average, while the cosmetics ad was delivered to over 90%
14 women on average.⁷

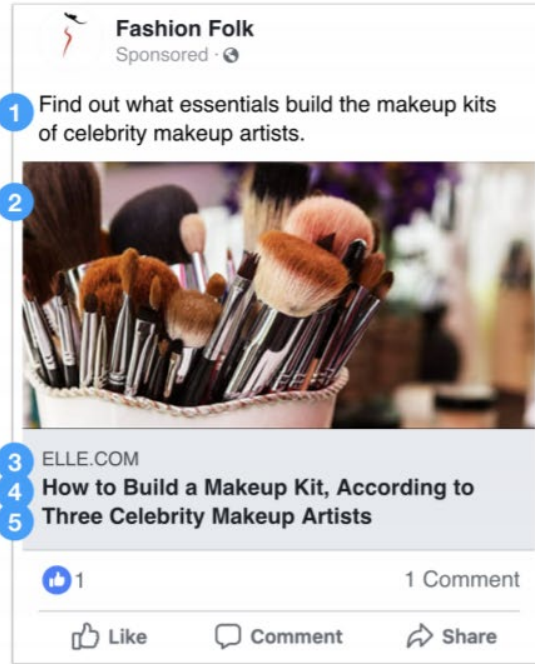
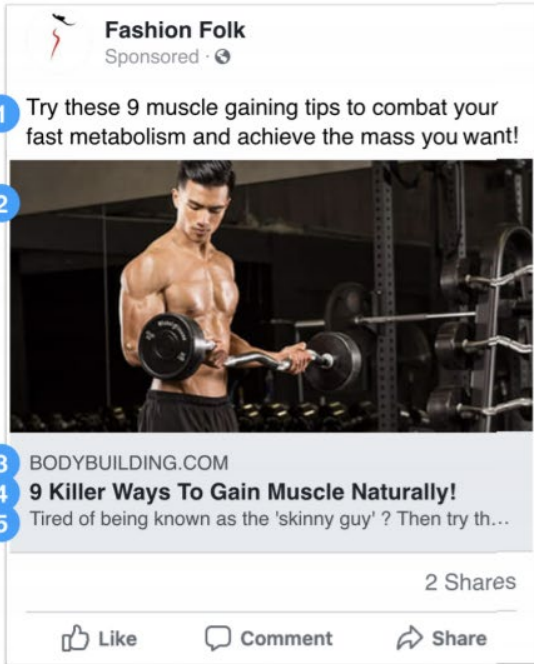
20 ³ Facebook, Advertiser Help Center, *Ads Help – Desktop*, Avoid Common Ad Set Mistakes,
21 [https://web.archive.org/web/20160930124257/https://www.facebook.com/business/
22 help/934288416682198?helpref=faq_content](https://web.archive.org/web/20160930124257/https://www.facebook.com/business/help/934288416682198?helpref=faq_content) (“If there are more and cheaper opportunities
23 among men than women, then we’d automatically spend more of your overall budget on the men
24 in the larger target audience of your single ad set.”). *See also* FAC at 22.

25 ⁴ In describing this and other research, for ease of readability, this brief will refer to “Amicus’s
26 research” Of course, this work could not have happened without the indispensable
27 contributions of Amicus’s collaborators and co-authors.

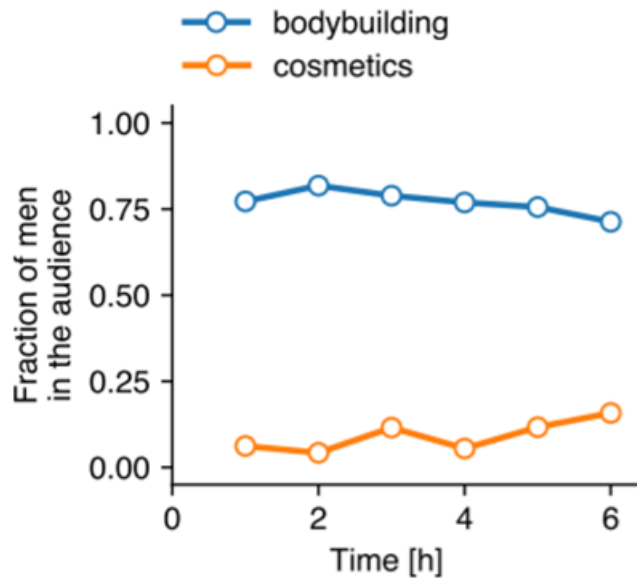
28 ⁵ *See* FAC at 23 (citing Muhammad Ali et al., *Discrimination through Optimization: How
Facebook’s Ad Delivery Can Lead to Biased Outcomes*, 3 Proceedings of the ACM on Human-
Computer Interaction CSCW 199:1 (2019), <https://dl.acm.org/doi/pdf/10.1145/3359301>).

