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Presented on: **09-03-2021**

Subject ***"Challenging the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules, 2021 and seeking a direction that such rules are ultra vires the parent act (Information Technology Act, 2000) and in violation of Articles 14, 19(1)(a), 19(1)(g) and 21 of the Constitution of India"***

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil) No. 6272 of 2021

(Special Original Jurisdiction)

Live Law Media Private Limited and others	:	Petitioners
v		v.
Union of India and Another	:	Respondents

MEMORANDUM OF WRIT PETITION (CIVIL) FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

C.F. Rs. /- is paid

SANTHOSH MATHEW( )
ARUN THOMAS ( )
JENNIS STEPHEN ( )
VIJAY V. PAUL ( )
KARTHIKA MARIA ( )
ANIL SEBASTIAN PULICKEL ( )
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&
NANDA SANAL ( )
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BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil) No. 6272 of 2021
(Special Original Jurisdiction)

Live Law Media Private Limited and others : Petitioners

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Dated this the 9th day of March, 2021

Sd/-

COUNSEL FOR THE PETITIONER

WWW.LIVELAW.IN

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil) No. 6272 of 2021
(Special Original Jurisdiction)

Live Law Media Private Limited and others	:	Petitioners
v.		
Union of India, represented by Secretary to Government and another	:	Respondents

SYNOPSIS

The present Writ Petition is being filed under Article 226 of the Constitution of India challenging the vires of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ["**Intermediaries Rules 2021**" or "**impugned Rules**"] notified by Respondent No. 1 under Sections 87(1) and Section 87(2)(z) and 87(2)(zg), read with Sections 69A(2) and 79(2) of the Information Technology Act, 2000 ["**IT Act 2000**"**]** for being *ultra vires* the parent legislation, namely the IT Act 2000, and for being violative of Articles 14, 19(1)(a), 19(1)(g) and 21 of the Constitution of India. In addition, the Intermediaries Rules 2021 have not been issued following due process under the IT Act 2000, are vague, suffer from excessive delegation of powers, will lead to the exercise of judicial functions by non-judicial authorities, and are an attempt to overrule the effect of the judgment passed by the Hon'ble Supreme Court in ***Shreya Singhal v Union of India*, (2015) 5 SCC 1**.

The Petitioners, as publishers of the legal news portal, LiveLaw, and consumers of online curated content are challenging Part III of the

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Impugned Rules, which seeks to regulate the publishers of news and current affairs content [“**Digital News Media**”] and publishers of online curated content [“**OTT Platforms**”]. Part III of the impugned Rules impermissibly extends the scope of the IT Act to publishers of online news, current affairs, and online curated content, and is thus *ultra vires* the parent statute, which does not contemplate the regulation of Digital News Media. In substance, Part III imposes an unconstitutional three-tiered complaints-and-adjudication structure upon publishers, which makes the executive both the complainant and the judge on vital free speech questions involving blocking and take down of online material. This is both arbitrary and violates the rule of law and separation of powers, especially since there is no provision for the aggrieved publishers to appeal against the decision of the Inter-Departmental Committee consisting only of members of the executive, constituted under Rule 14. The provision for ‘review’ under Rule 17 does not even provide any lip service to the rights of Digital News Media since the ‘Review Committee’ solely comprises of members of the executive (with the same Ministries as involved in the Inter-Departmental Committee); does not provide the aggrieved publisher with a right to be heard; and fails to provide any judicial oversight over the censorship complaint by Respondent No. 2.

In addition, Part III imposes a disproportionately onerous set of administrative regulations upon Digital News Media, which will make it virtually impossible for small or medium-sized publishers, such as Petitioner No. 1, to function. Finally, Part III requires publishers to comply with a Code of Ethics that is both vague and overbroad in its formulation, and seeks to proscribe constitutionally protected

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speech. The net effect of Part III, it is respectfully submitted, is to cause a chilling effect upon entities such as the Petitioners, in the exercise of their constitutional rights under Articles 19(1)(a) of the Constitution, and to disproportionately infringe their rights under Articles 19(1)(g) and 21 of the Constitution.

