

Examining the Autonomy of Social Media Content Moderation Oversight Boards: A Case Study of Facebook’s Oversight Board

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I. INTRODUCTION

It's a unique thing, in that Meta is a business and has responsibilities to its shareholders, of course. The interesting thing, I think . . . is in what sense does this independent [oversight] board fit in that story?¹

Moderating online content is not a new idea. To some extent, social media companies have engaged in content moderation, either through automated moderation or a human content moderator.² Content moderation or oversight boards are a different story. A content moderation or oversight board sits as an external appeal body on a case where a user's content has been moderated and the user has exhausted the internal appeal process of a social media company.³ This is why some have termed Facebook's Oversight Board (the Board), "Facebook's 'Supreme Court,' 'a quasi-judicial organization,' or even an 'international human rights tribunal.'"⁴ But oversight boards also challenge the common idea of a corporate board: a board elected by shareholders for "management, oversight, and service" to prioritize and maximize shareholder wealth.⁵ Content moderation boards are instead established on a broad corporate governance structure embracing multistakeholder input and external oversight.⁶ Compared to the corporate board preoccupied with shareholder wealth, content moderation boards prioritize "policies, values and human rights commitments."⁷ There is some tension between these two priorities when users' interests and shareholders' interests do not align.⁸

It is crucial that a content moderation board is autonomous from the corporate board and its officers for it to discharge its responsibilities to users at large and its broader

1. Sarah Oh Lam, Thomas M. Lenard & John Samples, *John Samples on the Oversight Board and Content Moderation*, TECH. POL'Y INST. (May 23, 2023), <https://techpolicyinstitute.org/publications/content-moderation/john-samples-on-the-oversight-board-and-content-moderation> (on file with the *Journal of Corporation Law*).

2. *Key Moments in Content Moderation*, WEBPURIFY (Apr. 16, 2024), <https://www.webpurify.com/blog/key-moments-in-content-moderation/> [<https://perma.cc/8CHC-LK4S>] (discussing the gradual evolution of content moderation on the internet from the early days in the 1970s to the modern internet environment).

3. *How We Do Our Work*, OVERSIGHT BD., <https://www.oversightboard.com/our-work> [<https://perma.cc/6AQR-B6BP>] [hereinafter *How We Do Our Work*].

4. Lakshmi Gopal, *Facebook's Oversight Board & the Rule of Law: The Importance of Being Earnest*, ABA: BUS. L. TODAY (Oct. 12, 2021), <https://businesslawtoday.org/2021/10/facebooks-oversight-board-the-rule-of-law-the-importance-of-being-earnest> [<https://perma.cc/K4LM-6RYF>].

5. Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051, 1053, 1060 (2014) (noting the role of corporate boards to oversee use of shareholders' capital to ensure responsible use).

6. Akash Pugalia, *Corporate Governance Structures Are Being Challenged—Can Advisory Boards Save the Day?*, FORBES (Mar. 2, 2023), <https://www.forbes.com/sites/forbesbusinesscouncil/2023/03/02/corporate-governance-structures-are-being-challenged-can-advisory-boards-save-the-day/?sh=190ac2a4592e> [<https://perma.cc/Q3T9-KG2P>].

7. *How We Do Our Work*, *supra* note 3.

8. Olivier Weinstein, *The Shareholder Model of the Corporation, Between Mythology and Reality*, 3 DE GRUYTER 43, 51–54 (2013).

stakeholders. Most content moderation boards are thus designed to be independent.⁹ Major social media companies use staffing with external experts as a baseline of independence. For example, TikTok staffed its Content Advisory Council with industry experts in technology, policy and health and wellness.¹⁰ Before it was dissolved by Elon Musk, Twitter had an advisory council of 100 organizations to address hate speech, child exploitation, suicide, self-harm, and other problems on the platform.¹¹ Facebook picked a former prime minister and a Nobel prize winner among the 20 experts comprising its Board.¹² According to Facebook, these experts were not its employees and Facebook had no power to remove them.¹³ However, independence continues to be an issue for many oversight boards including Facebook's, especially in relation to decision-making. Facebook's Board's mandate to "protect free expression by making principled, independent decisions"¹⁴ contradicts its composition, structure and funding. The first members of the Board were chosen by Facebook, and in 2019 Facebook settled the \$130 million Oversight Board Trust as its sole settlor.¹⁵ The Board is known as "quasi-independent oversight board"¹⁶ and this has practical implication for the board's independent decision-making.

Part II of this Note discusses the relevant background of content moderation oversight boards by briefly discussing the history of content moderation boards vis-à-vis Facebook's Oversight Board. It gives a broad overview of the internet space, the need for transparent content moderation policies and the need to amend Section 230 of CDA. Additionally, this Note considers the creation, funding, and selection of board members of content moderation boards and how this promotes or prevents independence.¹⁷ Part III examines the independence of the Board from a structural lens. In Part IV, this Note proposes solutions and makes recommendations that the Board could adopt to achieve a more transparent and accountable self-regulation.

II. BACKGROUND

A. History of Content Moderation Boards

The early years of the 21st century saw the emergence of social media platforms with models that made user-generated content easily accessible and distributed.¹⁸ Facebook

9. See Gopal, *supra* note 4 (discussing Facebook's oversight board).

10. Vanessa Pappas, *Introducing the TikTok Content Advisory Council*, TIKTOK (Mar. 18, 2020), <https://newsroom.tiktok.com/en-us/introducing-the-tiktok-content-advisory-council> [<https://perma.cc/LZ2V-3GEH>].

11. The Associated Press, *Musk's Twitter Has Dissolved its Trust and Safety Council*, NPR (Dec. 12, 2022), <https://www.npr.org/2022/12/12/1142399312/twitter-trust-and-safety-council-elon-musk> [<https://perma.cc/6Z7N-FDNJ>] [hereinafter The Associated Press].

12. Makena Kelly, *Facebook's Oversight Board Will Include a Former Prime Minister and Nobel Prize winner*, THE VERGE (May 6, 2020), <https://www.theverge.com/2020/5/6/21249427/facebook-oversight-board-nobel-peace-prize-instagram-snowden> [<https://perma.cc/9XR9-HZWN>].

13. *Id.*

14. OVERSIGHT BOARD LLC, LIMITED LIABILITY COMPANY AGREEMENT 3 (Oct. 17, 2019).

15. *Id.* at 1.

16. Gopal, *supra* note 4.

17. See Kate Klonick, *Why the History of Content Moderation Matters*, TECHDIRT (Jan. 30, 2018), <https://www.techdirt.com/2018/01/30/why-history-content-moderation-matters> [<https://perma.cc/3V7A-SDZ9>].

18. *Id.*

(now known as Meta)¹⁹ was created in 2004, YouTube in 2005, and Twitter in 2006.²⁰ While there was significant public interest around the success of these companies and their impact on global commerce, involvement in politics, financial structure, and corporate governance, regulators did not envisage the rapid growth that would take place within the internet space;²¹ for example, generative AI was not anticipated at the time. Hence, the regulations were not adequate to resolve internet usage challenges.²² However, as the internet space began to expand, the need for comprehensive regulations to cater to the increasing number of users who host on the various social media platforms increased as well.

Before the boom in the internet space, the prevalent public concern was focused on accessibility “to pornography and sexually explicit materials by minors” which was engineered by the expansion and growth of internet usage.²³ Platform owners were left to self-regulate obscene, harmful, or offensive content²⁴ that could be on their platforms and the ones that would be taken down for violations of their policies.²⁵ As the internet proliferated, various sites began taking steps to develop more comprehensive content moderation policies.²⁶ Internet users in particular wanted a more transparent and inclusive user policy for platforms.²⁷

Users needed more accountability and transparency on how content moderation policies were being implemented and what standards were being used by platform owners to flag content in violation of their policies.²⁸ Users wanted to know how these companies decide what content to keep up or take down to align with their community standards or

19. For this Note, all references to Facebook include Meta, and references to Meta include Facebook.

20. See Ahmed Medien, *The Evolution of Content Moderation Rules Throughout the Years*, MEDIUM (Apr. 1, 2021) <https://medium.com/checkstep/the-evolution-of-content-moderation-rules-throughout-the-years-bccc9859cb31> [https://perma.cc/JS43-RRP3] (providing for the history of content moderation rules over the years).

21. See Klonick, *supra* note 17.

22. For the general U.S. law regarding social media sites see 47 U.S.C § 230.

23. Sanne Roeven, *Exploring the History of Section 230 of the Communications Decency Act of 1996*, BALLOTPEDIA NEWS (June 8, 2021), <https://news.ballotpedia.org/2021/06/08/exploring-the-history-of-section-230-of-the-communications-decency-act-of-1996/> [https://perma.cc/6A6N-CYH6].

24. See, e.g., *Facebook Community Standards*, META: TRANSPARENCY CTR. (Sept. 10, 2024), <https://transparency.meta.com/policies/community-standards/> [https://perma.cc/W6SP-FNU5] (defining categories that violate Facebook’s community standards as including: “Hateful Conduct, Violent and Graphic Content, Adult Nudity and Sexual Activity, Adult Sexual Solicitation and Sexually Explicit Language”).

25. See Michael A. Cusumano, Annabelle Gawer & David B. Yoffie, *Social Media Companies Should Self-Regulate. Now.*, HARV. BUS. REV. (Jan. 15, 2021), <https://hbr.org/2021/01/social-media-companies-should-self-regulate-now> [https://perma.cc/7AQD-DWES] (discussing the ban of former President Trump from Facebook and Twitter due to the capitol riot).

26. Klonick, *supra* note 17.

27. See e.g., Rebecca Bellan, *Americans Want Transparency in Content*, FORBES (June 19, 2020), <https://www.forbes.com/sites/rebeccabellan/2020/06/19/americans-want-transparency-in-content-moderation-decisions-on-social-media/?sh=3a91b8f70ae8> [https://perma.cc/Y5NW-ZLGG] (“Platforms should offer more transparency about moderation decisions.”).

28. See Klonick, *supra* note 17 (discussing some of the frustration and controversy surrounding online content moderation).

terms of service.²⁹ Facebook’s Oversight Board was established by Facebook to address some of these concerns.³⁰

However, this framework immediately faced specific problems. One, it was unclear whether Facebook’s creation of the Board was a calculated attempt to deprive the government of the ability to step in and make regulations to help platforms moderate content.³¹ Two, the legitimacy and independence of the Board was called into question considering it functions as a pioneer board that has no specific government regulation guiding it.³² The Board’s creation was likely to lead other platform owners such as Twitter and YouTube to adopt Facebook’s content moderation board structure, thinking it was the appropriate structure—a potentially disastrous situation if the Board’s structure was defective.³³

Specifically, one prominent defect of the Board is that it needs far more independence flowing from its organization, structure, and decision-making mechanism.³⁴ It has been argued that, by funding the Board, Facebook asserts some form of authority over its decision-making, with Facebook being a judge in its court.³⁵ Further, critics have argued that Facebook’s selection of Board members could incentivize members to implicitly hold themselves to some level of loyalty towards Facebook, to be in Facebook’s good graces, and to continue benefitting from Facebook’s funding of the Board.³⁶ All these loopholes in the structure and operational running’s of the Board raise serious questions about the Board’s independence.³⁷

29. Kelly Tyko, *Mark Zuckerberg Talks About Threats to Free Speech and Creation of Oversight Board*, USA TODAY (Oct. 18, 2019), <https://www.usatoday.com/story/tech/2019/10/17/facebook-ceo-announces-creation-independent-oversight-board/4010346002/> [<https://perma.cc/8KEM-W6K8>] (discussing Meta’s motives for developing an independent oversight board, including addressing concerns regarding who has the power to make decisions about which content violates platform guidelines).