⁶ The examples and images below are adapted from *Discrimination through Optimization*, *supra*
note 5.

⁷ *Discrimination through Optimization*, *supra* note 5, at 14.



Above: Two ads used by Amicus and researchers to test Facebook's ad delivery algorithm.



Delivery pattern showing how Facebook skewed the delivery of neutrally targeted ads by gender.⁸

⁸ See *id.* at 17 (Figure 5).

1 Amicus observed skewed delivery immediately upon placing ads, indicating that
2 Facebook is not reacting to user responses in real-time, but rather acting on its own “prebaked”
3 predictions about who “the right people” were for the ads. Again, these delivery patterns reflect
4 Facebook’s independent judgment, *not* the targeting parameters selected for these ads.

5 In a separate experiment, Amicus and researchers also measured demographic skews in
6 job ads. For example, given neutrally targeted ads, Facebook delivered lumber industry job ads
7 to over 90% men, and janitor ads to 65% women.⁹

8 Facebook itself has acknowledged the potential for discriminatory effects arising from its
9 ad delivery decisions. In a previous settlement,¹⁰ Facebook committed to “engage academics,
10 researchers, civil society experts, and privacy and civil rights/liberties advocates to study the
11 potential for unintended biases in algorithmic modeling.”¹¹ However, the company did not
12 commit to any substantive relief. These issues with Facebook’s ad delivery algorithm remain
13 unresolved.

14 These facts help show why Facebook should not be presumed immune under Section 230
15 for the design and operation of its ad delivery algorithm. Section 230 confers immunity when a
16 plaintiff’s claim “inherently requires the court to treat the defendant [an interactive computer
17 service] as the ‘publisher or speaker’ of content provided by another.” *Barnes v. Yahoo!, Inc.*,
18 570 F.3d 1096, 1102 (9th Cir. 2009). Plaintiffs “cannot plead around Section 230 immunity by
19 framing these website features [including algorithms] as content.” *Dyroff v. Ultimate Software*
20 *Group, Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019). Facebook relies on this language to argue that
21

22 ⁹ *Id.* at 20-21.

23 ¹⁰ Settlement Agreement and Release, Exhibit A – Programmatic Relief, *National Fair Housing*
24 *Alliance, et al., v. Facebook, Inc.*, No. 18-cv-02689-JGK (S.D.N.Y. Mar. 8, 2019), Doc. 67-2,
25 <https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-Exhibit-A-3-18.pdf>.

26 ¹¹ *Id.* at 22 (“Facebook will engage academics, researchers, civil society experts, and privacy and
27 civil rights/liberties advocates to study the potential for unintended bias in algorithmic
28 modeling. Facebook will share the status of its efforts to investigate and understand this issue in
meetings between the Parties provided for in the Agreement, provide the Parties with an
opportunity to respond and make recommendations, and consider those recommendations and
whether to implement any feasible reforms as part of its ongoing commitment to
nondiscrimination in advertising on its platform.”).

1 its “use of an algorithm to make decisions about which third-party content to show to which
2 users is a protected function under the CDA.” Def.’s Dem. at 31.