Petitioners, as users of the internet and social media services, including the Petitioners' official Twitter and WhatsApp accounts are also challenging Part II of the impugned Rules, that seek to regulate social media intermediaries. Intermediaries - including social media intermediaries - serve as conduits for users such as the Petitioners to transmit information online, without assuming editorial functions (constituting the infrastructure of what is colloquially called the "information superhighway"). They are thus vital to ensuring the freedom of speech and flow of information online, and facilitate the ability of internet users (such as the Petitioners) to exercise their Article 19(1)(a) rights to receive and impart information online. It is respectfully submitted that Part II of the impugned Rules obligates social media intermediaries to perform private censorship, at the cost of severe penalties. These Rules have a direct chilling effect on online speech, will cause the proliferation of self-censorship, and thus disproportionately violate Article 19(1)(a) of the Constitution.

Part II of the impugned Rules also seek to overrule the judgment of the Hon'ble Supreme Court in ***Shreya Singhal (supra)*** by expanding the scope of the situations in which intermediaries can be deprived of their "safe harbour" protections under Section 79 of the IT Act and subjected to legal prosecution, and by requiring intermediaries to respond to complaints by aggrieved users. Finally,

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by obligating messaging intermediaries to alter their infrastructure to "fingerprint" each message on a mass scale for every user to trace the first originator, the impugned Rules disproportionately violate the fundamental right of internet users to privacy, and undermine the holding of the Hon'ble Supreme Court in ***K.S. Puttaswamy v Union of India,* (2017) 10 SCC 1**.

Hence the present writ petition.

LIST OF DATES

09.06.2000	The IT Act 2000 was notified in the official gazette and came into force.
23.12. 2008	Bill No. 96 of 2006 was passed by the Lok Sabha as the Information Technology (Amendment) Act, 2008.
05.02.2009	The Information Technology (Amendment) Act, 2008 was notified and came into effect, substituting Section 79, and laying the foundation for the IT (Intermediary Guidelines) Rules, 2011 . The amended Section 79 provides for exemption from liability of intermediary, where it, *inter alia,* complies with guidelines for due diligence. The Amendment Act also substituted Section 69 with Sections 69, 69A, and 69B. Section 69 provides for the power of interception, decryption or monitoring of information, and is currently under challenge before the Hon'ble Supreme Court in *Internet Freedom Foundation v Union of India,* WP (C) No. 44/2019. Section 69A provides for blocking for public access of information.

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11.04.2011	The Information Technology (Intermediaries Guidelines) Rules, 2011 were reportedly notified by Respondent No. 1, after an extremely hurried and secretive purported public consultation.
18.03.2013	After the Intermediaries Rules, 2011 were notified, a purported clarification dated 18.03.2013 titled "Clarification on The Information Technology (Intermediary Guidelines) Rules, 2011 under section 79 of the Information Technology Act, 2000" was issued by the Ministry of Communications & Information Technology explaining the timeline for removal of content and redressal of grievances.
2012-2014	Several writ petitions were filed before the Hon'ble Supreme Court challenging the constitutional validity of Sections 66A, 69A and 79 of the IT Act 2000 and the accompanying Rules as well as Section 118(d) of the Kerala Police Act.
24.3.2015	The Hon'ble Supreme Court delivered a landmark judgement in *Shreya Singhal & Ors. v. Union of India & Ors.*(2015) 5 SCC 1, striking down Section 66A of the IT Act 2000 as unconstitutional. The Hon'ble Court further upheld Section 69-A and the Rules framed thereunder on the basis of safeguards, which ensured that the content was only removed where 'necessary' on the basis of certain specified grounds and that intermediaries were only made liable for failure to comply with directions. The Hon'ble Supreme Court was also pleased to read down Section 79(3)(b) and the IT (Intermediaries Guidelines) Rules, 2011 to mean that an intermediary is required to expeditiously take down content only upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency.

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24.12.2018	A front-page report was published by Indian Express about a private meeting between ministry officials and select social media companies and industry associations on 21.12.2018. In the midst of widespread disapproval, Respondent No. 1 published a copy of the Information Technology [Intermediary Guidelines (Amendment)] Rules 2018 and sought comments from the public. These draft Rules were limited to regulating intermediaries under Section 79 of the IT Act and made no mention of online curated content or online news and current affairs content.
04.02.2019	Respondent No. 1 published the comments received in response to its draft 2018 Rules, and invited counter-comments till 14.02.2019.
09.11.2020	The Cabinet Secretariat issued Gazette Notification No. S.O. 4040(E) dated 09.11.2020, amending the Government of India (Allocation of Business) Rules, 1961 to confer Respondent No. 2, Ministry of Information and Broadcasting jurisdiction over "VA. Digital/Online Media" comprising "*Films and Audio Visual programmes made available by online content providers*" and "*News and current affairs content on online platforms*".
25.02.2021	The Hon'ble Union Ministers for Respondent Nos. 1 and 2 addressed a joint press conference announcing the Intermediaries Rules 2021. The Intermediaries Rules 2021 were notified by the Respondent No. 1 in the official gazette on the same date.
09.03.2021	Hence, the present Writ Petition.