30. *Id.* (discussing Mark Zuckerberg’s speech about creating an independent oversight board for people to turn to, to appeal Facebook’s content moderation decisions).

31. See Kelsey D. Atherton, *The Oversight Board Exists to Make Us Feel Like Facebook Can Govern Itself*, WASH. POST (May 7, 2021), <https://www.washingtonpost.com/outlook/2021/05/07/governance-theater-facebook-oversight-board/> [<https://perma.cc/ERK5-6YZS>] (arguing that the creation of the Oversight Board was calculated to evade government regulation through a well-planned self-regulation).

32. See *id.* (“The process was really little more than theater.”).

33. For a notable example of other social networks following Facebook’s lead, see Herb Scribner, *Musk: Twitter to Create New Council Before ‘Major Content Decisions’*, AXIOS (Oct. 28, 2022), <https://www.axios.com/2022/10/28/elon-musk-twitter-content-council-trump-ye-tweets> (on file with the *Journal of Corporation Law*) (reporting Elon Musk’s intent to establish an oversight council that would be responsible for making content moderation decisions for the platform).

34. See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2452–53 (2020) (discussing the internal debate regarding the proper degree of independence during the development phase of the Board).

35. Donie O. Sullivan, *What You Need to Know About the Board Deciding Trump’s Fate on Facebook*, CNN BUS. (May 4, 2021), <https://www.cnn.com/2021/05/04/tech/what-is-facebook-oversight-board/> [<https://perma.cc/XG2E-WN3A>].

36. Klonick, *supra* note 34, at 2488–89 (noting that, while the Board is intended to gradually become self-appointed, currently Facebook exerts decision-making power over the membership).

37. Olivia Solon & Jo Ling Kent, *Facebook’s New Oversight Board Strives to be Seen as Independent*, NBC NEWS (Oct. 22, 2022), <https://www.nbcnews.com/tech/tech-news/facebook-s-new-oversight-board-strives-be-seen-independent-n1244293> [<https://perma.cc/3TW5-8ZN5>] (stating that Facebook “provided \$130 million to establish an independent board trust and helped choose board members” and that while the oversight Board may give the appearance of oversight, the process is ultimately controlled by Facebook itself). This reiterates the fundamental argument in this Note that the Board’s independence is questionable.

Further, the Board is not autonomous to the extent that the initial and subsequent Board Members were selected and funded by Facebook, raising concerns about the independence of the Board and the fairness of their decisions.³⁸ This Note further argues that the continuous funding of the Board, irrespective of the funding structure, is inconsistent with the principles of corporate governance on independence.

B. Facebook's Content Moderation Before the Oversight Board

After several years of developing case law on whether platform owners would be responsible for offensive or harmful content hosted by third parties on their platforms,³⁹ the legislature stepped in and enacted Section 230 of the Communications Decency Act of 1996.⁴⁰ The central goal of Section 230 was to spur the “removal of ‘indecent’ content online.”⁴¹

However, as years went by, it became clear that the provisions of Section 230 did not sufficiently protect users, but instead shielded social media companies from liability for users’ activity.⁴² Congress has been reluctant to regulate content moderation policies of social media companies.⁴³ Complaints from users, especially Facebook users, on hate speech, election misinformation, incitement of violence, and harassment increased.⁴⁴ This heightened the need for more stringent regulation of social media content moderation

38. Roger McNamee & Maria Ressa, *Facebook's 'Oversight Board' is a Sham. The Answer to the Capitol Riot is Regulating Social Media*, TIME (Jan. 28, 2021), <https://time.com/5933989/facebook-oversight-regulating-social-media/> [<https://perma.cc/F84V-V4D6>].

39. *Compare* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991) (holding that CompuServe and other website operators should be seen more like a library than a publisher as it would be difficult for CompuServe to examine every publication it carries for likely defamatory content), *with* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, *5 (N.Y. Sup. Ct. May 24, 1995) (holding that online service providers can be liable for their users’ speech). The distinction between *CompuServe* and *Prodigy* for the *Prodigy* court was that Prodigy engaged in content screening and thus exercised editorial control. *Prodigy Servs. Co.*, 1995 WL at *4.

40. 47 U.S.C. § 230.

41. Alan Z. Rozenshtein, *Interpreting the Ambiguities of Section 230*, 41 YALE J. ON REGUL. BULL. 60, 68 (2024); *see also infra* notes 71–74.

42. *See* Eric Rosen, *Section 230 Under Fire: Recent Cases, Legal Workarounds, and Reforms*, DYNAMIS LLP <https://www.dynamislip.com/knowledge/section-230-immunity-changes> [<https://perma.cc/KVM7-WW95>] (noting the broad protection granted to internet platforms by Section 230); *see generally* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2024) (explaining the history of Section 230 of the Communications Decency Act and how it exempts social media owners from liability for content posted by third parties and how the exemption was important for the growth of internet).

43. *See generally* Caitlin Ring Carlson & Hayley Rousselle, *Report and Repeat: Investigating Facebook's Hate Speech Removal Process*, FIRST MONDAY (Feb. 3, 2020), <https://firstmonday.org/ojs/index.php/fm/article/view/10288/8327#:~:text=Results%20indicated%20that%20only%20about%20half%20of%20reported%20hate%20speech,impact%20on%20the%20removal%20process> [<https://perma.cc/DVC9-GBLR>] (noting the United States’ “hands-off approach” to internet hate speech); *see* Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1029, 1054 (2021).

44. Nicole Buckley & Joseph S. Schafer, ‘Censorship-Free’ Platforms: Evaluating Content Moderation Policies and Practices of Alternative Social Media, FOR(E)DIALOGUE, Feb. 2022, at 6 (noting that “[o]ver the last several years, social media platforms have faced increasing public pressure to moderate content, as issues of problematic content like online harassment, hate speech, and misinformation have become increasingly salient in public discourse[.]” suggesting increased presence of this content on social media platforms).

standards in the public interest.⁴⁵ The public began advocating for the government to set standard guidelines on content moderation for all social media platforms.⁴⁶ Consequently, in 2009, Facebook and some other social media platforms adopted “PhotoDNA”⁴⁷ technology to flag and remove content relating to “child pornography” online.⁴⁸ This tool was developed by Microsoft alongside Hany Farid, a professor at Dartmouth College, as a response to the growing trend of child exploitation through images.⁴⁹ Currently, PhotoDNA has helped different organizations as well as government agencies with the detection, disruption, and distribution of child exploitation material.⁵⁰

As social media was recording rapid developments and the number of Facebook users steadily increased,⁵¹ obscene content, misinformation, and fake news was also on the rise.⁵² The need to make policies on what content violates the use of the platform also heightened.⁵³ Facebook released its first-ever set of Community Standards Enforcement Report in 2018.⁵⁴ Before this, Facebook, in an effort to solve content moderation problems

45. See John Samples & Paul Matzko, *Social Media Regulation in the Public Interest: Some Lessons from History*, KNIGHT FIRST AMEND. INST. (May 4, 2020), <https://knightcolumbia.org/content/social-media-regulation-in-the-public-interest-some-lessons-from-history> [https://perma.cc/3M96-U7B7]; Adi Robertson, *Why the Internet's Most Important Law Exists and People are still Getting it Wrong*, THE VERGE (June 21, 2019), <https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview> [https://perma.cc/58UR-3SS8] (“Platforms need to have a much more transparent method of communicating what they’re doing.”).

46. Buckley & Schafer, *supra* note 44, at 3–4 (“Some level of moderation is always necessary to comply with a given set laws. In France, new legislation protects against specific types of ‘information manipulation’. . . . In Germany, pro-Nazi and neo-Nazi content is explicitly banned online and off.”) (citations omitted).

47. Microsoft Research, *PhotoDNA™: How it Works*, YOUTUBE (Dec. 16, 2009), <https://www.youtube.com/watch?v=NORISXfeWlo> [https://perma.cc/2S7A-NB22] (“PhotoDNA provides a way to create from a photo a unique signature similar to a fingerprint that will remain consistent even after it is edited or manipulated.”).

48. See Medien, *supra* note 20 (providing the history of content moderation rules over the years and how major platforms used “PhotoDNA technology to flag and remove child pornography image[s] (CSAM) online).

49. Redmond Wash, *New Technology Fights Child Porn by Tracking Its ‘PhotoDNA’*, MICROSOFT (Dec. 15, 2009), <https://www.business-humanrights.org/en/latest-news/new-technology-fights-child-porn-by-tracking-its-photodna/> (on file with the *Journal of Corporation Law*).

50. *Microsoft’s PhotoDNA: Leading the Fight Against Child Sexual Abuse Imagery*, THORN (Apr. 25, 2016), <https://www.thorn.org/blog/photodna-leads-fight-against-child-sex-abuse-imagery/> [https://perma.cc/M7HL-GC64] (discussing how PhotoDNA is used by “more than 100 companies worldwide, including Facebook, Twitter, Kik, and Flipboard. Law enforcement agencies all around the world also use PhotoDNA to help with their investigations”).

51. See Hillary Tune, *Looking Back on a Decade of Social Media*, UNIV. OF TENN., KNOXVILLE: COLL. OF COMM’NS & INFO., (Feb. 24, 2021), <https://cci.utk.edu/2021/02/24/looking-back-on-a-decade-of-social-media> [https://perma.cc/NM26-4YP3] (discussing the growth of Facebook, Twitter, YouTube, & Instagram).

52. See generally Esma Aïmeur, Sabine Amri & Gilles Brassard, *Fake News, Disinformation and Misinformation in Social Media: A Review*, SOC. NETWORK ANALYSIS & MINING, Feb. 2023 at 1, (stating that “[online social networks] (OSNs) are a double-edged sword”).

53. See Martyn Landi, *Facebook Turns 20: Highs and Lows from Two Decades of the Social Media Giant*, INDEPENDENT (Feb. 3, 2024), <https://www.independent.co.uk/tech/facebook-mark-zuckerberg-instagram-oculus-vr-harvard-college-b2490100.html> [https://perma.cc/4KSF-3L45] (discussing the evolution of Facebook and noting “[t]he need for effective moderation of Facebook’s online empire has never been more vital or high-pressured”).