3 However, unlike *Dyroff* and many similar cases, the ad delivery allegations in this case
4 do not arise from harmful or unlawful third-party content. The claims in *Dyroff* were based on
5 Ultimate Software’s recommendation of drug-related content. *Dyroff*, 934 F.3d at 1094-95. The
6 court in *Dyroff* held that an intermediary does not “[become] an information content provider . . .
7 by facilitating communication” of third-party content “through content-neutral website functions
8 like group recommendations and post notifications.” *Id.* at 1097. Here, the third-party content in
9 question is the underlying insurance ads, many of which are not only unobjectionable, but which
10 Plaintiff explicitly *wanted* to see. FAC at 8.

11 By contrast, Facebook’s ad delivery algorithm is Facebook’s “own conduct.” *Airbnb, Inc.*
12 *v. City & County of San Francisco*, 217 F. Supp. 3d 1066, 1073 (N.D. Cal. 2016). Running an ad
13 business that excludes protected groups from accessing all of its accommodations, facilities,
14 advantages, and services is “something the law prohibits” in its own right. *Roommates.com*, 521
15 F.3d at 1167; *see also* California Unruh Civil Rights Act, Cal. Civ. Code § 51(b) (“Unruh Act”).

16 The Ninth Circuit made this distinction in *Dyroff*, where harmful content was the source
17 of liability, and in *HomeAway.com*, where the Ninth Circuit held that the City of Santa Monica
18 could prohibit vacation rental platforms from facilitating unlicensed vacation rentals. The *Dyroff*
19 court summarized:

20 We found that HomeAway.com and Airbnb did not meet the second prong of the
21 *Barnes* test because the Santa Monica ordinance did not “proscribe, mandate, or
22 even discuss the content of the [website] listings” and required only that the
23 website’s transactions involve licensed properties. In other words, the vacation
rental platforms did not face liability for the content of their listings; rather
liability arose from facilitating unlicensed booking transactions.

24 *Dyroff*, 934 F.3d at 1098 (citing *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676,
25 683 (9th Cir. 2019)) (brackets in original).

26 Here, the laws underlying Plaintiff’s claims do not “proscribe, mandate, or even discuss
27 the content of the [website] listings.” *Id.* (quoting *HomeAway.com*, 918 F.3d at 683) (brackets in
28 original). Rather, they only require businesses to provide full and equal accommodations,

1 advantages, facilities, privileges, and services to all people. Cal. Civ. Code § 51(b). That is,
2 Facebook does not face liability for the *content* of the advertisements it runs; rather, liability
3 arises from the *conduct* of discriminatory delivery that Facebook itself causes. Facebook could
4 modify its conduct without having to remove, filter, or edit any third-party content. *See*
5 *HomeAway.com*, 918 F.3d at 683.

6 Of course, Facebook’s ad delivery algorithm does not operate in complete isolation from
7 third-party advertising content. However, the link between that third-party content and the
8 illegality alleged in this case is tenuous at best. Section 230 “does not provide a general
9 immunity against all claims derived from third-party content.” *Doe v. Internet Brands, Inc.*, 824
10 F.3d 846, 853 (9th Cir. 2016). Such a broad sweep would “exceed the scope of the immunity
11 provided by Congress.” *Id.* (quoting *Roommates.com*, 521 F.3d at 1164 n.15). Accordingly, the
12 Ninth Circuit “rejected use of a ‘but-for’ test that would provide immunity under the CDA solely
13 because a cause of action would not otherwise have accrued but for the third-party content.”
14 *HomeAway.com*, 918 F.3d at 682 (citing *Internet Brands*, 824 F.3d at 853). Facebook has made a
15 business decision to derive gender and age stereotypes from third-party content and uses those
16 stereotypes to segregate its users. The third-party content is not to blame.

17 Facebook appears to argue that any time it uses algorithms to analyze or process content,
18 it *necessarily* acts as a publisher, and is thus fully immunized by Section 230. Def.’s Dem. at 31.
19 However, an algorithm is just a step-by-step procedure to accomplish some end. Everything an
20 interactive computer service does — whether innocuous or abhorrent — is effectuated by
21 algorithms. An ad delivery business could choose to deliver all insurance ads to male users,
22 completely withholding such ads from women, simply by altering a few characters of computer
23 code. Affording such conduct immunity merely because it is codified in an algorithm threatens
24 any attempt to address discriminatory conduct online. As the Ninth Circuit described its *en banc*
25 decision in *Roommates.com*, “to ‘provid[e] immunity every time a website uses data initially
26 obtained from third parties would eviscerate [the statute].” *Barnes*, 570 F.3d at 1100 (quoting
27 *Roommates.com*, 521 F.3d at 1171) (brackets in original).