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Legislations cited:

1. Information Technology Act, 2000, as amended to date
2. Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
3. Information Technology (Intermediaries Guidelines) Rules, 2011
4. Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009

6. Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009

Cases cited:

1. *Shreya Singhal v Union of India*, (2015) 5 SCC 1
2. *New York Times vs Sullivan,* 376 US 254 (1964)
3. *R. Rajgopal vs State of Tamil Nadu,* (1994) 6 SCC 632
4. *Re: Prajwala*, SMW (Crl) No. 3/15, Supreme Court of India
5. *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1
6. *Anuradha Bhasin vs Union of India*, (2020) 3 SCC 637
7. *LIC vs Manubhai D. Shah,* (1992) 3 SCC 637
8. *Express Newspapers (P) Ltd. v. Union of India,* (1986) 1 SCC 133
9. *Bennett Coleman & Co. v Union of India,* (1978) 1 SCC 248
10. *Indibly Creative v. Government of West Bengal,* (2020) 12 SCC 436
11. *Union of India v. K.M. Shankarappa,* (2001) 1 SCC 582
12. *Prakash Jha Productions v. Union of India,* (2011) 8 SCC 372
13. *Viacom 18 Media Pvt. Ltd v. Union of India,* (2018) 1 SCC 761

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14. *K. S. Puttaswamy v. Union of India,* (2019) 1 SCC 1

15. *Shayara Bano vs Union of India & Others,* (2017) 9 SCC 1

Dated this the 9th day of March, 2021.

Sd/-

Counsel for the Petitioners

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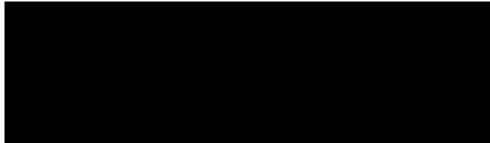
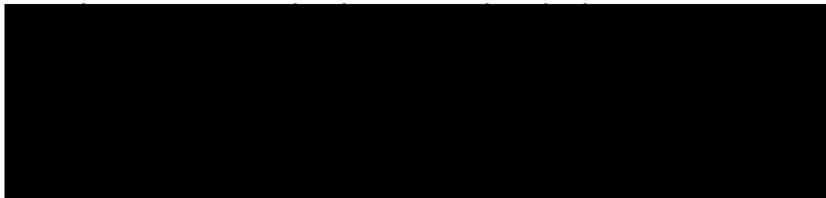
BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

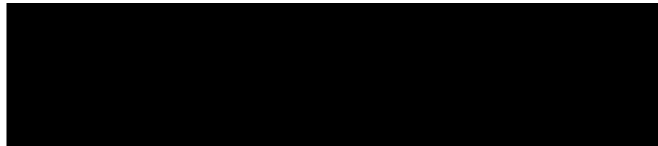
W.P.(C) NO. 6272 of 2021

(Special Original Jurisdiction)

Petitioners:

1. Live Law Media Private Limited

   Represented by its Director,
   M.A. Rashid.

2. M.A. Rashid


3. Manu Sebastian


Versus

Respondents:

1. Union of India,
   Represented by Secretary to Government,
   Ministry of Electronics and Information Technology
   Electronics Niketan, 6 CGO Complex,
   Pragati Vihar, Lodhi Road
   New Delhi – 110003

2. Ministry of Information and Broadcasting
   Represented by the Secretary,
   A-Wing, Shastri Bhavan,
   New Delhi – 110001.

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MEMORANDUM OF WRIT PETITION FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA:

The Address for service of notice and process to the Petitioner is that of its counsel **M/s. Santhosh Mathew, Arun Thomas, Jennis Stephen, Karthika Maria, Anil Sebastian Pulickel, Divya Sara George, Jaisy Elza Joe, Abi Benny Areeckal & Leah Rachel Ninan, M/s.Ninan & Mathew Advocates, S1, 2nd Floor, Empire Building, High Court East End, Cochin-18**.

The address for service of notice on the respondents is as stated above.