54. Jillian C. York, *Facebook Releases First-Ever Community Standards Enforcement Report*, EFF (May 16, 2018), <https://www.eff.org/deeplinks/2018/05/facebook-releases-first-ever-community-standards-enforcement-report> [https://perma.cc/EKY9-U2TA].

and show transparency, released its content moderation transparency report⁵⁵ and subsequently launched a fact-checking program on its platform.⁵⁶

Even with Facebook's community standards and its transparency report, some content that violated the company's guidelines was left on the platform while other content that did not violate its policy was wrongly taken down, leading to backlash from users and the public.⁵⁷ Consequently, in 2018, the founder and CEO of Facebook, Mark Zuckerberg, while addressing issues of the company, stated how difficult it was to enforce content moderation policies and guidelines but acknowledged how the content appeal process had been helpful in handling issues relating to content flagged on the website for violating the company's policies.⁵⁸ Zuckerberg further stated that after careful deliberations on content issues, it was finally time to acknowledge the reality that "Facebook should not make so many important decisions [relating to] free expression and safety" of its users.⁵⁹ To solve the problem of content moderation, Zuckerberg went on to announce the establishment of a content moderation Board that would be independent of Facebook's control.⁶⁰

In May 2020, after a rigorous consultation with the public,⁶¹ the Board's 20 founding members were announced.⁶² This was a step in the right direction, but it was unclear whether the creation of the Board would resolve the dilemma of content moderation given the number of users the platform controlled.⁶³ Further controversy existed despite the creation of the Board: could it be trusted in terms of its independence?⁶⁴ This Note argues that

55. This report was launched in 2013, one year after Facebook acquired Instagram. *See* Medien, *supra* note 20.

56. To better manage the "fact-checking" program, Facebook decided to partner with IFCN fact-checking organizations. *Facebook's Approach to Misinformation: Partnering with Third-Party Fact-Checkers*, FACEBOOK: JOURNALISM PROJECT (Mar. 23, 2020), <https://web.archive.org/web/20201215024312/https://www.facebook.com/journalismproject/programs/third-party-fact-checking/selecting-partners> (on file with the *Journal of Corporation Law*).

57. Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggles to Moderate Two Billion People*, VICE (Aug. 23, 2018), <https://www.vice.com/en/article/xwk9zd/how-facebook-content-moderation-works> [<https://perma.cc/3GM9-M2E7>] (discussing the challenges Facebook faces about its content moderation policies and how they are being enforced).

58. Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK (May 5, 2021), <https://www.facebook.com/notes/751449002072082/> (on file with the *Journal of Corporation Law*) (addressing the critical issues facing Facebook as the year wraps up).

59. *Id.*

60. *Id.*

61. Brent Harris, *Global Feedback and Input on the Facebook Oversight Board for Content Decisions*, META (June 27, 2019), <https://about.fb.com/news/2019/06/global-feedback-on-oversight-board/> [] (showing the number of people consulted through workshops, roundtables, one-on-one discussions, and online public consultation as well as the number of represented countries).

62. Elizabeth Culliford, *Facebook Names First Members of Oversight Board That can Overrule Zuckerberg*, REUTERS (May 6, 2020), <https://www.reuters.com/article/us-facebook-oversight/facebook-names-first-members-of-oversight-board-that-can-overrule-zuckerberg-idUSKBN22I2LQ/> [<https://perma.cc/P6ST-PX36>] ("Among the initial cohort are: former European Court of Human Rights judge András Sajó, Internet Sans Frontières Executive Director Julie Owono, Yemeni activist and Nobel Peace Prize laureate Tawakkol Karman, former editor-in-chief of the Guardian Alan Rusbridger, and Pakistani digital rights advocate Nighat Dad.").

63. *Id.* (noting uncertainties regarding the outcome of the formation of the Board).

64. Alex Kantrowitz, *Should We Trust the Facebook Oversight Board?*, MEDIUM (Apr. 18, 2021), <https://onezero.medium.com/should-we-trust-the-facebook-oversight-board-1692cb95bd10> (on file with the *Journal of Corporation Law*) ("Facebook handpicked the board's members, who make decisions using

the Board is unlikely to be independent, and raises some key questions.⁶⁵ Can Facebook allow an oversight board to control its model of business?⁶⁶ How much independence can the Board assert against Facebook?⁶⁷ Facebook users have been asking these very questions.⁶⁸

C. Section 230 and Social Media Content Moderation

The foundation of the content moderation issue lies in the provision of Section 230 of the CDA, which governs expression on digital platforms.⁶⁹ The provision aimed to protect social media platforms⁷⁰ “from liability for the third-party content that they distribute.”⁷¹ It provided that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁷² This provision shielded online providers from being sued by any user who suffers injury on their platforms—regardless of whether their complaint is legitimate.⁷³ But as technology boomed and changed online experiences, the need to change existing policies became apparent.

Countries with similar provisions to Section 230 have begun to improve those provisions to make social media companies accountable. The European Union’s Electronic Commerce Directive (ECD) is similar to Section 230.⁷⁴ After two decades of relying solely on the ECD, the EU, without amending or modifying the ECD, enacted “the EU’s Digital Services Act (DSA) . . . [which] established a ‘duty of care’ for online platforms.”⁷⁵ Further, in March 2023, the EU passed the New EU due diligence law governing big business, a landmark advancement for human rights.⁷⁶ This forward move by the EU highlights the ongoing need for Congress to modify the provisions of Section 230 to make social media

Facebook’s content guidelines, and Facebook pays their salaries via a trust. So it would be a bit of a stretch to call the board completely independent.”)

65. *Id.* (providing overview on Facebook’s influence over the Board’s membership).

66. See Taylor Hatmaker, *Oversight Board Calls on Meta to Rewrite ‘Incoherent’ Rules against Faked Videos*, TECHCRUNCH (Feb. 5, 2024) <https://techcrunch.com/2024/02/05/meta-facebook-oversight-board-biden-video-cheapfake/> [<https://perma.cc/BWL7-H49A>] (discussing how the oversight board urged Meta to make a more clear and coherent policy on content moderation after the Board encountered difficulty in relation to the “doctored seven-second video of President Biden that made the rounds on social media [in 2023]”).

67. Kantrowitz, *supra* note 64.

68. *Id.* (“[T]he key question underlying it all will be whether we can trust [the oversight board].”).

69. Tom Wheeler, *The Supreme Court Takes up Section 230*, BROOKINGS (Jan. 31, 2023), <https://www.brookings.edu/articles/the-supreme-court-takes-up-section-230/> [<https://perma.cc/KQ5E-RKDD>].

70. CompuServe, American Online, and Prodigy were dominating the online space at the time. *Id.*

71. *Id.* (stating that “the United States Supreme Court is scheduled to hear arguments in cases involving the content moderation practices of social media platforms”).

72. 47 U.S.C. § 230(c)(1).

73. Barbara Ortutay, *What You Should Know about Section 230, the Rule That Shaped Today’s Internet*, PBS NEWS (Feb. 21, 2023), <https://www.pbs.org/newshour/politics/what-you-should-know-about-section-230-the-rule-that-shaped-todays-internet> [<https://perma.cc/33TA-YUYQ>] (discussing the protections provided to social media companies by Section 230).

74. This Directive, adopted in 2000, exempts “online platforms from liability for the passive retransmission of third-party content.” See Wheeler, *supra* note 69 (discussing the changes the EU has made since 2000 and speculating what the Supreme Court ruling would be in relation to Section 230).

75. *Id.*

76. Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

platform owners accountable to their users for harmful content posted on their platform that causes injury to other users.

Recently, the provisions of Section 230 came up for interpretation at the Supreme Court, but the Court declined to make a pronouncement on the application of Section 230 to platform owners regarding their liability for third-party content that causes harm to other users.⁷⁷ The argument the Plaintiff presented to the Court was that limiting the immunity granted by social media platform owners makes them accountable to persons who suffer from “third-party content” posted on their platforms.⁷⁸ Elsewhere, the argument advanced against Section 230 is that if the immunity is removed or limited, companies like Facebook, Twitter, and Google would be more cautious.⁷⁹ However, another possibility is that these companies and other social media platform owners “could abandon moderation altogether and let the lowest common denominator prevail.”⁸⁰

Currently, the Department of Justice (DOJ) is reviewing Section 230 for possible reforms.⁸¹ The first issue the DOJ would address is the “unclear and inconsistent moderation practices that limit speech and go beyond the text of existing statute.”⁸² The second issue the DOJ would address is “the proliferation of illicit and harmful content online that leaves victims without any civil recourse.”⁸³

D. Facebook Oversight Board

It is important to note that Facebook’s Oversight Board was a purely internal and voluntary creation⁸⁴ and there is no legal requirement for Facebook to establish the Board in the United States. The implication is that Facebook can dissolve the Board at any time without any legal consequences. Twitter’s experience is illustrative of this. Elon Musk’s dissolution of Twitter’s Trust and Safety Council was criticized but no legal consequence followed.⁸⁵ Unsurprisingly, the framework of self-regulation that birthed Facebook’s Board calls into question its independence and its effectiveness. The structure, creation, and composition of the Board draw attention to this issue.

77. *Gonzalez v. Google LLC*, 598 U.S. 617, 622 (2023) (“We therefore decline to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief.”).

78. *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1165–66 (N.D. Cal. 2018); *see also* Ortutay, *supra* note 73.

79. Ortutay, *supra* note 73 (“If platforms were not immune under the law, then they would not risk the legal liability that could come with hosting Donald Trump’s lies, defamation, and threats.”).

80. *Id.*

81. *Department of Justice’s Review of Section 230 of the Communications Decency Act of 1996*, DEP’T. OF JUST. ARCHIVES, <https://www.justice.gov/archives/ag/departments-justice-s-review-section-230-communications-decency-act-1996> [https://perma.cc/BLE6-2JYH].

82. *Id.*

83. *Id.*

84. Gopal, *supra* note 4. Facebook’s Vice President of Global Affairs and former British Deputy Prime Minister, Sir Nick Clegg, is usually credited as the one who forced the creation of the Board following Facebook’s mounting scandals. *Id.*

85. *See* The Associated Press, *supra* note 11.

1. *Creation, Structure and Composition of Facebook Oversight Board*

The Facebook Oversight Board was created to be “independent” of Facebook in its internal decision-making process⁸⁶ and to make binding decisions on Facebook and its users.⁸⁷ Facebook being a public company means it is subject to government regulations.⁸⁸ Although Facebook has the power to self-regulate,⁸⁹ it is still bound by all the rules of corporate governance that apply to public companies.⁹⁰ Thus, in creating the Board, Facebook is exercising its powers to self-regulate content moderation policies.

The Board is “composed of a diverse set of members whose names will be public” and who have the responsibility of exercising “neutral, independent judgment and render[ing] decisions impartially.”⁹¹ The Board is required to have a minimum of 11 members but no more than 40 members.⁹² Currently, the Board has a total of 22 members, after the resignation of one of its members and a co-chair.⁹³ In April 2023, the Board announced that in order to continue its operations and decision-making process timeously, it was resolving to settle at 26 members as opposed to the 40 members the charter and bylaws originally provided for.⁹⁴ However, the Board is currently staffed by 21 members.⁹⁵

The charter gives the Board the option to change the number of board members as the Board deems fit to carry out its functions.⁹⁶ This likely explains why the Board notified Facebook of its intention to leave the number of board members at 26 in 2023.⁹⁷ While the Board claims that the rationale for the reduction of its members from 40 to 20 is to achieve

86. META, THE OVERSIGHT BOARD: OPERATIONALIZING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 4 (2022) (discussing the structure and composition of the Board) [hereinafter OPERATIONALIZING THE UN GUIDING PRINCIPLES].