1 **B. By creating Lookalike Audiences based on its users’ gender and age,**
2 **Facebook creates and develops content that materially contributes to illegal**
3 **conduct online.**

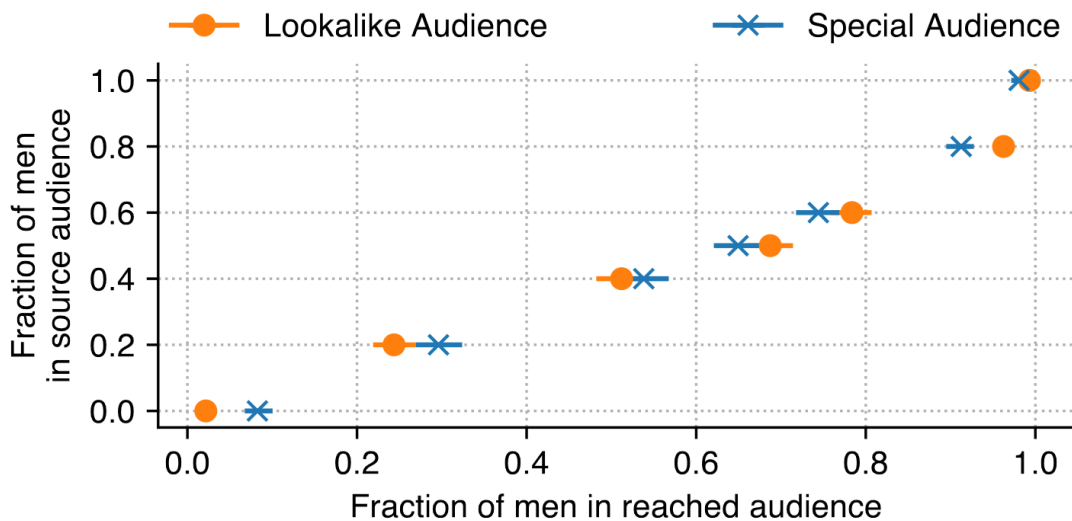
4 Plaintiff’s allegations related to Facebook’s Lookalike Audiences tool, *see, e.g.*, FAC at
5 19-21, provide a second reason Section 230 immunity does not apply. As explained below,
6 Facebook itself creates target audiences for advertisers that are biased on the basis of gender and
7 age. Thus, Facebook itself develops content that materially contributes to violations of state
8 antidiscrimination law.

9 As alleged, to create a Lookalike Audience, Facebook starts by soliciting from an
10 advertiser a “source audience” (or “seed audience”) of phone numbers, e-mail addresses, or other
11 personal identifiers. FAC at 19; *see also infra* n.13. Once it has this source list, Facebook takes
12 several steps to create a new, custom-built target audience (the “Lookalike Audience”) for the
13 advertiser. First, Facebook locates user accounts that match the identifiers contained in the
14 source audience. FAC at 19. Second, Facebook uses proprietary algorithms and personal data to
15 extract “common qualities” of those users based on their demographics, interests, online
16 behaviors, and other information. *Id.* (Virtually none of this data is available to the advertiser.)
17 Finally, Facebook creates a targeting list of new users, who were not included in the source
18 audience but who share common qualities found in the source audience. Facebook describes this
19 new target audience as comprising people who “are similar to (or ‘look like’)” people in the
20 source audience.¹² Facebook then delivers ads to members of this new Lookalike Audience with
21 no additional input or action from the advertiser. *See supra* Section II.A.; *see also* FAC at 20.

