



February 12, 2021

**Facebook Oversight Board**

1209 North Orange Street,  
Wilmington, DE 19801  
[submitted electronically]

Re: 2021-001-FB-FBR

Dear Oversight Board,

Below you will find the comments agreed by the following civil society organizations that are members of the **Alianza Regional por la Libre Expresión e Información**, regarding the case on reference: **Asociación Civil por la Igualdad y la Justicia** (ACIJ), Argentina; **Acción Ciudadana** (AC), Guatemala; **Article 19**, Brazil; **Comité por la Libre Expresión** (C-Libre), Honduras; **Fundación Democracia sin Fronteras** (FDsF), Honduras; **Fundación Salvadoreña para el Desarrollo Económico y Social** (FUSADES), El Salvador; **Fundación Violeta Barrios de Chamorro** (FVBCH), Nicaragua; **Fundación Ciudadanía y Desarrollo**, Ecuador; **Instituto de Prensa y Libertad de Expresión** (IPLEX), Costa Rica; **Transparencia por Colombia**, Colombia; **Transparencia Venezuela**, Venezuela; **Espacio Público**, Venezuela; **IDEA**, Paraguay; **Asociación Nacional de la Prensa** (ANP), Bolivia; **Cainfo**, Uruguay; and the **Observatorio Cubano de Derechos Humanos**, Cuba

Thank you for your consideration

**Comments that address issue 1**

Political speech is protected under international standards of freedom of expression, and only in very exceptional cases, as established by international law, could it be subject to limitation.

A company whose business model has as one of its central axes allowing people to disseminate ideas and information, as well as advertisement, on a global scale, should adapt to these international standards, adopting them as its own. Even more so when this company has a dominant position in the market together with no more than 2 or 3 social networks not linked to FB that have made similar decisions.

As a human right, the limitation of the dissemination of thought or opinion should fall under a jurisdictional authority that balances, even summarily, the rights at stake under the principles of legality, necessity and proportionality. If Facebook considered that the expressions of former President Trump were for any reason encouraging national, racial or religious hatred that induced to acts of violence or any other similar illegal action against any person or group of persons, including discrimination related to racial, ethnic, religion, language or national origin, it should have turned to instances independent from that of the company's own criteria –including, as a possibility, the creation of *ad hoc* juries consisting of its users that could deliberate and decide on the case or the filing of judicial actions before the courts, among other possible measures, based on previously established democratic rules of procedure that leave no room for the company's arbitrariness in settling this type of tension between human rights of utmost importance. This, without prejudice that the platform itself adopts a transparent and objective system of alerts to consider the potential risk of an expression for any of the



reasons already mentioned; and without prejudice to always being able to point out its own dissent.

Using company rules, which are unilaterally modified, interpreted and executed by the company without regard of any of the universal rules of due process, transparency and democratic participation and which have the consequence of censoring the freedom of expression of a high political official, are far from agreeing with international standards for the protection of human rights, since human rights by their own nature enjoy protection in both the public and private spheres.

The adopted measure violates the principles of legality, necessity and proportionality. It is not equivalent to eliminate comments or insert a caption or a legend on them warning about their content, than suspending indefinitely an account, especially one of public scope, in the above mentioned terms. The former could be adopted as a consequence of subsequent liabilities to be judicially determined in the specific case. The latter implies prior censorship and an excessive measure in advance, which is contrary to the standards of freedom of expression.

The interpretation and application of the terms of service of a company with high concentration of power in the world of communications, both for its antidemocratic nature and its implications on rights such as freedom of expression, access to information, citizen participation in public affairs, as well as the exercise and defense of social, economic and cultural rights in its platform or outside of it, cannot be executed at the discretion of the company itself, since it does not meet minimum standards of due process, democratic authority or technical competence in the field of human rights.

### **Comments that address issue 2**

The relation between the content published on the network and its consequences in the political and social context of a given country must be evaluated by people who are independent from the company's interests, including the possibility of creating systems of deliberation and evaluation by juries consisting of the social network's users, as well as eventually by the state judicial branches that, subject to the rule of law and in each case, are more reasonably linked according to the territory in which the speech under analysis has an impact, the subject matter, etc.