87. *Id.*

88. See *Public Companies: What Is a Reporting Company*, SEC, <https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/public-companies> [<https://perma.cc/7KP5-MJRU>]; Lauren Jackson, *How Should We Limit Facebook's Power?*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2021/10/08/podcasts/facebook-regulation.html> (on file with the *Journal of Corporation Law*).

89. Jackson, *supra* note 88 (noting Facebook's resistance to regulation and the lack of any means for Congress to enforce Facebook's internal oversight guidelines).

90. *Id.* (noting the possibility of relying on antitrust laws to combat Facebook's negative influence).

91. META, THE OVERSIGHT BOARD CHARTER 4 (2024) [hereinafter OVERSIGHT BOARD CHARTER].

92. *Id.*

93. In May 2020, when the Board was created, it started out with 20 members with 16 being members and four being co-chairs. *Announcing the First Members of the Oversight Board*, OVERSIGHT BD. (May 2020), <https://web.archive.org/web/20221206212351/https://www.oversightboard.com/news/327923075055291-announcing-the-first-members-of-the-oversight-board/> (on file with the *Journal of Corporation Law*) [hereinafter *First Members of the Board*]. In January 2023, co-Chair Jamal Green resigned his position. While it is unclear why he resigned before the end of his first term, whatever the reason for the resignation may be, it painted the Board and Facebook in a negative light. See Steven Levy, *Inside Meta's Oversight Board: 2 Years of Pushing Limits*, WIRED (Nov. 8, 2022), <https://www.wired.com/story/inside-metas-oversight-board-two-years-of-pushing-limits> [<https://perma.cc/8AV6-JBZK>]; *Updates on Oversight Board Membership*, OVERSIGHT BD. (Apr. 5, 2023), <https://www.oversightboard.com/news/77169078717546-updates-on-oversight-board-membership/> [<https://perma.cc/MS9E-4XSF>] (updating the public on the Board's status, including that Maina Kiai, one of the initial Board Members planned to step down) [hereinafter *Oversight Board Membership*].

94. *Oversight Board Membership*, *supra* note 93.

95. *Get to Know Our Board Members*, OVERSIGHT BD., <https://www.oversightboard.com/meet-the-board> [<https://perma.cc/C5A9-UYHR>].

96. OVERSIGHT BOARD CHARTER, *supra* note 91, at 4.

97. *Oversight Board Membership*, *supra* note 93.

timely, practical deliberation and decision-making, the Board has had trouble recruiting new members when Facebook has expressed concerns over their appointment.⁹⁸

The charter provides that all Board members must possess and exhibit a broad range of knowledge,⁹⁹ competencies,¹⁰⁰ diversity, and expertise with matters concerning digital content and governance, as well as safety, privacy, and technology.¹⁰¹ Currently, the by-laws allow a member of the board to serve for up to nine consecutive years.¹⁰² Approvals and renewals are handled by the Board of Trustees.¹⁰³

2. Selection of Oversight Board Members.

Facebook together with the Board select the initial Board members. However, while providing updates on the appointment of new members, the Board noted that Facebook would cease to make selections on its members with the completion of the initial members' first term and after the appointment of new members to replace the members who recently resigned.¹⁰⁴ Hence, the Board will be solely responsible for selecting new members of the Board.¹⁰⁵ Though this is a positive step towards achieving a more independent Board, there are still doubts about its independence given that Facebook had a significant influence on the selection of the initial and subsequent members.¹⁰⁶

3. What Does the Oversight Board Do?

The Board was established to assist Facebook to resolve and "answer some of the most difficult questions" regarding "freedom of expression online."¹⁰⁷ The Board decides what should be taken down and what should remain on the platform.¹⁰⁸

The Board is supposed to exercise independent judgment while reviewing appeals but it is not clear whether that independence can be achieved considering that the Board still

98. See Levy, *supra* note 93 (discussing the frustrations the Board is encountering with hiring new members to the Board).

99. The Board must be competent to decide all cases that come to them and when in doubt the Board should hire persons with the technical skills that the Board lacks. See CONSIDERING FACEBOOK OVERSIGHT BOARD: TURNING ON EXPECTATIONS 5 (2019).

100. *Id.* at 9 ("Knowledge and expertise in international human rights and particularly free speech should be among the qualities of any candidate.").

101. OVERSIGHT BOARD CHARTER, *supra* note 91, at 5.

102. META, OVERSIGHT BOARD BYLAWS 7 (2023) (providing that Co-chairs and other officers will serve initial terms of three years, up to a maximum of two terms total, or until their resignation or removal) [hereinafter OVERSIGHT BOARD BYLAWS].

103. In April 2023, the Board announced the tenure of its members was renewed for a second three-year term effective from April 1, 2023. The Board further mentioned that members who joined after 2020 would have their tenure renewed after their first term. See *Oversight Board Membership*, *supra* note 97.

104. *Id.*

105. *Id.*

106. Levy, *supra* note 93.

107. Terry Collins, *Facebook Oversight Board: The Members Who Decide 'What to Take Down, What to Leave Up'*, USA TODAY (May 5, 2021), <https://www.usatoday.com/story/tech/2021/05/05/facebook-oversight-board-members-mark-zuckerberg/4954484001> [<https://perma.cc/Q8A2-B2E8>].

108. *Id.*; see also Ime Archibong, *Strengthening Safety and Encouraging Free Expression: Facebook's Goals for a New Content Oversight Board*, META (Mar. 26, 2019), <https://about.fb.com/news/2019/03/ime-op-ed/> [<https://perma.cc/3V7L-CEBB>] (stating that Facebook will "design a global body, an Oversight Board, which will have the authority to review some of our most challenging and contentious content decisions").

uses Facebook guidelines as a standard to determine whether a user has violated Facebook's policy or whether Facebook has negligently taken down content for violations.¹⁰⁹ Further, "[t]he Board's decisions to uphold or reverse Facebook's content decisions will be binding," that is "Facebook will have to implement them, unless doing so could violate the law."¹¹⁰ The Board is also empowered to make appropriate recommendations to Facebook concerning its Community Standards or policies.¹¹¹ However, Facebook reserves the right to decide whether it would act on the recommendation or ignore it.¹¹²

E. Autonomy and Independence of the Board

To demonstrate that it had an independent operation free from Facebook's strategic management, Facebook established an Oversight Board Trust ("the Trust")¹¹³ and the Oversight Board Limited Liability Corporation and its subsidiaries ("the LLC").¹¹⁴ This dual structure was adopted to enable the Board to review content independently without interference from Facebook.¹¹⁵ On the one hand, the Trust was created to "facilitate the creation, funding, management, and oversight of a structure" that would enable and protect the smooth operation of the Board.¹¹⁶ On the other hand, the LLC, being a legal entity, was created by the Trust "to hold the contractual relationship with board members and hire staff" directly or through its subsidiaries.¹¹⁷

1. The Governing Bylaws

The Board is governed primarily by its "charter" which provides that a set of bylaws will stipulate the operational structure of the Board. Hence, the charter and the bylaws detail the Board's purpose, and how it will function.¹¹⁸ Also, the bylaws provide the relationship between all the beneficiaries of the Board's success, the Board itself, the users who submit review requests, and the Trust.¹¹⁹

109. Asha Barbaschow, *Everything You Need to Know about Facebook's Board*, ZDNET (Apr. 13, 2021), <https://www.zdnet.com/article/everything-you-need-to-know-about-facebooks-oversight-board/> [<https://perma.cc/PHF3-V62R>] (providing an overview of the Board's authority).

110. *Id.* The Board was expected to make its decisions on content respecting users' right to free expression within the limitations sets under the First Amendment of the United States Constitution even if Facebook, as a private company, is not bound by the First Amendment. See Joseph Thai, *Facebook's Speech Code and Policies: How They Suppress Speech and Distort Democratic Deliberation*, 69 AM. U. L. REV. 1641, 1644 (2020).

111. *Oversight Board Recommendations*, META: TRANSPARENCY CTR. (July 25, 2025), <https://transparency.meta.com/oversight/oversight-board-recommendations/> [<https://perma.cc/338A-YHQ3>].

112. *Id.*; Sharon Bradford Franklin & Spandana Singh, *Facebook's Oversight Board Is Not as Powerful as We Think. But It Can Push the Company's Policies in the Right Direction.*, NEW AM. (Jan. 15, 2021), <https://www.newamerica.org/oti/blog/facebook-oversight-board-is-not-as-powerful-as-we-think-but-it-can-push-the-companys-policies-in-the-right-direction/> [<https://perma.cc/RSL6-FG5P>] ("[E]ven if Facebook's Board concludes that a Facebook rule conflicts with international human rights law or otherwise fails to protect users' human rights, the Board cannot demand that Facebook remove or amend that rule.").

113. OVERSIGHT BOARD BYLAWS, *supra* note 102, at 5.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. See generally OVERSIGHT BOARD CHARTER, *supra* note 91.

119. OVERSIGHT BOARD BYLAWS, *supra* note 102, at 5.

Article 1 provides for the roles of the board members, its committees, and administration.¹²⁰ Article 2 reiterates Facebook's commitment to the Board and creates procedures for case submission, decision implementation, and responses to policy advisory opinions.¹²¹ If there is a conflict between the interpretation of the charter and the bylaws, the charter controls.¹²² The bylaws apply to Facebook, the Board, and the Trustees.¹²³

2. Powers of the Oversight Board.

According to the charter, the Board has the express authority to request from Facebook any information that would assist the Board in its deliberations,¹²⁴ and assist in interpreting Facebook's Community Standards¹²⁵ and other policies relevant to its decisions on content. The Board also has the power to instruct Facebook on whether content should be removed or left on the platform.¹²⁶ Further, the Board could instruct Facebook to either "uphold or reverse a designation that led to an enforcement outcome."¹²⁷ More importantly, the Board has the power to provide "prompt, written explanations of the Board's decisions."¹²⁸

Additionally, the Board can provide "policy advisory opinions" specifically on a case decision or upon Facebook's request on its content policies.¹²⁹ The Board does not have authority beyond the express powers provided by the charter.¹³⁰ This is a limitation on the Board, as neither the charter nor the bylaws provides for any implied powers for the Board. This limitation is viewed as a calculated means to limit the Board's independence on how the Board handles decisions between Facebook and its users.¹³¹ This is because Facebook

120. *Id.* at 6–18.

121. *Id.* at 19–26.

122. *Id.* at 5.

123. OVERSIGHT BOARD BYLAWS, *supra* note 102, at 5.

124. OVERSIGHT BOARD CHARTER, *supra* note 91, at 3.

125. *Id.*

126. *Id.*

127. *Id.*

128. OVERSIGHT BOARD CHARTER, *supra* note 91, at 3.

129. *Id.* at 2. Facebook is not bound to act on the advisory opinion or recommendation. *See* Levy, *supra* note 93. If the company decides to ignore the advice, it is expected to provide an explanation as to why it is rejecting the recommendation after which nothing happens. *Id.*

130. *See* OVERSIGHT BOARD CHARTER, *supra* note 91, at 3.