22 Recent research by Amicus and academics at Northeastern University demonstrates how
23 Facebook reproduces protected class characteristics of source audiences — including gender and
24

25 ¹² *See* Facebook for Business, Business Help Center, *About Lookalike Audiences*,
26 <https://www.facebook.com/business/help/164749007013531> (last visited Feb. 11, 2021) (“We
27 identify the common qualities of the people in it (for example, demographic information or
28 interests). Then, we deliver your ad to an audience of people who are similar to (or ‘look like’)
 them.”).

1 age — by creating Lookalike Audiences with similar demographic compositions.¹³ For example,
2 in one experiment, Amicus and researchers compiled source audiences based on New York voter
3 records. Each source audience contained 10,000 individuals, with varying fractions of men (0-
4 100%).¹⁴ Amicus and researchers then ran ads to the resulting Lookalike Audiences created by
5 Facebook and compared demographic results reported by Facebook’s advertiser interface. The
6 results made crystal clear that Facebook reproduced the underlying demographics of the source
7 audiences: The Lookalike Audience derived from a male-only source audience delivered to over
8 99% men, and female-only source audience delivered to over 97% women.¹⁵ A similar
9 experiment for age groups revealed essentially the same pattern.¹⁶



19 *Results showing that source audiences comprised varying fractions of male users yielded*
20 *Lookalike Audiences that deliver to similar fractions of male users.*¹⁷

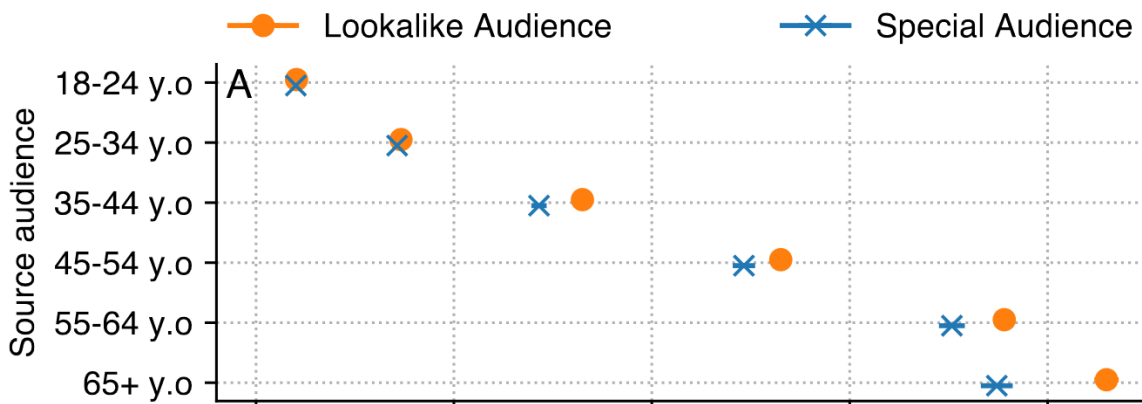
25 ¹³ Piotr Sapiezynski et al., *Algorithms that “Don’t See Color”: Comparing Biases in Lookalike*
26 *and Special Ad Audiences*, arXiv:1912.07579 (2019), <https://arxiv.org/abs/1912.07579>.

26 ¹⁴ *Id.* at 4.

27 ¹⁵ *Id.* at 4-5.

27 ¹⁶ *Id.* at 5.

28 ¹⁷ *Id.* at 4 (Figure 2).



Results showing that source audiences comprised of younger users yielded Lookalike Audiences that deliver to similar fractions younger users (and vice-versa for older users).¹⁸

These results might seem unsurprising or inconsequential. However, it is important to remember that advertisers often have no knowledge about the people in their source audience. An advertiser’s source audience may contain only phone numbers or opaque identifiers that offer no indication as to demographics. The resulting Lookalike Audience is created by Facebook, which has the sole power to leverage its users’ data to find and reproduce demographic similarities. Facebook chooses each member of the Lookalike Audience, reaching beyond the source audience provided by the advertiser. *See, e.g.*, FAC at 20. When a Lookalike Audience happens to be exclusionary or otherwise discriminatory on protected status grounds, it is Facebook — not the advertiser — that develops the exclusionary target audience.

