

## **Property**

Section 2  
Spring 2019  
Professor William Fisher

Available for download: starting at 7:30am on May 17, 2019  
Exam must be submitted 8 hours after download, or by 4:30pm, whichever time is earlier.

The exam mode is TAKEHOME. There are 13 pages, including this coversheet and the appendix. Please make sure you have all 13 pages.

The exam is "open book" in the following senses: In preparing your answers, you may rely upon any of the materials assigned in the course, any of materials distributed in class, any notes prepared before the start of the exam by yourself or by any other present or past student in the course, and any other material that you have actually read before the start of the exam. Once the exam begins, however, you may not do any additional research. Nor, after the exam begins, may you consult in any way with any other person concerning any aspect of the exam.

Exam4 will automatically put your Anonymous ID and word count on the exam copy. Do not write your name on any part of your response. To preserve the anonymity of your response, avoid including any information that would enable the instructor to identify you.

The exam contains four questions. You must answer all. The word limits for your answers are as follows:

- Question #1: 750 words;
- Question #2: 500 words;
- Question #3: 500 words;
- Question #4: 2000 words.

In the grading, the questions will be weighted as follows:

- Question #1: 20%;
- Question #2: 15%;
- Question #3: 15%;
- Question #4: 50%.

**Question #1:**

The zoning ordinance of Provincetown, Massachusetts, provides that a house located within the “Historic District” may not be materially modified unless the owner obtains a “certificate of appropriateness” from the Provincetown Historic District Commission (PHDC). In deciding whether to issue such a certificate, the PHDC must consider “the historic, architectural and cultural value and significance of the site, building or structure; the general design, proportions, detailing, mass, arrangement, texture, and material of exterior architectural features involved; and the relation of the work proposed in the application to similar features of buildings and structures in the surrounding area and the district as a whole.”

Until recently, Ophelia, a married Massachusetts resident, owned a small, traditional cottage located in the Historic District of Provincetown. She and her family used the cottage for vacations during the summer months; during the rest of the year, it was vacant.

Nancy owns a house on a lot abutting Ophelia’s land. Nancy avoids Provincetown in the busy summer months. Instead, she uses her house in the spring and fall. On most days during those seasons, she walks across Ophelia’s property to reach the beach.

On January 1, 2019, Ophelia died. Her will provided, in pertinent part, “I give my cottage in Provincetown to my daughter Paula for life, then to my grandson Quentin provided he does not marry a man. In any event, the cottage shall go in fee simple to the first of my descendants to graduate from an accredited US law school.”

At the time of Ophelia’s death, Paula was a fifty-year-old married physician. Quentin was unmarried and a first-year student at Harvard Law School.

In an essay containing no more than 750 words, answer the following questions:

- (a) What interests in the cottage were created by Ophelia’s will?
- (b) If Massachusetts adhered to the traditional rule against perpetuities, would any of those interests be invalid?
- (c) Assume that all of the interests are valid. Paula is currently in possession of the cottage. She would like to build an addition made of stainless steel and glass. She believes that the PHDC would not grant her a certificate of appropriateness for such a structure. What are her options?
- (d) If Quentin graduates from Harvard Law School and takes possession of the cottage, may he stop Nancy from walking across the property?

If you need any additional information to answer any one of these questions, say what that information is and why it matters. In your response, you should feel free to use the abbreviations set forth in Appendix A.

**Question #2:**

Abigail, Bill, Carl, Daphne, and Eve own houses on adjacent plots of land in Liberty, Massachusetts. Until very recently, they were good friends.

In July of 2018, it became lawful in Massachusetts to sell marijuana for recreational purposes. A person who wishes to establish a marijuana store must obtain both a license from the Massachusetts Cannabis Control Commission (MCCC) and a permit from the town in which the store will be located.

In January of 2019, Carl applied to the MCCC for a license and applied to the town of Liberty for a permit to operate a marijuana store on his property. To the dismay of Abigail, Bill, Daphne, and Eve, both were granted. Carl quickly constructed a small shop and began selling marijuana (in both combustible and edible forms).