STATEMENT OF FACTS

1. Petitioner No. 1 is Live Law Media Private Ltd., the publisher of the legal news portal, www.livelaw.in, and Petitioner Nos. 2 and 3 are citizens of India and active users of social media and messenger platforms and viewers of online curated content. The Petitioners are constrained to invoke the Writ Jurisdiction of this Hon'ble Court against the violation of their fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India. To this end, the instant Petition seeks to challenge the constitutional validity of Part II and Part III of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (the "**Intermediaries Rules 2021**" or "**impugned Rules**") made under Sections 87(2)(z) and 87(2)(zg), read with Sections 69A(2) and 79(2) of the Information Technology Act, 2000 (the "**IT Act 2000**") for being excessive, arbitrary, vague, unreasonable, disproportionate, and violative of the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India, and for being *ultra vires* the

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parent legislation, namely the IT Act 2000. In addition, the impugned Rules 2021 have not been issued following due process under the IT Act 2000, are vague, suffer from excessive delegation of powers, will lead to exercise of judicial functions by non-judicial authorities, and are an attempt to overrule the effect of the judgment of the Hon'ble Supreme Court in ***Shreya Singhal v Union of India*, (2015) 5 SCC 1**. A true copy of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 is produced herewith and marked as **EXHIBIT P-1**.

2. As elaborated below, the Petitioners are challenging Parts II and III of the impugned Rules on grounds pertaining both to due process and to substance. On due process, Petitioners submit that the impugned Rules impermissibly expand the scope of the parent legislation (the IT Act), both under Part II (by *inter alia* compelling interception, monitoring and decryption of communications) and under Part III (by *inter alia* seeking to regulate publishers of online news and current affairs content ["**Digital News Media**"] and publishers of online curated content ["**OTT Platforms**"]). On substance, the Petitioners submit that Part II of the impugned Rules violates Article 19(1)(a) by seeking to impermissibly deprive intermediaries of their safe-harbour protections under Section 79 of the IT Act, and violates Article 21's guarantee of privacy by requiring traceability by design; Part III violates Article 19(1)(a) and 19(1)(g) through over-broad proscription of online speech, as well as an onerous adjudicatory mechanism that is solely helmed by the executive branch without any judicial recourse being available to aggrieved parties; which

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will have a direct chilling effect on content and cause overbroad self-censorship.

3. It is submitted that, to elaborate, the present petition raises the following concerns in the Intermediaries Rules 2021:

    a. Part II of the Rules, particularly Rules 3-5 are purportedly in furtherance of Section 79 (2) of the IT Act, 2000 which provides for safe harbour for intermediaries if they, *inter alia,* comply with the guidelines for due diligence laid down by the Central Government. However, the Rules go far beyond the scope of the said provision, creating onerous requirements for intermediaries that are *ultra vires* the IT Act 2000. Rule 4(2) requires significant social media intermediaries to enable the identification of the 'first originator' of messages pursuant to a judicial order or an order passed under Section 69 of the IT Act 2000, for decryption, monitoring, and interception of communication. The said provision not only unreasonably enhances the scope of obligations envisaged under the parent legislation, but has also been introduced without exercising the powers under Section 69, read with Section 87(2)(y).

    b. Rule 4(4) further requires that significant social media intermediaries deploy technology-based measures, including automated tools and other mechanisms for proactively identifying information that depicts any act or simulation of explicit or implicit rape or child sexual abuse or conduct, or previously removed information. The said Rule, as per the Respondents' press release, is ostensibly in compliance of the Order of the Hon'ble Supreme Court in

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Re: Prajwala Letter Dated 18.2.2015 Videos of Sexual Violence and Recommendation, *SMW (Crl.)No(s).3/2015.* However, the impugned Rule far exceeds the mandate of the said order as well as the parent legislation. The impugned Rules, specifically Rules 3(2)(b) and 4(4) in requiring identification and take down of content that is obscene, defamatory, libellous, relates to "any other matters pertaining to computer resources", or shows partial nudity, or implicit child sexual abuse material ["**CSAM**"] also delegate the censorship powers of the State to a private party, which is in blatant contravention with the judgment of the Hon'ble Supreme Court in ***Shreya Singhal (supra)*****.**

c. Part III of the Rules provide for the blocking and oversight of content by 'publishers of news and current affairs' and 'publisher of online curated content'. The regulation of Digital News Media is beyond the scope of Section 69-A or 79 of the IT Act 2000; and is *ultra vires* that Act. The creation of grievance redressal mechanism, through a governmental oversight body (the Inter-Departmental Committee constituted under Rule 14) through guidelines amounts to excessive delegation, given that such grievance redressal mechanisms are not envisaged by the parent statute; and poses an unreasonable restriction to free speech guaranteed to Petitioner No. 1 under Article 19(1)(a). This is both arbitrary and violates the rule of law and separation of powers, especially since there is no provision for the aggrieved publishers to appeal against the decision of the Inter-Departmental Committee.