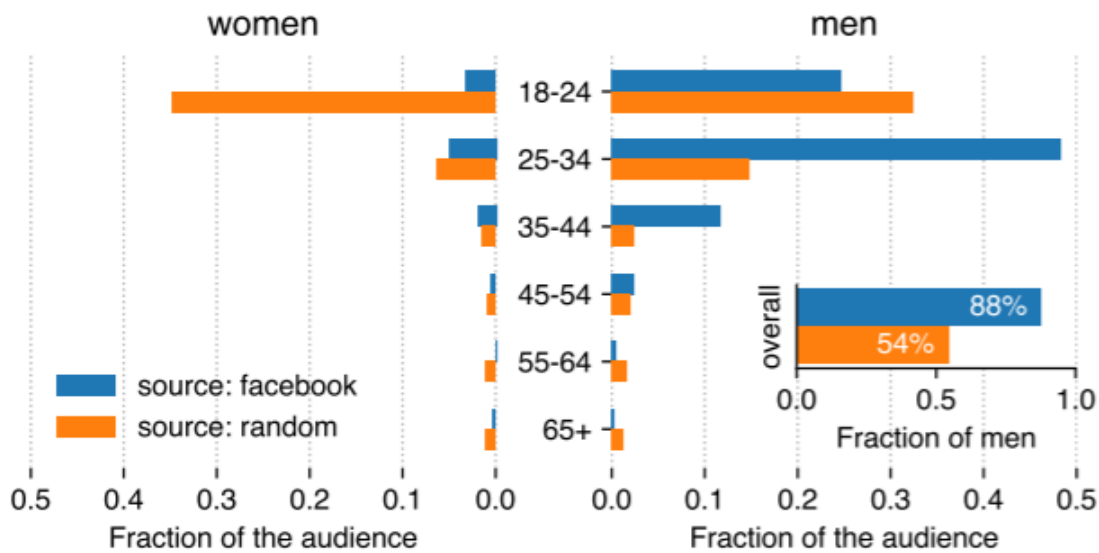
To simulate a “real-world” scenario, Amicus ran employment ads targeted with a version of the Lookalike Audience tool called Special Ad Audiences.¹⁹ Amicus and researchers created two Special Ad audiences: one derived from a source audience of randomly generated American phone numbers (intended as a “baseline audience”) and the other derived from email addresses with the domain “fb.com” (intended to be a proxy for Facebook employees).²⁰ Amicus then delivered the same job ads to each Special Ad audience. The results were telling: The Special Ad

¹⁸ *Id.* at 5 (Figure 3).

¹⁹ *Id.* at 2.

²⁰ *Id.* at 7-8.

1 audience based on Facebook employees delivered to 88% men, compared to 54% in the generic
 2 case. Further, the Special Ad audience based on Facebook employees delivered to 48% men aged
 3 between 25-34, compared to 15% for the baseline audience. Finally, 47% of all deliveries to the
 4 Special Ad audience of Facebook employees were to users in California, compared to 2% in the
 5 baseline audience.²¹



16 *Results showing a Special Ad Audience created with Facebook email addresses delivered to a*
 17 *significantly younger and more male audience than a random sample of users.*²²

18 To summarize, Facebook’s Lookalike Audience tool reproduces and can even amplify
 19 gender and age biases present in the source audience in ways likely to have real-world
 20 discriminatory effects.

21 Facebook cannot claim Section 230 immunity when its Lookalike Audience tool
 22 materially contributes to alleged illegality. *See Roommates.com, LLC*, 521 F.3d at 1167. By
 23 creating Lookalike Audiences, Facebook has clearly created or developed content — i.e., the
 24 resulting list of users in the target audience. These target audiences can exclude users from full
 25 and equal accommodations, advantages, facilities, privileges, and services because of their
 26 membership in protected classes. *See Cal. Civ. Code* § 51(b).

27 ²¹ *Id.* at 7.

28 ²² *Id.* at 8 (Figure 7).