Carl's shop rapidly became popular. In the evenings, the line of customers waiting to be served extended down the street. The boisterous crowds angered Abigail, Bill, Daphne, and Eve. On occasion, a customer would smoke a marijuana cigarette, and the fumes would drift onto their property. In addition, customers in the line would sometimes step off the public sidewalk onto land owned by Abigail, Bill, Daphne, or Eve. Last but not least, Bill and Daphne, believing that the consumption of marijuana is sinful, were deeply offended by the daily display of immorality.

Abigail, Bill, Daphne, and Eve have begun discussing possible responses to this situation. They are considering two options. Their preferred course of action would be to bring suit to force Carl to cease selling marijuana. But if that is infeasible, they are considering selling their houses and buying four adjacent parcels in a more rural part of the town. If they choose the latter, more drastic option, they want to be sure that this scenario does not recur – in other words, that it will not be possible for any one of them (or any person to whom one of their parcels is later sold) to use his or her premises to sell marijuana.

Advise Abigail, Bill, Daphne, and Eve. If you need additional information to assess their options, say what that information is and why it matters. Your response may not exceed 500 words.

**Question #3:**

The state of New Mexico uses the prior appropriation doctrine to allocate rights to water flowing in non-navigable streams. The Rocky Brook originates in the mountains in the central part of New Mexico, flows northwest through an arid but fertile plain, and finally joins the much larger San Juan River, which in turn flows into Utah and ultimately joins the Colorado River. Just before its junction with the San Juan River, the Rocky Brook flows through a marsh, which is crucial to the migratory patterns of several species of birds, including the Whooping Crane, a highly endangered species.

Frank Farmer purchased a large plot of land abutting the Rocky Brook in the late 19<sup>th</sup> century. At the time, no one else was using the water in the stream for productive purposes. Frank planted pecan trees on the land and began extracting large amounts of water from the stream to irrigate the trees. (A mature pecan tree can consume as much as 2000 gallons of water per week.) The farm quickly became highly productive. Because Frank was using the majority of the water in the stream, no other farms were established in the area.

When Frank died, he bequeathed the farm to his only child, Frank Jr., who continued to grow and sell pecans. Frank Jr., in turn, bequeathed the working farm to Frank III, who bequeathed it to Frank IV. In 2010, Francine inherited the farm from her father, Frank IV. The current fair market value of the farm is approximately \$5 million.

Climate change has reduced the annual snowfall in the mountains of New Mexico, which in turn has reduced the amount of water in the Rocky Brook. Thus far, just enough water has reached Francine's farm to enable her to continue to irrigate her trees. However, because she is consuming almost the entire available flow, the marsh downstream of her property is drying up, which impairs bird migrations.

On May 1, 2019, the legislature of New Mexico adopted the Whooping Crane Preservation Act (WCPA), which forbids extraction of water from streams if the effect is substantially to impair the ability of Whooping Cranes to transit the state safely. To comply with the statute, Francine will be forced to cease irrigating a significant number of her pecan trees. She fears that, if the diminution of rainfall in the region continues, she will be forced to shut down her operation altogether.

Francine is outraged. She believes the statute is unconstitutional. You have known Francine since childhood. She calls you, explains the situation, and asks your advice. Write her a letter containing no more than 500 words discussing her legal options. If you need more information to provide her advice, say what that information is and why it matters.

**Question #4:**

Select **one and only one** of the following options:

- (a) Personal health data consists of two kinds of information: (i) data concerning a person's genetic makeup and (ii) records of the health care that a person has received and the efficacy of that care. Access to large sets of such data can help doctors and companies determine which drugs or treatments are likely to be most effective in addressing the diseases of particular patients in the future. However, such data can also be used for other, less socially beneficial purposes. Should the law treat a person's health data as that person's property? If so, what combination of entitlements should that property right encompass?
- (b) Assume that the complaint recently filed by the Department of Housing and Urban Development against Facebook is factually accurate. (That complaint was distributed in class. An additional copy is attached to this exam as Appendix B.) You are employed by a member of Congress who doubts that the Fair Housing Act is well suited to addressing situations of the sort described in the complaint. She asks you for a memorandum discussing how, in your judgment, the Act should be modified to address similar conduct by Facebook or other social media platforms in the future.
- (c) "The laws that today govern residential leaseholds are excessively protective of tenants and insufficiently protective of landlords." Assess this statement from the standpoint of each of the four theories of property that we have studied this semester.