131. Andreas Kulick, *Meta's Oversight Board and Beyond—Corporations as Interpreters and Adjudicators of International Human Rights*, in *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 161, 173 (2023) ("While the corporation may have a genuine interest in the OB operating well and discharging its duties in a competent manner, it is hard to imagine that this perspective does not include the overall expectation that its general business model will remain unhampered by the Board."); *see also* Kate Klonick, *Inside the Making of Facebook's Supreme Court*, *NEW YORKER* (Feb. 12, 2021), <https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court> [<https://perma.cc/9Q9M-NDLZ>] (describing the apprehension of many Facebook executives against a Board making decisions that would kill or significantly limit Facebook's business or its model).

had a significant influence in the drafting of the charter and the bylaws.¹³² Facebook faced criticism alleging that it limited the Board's powers to shield its business model.¹³³

3. *Selection of Cases by the Oversight Board*

The Board is responsible for picking cases from the cases submitted to it by Facebook or users of Facebook.¹³⁴ To demonstrate transparency and accountability in case selections, the Board provides an annual criteria to help the Board make informed decisions during the selections, including the content's critical importance to public discourse, if the impugned content directly or indirectly affects a large number of individuals, and whether the content raises significant questions about Facebook's policies.¹³⁵ Further, the Board uses its 2022 Strategic Priorities as important criteria for selecting the subject matter of cases.¹³⁶ The Strategic Priorities reflect the most important content moderation concerns of Facebook users.¹³⁷ Additionally, Facebook aims to select cases that "ensure geographic and linguistic" diversity.¹³⁸ The Board's selection of cases is supposed to "reflect the concerns of [all] the people and communities who use and are affected by Facebook...around the world."¹³⁹ So far, the Board has upheld this criterion in its selection. The cases selected by the Board since its inception evidence a greater proportion of appeals from non-Western countries, especially with the number of cases selected being outside of the United States and Canada.¹⁴⁰

F. *How Did the Oversight Board Handle Its First Case?*

The Board, in making selections for its first-ever set of decisions¹⁴¹ for the purpose of content moderation, selected a case involving a user in Brazil who, in a bid to create breast cancer awareness, posted a picture on Instagram with a title in Portuguese stating

132. *Id.* (stating how employees of Facebook "spent much of their time drafting the board's charter, which some called its 'constitution,' and its bylaws, which some called its 'rules of the court'" and how Mark Zuckerberg edited the charter to make it "more approachable").

133. Levy, *supra* note 93, (discussing Facebook's reaction after the Board reviewed a case on the company's content policies that Facebook told the Board to drop because the case was moot). The Board has voiced interest in having a more proactive role, with one member stating "[w]e want to talk about algorithms." *Id.*

134. OVERSIGHT BOARD BYLAWS, *supra* note 102, at 15.

135. *Id.* at 22; see OVERSIGHT BD., OVERARCHING CRITERIA FOR CASE SELECTION 2 (2024) [hereinafter OVERARCHING CRITERIA FOR CASE SELECTION].

136. These priorities drawn from users' major concerns including (i) elections and civic space (ii) crisis and conflict situations (iii) gender (iv) hate speech and marginalized groups (v) government use of Meta platforms (vi) treating users fairly and (vii) automated enforcement of policies and curated content. OVERARCHING CRITERIA FOR CASE SELECTION, *supra* note 135, at 1–2.

137. *Strategic Priorities*, OVERSIGHT BD., <https://www.oversightboard.com/strategic-priorities/> [https://perma.cc/QL2D-YY2P].

138. OVERARCHING CRITERIA FOR CASE SELECTION, *supra* note 135, at 1.

139. *Id.* at 2.

140. The Board's first set of cases hailed from Myanmar, Israel and Palestine, and Ethiopia, among others. See generally Noor Waheed, *Insights from Meta's Oversight Board Cases on the Conflict in Ethiopia*, RSCH SOC'Y INT'L L. (Dec. 1, 2022), <https://rsilpak.org/2022/insights-from-metas-oversight-board-cases-on-the-conflict-in-ethiopia/> [https://perma.cc/3ZMJ-HYLY].

141. Jacob Schulz, *What Do the Facebook Oversight Board's First Decisions Actually Say?*, LAWFARE (Jan. 29, 2021), www.lawfaremedia.org/article/what-do-facebook-oversight-boards-first-decisions-actually-say [https://perma.cc/ML2B-QHMB] (discussing the first sets of decisions from Facebook Oversight Board).

that it was trying to create awareness on the symptoms of breast cancer.¹⁴² The picture posted was pink, depicting “Pink October,” an international campaign to raise awareness for breast cancer.¹⁴³ While some of the pictures showed breast cancer symptoms, others showed visible, uncovered female nipples and breasts.¹⁴⁴

Facebook’s automated systems in charge of enforcing Facebook’s Adult Nudity and Sexual Activity Community Standard, removed the post for violating these standards.¹⁴⁵ Upon the Board’s selection of the case for review, Facebook restored the post, stating it was removed originally in error, urging the Board to decline to hear the case, and arguing that the case was moot since there was no longer a disagreement between Facebook and its user.¹⁴⁶

In response to Facebook’s argument, the Board maintained “the need for disagreement applies only at the moment the user exhausts Facebook’s internal process.”¹⁴⁷ Though Facebook referred to the Board as a “Supreme Court,”¹⁴⁸ the Board does not apply the rules of a traditional court other than when hearing appeals from users or Facebook; exhaustion of remedies is a standard requirement for judicial review.¹⁴⁹ For instance, if a user had taken the case to a traditional court and subsequently settled with the defendant (Facebook), the court would no longer need to hear the case because it would be moot.¹⁵⁰ Furthermore, a traditional court does not call for cases to be submitted to it for decisions. Hence, referencing the Board as the “Supreme Court” should be made with caution. Finally, users who appeal to the Board do not get remedies, unlike what is obtainable under traditional courts where a petitioner who wins is likely to be compensated depending on the claim.¹⁵¹

When Facebook and the user fail to agree internally, the Board has the power to hear the case. The Board has emphasized that their review is “separate from, and not an extension of Facebook’s internal appeals process.”¹⁵² Consequently, the Board stressed that if its recommendation to Facebook about an error leads Facebook to correct the error without

142. *Id.*

143. *Id.*

144. *Breast Cancer Symptoms and Nudity*, OVERSIGHT BD. (Jan. 28, 2021), <https://www.oversight-board.com/decision/ig-7thr3si1> [<https://perma.cc/4U48-8UUE>].

145. *Id.*

146. *Id.*

147. *Id.*

148. Care should be taken to avoid confusing the powers of the Supreme Court—as a constitutional body with the legal authority to assume appellate jurisdiction—and a separate entity created to serve as an oversight body for platform governance. See Josh Cowls et al., *Constitutional Metaphors: Facebook’s ‘Supreme Court’ and the Legitimation of Platform Governance*, 26 NEW MEDIA & SOC’Y 2448, 2463–64 (2024) (discussing the problem associated with referring the Oversight Board of Facebook as a “supreme court”).

149. *Id.*

150. This is a constitutional limitation placed on federal courts to hear cases that are no longer in controversy because the issue has been resolved or the question for review has been answered. See Samuel Strom, *The Mootness Doctrine*, FINDLAW (Aug. 7, 2024) <https://constitution.findlaw.com/article3/the-mootness-doctrine.html> [<https://perma.cc/6TLS-BMV5>] (discussing the doctrine of mootness provided for by U.S. CONST. art. III, § 2, cl. 1).

151. See Gabriella Casanova, Carlos Lopez & Sam Zarifi, *Some Questions Regarding Facebook’s Oversight Board and Remediation of Human Rights Impacts (Part I)*, OPINIONJURIS (Mar. 3, 2020), <http://opiniojuris.org/2020/03/03/some-questions-regarding-facebooks-oversight-board-and-remediation-of-human-rights-impacts-part-i/> [<https://perma.cc/A4MA-J98K>] (providing that there are no available “remedies to a user, or a non-user . . . who feels that content is injurious to them and wants to ‘appeal’ to the Board . . .”).

152. *Breast Cancer Symptoms and Nudity*, *supra* note 144.

further review from the Board, it would take away the Board’s independence and public trust.¹⁵³

III. ANALYSIS

A. *Determining if the Oversight Board is Independent*

The charter and bylaws of the Board urge the members to be independent while deliberating and deciding cases that come to them.¹⁵⁴ This obligation seems easy to accomplish. However, a closer look into the governance structure of the Board demonstrates the unlikelihood that the Board is truly independent, as Facebook portrays it to be.¹⁵⁵ Even though Facebook showed an intention to create an independent entity to make decisions on certain high-profile cases between Facebook and its users on its content policies, one cannot ignore the fact that Facebook was very influential in setting up the Board.¹⁵⁶ For example, Facebook was very deliberate about which candidates were brought onto the board.¹⁵⁷ A close look at the decision to vet people who sit on the board by Facebook reiterates the argument of this Note that the Board is unlikely to be independent, and the mere fact of calling the Board an independent entity does not ultimately make it so.¹⁵⁸ For example, both the charter and the bylaws failed to state that the board must not have a relationship or any form of affiliation with Facebook.¹⁵⁹ Additionally, the Board is operationally limited from monitoring certain aspects of Facebook.¹⁶⁰

Independence means that the Board should be able to carry out its functions without interference from Facebook or external influence. However, here, the Board is limited; it cannot hear all the cases that it would want to hear because Facebook has the sole discretion to choose the cases that come to the Board.¹⁶¹

One instance of the Board’s questionable independence is Facebook’s occasional bypass of the Board’s supervisory role. Notably, Facebook designed its Crosscheck feature to review content moderation decisions involving high-profile users—separately from

153. *Id.*

154. See OVERSIGHT BOARD BYLAWS, *supra* note 102, at 11–12 (providing a standard for the responsibilities and duties of oversight board members); see OVERSIGHT BOARD CHARTER, *supra* note 91 at 3.

155. *Oversight Board*, META: TRANSPARENCY CTR. (Sept. 10, 2024), <https://transparency.fb.com/oversight/> [<https://perma.cc/K3KQ-DSPM>] (advertising the independence of the Board).

156. Salvador Rodriguez, *Facebook’s Rules for New Oversight Board Leave the Company Firmly in Control*, CNBC (Jan. 28, 2020), <https://www.cnbc.com/2020/01/28/facebook-oversight-board-bylaws-leave-company-firmly-in-control.html> [<https://perma.cc/K4KJ-GJZX>] (emphasizing that Facebook releasing the bylaws for the Board reiterates the fear of the public that Facebook is “in control of its platform”).

157. Casey Newton, *How Facebook Undercut the Oversight Board*, THE VERGE (May 12, 2022), <https://www.theverge.com/23068243/facebook-meta-oversight-board-putin-russia-ukraine-decision> [<https://perma.cc/M6XW-Z5K6>] (stating that Facebook “hand-picked” the founding board members).

