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Re: 2021-001-FB-FBR

Dear Members of the Oversight Board,

This letter is in response to the Oversight Board's call for public comments as it evaluates Facebook's decision to suspend indefinitely the accounts of Donald J. Trump. I submit these comments strictly in my personal capacity.

I wish to convey three sets of points.

First, I urge the Board not only to apply human rights standards but also to recommend that Facebook expressly integrate human rights principles into its Community Standards.

Facebook's Community Standards reflect the discretionary rules the company has incorporated into its Terms of Service. Concepts of "voice" and "safety", while laudable touchstones for company culture, introduce vague and changeable guides as to how the company ought to apply its rules. Article 2 of the Board Charter seems to recognize this. It provides that the Board is to determine whether "content enforcement decisions . . . were consistent with Facebook's content policies and values," but then adds, "the board will pay particular attention to the impact of removing content in light of human rights norms protecting free expression."

As long as Community Standards exclude human rights as an express framework, and as long as Article 2 of the Board Charter fails to clarify the weight to be given to human rights, it is doubtful that the company can consistently meet – or be seen to meet – its responsibilities under the [UN Guiding Principles on Business and Human Rights](#) to "avoid causing or contributing to adverse human rights impacts" (Principle 13). A human rights framework, in this context, permits the Board to evaluate whether the suspension of Trump's account was necessary to protect, for instance, the rights of others or public order. Company standards alone provide very little, if any, basis to assess Facebook's actions in a way that speaks to the public values at stake.

Second, international human rights law recognizes the essential role of political speech and public debate in democratic societies. *See generally* Human Rights Committee, [General Comment 34: Article 19: Freedom of Opinion and Expression](#), UN Doc. CCPR/C/GC/34 (12 September 2011). This is especially so when it comes to *criticism of public figures*, in which "the value placed by the [International Covenant on Civil and Political Rights] upon uninhibited expression is particularly high." *Id.* Paras 34, 38. Political figures as such have no greater right to "impart information" than anyone else, whether a citizen, a reporter, or a Facebook user. To be sure, the public has a particular interest in knowing the content of a public figure's speech, something that should be guarded jealously. The Facebook concept of "newsworthiness" should be understood in this light. Even so, in contexts where political speech involves calls to violence or threats to public disorder, human rights law provides grounds for transparent, necessary and proportionate limitations. The Board should thus approach the question not

according to a formula that rests merely on the characterization of the speaker but instead evaluates the entire context at issue.

Third, and in keeping with the previous point, I urge the Board to apply human rights principles in a way that recognizes the particularities of the relevant platforms – Facebook and Instagram – and the specific context of the relevant content. To begin with, any evaluation should examine whether the rules themselves are clear enough to provide guidance to users and the public (the principle of “legality”). The Board should also evaluate whether indefinite suspension is proportionate given the harms caused, or likely to be caused, and the likely continuation of problematic behavior by the account holder (and its many unnamed administrators). On this point I especially commend to the Board the human rights framework outlined by the NGO, Article 19.

I specifically want to emphasize that applying a human rights framework here does not mean applying a mechanical approach that merely asks whether the language in the relevant posts constituted, in the sense conveyed by criminal law, incitement to violence or threats to public order. Rather, an evaluation of incitement to harm requires a full investigation of myriad factors. Cf. [Rabat Plan of Action](#), UN Doc. A/HRC/22/17/Add.4 (11 January 2013). Although Rabat specifically dealt with hate-induced incitement, it lays out multiple factors that may guide an evaluation of whether any particular advocacy constitutes incitement, including context, intent, the status of the speaker, the reach of the speech, and the likelihood or imminence of harm. These factors should be instructive. I believe that the Board can be in a position to evaluate this context appropriately, and with public credibility, with full transparency by Facebook and consideration of the interplay between Mr. Trump’s account and the network of disinformation-amplifying accounts, authentic and inauthentic, on and off the platform. I would especially urge the Board to use the guidance of Rabat, even if by analogy, to evaluate whether Facebook’s actions are consistent with its responsibility to prevent human rights harms and mitigate the adverse human rights impacts its products may cause.

I would further urge the Board to situate any decision it takes within the particularities of Facebook and Instagram themselves. The Board’s decision will only implicate Facebook, and Facebook differs in marked ways from others in the social media space. For instance, it is my understanding that Mr. Trump’s account was managed by multiple administrators, in contrast to the very personal control that he had over his Twitter account. It may be that this feature has implications for how the Board ought to evaluate the impact on Mr. Trump’s freedom of expression and the public’s access to what he wishes to share.

Given all these factors, I believe that the Board will be in a position to uphold Facebook’s decision, even as it encourages the company to improve its transparency and its explicit integration of human rights standards into its rules and rule-enforcement.

With respect,

David Kaye