Your answer to this question may not contain more than 2000 words.

End of Exam

**Appendix A: Estate-System Abbreviations**

FS = fee simple (absolute)

FT = fee tail

FTM = fee tail male

FTF = fee tail female

FTS = fee tail special

FSD = fee simple determinable

FSCS = fee simple subject to a condition subsequent

FSEL = fee simple subject to an executory limitation

LE = life estate

LEAV = life estate pur autre vie

RV = reversion

PR = possibility of reverter

PT = power of termination (right of entry)

RM = remainder

VRM = vested remainder

VRMSD = vested remainder subject to divestment

VRMSO = vested remainder subject to open

CRM = contingent remainder

EI = executory interest

ShEI = shifting executory interest

SpEI = springing executory interest

TY = term of years

TW = tenancy at will

TP = periodic tenancy

TS = tenancy at sufferance

ll = landlord

t = tenant

TC = tenancy in common

JT = joint tenancy

TE = tenancy by the entirety

CP = community property

## Appendix B

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of  
Complainant Assistant Secretary for Fair Housing and Equal Opportunity v. Facebook, Inc.,  
Respondent

HUD ALJ No. FHEO No. 01-18-0323-8

### CHARGE OF DISCRIMINATION

#### I. JURISDICTION

On August 13, 2018, the Assistant Secretary for Fair Housing and Equal Opportunity (“Assistant Secretary”) filed a timely complaint with the Department of Housing and Urban Development (“HUD” or the “Department”) alleging that Respondent violated subsections 804(a), 804(b), 804(c) and 804(f) of the Fair Housing Act, 42 U.S.C. §§ 3601-19 (“Act”), by discriminating because of race, color, religion, sex, familial status, national origin and disability.

The Act authorizes the Secretary of HUD to issue a Charge of Discrimination (“Charge”) on behalf of aggrieved persons following an investigation and a determination that reasonable cause exists to believe that a discriminatory housing practice has occurred. *See* 42 U.S.C. § 3610(g)(1), (2). The Secretary has delegated that authority to the General Counsel, 24 C.F.R. §§ 103.400, 103.405, who has re-delegated that authority to the Associate General Counsel for Fair Housing and the Assistant General Counsel for Fair Housing Enforcement. 76 Fed. Reg. 42,463, 42,465 (July 18, 2011).

By a Determination of Reasonable Cause issued contemporaneously with this Charge of Discrimination, the Director of the Office of Systemic Investigations in the Office of Fair Housing and Equal Opportunity has determined that reasonable cause exists to believe that a discriminatory housing practice has occurred and has authorized and directed the issuance of this Charge. 42 U.S.C. § 3610(g)(2).

#### II. SUMMARY OF FINDINGS IN SUPPORT OF THIS CHARGE

Based on HUD’s investigation of the allegations contained in the aforementioned complaint and the Determination of Reasonable Cause, Respondent is hereby charged with violating the Act as follows:

##### A. Legal Authority

1. It is unlawful to make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, national origin or disability. 42 U.S.C. § 3604(a), (f)(1); 24 C.F.R. § 100.50(b)(1), (3); 24 C.F.R. § 100.60(a); 24 C.F.R. § 100.70(b); 24 C.F.R. § 100.202(a).
2. It is unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of

race, color, religion, sex, familial status, national origin or disability. 42 U.S.C. § 3604(b), (f)(2); 24 C.F.R. § 100.50(b)(2); 24 C.F.R. § 100.65(a); 24 C.F.R. § 100.70(b); 24 C.F.R. § 100.202(b).