158. *Id.*

159. See generally OVERSIGHT BOARD BYLAWS, *supra* note 102; OVERSIGHT BOARD CHARTER, *supra* note 91.

160. Rodriguez, *supra* note 156 (discussing the limitations of the Board).

161. *Id.* (noting that the board does not have the power to review “content posted on Facebook’s marketplace, fundraisers, Facebook dating features or the Facebook-owned WhatsApp, Messenger, Instagram Direct or Oculus services”).

other users.¹⁶² Crosscheck or “XCheck”¹⁶³ gives an added layer of review to politician and celebrity accounts, allowing their posts to remain on the site after they are reported and using what might be considered newsworthy, popular, or a PR risk to the company as criteria for whether the content should be taken down.¹⁶⁴ However, Facebook deployed Crosscheck without the full knowledge of the Board, which is supposed to act as an ethical backstop for the company.¹⁶⁵

While the Charter makes the content moderation decisions of the Board in specific cases binding on Facebook, it gives Facebook the discretion to accept the Board’s policy recommendations (which require operational or systemic changes) if they are “technically and operationally feasible.”¹⁶⁶ Facebook can ignore the policy recommendations of the Board, even if it has to communicate its compliance or non-compliance with the policy recommendations to the public.¹⁶⁷ This puts a question mark on the efficacy and independence of the Board. To demonstrate that the Board maintains an independent status as posited by Facebook, experts have recommended that the Board’s recommendations and advisory opinions to Facebook should be binding on Facebook.¹⁶⁸ Independence cannot be achieved simply by incorporating the word “independent” in the charter or the bylaws. Independence can be achieved if the Board is allowed to function without interference from Facebook, and if Facebook applies the recommendations from the Board without reservation, to improve its content moderation policies.

B. Funding

According to the bylaws and the charter, Facebook is expected to fund the Board through the Trust for a period of six years starting at its creation.¹⁶⁹ This type of structure is rife with problems. For instance, companies that donate to charities usually assert some form of influence and most of the time crave loyalty from the donee.¹⁷⁰ To this end, many have questioned if the model promotes independence and if the Board can really be

162. Hanna Ziady, *Facebook Kept Its Own Oversight Board in the Dark on Program for VIP Users*, CNN (Oct. 21, 2021), <https://www.cnn.com/2021/10/21/tech/facebook-cross-check-oversight-board> [https://perma.cc/59MJ-9B4R].

163. Facebook uses this program to exempt millions of high-profile users from community standards applied to less famous and less wealthy individuals. See Jon Jackson, *Who Does Facebook’s VIP ‘XCheck’ Program Protect in Community Standards Shield?*, NEWSWEEK (Sept. 14, 2021), <https://www.newsweek.com/who-does-facebooks-vip-xcheck-program-protect-community-standards-shield-1629115> [https://perma.cc/CNP3-2PS7]. The program, which was hidden from the Oversight Board, is known as XCheck or Cross Check. *Id.*; see also Ziady, *supra* note 162.

164. Sareeta Amrute, *Twitter, Facebook, and Google All Have a Trust Problem*, 29 INTERACTIONS 70 (2022).

165. Adam Sataiano & Sheera Frenkel, *Oversight Board Criticizes Meta for Preferential Treatment*, N.Y. TIMES, (Dec. 6, 2022), <https://www.nytimes.com/2022/12/06/technology/meta-preferential-treatment.html> (on file with the *Journal of Corporation Law*) (reporting on how via a two-tiered moderation system, “users with high followers get preferential treatment from Facebook”).

166. OVERSIGHT BOARD CHARTER, *supra* note 91, at 10.

167. Peng Hwa Ang & Sherly Haristya, *The Governance, Legitimacy and Efficacy of Facebook’s Oversight Board: A Model for Global Tech Platforms?*, 2 EMERGING MEDIA 169, 176 (2024).

168. See *id.*

169. OVERSIGHT BOARD BYLAWS, *supra* note 102, at 20; see also OVERSIGHT BOARD CHARTER, *supra* note 91, at 8.

170. See generally Susan A. Ostrander, *The Growth of Donor Control: Revisiting the Social Relations of Philanthropy*, 36 SOC. REL. PHILANTHROPY 356 (2007).

independent of the creator and the funder.¹⁷¹ Regular questions of independence that emerge include: what is in it for Facebook, why is Facebook spending over \$130 million dollars to fund the operation of the Board?¹⁷² Critics argue Facebook created the Board as a front to gain public trust.¹⁷³ Even though Facebook is a publicly traded company, Mark Zuckerberg still holds the largest class of shares, meaning he still maintains the highest form of control.¹⁷⁴

To further prove that the Board is independent of Facebook, the qualifications and social status of the members have been used to justify the Board's independence from Facebook.¹⁷⁵ However, Facebook pays Board members a whopping six figure annual salary with an estimation of a mere 15 hours of work weekly.¹⁷⁶ This is difficult to reconcile. Despite the assertions that qualification equals independence, Enron is a perfect example of the contrary.¹⁷⁷ Enron's Chief Executive Officer, Kenneth L. Lay, alongside the Chief Accounting Officer, Andrew S. Fastow, perpetuated one of the biggest accounting frauds in 2001, despite Enron having the most sophisticated Board members in place.¹⁷⁸ Enron hired Arthur Andersen and David B. Duncan to oversee the Company's accounts as an independent auditor.¹⁷⁹ Despite the Company's poor accounting practices, Arthur Andersen approved the Company's report for many years, thereby giving confidence to the public because of the high standard Arthur Andersen had maintained in the past.¹⁸⁰ Enron's

171. See, e.g., Brian Wallheimer, *How Corporations Use Charitable Giving to Wield Political Influence*, CHI. BOOTH REV. (June 7, 2018), <https://www.chicagobooth.edu/review/how-corporations-use-charitable-giving-wield-political-influence> [https://perma.cc/DE25-HHWF] (describing how companies make charitable donations to wield political influence and secure tax breaks); see also Evelyn Douek, *What Kind of Oversight Board Have You Given Us?*, UNIV. CHI. L. REV. ONLINE, <https://lawreview.uchicago.edu/online-archive/what-kind-oversight-board-have-you-given-us> [https://perma.cc/JU3L-45DZ].

172. See Allana Akhtar, *Facebook is Reportedly Paying its Oversight Board 6-Figure Salaries only for it to tell the Company to Solve its own Problems*, BUS. INSIDER (May 6, 2021), <https://www.businessinsider.com/facebook-oversight-board-members-get-six-figure-salaries-report-2021-2> (on file with the *Journal of Corporation Law*) (reporting "Facebook gave an independent trust \$130 million to manage the Oversight Board's payment and operations."); see also, Levy, *supra* note 93 (announcing Facebook's commitment to "give the Board \$150 million—more than double its original commitment—to keep the project going through 2025").

173. See Levy, *supra* note 93, (remarking "[s]ome critics see the Oversight Board as an exercise in corporate ass-covering by a bunch of Meta's puppets. If the company doesn't want to make a controversial call, it can push the board to take a position on the issue and, conveniently, take the heat").

174. Emily Stewart, *Mark Zuckerberg Is Essentially Untouchable at Facebook*, VOX (Dec. 19, 2018), <https://www.vox.com/technology/2018/11/19/18099011/mark-zuckerberg-facebook-stock-nyt-wsj> (on file with the *Journal of Corporation Law*) (noting that "[Mark] Zuckerberg has an enormous amount of voting power at Facebook").

175. Evelyn Douek, *The Meta Oversight Board and the Empty Promise of Legitimacy*, 37 HARV. J.L. & TECH. 373, 384, 386–87 (2024) (noting the impressive resumes of Board members, the strategic creation of the Board, the issues of trust surrounding online communications companies).

176. See Akhtar, *supra* note 172 (reporting how much Facebook pays the Board members for their work).

177. See generally PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., REP. ON THE ROLE OF THE BOARD OF DIRECTORS IN ENRON'S COLLAPSE (Comm. Print 2002).

178. *Id.* at 3.

179. See TROY SEGAL, ENRON SCANDAL: THE FALL OF A WALL STREET DARLING 5–6 (2021) (providing an account on how officers of Enron and their independent auditor deceived the public and the SEC on the actual financial standing of the Company).

180. *Id.*

example casts doubts on the independence-in-fact of a review body remunerated by the review subject.

While arguments can be made in favor of the Board's independence, the circumstances surrounding the creation and funding of the Board, coupled with the fact that Facebook was very instrumental in the selection of the initial Board members, raise suspicion.¹⁸¹

C. Corporate Governance and Oversight

Under the rules of corporate governance, an independent director must not have any connection with the company that they serve, and they must be capable of exercising their judgment freely without interference from the company or its management.¹⁸² Looking at the structure and composition of Facebook's Board, it is difficult to readily conclude that Facebook created a functionally independent Board as it has been asserting.¹⁸³ Instead, a deeper look at the structure of the Board shows that Facebook may have created a more organized internal Board with minimal transparency.¹⁸⁴ Why would Facebook invest so much in creating a Board? The answer might seem simple, but this question has been asked by many of the Board's critics.¹⁸⁵ The easiest answer would be to evade government regulation.¹⁸⁶ This answer stems from threats made by lawmakers after the January 6th Capitol riot and the subsequent ban of President Donald Trump from Facebook, Twitter, and other media outlets in 2021.¹⁸⁷ Facebook got a lot of backlash from the public, and lawmakers threatened that "the time for self-regulation is over."¹⁸⁸ Facebook's motivations for creating the Board have been the subject of much debate. However, the practical challenge to the efficacy and independence of the Board is that, compared to conventional corporate governance, there are fewer "affirmative principles for corporate governance of online expression."¹⁸⁹

In the absence of comprehensive self-regulation, it is time for Congress to step in again, just like in 1996, to make uniform content moderation guidelines.¹⁹⁰ These

181. Klonick, *supra* note 131.

182. Scott Powell, *Independent Director*, CFI, <https://corporatefinanceinstitute.com/resources/career/independent-director/> [<https://perma.cc/L6AK-D7MY>].

183. Klonick, *supra* note 131.

184. *Id.*

185. See McNamee & Ressa, *supra* note 38 (noting issues with the Board and its potential ineffectiveness in combating problematic content on Facebook as well as noting the need for regulation of social media platforms).

186. Diane Bartz & Elizabeth Culliford, *Big Tech CEOs Told 'Time for Self-Regulation is Over' by U.S. Lawmakers*, REUTERS (Mar. 25, 2021), <https://www.reuters.com/business/media-telecom/tech-ceos-back-capitol-hill-this-time-talk-about-misinformation-2021-03-25/> (on file with the *Journal of Corporation Law*) (highlighting concerns from one politician that "the time for self-regulation is over").

187. *Id.*

188. *Id.*

189. Paul M. Barrett, *Meta's Oversight Board and the Need for a New Theory of Online Speech*, LAWFARE (Nov. 9, 2023), <https://www.lawfaremedia.org/article/meta-s-oversight-board-and-the-need-for-a-new-theory-of-online-speech> [<https://perma.cc/9U89-NVAS>].