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d. The impugned Rules also have an adverse impact on the freedom of speech of users under Article 19(1)(a) of the Constitution and the right to practice any trade under Article 19(1)(g), and do not constitute reasonable restrictions under Article 19(2) and 19(6) of the Constitution. The impugned Rules are further vague, overbroad, arbitrary and violative of Article 14 of the Constitution, and will have a chilling effect on speech online. They also violate the right to privacy under Article 21 of the Constitution.

Description of the Parties

4. The Petitioner No. 1 is a legal news portal, established in the year 2013, which covers judgments, petitions and hearings of Supreme Court, High Courts and other major courts and tribunals across the country. Through legal journalism over the past seven years, the Petitioner No. 1 has built a reputation of being a credible and accurate source of legal news, and has received appreciation from judges, senior advocates and notable legal academicians for its legal journalism. There are several Supreme Court and High Court judgments which have cited reports of the Petitioner No. 1. Petitioner No. 1 is regularly quoted by other mainstream media, including international media outlets like BBC, LA Times, Al Jazeera, CNN etc. Petitioner No. 1's website, LiveLaw (www.livelaw.in) has over 5 million unique visitors per month, and it has a remarkable social media presence with nearly 9 lakh followers across Twitter, Facebook, Instagram, LinkedIn and YouTube, with over 3.6 lakh

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followers on its Twitter handle (@LiveLawIndia) alone. Petitioner No. 1 also has multiple WhatsApp groups, where it transmits information about court proceedings and other legal news, coverage, and opinion to its users. It is not just members of the legal fraternity who rely on Petitioner No. 1, but also ordinary people to get information about legal issues affecting their lives. Petitioner Nos. 2 and 3, being shareholders and employees respectively of Petitioner No. 1 are directly affected by the impugned Rules since their fundamental rights under Article19(1)(a) and 19(1)(g), as well as Articles 14 and 21 have been violated.

5. Petitioner No. 2 is the Founder and Chief Editor of Petitioner No. 1, and a law graduate from Govt. Law College Thiruvananthapauram. He is also the Managing Director of LiveLaw Media Pvt. Ltd., which owns LIVELAW.IN. He has authored many books for lawyers and law students. He revised the 34Th Edition of Ratan Lal Dhiraj Lal – Indian Penal Code, with Justice KT Thomas, and worked as an Editorial Consultant to LexisNexis, one of the largest legal publishers in the world. In addition to the Petitioner No.2's association with the Petitioner No. 1, he is also a user of the internet and a consumer of online curated content.

6. Petitioner No. 3 is the Managing Editor of Petitioner No. 1, having been associated with Petitioner No. 1 since its beginning as a freelance reporter/contributor. He enrolled with the Kerala State Bar Council in 2011 and practiced in the High Court of Kerala and other courts in Ernakulam for about

8 years, with a brief stint as a law-clerk with Justice (Retd.) Deepak Verma, at the Hon'ble Supreme Court in 2012.

7. Respondent No. 1 is the Ministry of Electronics and Information Technology, which is the nodal ministry solely responsible for administration of the Information Technology Act, 2000 and other IT-related laws. Respondent No. 1 is also responsible for administering Part II of the impugned Intermediary Rules titled '*Due Diligence by Intermediaries and Grievance Redressal Mechanism'.*

8. Respondent No. 2 is the Ministry of Information and Broadcasting, Government of India, which is the nodal Ministry (vide Gazette Notification No. S.O. 4040(E) dated 09.11.2020 amending the Government of India (Allocation of Business) Rules, 1961) for regulating *'Films and Audio Visual programmes made available by online content providers'* and *'News and current affairs content on online platforms'*. Respondent No. 2 also administers Part III of the Intermediary Rules titled *'Code of Ethics and Procedure and Safeguards in relation to Digital Media'* which is *ultra vires* the IT Act, 2000.

Legislative History of the IT Act 2000 and the Intermediaries Rules, 2021

9. It is submitted that enactment of the IT Act 2000 was prompted by the Model Law on Electronic Commerce drafted by the United Nations Commission on International Trade Law in 1996 with the objective of standardizing national legislations to facilitate electronic commerce. The IT Act 2000

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containing national derogations to the Model Law on Electronic Commerce, 1996 was introduced to provide legal recognition for transactions carried out by means of electronic communication, commonly referred to as 'electronic commerce.'