3. It is unlawful to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, familial status, national origin or disability, or that indicates an intention to make such a distinction. 42 U.S.C. § 3604(c); 24 C.F.R. § 100.75(a), (b), (c)(1). Such unlawful activity includes “[s]electing media or locations for advertising the sale or rental of dwellings which deny a particular segment of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.” 24 C.F.R. § 100.75(c)(3). Such unlawful activity also includes “[r]efusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.” 24 C.F.R. § 100.75(c)(4).

## **B. Parties**

4. Complainant Assistant Secretary is authorized to file a complaint of discrimination under the Act on behalf of the Secretary of HUD. 42 U.S.C. § 3610(a); 24 C.F.R. § 103.204(a).

5. Respondent Facebook, Inc., is incorporated in Delaware with headquarters in Menlo Park, California. Respondent is the second largest online advertiser in the United States and is responsible for approximately twenty percent of all online advertising nationwide.

6. Respondent operates Facebook and Instagram, two of the most widely used social media platforms in the United States. Facebook has approximately 221 million active users in the United States and over two billion active users globally, while Instagram has approximately 114 million active users in the United States and over one billion active users globally, with active user defined as someone who uses the platform at least once per month. Respondent also operates Messenger, a messaging tool and platform that can be accessed from within Facebook or through a standalone website and mobile application. In addition, Respondent has created an “Audience Network,” which is comprised of thousands of websites and mobile applications that are operated by third parties but on which Respondent displays targeted ads.

## **C. Factual Allegations**

7. Respondent collects millions of data points about its users, draws inferences about each user based on this data, and then charges advertisers for the ability to microtarget ads to users based on Respondent’s inferences about them. These ads are then shown to users across the web and in mobile applications. Respondent promotes and distinguishes its advertising platform by proclaiming that “most online advertising tools have limited targeting options . . . like location, age, gender, interests and potentially a few others. . . . But Facebook is different. People on Facebook share their true identities, interests, life events and more.” As Respondent explains, its advertising platform enables advertisers to “[r]each people based on . . . zipcode . . . age and gender . . . specific languages . . . the interests they’ve shared, their activities, the Pages they’ve like[d] . . . [their] purchase behaviors or intents, device usage and more.” Thus, Respondent “use[s] location-related information—such as your current location, where you live, the places you like to go, and the businesses and people you’re near to provide, personalize and improve our Products, including ads, for you and others.”

8. Advertisers pay Respondent to show targeted ads to users on Facebook, Instagram, and Messenger, and on Respondent's Audience Network. Targeted ads are generally placed through a single advertising platform called Ads Manager regardless of where the ads will be shown to users.

9. Respondent holds out its advertising platform as a powerful resource for advertisers in many industries, including housing and housing-related services. For example, Respondent promotes its advertising platform with "success stories," including stories from a housing developer, a real estate agency, a mortgage lender, a real-estate-focused marketing agency, and a search tool for rental housing.

10. Respondent's advertising platform is actively being used for housing-related ads. Such ads include ads for mortgages from large national lenders, ads for rental housing from large real estate listing services, and ads for specific houses for sale from real estate agents.

11. Because of the way Respondent designed its advertising platform, ads for housing and housing-related services are shown to large audiences that are severely biased based on characteristics protected by the Act, such as audiences of tens of thousands of users that are nearly all men or nearly all women.

12. Respondent sells advertisers the ability to target advertisements to people who, according to Respondent's assessment of the data it collects, share certain personal attributes and/or are likely to respond to a particular ad. Users may disclose some data about themselves when they set up their profiles, such as name and gender. However, users disclose most of this data unwittingly through the actions they, and those associated with them, take on and off of Respondent's platforms.

13. Respondent determines which users will see an ad through a two-phase process. First, in the ad targeting phase, Respondent provides the advertiser with a variety of tools for selecting an ad's "eligible audience." In other words, the advertiser can specify attributes that the users who will be shown the ad must have and attributes that users who will be shown the ad must not have. Second, in the ad delivery phase, Respondent selects the ad's "actual audience," meaning Respondent chooses which users will actually be shown the ad from among the pool of eligible users.