190. Aidan Smith, *The Era of 'Self-Oversight' is Over: Only Antitrust Can Rein in Facebook*, COMMON DREAMS (July 3, 2022), <https://www.commondreams.org/views/2022/07/03/era-self-oversight-over-only-anti-trust-can-rein-facebook> [<https://perma.cc/927Z-DQAK>] ("Facebook's dominance is unchallengeable without government intervention.").

guidelines must incorporate the United Nations Guiding Principles on Business and Human Rights to be effective and efficient.¹⁹¹

D. *Can an Amendment of Section 230 Cure the Defects?*

Modification of Section 230 is unlikely to cure all the challenges of content moderation but it will be a step in the right direction.¹⁹² While an amendment may bring about some innovation in the social media space, a uniform content moderation policy that sets standards for social media platforms and compliance would need to be monitored by an independent agency.¹⁹³ These new standards by Congress are likely to face challenges, including challenges to free speech, but these could be solved by enacting guidelines that strike a balance between the right to free speech and comprehensive regulations.¹⁹⁴

E. *A “No Policy” Board*

The Board has no policy or guidelines prepared by itself for reviewing cases that come to it.¹⁹⁵ The Board, in making decisions on content moderation between Facebook and its users, adopts “three sets of norms,” namely: (i) Facebook’s Community Standards, (ii) Facebook’s values, and (iii) international human rights law (United Nations Guiding Principles on Business and Human Rights (UNGIPs)).¹⁹⁶ Further, the Board relies on the charter and the bylaws, which were designed by Facebook.¹⁹⁷

Facebook’s Oversight Board is an experiment in corporate governance, and its concept of independence amid self-regulation is unique.¹⁹⁸ A board that oversees another entity that funds and staffs that same board will certainly have questions about its independence and efficacy—the Oversight Board has been no exception.¹⁹⁹ Indeed, the Oversight Board Trust states that Facebook’s goal is to establish an administration and structure that would ensure the Board renders “independent judgment.”²⁰⁰ Facebook puts the Board’s

191. See OPERATIONALIZING THE UN GUIDING PRINCIPLES, *supra* note 86, at 2–4 (discussing board’s attempt to implement the Guiding Principles).

192. Luke J. Matthews, Heather J. Williams & Alexandra T. Evans, *Protecting Free Speech Compels Some Form of Social Media Regulation*, RAND (Oct. 20, 2023) <https://www.rand.org/pubs/commentary/2023/10/protecting-free-speech-compels-some-form-of-social.html> [<https://perma.cc/L8GX-CGAB>] (noting various options for effectively regulating social media platforms, including giving power to an independent government agency).

193. *Id.*

194. *Id.*

195. Faiza Patel & Laura Hecht-Felella, *Facebook’s Content Moderation Rules Are a Mess*, BRENNAN CTR. FOR JUST. (Feb. 22, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/facebooks-content-moderation-rules-are-mess> [<https://perma.cc/TU38-G7HB>] (noting how unreliable algorithms, vague rules, and more contribute to Facebook’s confusing content moderation guidelines).

196. Mårten Schultz, *Six Problems with Facebook’s Oversight Board. Not Enough Contract Law, Too Much Human Rights*, in PERSPECTIVES ON PLATFORM REGULATION 145, 154–57 (Judit Bayer et al. eds. 2021)

197. See OVERSIGHT BOARD CHARTER, *supra* note 91; see also OVERSIGHT BOARD BYLAWS, *supra* note 102.

198. Douek, *supra* note 176, at 397; see also Shira Ovide, *Zuckerberg’s Facebook ‘Supreme Court’ Can’t Handle All the Disputes*, BLOOMBERG (June 24, 2019), <https://www.bloomberg.com/view/articles/2019-06-24/zuckerberg-s-facebook-supreme-court-can-t-handle-all-disputes?embedded-checkout=true> (on file with the *Journal of Corporation Law*).

199. Douek, *supra* note 175, at 397.

200. *Id.*

funding into an irrevocable trust,²⁰¹ and the Board “recommends members for appointment by the trust.”²⁰² However, it is doubtful that Facebook anticipated a fully independent and comprehensive oversight board.²⁰³

First, Facebook has been slow to implement much of the Board’s decisions and recommendations, such as to “inform users when automation is used to take enforcement action against their content,”²⁰⁴ or to “[e]ngage an independent entity not associated with either side of the Israeli-Palestinian conflict to conduct a thorough examination”²⁰⁵—decisions that “require more dramatic restructuring and resources to implement than the simple policy recommendations or rule changes it seems Meta had intended.”²⁰⁶ On the other hand, the Board has demonstrated a bold and aggressive and sometimes, opposite, approach to Facebook by insisting on an interpretation of the charter that allows the Board to define its own role.²⁰⁷

Second, the Board can only review a small portion of individual content moderation decisions and only the “tiniest fraction of the content moderation decisions Facebook makes.”²⁰⁸

Third, the Board does lack standard rules that guide its adjudication processes, making its “Facebook Supreme Court” appellation somewhat of a misnomer.²⁰⁹ The Board looks at the content policies of Facebook to determine whether the policy has been violated before making its decisions. There is no standard guideline created by the Board to conduct its reviews, diminishing some form of independence that the Board would have had.²¹⁰

Before now, social media platforms have found ways to moderate content hosted on their platforms by hiring independent moderators to help them make decisions on content. For example, Reddit had a “user-based moderation [] where the community appoints their own moderators.”²¹¹ Under this structure, “each content channel (a ‘subreddit’) is monitored for spam by a volunteer from within that online community.”²¹² This type of structure is more user-friendly and manifests transparency and accountability, which are all features of independence.²¹³ The argument here is not for Facebook to copy the structure of Reddit;

201. OVERSIGHT BOARD CHARTER, *supra* note 91, at 2.

202. *Id.* at 7.

203. See Douek, *supra* note 175, at 397. Facebook admitted that “[t]he size and scope of the board’s recommendations go beyond the policy guidance that we first anticipated when we set up the board, and several require multi-month or multi-year investment.” FACEBOOK, FACEBOOK Q1 2021 QUARTERLY UPDATE ON THE OVERSIGHT BOARD 6 (2021).

204. *Breast Cancer Symptoms and Nudity*, *supra* note 144.

205. *Shared Al Jazeera Post*, OVERSIGHT BD. (Sept. 14, 2021), <https://www.oversightboard.com/decision/FB-P93JPX02> [<https://perma.cc/B6AD-Q2ML>].

206. Douek, *supra* note 175, at 398.

207. *Id.* at 398–99.

208. Douek, *supra* note 175.

209. *Id.*

210. See Patel & Hecht-Felella, *supra* note 195 (urging the Board to create content policies for its users benefit).

211. Jamie Andrew, *Content Moderation and Online Platforms: An Impossible Problem?*, CLIFFORD CHANCE (July 21, 2020), <https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2020/07/content-moderation-and-online-platforms--an-impossible-problem--.html> [<https://perma.cc/CZ8S-3MFQ>] (discussing the various modes of content moderation).

212. *Id.*

213. *Id.*

however, to build a more transparent and accountable Board, Facebook must engage and carry its users along in its quest to solve content moderation controversies.

F. Is the Board Protecting Facebook or Users?

The Board's objective stated that the Board was created to protect the human rights of Facebook users; how then did Facebook select the founding board members without the input of the users whom the Board seeks to protect? One of the challenges of being the first is not having a precedent to follow. While being the first may seem good for the company, it could be challenging for the users or the general public, especially where all interests are not protected equally.²¹⁴

Facebook has over two billion active monthly users.²¹⁵ How is it possible that a Board of 22 members can solve all the problems of these people with diverse values and peculiarities? Even the U.S. Supreme Court with all its resources, "agrees to hear about 100–150 of the more than 7,000 cases it is asked to review each year."²¹⁶ How then, can a 22-member Board with over two billion users adjudicate a fraction of the issues Facebook users report? While having an independent Board may be a positive step in the right direction towards solving content moderation issues, the independence of the Board is not enough to tackle the problems associated with the proliferation of social media of social media content moderation. The likely answer to achieving near perfect content moderation rules would be an intervention from the government. This Note further argues that while social media companies can self-regulate, the government needs to provide a guide for all social media companies.

IV. RECOMMENDATIONS

A. Appointment of Trustees and the Board

To avoid the controversy surrounding the independence of the Board, Facebook should engage the expertise of an independent body to conduct the appointment of the independent trustees of the Trust.²¹⁷ Facebook appointing the independent trustees of the Trust indicates some level of control over the Trust. Since the Trust owes fiduciary duties to the Board, the Trust's lack of independence and attendant control or coercion from Facebook undermines the Board's independence. No doubt, there is a risk that some form of loyalty would be demanded of members of the Board because of the relationship formed during their appointment.

The apparent lack of independence has not been eliminated by the Board's policy requiring future members to "contract directly" with the Board.²¹⁸ The Board's role and

214. Lakshmi Gopal, *Facebook's Oversight Board & the Rule of Law: The Importance of Being Earnest*, ABA: BUS. L. TODAY (Oct. 12, 2021), <https://businesslawtoday.org/2021/10/facebooks-oversight-board-the-rule-of-law-the-importance-of-being-earnest/> [<https://perma.cc/EU8G-3A8C>] (discussing how the Board applies human rights principles).

215. *Id.*

216. *About the Supreme Court*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about> [<https://perma.cc/6EK4-3C3Z>].

217. See OVERSIGHT BOARD CHARTER, *supra* note 91, at 7–8 (establishing Facebook's power to appoint independent trustees under Article 5).

218. *Get to Know Our Board Members*, *supra* note 95.

independence has seen a “change of content moderation policy” after Trump’s inauguration with CEO Mark Zuckerberg announcing broad changes to its overall content moderation policies.²¹⁹ Facebook replaced “fact checkers” with “community notes” in a stated commitment to “freedom of expression.”²²⁰ The Board has since tightened its standards for removing posts, again demonstrating the fiction of independence under which the Board claims to operate.²²¹

With respect to appointment, the Board’s founding members originally appointed by Facebook have become the new appointers.²²² Whatever threats to independence affecting the first board members will to some extent affect those they appoint.

To ensure true independence, the selection of new members should be overseen by an external body with the freedom to conduct independent and uninfluenced decisions. The Board should work with this body. The Board announced that the Baker McKenzie law firm is managing a recommendation portal where anyone can recommend potential candidates for consideration to the Board.²²³ Facebook has created a link that allows anyone to nominate a potential member to the Board, with options to include the experience and employment background of the potential member.²²⁴ While this is a welcome innovation towards achieving transparency and independence of the Board, the Board should communicate how it selects the successful members of the Board from its nomination pool, including the criteria for selection. This would increase public perception of its accountability and transparency.