1 In *Roommates.com*, the Ninth Circuit held that Roommates.com was “not entitled to
2 [Section 230] immunity for the operation of its search system . . . which directs emails to
3 subscribers according to discriminatory criteria.” *Roommates.com*, 521 F.3d at 1167 (also
4 finding that Roommates.com “steer[s] users based on the preferences and personal characteristics
5 that Roommate itself forces subscribers to disclose”). This was enough to determine that
6 Roommates “developed” content that contributed materially to unlawfulness under the Fair
7 Housing Act. *Id.* Here, Facebook goes even further than Roommates.com by *independently*
8 creating demographically skewed audiences that it then uses to exclude protected groups from
9 important economic opportunities.

10 **C. Section 230 immunity is not limitless and sustaining the demurrer would**
11 **improperly hinder enforcement of anti-discrimination laws online.**

12 Facebook argues that “courts routinely apply the CDA at the pleading stage to dismiss
13 claims, no matter how artfully pleaded.” Def.’s Dem. at 28-29. True enough. But this is not a
14 routine Section 230 case, and “the CDA does not provide internet companies with a one-size-
15 fits-all body of law.” *HomeAway.com*, 918 F.3d at 683.

16 Courts routinely withhold Section 230 immunity, and for good reason: Section 230 “was
17 not meant to create a lawless no-man’s-land on the Internet.” *Roommates.com*, 521 F.3d at 1164.
18 The internet’s “vast reach into the lives of millions is exactly why we must be careful not to
19 exceed the scope of the immunity provided by Congress and thus give online businesses an
20 unfair advantage over their real-world counterparts, which must comply with laws of general
21 applicability.” *Id.* at 1164 n. 15; *see also HomeAway.com*, 918 F.3d at 683 (“allowing internet
22 companies to claim CDA immunity” from a duty that “could have been satisfied without changes
23 in content posted by the website’s users” “would risk exempting them from most local
24 regulations”).

25 Immunity is an affirmative defense only suitable at the pleading stage when “the statute’s
26 barrier to suit is evident from the face of the complaint.” *Marshall’s Locksmith Serv., Inc. v.*
27 *Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019). “Section 230 immunity . . . is generally
28 accorded effect at the *first logical point* in the litigation process.” *Nemet Chevrolet, Ltd. v.*

1 *Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (emphasis added). Given the
2 significant questions regarding Facebook’s technology and conduct in this case, that logical point
3 has not yet arrived.

4 Here, Plaintiff presses civil rights anti-discrimination claims arising from Facebook’s
5 own conduct and creation of content. Development of the facts alleged in the operative
6 complaint would involve queries about the design and operation of Facebook’s ad delivery
7 algorithm and the working of its Lookalike Audience tool, not broad searches of third-party
8 speech on Facebook’s social networking platform. Overruling Facebook’s Demurrer to the First
9 Amended Complaint would allow for appropriate factual development of claims in clearly
10 sufficient pleadings and would not place an undue burden on Facebook.

11 **III. CONCLUSION**

12
13 More than twenty years ago, the Ninth Circuit observed that the internet was “no longer a
14 fragile new means of communication that could easily be smothered in the cradle by overzealous
15 enforcement of laws and regulations[.]” *Roommates.com*, 521 F.3d. at 1164 n.15. Since
16 *Roommates.com* was decided, the internet has grown to encompass ever greater shares of our
17 lives. Much of it is algorithmically driven. Civil rights laws must apply to Facebook as much as
18 any other business. Section 230 immunity, though broad, does not fully eclipse those laws.

19 Given the significant legal and factual questions still unresolved in this case, this Court
20 should not sustain Facebook’s Demurrer. In light of those questions, the Plaintiff’s own
21 arguments, and the foregoing reasons, Amicus Upturn asks this Court to OVERRULE Defendant
22 Facebook’s Demurrer to First Amendment Complaint.

23
24 Dated: February 12, 2021

Respectfully submitted,

25 By: /s/ Jim Davy
26 Jim Davy (PA #321631)*
27 All Rise Trial & Appellate
28 P.O. Box 15216
Philadelphia, PA 19125
**Pro Hac Vice Application Forthcoming*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Lindsay Nako (SBN 239090)
Impact Fund
2080 Addison Street, Suite 5
Berkeley, CA 94704

Counsel for proposed amicus curiae Upturn