14. During the ad targeting phase, Respondent provides an advertiser with tools to define which users, or which types of users, the advertiser would like to see an ad. Respondent has provided a toggle button that enables advertisers to exclude men or women from seeing an ad, a search-box to exclude people who do not speak a specific language from seeing an ad, and a map tool to exclude people who live in a specified area from seeing an ad by drawing a red line around that area. Respondent also provides drop-down menus and search boxes to exclude or include (i.e., limit the audience of an ad exclusively to) people who share specified attributes. Respondent has offered advertisers hundreds of thousands of attributes from which to choose, for example to exclude "women in the workforce," "moms of grade school kids," "foreigners," "Puerto Rico Islanders," or people interested in "parenting," "accessibility," "service animal," "Hijab Fashion," or "Hispanic Culture." Respondent also has offered advertisers the ability to limit the audience of an ad by selecting to include only those classified as, for example, "Christian" or "Childfree."

15. During this first phase, Respondent also provides a tool called Custom Audiences, which enables an advertiser to use a list of specific people whom the advertiser wants included in or excluded from the eligible audience for an ad. The advertiser can do this by uploading the personal information of

its customers, or by having Respondent generate a list of people who have engaged with the advertiser's content on Facebook or Instagram, on other websites, in a mobile application, or offline.

16. Facebook offers a variant of its Custom Audiences tool called Lookalike Audiences. If an advertiser selects this option, the platform directs the advertiser to pick a Custom Audience that represents the advertiser's "best existing customers." Respondent then identifies users who share "common qualities" with those customers, and these users become the ad's eligible audience. To generate a Lookalike Audience, Respondent considers sex and close proxies for the other protected classes. Such proxies can include which pages a user visits, which apps a user has, where a user goes during the day, and the purchases a user makes on and offline. Respondent alone, not the advertiser, determines which users will be included in a Lookalike Audience.

17. During the second phase, the ad delivery phase, Respondent selects from among the users eligible to see an ad which users will actually see it. Respondent bases this decision in large part on the inferences and predictions it draws about each user's likelihood to respond to an ad based on the data it has about that user, the data it has about other users whom it considers to resemble that user, and the data it has about "friends" and other associates of that user. To decide which users will see an ad, Respondent considers sex and close proxies for the other protected classes. Such proxies can include which pages a user visits, which apps a user has, where a user goes during the day, and the purchases a user makes on and offline. Respondent alone, not the advertiser, determines which users will constitute the "actual audience" for each ad.

18. Respondent charges advertisers different prices to show the same ad to different users. The price to show an ad to a given user is based, in large part, on how likely Respondent believes that user is to interact with the particular ad. To decide how an ad will be priced for each user, Respondent considers sex and close proxies for the other protected classes. Such proxies can include which pages a user visits, which apps a user has, where a user goes during the day, and the purchases a user makes on and offline. Respondent alone sets the price the advertiser will pay to have Respondent show each ad to each user. Furthermore, Respondent uses the pricing differentials it sets to determine which users will see which ads rather than allowing advertisers to make that decision. As Respondent explains, "If there are more and cheaper opportunities among men than women, then we'd automatically spend more of [an advertiser's] overall budget on the men."

19. Respondent's ad delivery system prevents advertisers who want to reach a broad audience of users from doing so. Even if an advertiser tries to target an audience that broadly spans protected class groups, Respondent's ad delivery system will not show the ad to a diverse audience if the system considers users with particular characteristics most likely to engage with the ad. If the advertiser tries to avoid this problem by specifically targeting an unrepresented group, the ad delivery system will still not deliver the ad to those users, and it may not deliver the ad at all. This is so because Respondent structured its ad delivery system such that it generally will not deliver an ad to users whom the system determines are unlikely to engage with the ad, even if the advertiser explicitly wants to reach those users regardless.

