**The Case of Gender identity and nudity**

**Case Analysis**

***Meta-Data*:**

* **Case Number**: 2022-009-IG-UA and 2022-010-IG-UA
* **Date of decision**: Jan 17, 2023
* **Featured case**: N/A
* **Region**: United States & Canada
* **Country**: United States
* **Type of expression**: Electronic / Internet-based communication
* **Judicial Body**: The Oversight Board
* **Type of law**: Meta's content policies, International Human Rights Law
* **Main Themes**: Gender Expression, Instagram Community Guidelines
* **Outcome**: Overturned
* **Status**: Closed
* **Tags**: Instagram Community Guidelines, Gender Identity/Sexual Orientation, LGBTQI+, Oversight Board Policy Advisory Statement, Oversight Board Enforcement Recommendation, Oversight Board Content Policy Recommendation, Sexual Solicitation Community Standard, Adult Nudity and Sexual Activity Community Standard

***Analysis:***

* **Summary and Outcome**:

On January 17, 2023, the Oversight Board overturned Meta’s original decision to remove two pictures of a couple identifying as trans and non-binary bare chested with their nipples cover by either body parts or objects from Instagram. Meta recognized the decision as an enforcement error of their Sexual Solicitation and Adult Nudity policies and restored the content after being notified by the case. The Board found the policies and their enforcement criteria to be unclear which had led to women and the LGBTQI+ community to be disproportionately impacted by enforcement errors. The Board recommended Meta to modify the policies and internal guidance to include clearer definitions and to adapt a contextual determination on whether the posts are of a sexual nature rather than a gendered one.

* **Facts**:

In 2021, an image of two bare-chested people with flesh colored tape covering their nipples was posted to Instagram. In 2022, another photo of the couple was posted to the same account where one person is clothed while the other one is bare-chested and covering their nipples with their hand. The two people in the images are a US-based couple who identify as transgender and non-binary. Both images were accompanied with captions on how the person who was bare-chested in both images will undergo a gender-affirming surgery to create a flatter chest. The captions explained their plants to document the surgery as a way of discussing transgender healthcare issues. The couple announced they were holding a fundraiser to pay for the surgery after they were unable to secure insurance coverage.

Initially, the first image image was classified as unlikely to be violating by Meta’s automated system. Moreover, after three users reported the content for pornography and self-harm, human moderators reviewed the content and found it non-violating. However, after a fourth report, another human moderator removed the post after they found it violated the Sexual Solicitation Community Standard.

In a similar manner, the second image was classified twice by Meta’s automated systems and human moderators to be non-violating initially then two users reported the content, however, the reports were closed automatically without human review. Finally, Meta’s automated systems identified the content for a third time and sent it to human review which found the content violating of the Sexual Solicitation Community Standard and removed it.

Although, the account owners appealed the removal decisions to Meta and the content underwent human review, the posts weren’t restored. This led the users to appeal the decisions to the Board. The Board decided to consider the two cases together in order to identify issues in Meta’s content policies and to address how academic research found that enforcement errors affect women and the LGBTQI+ community disproportionately.

Meta restored the posts as they considered the removals to be “enforcement errors” after they were notified of the case by the Board.

* **Decision Overview**:

The Oversight Board analyzed whether Meta’s original decisions to take down two pictures, which were initially classified as non-violating, of a couple who identified as transgender and non-binary were in compliance with Meta’s Sexual Solicitation Community Standard, Meta’s values and Meta’s human rights obligations.

The users submitted that they believed the decision stemmed from transphobia. They urged the Board to overturn Meta’s decision as it would make Instagram a safer place for LGBTQI+ expression.

Meta recognized that both decisions were wrong and were results of “enforcement errors” as both posts didn’t violate the Sexual Solicitation Community Standard since they only asked for donations to a fundraiser. Meta further recognized that the content did not violate its Adult Nudity and Sexual Activity Community Standard due to the non-binary and transgender context of the posts.

Meta was unable to provide which policies the automated systems identified the content according to due to the elapsed between the removal of the content and the appeal to the Board. Furthermore, Meta couldn’t provide a rationale behind why its reviewers though the content was violating, and it acknowledged that an overly technical application of the internal reviewer guidance might have led to the errors. Meta answered all 18 questions asked by the Board.