B. Implementing Self-Regulation with Oversight.

The Board could cure its structural defect during its creation by having external stakeholders review the operations of the Board as well as its decision-making process to ascertain the independence of the Board on its decision. This could be achieved by creating an external committee or partnering with an independent institution to oversee the Board’s work, specifically how cases are selected, and to audit the Board’s reports to assess the Board’s independence.²²⁵ Creating this external stakeholder committee would be in furtherance of Facebook’s commitment to implement the UN Guiding Principles. The Principles urge social media companies and businesses to “protect, respect and remedy” individuals who suffer human rights violations either directly or indirectly on their platforms.²²⁶

219. See Judit Bayer, *Zuckerberg’s Strategy: Leveraging Trump to Defy European Regulation?*, VERFASSUNGSBLOG (Jan. 21, 2025), <https://verfassungsblog.de/zuckerbergs-strategy> [<https://perma.cc/66WM-AEXD>].

220. Mark Zuckerberg (@zuck), INSTAGRAM (Jan. 7, 2025), <https://www.instagram.com/zuck/reel/DEhf2uTJUs0/?hl=de> (on file with the *Journal of Corporation Law*).

221. Juha Tuovinen, *The Meta Oversight Board in the Trump Era*, VERFASSUNGSBLOG (May 26, 2025), <https://verfassungsblog.de/the-meta-oversight-board-in-the-trump-era> [<https://perma.cc/8D64-YE9Q>] (noting a trend towards a “more permissive stance” in the Board’s content moderation decisions).

222. OVERSIGHT BOARD CHARTER, *supra* note 91, at 4.

223. See Brent Harris, *Getting Input on an Oversight Board*, META (Apr. 1, 2019), <https://about.fb.com/news/2019/04/input-on-an-oversight-board> [<https://perma.cc/M7RD-Y33F>].

224. *Board Member Recommendation Portal*, OVERSIGHT BD., <https://communications.oversight-board.com/bm/member-recommendation-portal> [<https://perma.cc/Z2QA-XGLT>].

225. See generally OECD, OWNERSHIP AND GOVERNANCE OF STATE-OWNED ENTERPRISES 2021: A COMPENDIUM OF NATIONAL PRACTICES (2021) (discussing general principles of independence in governance).

226. See generally UNITED NATIONS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011).

As a first step towards transparency and accountability when publishing its quarterly report, the Board should adopt some OECD Guidelines on Corporate Governance of State-Owned Enterprises (the SOE Guidelines) in relation to general principles of independence in governance.²²⁷ In making decisions, the Board should exercise the highest form of transparency to the general public, regardless of who is on the Board and who the decision is likely to affect.

Further, the Board should have external audit procedures conducted by an external audit committee in conjunction with the Board's internal audit committee to lend credibility to the "Transparency Report" published quarterly by the Board.²²⁸ This would easily align with expectations of public companies whose audited financial statements derive credibility from having been audited by an independent audit firm. Such an external independent audit of the Board would ensure transparency and accountability in content moderation decisions.

To further demonstrate the Board's independence through external oversight, the Board should appoint independent external board members, state representatives (persons from the different regions where Facebook has a physical presence), and public interest advocates as provided under the SOE Guidelines.²²⁹

Additionally, the Board should be able to amend the charter and bylaws without approval from Facebook. Currently, Article 6 of the charter provides that the charter may only be amended with the permission of most of the individual trustees, and with the agreement of Facebook.²³⁰ This provision limits the powers of the Board and takes away the control that the Board is expected to exercise.

C. *Government Regulation vs. Self-Regulation*

Alternatively, Congress could make uniform guidelines which mirror the UN Guiding Principles on Business and Human Rights. A principles-based approach provides "soft" guidance for social media companies to follow while also preventing the government from violating the First Amendment right of social media companies to editorial judgment.²³¹ These guidelines should mandate each social media company to create a content moderation oversight board that would implement the principles created by Congress. Alternatively, Congress could amend the provisions of Section 230 of the Communications Act to include a due diligence requirement for all social media companies with a minimum share capital, which would be set by Congress with a consideration of small companies. By amending Section 230 of the Communications Act, the prospective regulation should lay out alternative standards on funding content moderation boards and regulate the level of involvement of social media platform owners. The proposed guidelines should include the minimum standards of liability that social media companies would bear for content that causes injury to their users based on their negligence in flagging and removing such

227. See generally OECD, *supra* note 225 (discussing general principles of independence in governance).

228. See *Transparency Reports*, META, <https://transparency.meta.com/reports/> (on file with the *Journal of Corporation Law*).

229. See OECD, *supra* note 225.

230. OVERSIGHT BOARD CHARTER, *supra* note 91, at 8.

231. See *Moody v. NetChoice, LLC*, 603 U.S. 707, 707, 717 (2024) (holding unconstitutional Florida's and Texas' social media moderation laws which curtail "platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied third-party messages, videos, and other content their users wish to post").

content.²³² In essence, the guidelines should give a reasonable timeline of how long content could stay on the platform, which would give rise to liability for platform owners. One issue the above recommendation might face is that it is likely to be challenged based on free speech grounds. The recommendation, however, is that Congress should test-run to determine viability. Congress could adopt the new model that the EU is currently using to regulate online platforms. Just like the EU, Congress could also hold “Big Tech” platforms to a much higher standard in terms of harmful and injurious content posted on their platforms, which would still allow the growth of emerging and smaller platforms.²³³

D. Alternative Funding Mechanisms for the Oversight Board

The Oversight Board could have avoided the criticism it has suffered since its creation if it had been funded through an alternative means instead of the heavily relying on Facebook establishing a \$130 million trust to enable its smooth operation.²³⁴ For instance, the Board’s independence would have been criticized less from the public if the Board had called for donations from the public, independent entities or individuals, similar to what is obtainable in a nonprofit organizational fundraising structure.²³⁵

Receiving money from the public to fund the Board’s operation takes away some of Facebook’s control over the Board through its commitment to provide funding for the continuous operation of the Board. To demonstrate absolute independence from Facebook, the Trust created by Facebook to fund the Board would need to undergo a restructuring phase under the rules of corporate governance for nonprofit entities. If shown, the Board would have the independence to make decisions on content and to provide recommendations without the threat of Facebook discontinuing the funding of the Trust if the Board’s decision is not favorable to Facebook.²³⁶

This fundraising structure allows donors make donations to further the impactful work the Board is doing concerning content moderation policies between users and Facebook—as opposed to funding to enjoy a personal benefit—which seems like what Facebook is trying to do with its contributions.²³⁷ The likelihood of control from contributors or donors is minimal. Rather, the contributors or donors are likely to be more interested in the fact that the Board is furthering the objectives of its creation independently without influence or interference from Facebook or its staff in exercising its powers under the bylaws and

232. Cusumano & Yoffie, *supra* note 25 (recommending self-regulation for social media platforms).

233. See Wheeler, *supra* note 69 (“[T]he EU’s Digital Services Act (DSA) . . . established a ‘duty of care’ for online platforms, with the most expansive duties reserved for the largest platforms.”).

234. *Securing Ongoing Funding for the Oversight Board*, OVERSIGHT BD. (July 22, 2022), <https://www.oversightboard.com/news/1111826643064185-securing-ongoing-funding-for-the-oversight-board/> [<https://perma.cc/FYE8-BE7E>] (announcing that Facebook has pledged to make an additional \$150 million contribution to the Oversight Board Trust in furtherance of Facebook’s commitment to the Trust, to enable continuous operation of the Board). This recent contribution is in addition to a 2019 contribution Facebook made when the Trust was established. *Id.*

235. See Kiah Treece, *Nonprofit Financing Options: 8 Ways to Secure Funds*, FORBES (Feb. 10, 2023), <https://www.forbes.com/advisor/business-loans/nonprofit-small-business-loans/> [<https://perma.cc/SY36-GYN9>] (discussing various ways to raise funds and the risks associated with each of them).

236. Levy, *supra* note 93 (“All the members had something had one thing in common—a resolve that they be seen as independent of the company funding their paychecks.”).

237. *Id.*

charter. However, the contributors would demand accountability and transparency reports on how the funds are expended and whether the mission of the Board is being achieved.

As of the date of this Note, it is still unclear how the Trust²³⁸ would be funded if Facebook suspends or ceases to provide the necessary funding for the continuity of operation.²³⁹ An alternative would be for the Board to expand its scope and powers to make decisions on other social media platforms and not limit its operations to Facebook alone.²⁴⁰

V. CONCLUSION

Despite the controversy and uncertainty surrounding the establishment and creation of the Facebook Oversight Board, especially in its independence, the Board has managed to remain dedicated to its cause.²⁴¹ Nevertheless, there is an urgent need for clear and consistent content moderation policies. The emergence of the Board has set a precedent for the feasibility of self-regulating content by private social media platforms. Other companies are likely to adopt this model, but this online governance model is not yet perfect. There are looming questions as to the appearance of independence and the independence-in-fact of the Board when it is funded by Facebook, and its initial members, handpicked by Facebook, in turn elect newer members. Facebook's discretionary compliance with policy recommendations of the Board continues to undermine its overall effectiveness and appearance of independence. Hence, there is a compelling argument for better independent funding and staffing structures for the Board. Most of all, government supervision and regulation must fill the gaps in self-regulation through principles-based guidance of content moderation boards that balances safeguarding the public interest and upholding the First Amendment rights of social media companies.

Also, while self-regulation by private social media companies may appear appropriate, with minimal government interference due to free speech concerns, that model does not consider the well-being of the public, which could be disastrous if not checked. This new model adopted by Facebook must be closely watched to ascertain whether this is a

238. In a quest to demonstrate the independence of the Board, Facebook adopted the Delaware Purpose Trust Statute “to create and fund an independent body.” See Vincent C. Thomas, Justin P. Duda & Travis G. Maurer, *Independence with a Purpose: Facebook’s Creative Use of Delaware’s Purpose Trust to Establish Independent Oversight*, ABA: BUS. L. TODAY (Dec. 17, 2019), <https://businesslawtoday.org/2019/12/independence-purpose-facebooks-creative-use-delawares-purpose-trust-statute-establish-independent-oversight/> [<https://perma.cc/Y5KU-64V2>] (noting the purpose of the Trust is “to facilitate the creation, funding, management, and oversight of a structure that will permit and protect the operation of an Oversight Board for Content Decisions (the ‘Oversight Board’ or ‘Board’), whose purpose is to protect free expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook’s content policies.”).

239. OVERSIGHT BOARD CHARTER, *supra* note 91, at 7–8 (providing that the Trust would fund the Board’s operations and expenses and in turn the Trust will receive funding from Facebook).

240. *Q2 2023 Transparency Report: Board’s Recommendations Lead to Key Changes in Meta’s Cross-Check Program*, OVERSIGHT BD. (Oct. 26, 2023), <https://www.oversightboard.com/news/228158946731169-q2-2023-transparency-report-board-s-recommendations-lead-to-key-changes-in-meta-s-cross-check-program/> [<https://perma.cc/YN7H-4YHU>].

241. See Andrew Morse & Queenie Wong, *Facebook Says It Can’t Keep Up with the Oversight Board’s Recommendations*, CNET (Nov. 9, 2021), <https://www.cnet.com/culture/internet/oversight-board-says-facebook-wasnt-forthcoming-on-cross-check-program/> [<https://perma.cc/4B9D-VXNB>] (explaining the controversies between Facebook and the Board).

calculated means adopted by companies to limit the state from making regulations that would protect the public. Failure to do this could lead to widespread problems of content moderation.