20. To group users by shared attributes, to create a Lookalike Audience, to determine an ad's "actual audience" during the ad delivery phase, and to price each ad for each user, Respondent combines the data it has about user attributes and behavior on its platforms with data it obtains about user behavior on other websites and in the non-digital world. Respondent then uses machine learning and other prediction techniques to classify and group users so as to project each user's likely response to a

given ad. In doing so, Respondent inevitably recreates groupings defined by their protected class. For example, the top Facebook pages users “like” vary sharply by their protected class, according to Respondent’s “Audience Insights” tool. Therefore, by grouping users who “like” similar pages (unrelated to housing) and presuming a shared interest or disinterest in housing-related advertisements, Respondent’s mechanisms function just like an advertiser who intentionally targets or excludes users based on their protected class.

#### **D. Legal Allegations**

21. As described above, Respondent discriminated by making dwellings unavailable because of race, color, religion, sex, familial status, national origin or disability. 42 U.S.C. § 3604(a), (f)(1); 24 C.F.R. § 100.50(b)(1), (3); 24 C.F.R. § 100.60(a); 24 C.F.R. § 100.70(b); 24 C.F.R. § 100.202(a).

22. As described above, Respondent discriminated in the terms, conditions, or privileges of the sale or rental of dwellings because of race, color, religion, sex, familial status, national origin or disability. 42 U.S.C. § 3604(b), (f)(2); 24 C.F.R. § 100.50(b)(2); 24 C.F.R. § 100.65(a); 24 C.F.R. § 100.70(b); 24 C.F.R. § 100.202(b).

23. As described above, Respondent made, printed, or published – or caused to be made, printed, or published – notices, statements, or advertisements with respect to the sale or rental of dwellings that indicated preferences, limitations, or discrimination because of race, color, religion, sex, familial status, national origin or disability, or that indicated an intention to make such a distinction. 42 U.S.C. § 3604(c); 24 C.F.R. § 100.75(a), (b), (c)(1).

24. As described above, Respondent selected media or locations for advertising the sale or rental of dwellings that denied persons information about housing opportunities because of race, color, religion, sex, familial status, national origin or disability. 24 C.F.R. § 100.75(c)(3).

25. As described above, Respondent refused to publish advertising for the sale or rental of dwellings because of race, color, religion, sex, familial status, national origin or disability. 24 C.F.R. § 100.75(c)(4).

26. As described above, Respondent required different charges or terms for advertising the sale or rental of dwellings because of race, color, religion, sex, familial status, national origin and disability. 24 C.F.R. § 100.75(c)(4).

### **III. CONCLUSION**

WHEREFORE, the Secretary of the United States Department of Housing and Urban Development, through the Office of the General Counsel, and pursuant to 42 U.S.C. § 3610(g)(2)(A), hereby charges Respondent with engaging in discriminatory housing practices in violation of 42 U.S.C. § 3604(a), (b), (c) and (f), and prays that an order be issued that:

1. Declares that the discriminatory housing practices of Respondent, as set forth above, violate the Fair Housing Act, 42 U.S.C. §§ 3601-19;
2. Enjoins Respondent and its agents, employees, successors, and all other persons in active concert or participation with it, from discriminating because of race, color, religion, sex, familial status,

national origin or disability in any aspect of the sale, rental, use, marketing, or advertising of dwellings and related services pursuant to 42 U.S.C. § 3612(g)(3);

3. Requires Respondent's agents and employees to attend, at Respondent's cost, training that addresses the Fair Housing Act's prohibitions against discrimination in advertising;
4. Awards such damages pursuant to 42 U.S.C. § 3612(g)(3) as will fully compensate any aggrieved persons for any harm caused by Respondent's discriminatory conduct;
5. Awards the maximum civil penalty against Respondent for each violation of the Act, pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 180.671; and
6. Awards such additional relief as may be appropriate under 42 U.S.C. § 3612(g)(3).

Respectfully submitted on this 28th day of March, 2019.

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