*Compliance with Meta’s content policies*

1. Sexual Solicitation Community Standard

Under Meta’s Sexual Solicitation Community Standard implicit sexual solicitation requires the fulfillment of two elements; content containing an implicit offer or ask and sexually suggestive elements. The policy defines the implicit offer or ask to be content indirectly offers or asks for sexual solicitation. In its additional guidance for its reviewers, Meta lists triggers for implicit offer such as social media profile links and subscription-based websites such as Patreon and OnlyFans. In the case at hand, the users only provided a link to their fundraiser for the surgery, due to the excessive nature of Meta’s internal criteria for defining “implicit offer or ask”, the link would qualify as an offer or ask despite not being of a sexual nature.

As for the sexually suggestive element, the Community Standard provides a list of sexually suggestive element and Meta provides a more detailed exhaustive list for its reviews. Among the elements are poses, which include "female breasts covered either digitally or by human body parts or objects". The Board recognized that in both images featured breasts cover by objects and human body parts. However, the subjects if the photo identify as trans and nonbinary and not women. The Board also recognized the content as not sexually suggestive which meant the second element of sexual solicitation was not fulfilled.

Due to the second element being not satisfied, the posts did not violate Meta’s Sexual Solicitation Community Standard. Moreover, the Board saw that the first element was unfulfilled as well as the offer/ask was not for something of a sexual nature.

1. Adult Nudity and Sexual Activity Community Standard

The Adult Nudity and Sexual Activity Community Standard prohibits posting uncovered female nipples unless it is in the context of “breastfeeding, birth-giving and after-birth moments, medical or health context (for example, post-mastectomy, breast cancer awareness or gender confirmation surgery) or an act of protest.” Meta furthers instructs its reviewers to allow “imagery of nipples when shared in an explicitly female-to-male transgender, non-binary or gender-neutral context (e.g. a user indicates such gender identity), regardless of size or shape of breast.” As both images feature covered nipples, whether by object or body part, the Board found the images to be non-violating of the policy. The Board further noted that even if the nipples were uncovered, the images wouldn’t have violated the policy either because the text set the non-binary context.

*Compliance with Meta’s Values*

The Board found the original decisions of removal inconsistent with the values of “Voice”, “Dignity” nor did they serve the value “Safety” as enforcement errors that disproportionately impact groups facing discrimination jeopardize the first two values. As for the value “Safety”, the Board found that the removals did not advance it as the posts were unrelated to non-consensual image sharing, sex trafficking and child abuse.

*Compliance with Meta’s Values*

1. Freedom of expression

The Board referred to article 2 and article 19 of the International Covenant on Civil and Political Rights (ICCPR) to reiterate that freedom of expression is a fundamental right to everybody without discrimination, including discrimination on the grounds of gender identity, as explained by the Human Rights committee in Nepomnyashchiy v Russia. The Board stressed the importance of Instagram as a forum for the LGBTQI+ community to discuss their struggles and find support. Additionally, the Board highlighted how the content was crucial to the user as it highlighted their journey to undergo top surgery and their fundraiser.

The Board employed the three-part test, which was introduced in article 19(3) of the ICCPR, to analyze whether Meta’s original decisions to remove the posts were compatible with its human rights obligations.

1. Legality (clarity and accessibility of the rules)

The Board decided that both Community Standards related to this case were not clear nor accessible for reviewers and users which made them incompatible with article 19 of the ICCPR.

1. Sexual Solicitation Community Standard

The Board found Meta’s Sexual Solicitation Community Standard to include over-broad criteria in the internal guideline addressed to reviewers, which in turn led to over-enforcement. Meta acknowledged this and confirmed there was over-enforcement of the Community Standard when there was no intention to solicit sex. The confusion is shown in both elements in the policy.

For the first element, the offer or ask, the rules dedicated to the users require contact methods for the soliciting party, however, for reviewers the rules include that links to social media profiles and subscription-based websites are contact methods, yet it is unclear whether links to any social media profiles and subscription-based websites should be treated as solicitation, or specific ones.

As for the second element, the sexually suggestive element, the Board found to be imprecise, excessive, and incompatible with Meta’s Adult Nudity and Sexual Activity policy. The rules dedicated to the users only include “sexually suggestive poses” as a sexually suggestive element unlike the reviewers’ rules which has an exhaustive list of the sexually suggestive poses including covering breasts with hands and objects. This leaves users with no ability to predict that covered breasts constitute sexually suggestive poses, the confusion is furthered by the permittance of topless photos where the nipples are covered under the Adult Nudity policy. The policy is vague for the reviewers as well, evidenced by the frequent different outcomes.