FB should include in its "contract" with users rules of international jurisdiction that reflect these principles. These rules, if reasonable and accepted by international practice, could give rise to a future regulation via treaty.

Both substantive and jurisdictional rules, as well as the criteria for their subsequent application, should be constructed in a participatory and transparent manner by the community of academics, activists and internationally recognized experts on freedom of expression. Logically, this also includes the members of the Oversight Board.

Finally, these rules should establish the cases in which FB should go directly to court and the cases that, always subject to judicial review, should be dealt with by the Oversight Board or other bodies that may be created to build participatory and deliberative mechanisms for the resolution of this type of conflicts. The former should undoubtedly include cases involving a political or social leader.

### **Comments that address issue 3**



International standards on freedom of expression recognize political speech as specially protected, precisely to encourage debate on issues of public interest and promote vibrant democracies. FB should only act, directly and without the intervention of control instances absolutely independent from the company, when such speech explicitly, consistently and unequivocally provokes incitement to violence in the terms of art. 20 of the ICCPR or 13.5 of the ACHR; and immediately after having made that determination, FB should intervene with the judiciary most closely linked to the case.

In case of discrepancies of opinion between the company's determination and the judicial authority, the company is obliged to execute the latter to the extent that the decision results from democratic states of law, without prejudice to the possibility of expressing reasoned dissent. The company should resist decisions of authoritarian countries or countries experiencing a pattern of gross and flagrant violations of the rule of law and instead turn immediately to the authority of other States reasonably linked to the case, being able to rely on the opinion of international human rights organizations within the framework of the universally accepted principles of subsidiarity and complementarity.

As a global company that provides a platform where users make use of their freedom of expression, and also obtains profit from it, FB should have legal advisors trained in human rights in each of the countries in which it operates.

#### **Comments that address issue 4**

FB's rules are, in practice, little known and written in a vague and open language that allows the company a lot of discretion. Even worse: these rules are interpreted by the company itself, when there are interests at stake that have a universal and special protection due to their category of fundamental right, such as freedom of expression and thought.

It would be reasonable for Facebook to apply artificial intelligence mechanisms to temporarily suspend accounts when political activists disseminate what, *prima facie*, could be considered hate speech or when there are cases of potential pedophilia. Such mechanisms should never be used when dealing with the speech of political or public interest leaders. In such cases, there should always be human intervention and be subject to international standards on freedom of expression and with the intervention of the judicial body that, *a priori*, is more closely linked to the case.

All decisions adopted by the company directly and/or its independent review mechanism should not exclude the right to appeal to the judicial authority of the country reasonably linked to the case, always within the framework of due process guarantees and respect and guarantee of human rights in general.

Companies should adopt transparency reports on a regular basis, simple, accessible and with disaggregated information that allows public scrutiny regarding the application of their terms of service, referring at least to the number of requests handled and excluded, legal and factual reasons and arguments used in each case, procedures applied, as well as sufficient information on possible information curators, algorithms and any other general or contextual data that contributes to understanding the decision taken. These reports should allow revisions and adjustments, and favor instances of evaluation and follow-up by all interested parties.

#### **Comments that address issue 5**



Unless ordered to do so by a court decision, FB should never suspend accounts indefinitely, since it would not only be incurring in prior censorship, but also an indefinite and serious infringement of a human right. With the prior intervention of decision-making bodies independent from the company and processes that adequately protect rights -especially those of minorities and disadvantaged groups-, or in serious cases of evident incitement to violence by a political leader, and with the immediate intervention of these independent jurisdictional bodies, the company could remove comments, since it would be applying subsequent responsibilities. In borderline cases, it could post warnings that such a comment or post could be considered as hate speech or a violation of another community rule. This would also be a case of subsequent liability.

Javier Castro de León, Mauricio Alarcón Salvador, Ezequiel Santagada  
Members of the Executive Committee