Public Comments of American Center for Law and Justice
Regarding U.S. Social Media Posts Discussing Abortion

In Re: Appeals No. 2023-011-IG-UA, 2023-012-FB-UA, and 2023-013-FB-UA

The American Center for Law and Justice (ACLJ), by its undersigned counsel, submits these public comments to the Oversight Board (OSB) regarding United States user posts discussing abortion on Facebook and Instagram, and on the content moderation practices by those platforms regarding the above user posts and on those additional issues solicited by the OSB for public comment.

I. Meta's Facebook and Instagram rule on violence and incitement was not properly followed in these cases

Meta's guidelines on incitement to violence stress "language and context" in evaluating questionable posts. They also distinguish between acceptable "casual statements" or references to violence in a "non-serious" manner from those that comprise a "credible threat;" moreover, they even suggest that certain strongly worded aspirational statements employing words like "kill" (e.g., "Terrorists deserve to be killed") are not actionable. See: https://transparency.fb.com/policies/community-standards/violence-incitement/.

All three posts under review here dealt with abortion, a matter of clear public interest. All used the word "kill" with reference to larger issues of human life and those lives that are worthy of protection. A context-driven approach by content moderators should have easily erred on the side of permitting those posts. The fact that adverse actions were nevertheless taken against the posts suggests that Meta's content policies need to be informed by established free speech principles of American and similar international law in order to rightly interpret expressive context.

II. Meta's policies on abortion posts using the word "kill" should follow established U.S. First Amendment law supported by international law, both of which counsel that these posts should not have been treated adversely.

U.S. First Amendment law was not followed.

The Posts Did not involve "incitement to violence."

The U.S. Supreme Court in *Stewart v. McCoy*, 537 U.S. 993, 994-95 (2002) noted that the rule under U.S. constitutional law for more than five decades has been that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of

the use of force or of law violation except where such advocacy is *directed to inciting* or producing *imminent lawless action* and *is likely to incite or produce such action*," citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

None of the posts under review here were "directed" toward inciting violence of any kind. They were simply moral arguments dressed in popular vernacular.

Case 011, a pro-life post, was arguing the ironic and contradictory "logic" of those who support abortion on the grounds of supposed compassion because, otherwise, a forced birth would result in a baby who is unwanted and uncared-for. The post implies that such *compassion* resulting in the death of the pre-born in order to rescue it from a troubled life is no compassion at all.

The posts in cases 012 and 013, both apparently by supporters of abortion, make the opposite argument when applied to a South Carolina bill that would impose the death penalty for those getting abortions. Case 012 suggested that it is illogical to declare yourself "pro-life" if you believe in sanctioning the execution of abortion law offenders. Case 013 makes a similar claim, this time asserting that pro-life supporters of the bill are adopting a position of "it's wrong to kill [the pre-born] so we are going to kill you [who get abortions]."

Thus, when these posts are read in their rhetorical context, it is clear no "incitement" was either intended or likely to be produced by these polemical references to "kill," let alone any "imminent" lawlessness threatening public safety.

Hyperbole, exaggeration, parody, and political rhetoric are <u>not</u>
"true threats," and therefore are protected free speech.

The U.S. Supreme Court has recognized the distinction between real threats to public safety that are *not* protected expression, and facetious or hyperbolic remarks that *are* protected. For instance, in *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*) no real "threat" was found, even though Watts had stated during an anti-war protest event that if he was drafted, he would point his rifle at U.S. President Lyndon Johnson. The Court decided it was merely a "crude" political attack against the President's war policies and therefore was protected free speech, and was not a violent threat against the President himself. In each of the three posts under review here, each side on the abortion issue was making arguments attempting to reduce the other side's position to its most illogical conclusion through *reductio ad absurdum*, a customary debating approach. The "kill" references were the expressive vehicle to extol a particular view of the value of human life and to question the other side's failure to recognize it, rather than being threats against the life or safety of anyone.

Because the three posts were presenting arguments on an important public issue regarding abortion and human life and were not targeting persons or groups for harm, they do not fall within Meta's own rules prohibiting incitement. Moreover, they are consistent with American free speech standards under the First Amendment. Currently the Supreme Court is considering

the "true threats" doctrine in *Counterman v. The People of the State of Colorado* (Case No. 22-138) where the State of Colorado convicted the Petitioner of criminal stalking. He presented himself as a one-time "fan" of a female performing artist but then sent her voluminous and disturbing posts on Facebook. Yet, despite the differing opinions between the parties on matters of legal nuance, the overriding importance of the "context" of the Facebook posts in applying the "true threats" rule was recognized by both sides. Compare the brief of Petitioner at page 4, about the importance of "critical context about [the] meaning" of his words, Microsoft Word - 2023-02-22 (22-138) (supremecourt.gov), with the brief of Respondent Colorado at page 36, emphasizing the importance of a "context-driven test" for "true threats:" 20230324141807845_22-138 Brief for Respondent Final.pdf (supremecourt.gov). Had Meta content reviewers properly studied the context of the posts in our three cases, they should have arrived at the unavoidable decision that no threats were intended, nor could any reasonable reviewer conclude that the public would be incited to violence as a result.

The benefit of the doubt goes to free speech in close cases.