1. Adult Nudity and Sexual Activity Community Standard

The Board noted that the gender distinctions in the Adult Nudity and Sexual Activity Standard made it difficult to implement and that it contained poorly defined exceptions. Most Meta rules focused on body parts were heavily binary gendered which did not explain how reviewers should deal with content depicting such body parts belonging to intersex, trans or non-binary people, such vagueness also led to confusion between people of these gender identities on what was acceptable and what wasn’t under Meta’s rules.

The rules of this Community Standard required human reviewers to assess a user’s sex and gender identity as it prohibited images depicting “female nipples” with exceptions based on whether the subject of the photo is non-binary, gender neutral, transgender or the photo was posted in a gender confirmation surgery context. The rule failed to recognize how perceptions of sex and gender are highly subjective and prone to many errors. The confusion was exacerbated by Meta’s “default to female” principle which instructed reviewers to assume a subject was female and apply the relevant policy in case of doubt of their gender identity.

The restrictions and exceptions to rules on female nipples were both extensive and confusion. The exceptions were rarely defined or undefined altogether, the list of exceptions was also constantly growing and expected to continue to grow with the evolving of expression. Such exceptions caused even more confusion, for example the gender confirmation surgery exception lacks explanation on the scope of the exception in the rules accessible by the users.

Due to Meta’s policies being created upon binary distinctions between male and female, challenges appeared in its gender confirmation surgery. Meta explained to the Board that the exception allowed uncovered “female nipples” before top surgery in an explicit “female to male” transgender, non-binary or gender-neutral context. However, transgender women who have undergone top surgery were prohibited from sharing their uncovered nipples unless scarring over the nipple was present.

Nevertheless, the internal guidelines on surgical scarring and nipples were confusingly complicated. For example the rules for mastectomies allowed content if the nipple was reconstructed, stenciled or tattooed. Photos where one surgically removed breast is visible were also allowed, even if the other female nipple is visible. Another confusing rule entailed “For mastectomies, scarring includes depiction of the area where the removed breast tissue used to be. The actual surgical scar does not need to be visible.”

The Board recognized the complicated and confused struggle of reviewers, as they had to assess the sex of the person to apply female nipple rules then assess their gender to decide if exception apply and then consider whether the content depicted the before or after of an approved surgery and the extent and nature of the scarring. If similar pictures of female-presenting nipples were by two different people, one identifying as a cisgender woman and the other as a non-binary person, the rules applied would change. There are also other exceptions such as giving birth or breast feeding which must be considered as well. The Board noted that the unclarity and complexity of the standard for both users and reviewers made it unworkable.

1. Legitimate aim

The Board analyzed the restrictions and the policies under the scope of the legitimate aims provided in article 19 of the ICCPR.

1. Sexual Solicitation Community Standard

The Board recognized that the Sexual Solicitation Community Standard aims to protect the rights of others as it aims to prohibit the using of Meta’s platforms to facilitate trafficking, coercion and non-consensual sexual acts which could occur off-platform.

1. Adult Nudity and Sexual Activity Community Standard

The Board considered Meta’s rationale that Adult Nudity and Sexual Activity policy might align with the legitimate aim of protecting the rights of others as it aimed to protect minors and women. However, the Board highlighted how the policy aimed to protect “community sensitivity” and how it might align with the legitimate aim of public morals. The Board noted that this legitimate aim is abused by governmental speech regulators to stifle freedom of expression, especially of minority and vulnerable groups.

Meta provided that public morals were not the only aim that this policy aimed to protect as morals around nudity differ across cultures and would be impossible to implement at scale. The Board underlined its concern about how Meta’s policies disproportionally impact freedom of expression of women, transgender and non-binary people. Another concern the Board recognized is that Meta’s nudity policy automatically sexualizes the bodies of women, trans and non-binary bodies while cisgender men bodies are treated differently.

The Board recognized Meta’s aim to prevent harms of gendered impacts as women are more likely to be victimized by non-consensual digital dissemination of intimate images, and it recommended the company keep seeking to limit gendered harms both in over-enforcement and under-enforcement of the policy.

1. Necessity and proportionality

The Board found that both Meta’s policies restrict more content than necessary and neither of them is proportionate.

1. Sexual Solicitation Community Standard

The Board found the definitions of implicit offer or ask and sexually suggestive poses to be overboard resulting in restricting speech unrelated to sexual solicitation. Meta itself recognized the possibility of erroneous enforcement of the policy. The Board referenced the UNESCO report on how over-enforcement of policies of this nature impact digital education negatively.

1. Adult Nudity and Sexual Activity Community Standard

The Board found the Adult Nudity and Sexual Activity policy to be disproportionate. The Board highlighted Meta’s different restrictive measures that would be able to achieve the aim of the policy other than removal such as warning screens and age restricting content. Such measures are applied under the same policy in cases of artistic depiction of sexual activities. The Board emphasized the Meta should instruct its automated systems and human moderations to determine whether nude content is of sexual basis based on the context of the content rather than the gender of the body. The Board advised Meta to introduce more in-depth user control to enable those who don’t want to view nude content to do so.

The Board drew attention to Meta’s Community Standards enforcement report for Instagram which disclosed that 21% of the content removed under this policy was appealed and restored which highlighted the over-enforcement caused by the policy.

1. Nondiscrimination

The Board considered the evidence on how the Adult Nudity and Sexual Activity policy and its enforcement disproportionately impact women and LGBTQI+ people as it severely limit the ways in which these groups can express themselves which may be in violation of article 2 of the ICCPR which prohibits discrimination. However, the Board noted that international human rights bodies have not discussed how permitting and prohibiting consensual adult nudity impact human rights.

The Board reiterated its stance that Meta should be mindful to how its policies and their enforcement disproportionally impact marginalized groups. The Board referenced the “Reclaiming Arabic words” case to highlight its decision on how Meta’s policies over-moderate users from prosecuted minority groups. These practices by Meta result in limiting the ways of expression for women, trans and non-binary people.

The cases at hand underlined how Meta’s policies and enforcement disproportionately impact the LGBTQI+ community as the posts were identified multiple times by adult nudity and sexual activity automated systems despite falling out of the scope of the policy. The cases are representative of bigger problems on the platforms as transgender people experience high levels of content being removed and suspensions of accounts due to nudity and sexual content.

The enforcement of Meta’s policy impact women disproportionately as well with up to 22% of images of women’s bodies being wrongfully removed from Instagram. Additionally, the default to female principle impacts women even further.

The Board advised Meta to rely on contextualized determinations on what content is of sexual nature in order to avoid discrimination based on gender identity. The Board recognized Meta’s interests in prohibiting sexual and pornographic platform but it emphasized that such business interests can and should be achieved through non-discriminatory practices.

Some members of the Board suggested Meta implement adult nudity policies that are not based on sex or gender referencing Meta’s commitment to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). However, other members agreed in principle that Meta should not solely rely on gender or sex to limit expression, but they refused the policy practices suggested by the other members. They noted that distinctions on grounds of protected characteristics are accepted as long as they are reasonable, objective and in pursuit of a legitimate aim under the ICCPR as decided by the Human Rights committee in Nepomnyashchiy v Russia. The first group recognizes the principle of Nepomnyashchiy v Russia, however, they didn’t believe Meta’s policy fulfilled the standard.

*Policy Advisory Statement*

1. Content Policy

The Board recommended Meta modifies its Adult Nudity and Sexual Activity policy to include a clear, objective and rights-respecting criteria to allow its reviewers and users with a workable standard without discrimination on the basis or gender identity. The Board advised Meta to conduct a comprehensive human rights impact assessment including inclusive engagement in order to assess the implications of the new criteria before adopting it.

The Board additionally recommended Meta to provide a more in-depth definition “offer and ask” as well as sexually suggestive poses, which are present in the Sexual Solicitation Community Standard.

1. Enforcement

The Board advised Meta to revise its internal reviewer guidance to ensure the criteria in its Sexual Solicitation policy does not remove content that is permitted under the public-facing policy and to avoid the removal of non-sexual content and to require a more defined connected between the two elements of sexual solicitation.

***Direction:***

* **Outcome**: Expands Expression

In this decision, the Board expands expression as it highlights how Meta’s policies discretionally impact women and the LGBTQI+ community which violates their right to freedom of expression and limits their ways of expression. The Board expanded expression when it advised Meta to implement policies that are not based on gender but rather on the context of the posts in order to determine whether content is of sexual nature. The Board’s decision and discrimination aim to lead Meta to exterminate any discrimination present in its Sexual Solicitation and Adult Nudity and Sexual Activity policies.