We consider these three cases to be clear examples of improper suppression of speech that should have been being protected by Meta's own rules as well as under both American and international principles. They are far from "close" cases. But even if close questions, the U.S. Supreme Court has stated that the issue must be resolved in favor of more expression rather than less, because the First Amendment "give[s] the benefit of the doubt to speech, not censorship." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 482 (2007).

International free speech standards were not followed.

International law standards have long recognized freedom of expression as a primary human right, including expression critical of abortion. Article 19 of the U.N.'s Universal Declaration of Human Rights ("Declaration") states: "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas *through any media* and regardless of frontiers" (emphasis added). The later 1967 International Covenant on Civil and Political Rights tracked language similar to the Declaration, but added that some restrictions could operate as an exception in matters of "incitement to discrimination, hostility or violence," but only to the extent "necessary." Id., Article 20, par. 2. Although restricting speech because it incites "discrimination" or "hostility" (as opposed to "violence") is inconsistent with American law, in these cases, it does not matter. As we point out, restricting these posts was never "necessary" to protect public safety in any event.

Meta's handling of these three posts is also inconsistent with a decision of the European Court of Human Rights (ECHR). ACLJ's international affiliate, the European Center for Law and Justice

appeared as *Amicus Curiae* before that Court in the case of *Annen v. Germany* (2015). A German court had imposed an injunction against pro-life leafletting and a website because specific "abortion doctors" cited by both name and address had been denounced as participants in a modern-day abortion *holocaust*. However, the ECHR tribunal ruled that the injunction in Germany violated free speech principles under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ("European Convention"). See: https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/06/CASE-OF-ANNEN-v.-GERMANY.pdf; accessed via https://globalfreedomofexpression.columbia.edu/cases/annen-v-germany/.

In *Annen*, the ECHR tribunal noted that under "consistent case-law … there is little scope under Article 10 of the Convention for restrictions on political expressions or on debate on questions of public interest," *Id.*, par. 53. Of course, abortion issues touch on both "political expression[]" as well as "public interest" and are therefore protected by Article 10 of the European Convention, rendering "restrictions" on such expression, like the kind imposed by Meta, highly suspect. In the *Annen* decision, as in the Meta cases here, such communications are required to be afforded a "special degree of protection afforded to expressions of opinion which were made in the course of a debate on matters of public interest," *Id.*, par. 64.

III. Meta's Violence and Incitement Policy should be revised to reflect the importance on context, permitting the use of "kill" in non-threat, abortion-related ways, as well as in hyperbole, exaggeration, parody, or political rhetoric.

For the reasons set forth above, Meta should revise its policies to explicitly state that when the *context fails to clearly show* that a message is intended to be or could be reasonably viewed by a person or group mentioned in the post to be, a direct and imminent threat against them, it therefore does not violate the incitement rule and should not be restricted. Words that have multiple meanings (e.g., "kill") depending on context, particularly in debate over matters of public interest like abortion, should not trigger adverse action simply because one meaning could imply a threat of violence. Only when the context clearly shows such a threat of impending violence targeting a person or an identifiable group should the post be restricted.

IV. Meta's content moderation practices employing "fact-checking" on abortion issues detrimentally impacts political dialogue.

Facebook fact-checking systems are often an unreliable process in politically charged issues like abortion, a subject that arises in every election cycle. In the lead-up to the 2020 U.S. national elections, LifeNews, a pro-life site, commented on Facebook regarding a state governor's push for funding of Planned Parenthood, a major provider of abortion services. LifeNews noted that the organization was engaged in the "abortion business." Facebook's fact-checker levied a strike

against the posting. Yet, the fact-check's analysis itself contained substantial error. See: Alexandra DeSanctis, "Fact-Checker Denies Planned Parenthood Is an Abortion Business," National Review.com (May 12, 2020). In another example, during the pre-2022 election, regarding proposed Maryland legislation on an abortion issue in which ACLJ's Senior Litigation Counsel Olivia Sommers had testified, an ACLJ Facebook post was publicly labeled "not even close" by Facebook's fact-checker because of supposed inaccuracy. The issue? Whether the matter was heading to a vote as ACLJ claimed, a virtual self-evident truth considering the fact that the bill was in committee. Yet the ultimate "missing context" conclusion by the fact-checker, as he later explained in email to ACLJ, was based on the fact that the bills "had not progressed." That kind of strained reasoning is basically opinion-countering rather than fact-checking, and silences voices during elections.

V. Conclusion: Meta should revise its rules regarding posts dealing with abortion, and should err on the side of free expression when dealing with online dialogue on that issue in all cases except for true threats against specific persons or groups that are obvious on their face.

We submit that our proposal would foster political speech rather than strangle it. Restriction of a post when read in its accurate context should require a clear showing of (1) a "true threat" of impending violence (2) against a specific person or identifiable group, where the post (3) appears to be intended to, and is likely to incite actual imminent criminal behavior by others. This approach is consistent with both American constitutional law as well as international free speech standards. In fact, because Meta is obviously concerned about violent speech inciting real violence, Meta should consider this: that the balanced, informed, contextual approach we have suggested may actually avoid the very violence that Meta fears, by providing a healthy *release valve* for public dialogue on highly contentious issues like abortion while at the same time assuring its users that Meta's content decisions are based on widely-established, enduring principles of free speech.

Respectfully submitted this 23rd day of June, 2023,
American Center for Law and Justice by:

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