***Perspective***:

* **Related International and/or regional laws**:
* United Nations Guiding Principles on Business and Human Rights (2011)

The Board referred to this instrument to highlight Facebook’s businesses’ human rights responsibilities.

* ICCPR, art. 2(1)

The Board referenced this article to highlight Meta’s obligation of uphold the right to non-discrimination on gender and sex basis.

* ICCPR, art. 19

The Board assessed Meta’s responsibilities towards human rights through the lens of freedom of expression. It analysed whether Meta’s action met the three-part test stipulated in Article 19(3).

* ICCPR, art. 26

The Board used this article to provide the grounds on which discrimination is prohibited.

* CEDAW, art. 1

The Board highlighted the prohibition of discrimination of women on gender basis by referencing this article.

* CEDAW, art. 5 & 10

The Board referenced this article to underline Meta’s obligations to eliminate gendered stereotypes.

* UNHR Comm., General Comment No. 34 (CCPR/C/GC/34)

While employing the three-part test to assess if Meta’s actions allowed expression to be limited, the Board referred the General Comment for guidance. The Board also referenced the General Comment to underline how public morals differ widely.

* UN Special Rapporteur on freedom of opinion and expression, A/HRC/38/35 (2018)

The Board remarked that the UN Special Rapporteur on freedom of expression has proposed that the three-part test shall be used as a framework to guide platforms in content moderation practices. It was also referred to in order to highlight the Special Rapporteur’s request for platforms to develop better indicators to take the cultural context of nudity in different groups and to consider the concerns of marginalized groups.

* UNHR Comm., Toonen v. Australia, Comm. No. 488/1992 (31 March 1994)

The Board highlighted that sexual orientation and gender identity is included in the “sex” or “other status” as unacceptable grounds of discrimination mentioned in article 2 of the ICCPR.

* UNHR Comm., Nepomnyashchiy v. Russia, Comm. No. 2318/2013 (17 July 2018)

The Board reiterated that differentiation based on the grounds listed in article 26 of the ICCPR is not discrimination as long as it based on a reasonable and objective criteria pursuing a legitimate aim.

* **General Law Notes**:

Oversight Board Decisions:

* "Reclaiming Arabic words" decision (2022-003-IG-UA)

The Board referenced this case to reiterate that over-moderation of minority groups’ expression pose a threat to their freedom of expression.

* "Wampum belt" decision (2021-012-FB-UA)

The Board emphasized its principle in on how applying policy exceptions can be unnecessarily complex and the disproportionate impacts of some policy choices.

* "Breast cancer symptoms and nudity" (2020-004-IG-UA)

The Board referenced this case as it included analysis of how unclear the Adult Nudity and Sexual Activity policy and its exceptions.

***Significance***:

* **Binding or persuasive precedent within jurisdiction**; The decision establishes a binding or persuasive precedent within its jurisdiction.

According to Article 2 of the Oversight Board Charter, “For each decision, any prior board decisions will have precedential value and should be viewed as highly persuasive when the facts, applicable policies, or other factors are

substantially similar.” In addition to Article 4 of the Oversight Board Charter, “The board’s resolution of each case will be binding and Meta will implement it promptly, unless implementation of a resolution could violate the law. In instances where Meta identifies that identical content with parallel context — which the board has already decided upon — remains on Meta, it will take action by analyzing whether it is technically and operationally feasible to apply the board’s decision to that content as well. When a decision or a policy advisory opinion includes recommendations, Meta will take further action by analyzing the operational procedures required to implement the recommendations, considering those recommendations in the formal policy development process of Meta, and transparently communicating about actions taken as a result.”

* **Related Cases**: Self-generated
* **Date updated**: N/A

***Docs***:

* **Official Case Documents**:

Judgment (in English)

https://www.oversightboard.com/decision/BUN-IH313ZHJ/

Press Release issued by the Oversight Board

https://www.oversightboard.com/news/1214820616135890-oversight-board-overturns-meta-s-original-decisions-in-the-gender-identity-and-nudity-cases/

* **Amicus Briefs and Other Legal Authorities**

Public Comments Appendix

https://oversightboard.com/attachment/1097484180908981/