10. The Information Technology (Amendment) Act, 2008 was notified on 05.02.2009, and substituted Section 79 under which the Information Technology (Intermediaries Guidelines) Rules, 2011 were notified. The Amendment Act reversed the burden of proof under Section 79. After 05.02.2009, intermediaries were no longer required to prove that the offence or contravention was committed without their knowledge or that they had exercised all due diligence to prevent the commission of such an offence. Instead, intermediaries were only required to follow the guidelines issued by the Respondent No. 1 and expeditiously remove unlawful content after receiving actual knowledge of the same or on being notified by the appropriate Government or its agency. In addition, Section 69 was substituted with Sections 69, 69A, and 69B. Section 69 provides for the interception, decryption and monitoring of information along with Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009. Section 69A provides for the blocking for public access of information along with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

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11. On 07.02.2011, the then Ministry of Communications & Information Technology released the Information Technology (Intermediaries Guidelines) Draft Rules, 2011 for a public consultation inviting views and comments till 28.02.2011. The consultation was carried out in a secretive manner where the comments received on the Draft Rules were not made public, nor were reasons provided for the acceptance or rejection of the comments. Thereafter, on 11.04.2011, Respondent No. 1 notified the Information Technology (Intermediaries Guidelines) Rules, 2011 (the "**Intermediaries Rules 2011")**, prescribing the due diligence standard and other guidelines for intermediaries, in exercise of its powers under Section 87(2)(zg) read with Sections 69A and 79 of the IT Act 2000.

12. After the Intermediaries Rules 2011 were notified, a purported clarification dated 18.03.2013 titled "Clarification on The Information Technology (Intermediary Guidelines) Rules, 2011 under section 79 of the Information Technology Act, 2000" was issued by the Ministry of Communications & Information Technology in the form of a press release stating:

> "It is clarified that the intended meaning of the said words is that the intermediary shall respond or acknowledge to the complainant within thirty-six hours of receiving the complaint/grievances about any such information as mentioned in sub-rule (2) of Rule 3 and initiate appropriate action as per law. Further, the Grievance Officer of the intermediary shall redress such complaints promptly but in any case, within one month from the date of receipt of complaint in accordance with sub-rule (11) of Rule 3. The intermediary should have a publicly accessible and published grievance redressal process by which complaints can be lodged."

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True copy of the "Clarification on The Information Technology (Intermediary Guidelines) Rules, 2011 under section 79 of the Information Technology Act, 2000" dated 18.03.2013 is produced herewith and marked as **EXHIBIT P-2.**

13. The constitutionality of Sections 69A and 79 of the IT Act 2000 and accompanying Rules was challenged before the Hon'ble Supreme Court in ***Shreya Singhal (supra),*** wherein the Hon'ble Court upheld Section 69-A and the Rules framed thereunder on the basis of the existing safeguards, which ensured that the content was only removed where 'necessary' on the basis of certain specified grounds and intermediaries were only made liable for failure to comply with directions. The Hon'ble Supreme Court was also pleased to read down Section 79(3)(b) and the Intermediary Rules, 2011 to mean that an intermediary is required to expeditiously take down content *only* upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency.

14. On 21.12.2018, as per press reports, Respondent No.1 conducted a private meeting with major social media companies like Facebook, Google, Twitter, Yahoo and other industry associations like IAMAI, COAI and ISPAI to discuss the proposed amendments to Intermediaries Rules 2011. Such a private meeting left out users of such platforms, who are important stakeholders, and thus, concerns regarding the impact on their digital rights, remained unrepresented.

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15. On 24.12.2018, Respondent No. 1 published a copy of Information Technology [Intermediary Guidelines (Amendment)] Rules 2018 on its website and sought public comments, which were then published on 04.02.2019. Counter-comments were invited until 14.02.2019. Notably, the draft 2018 Rules did not contemplate regulation of OTT Platforms and Digital News Media.

16. On 09.11.2020 *vide* Gazette Notification No. S.O. 4040(E) dated 09.11.2020, the President of India amended the Government of India (Allocation of Business) Rules, 1961 to confer Respondent No. 2 with jurisdiction over *'Films and Audio Visual programmes made available by online content providers'* and *'News and current affairs content on online platforms'.* A true and correct copy Gazette Notification No. S.O. 4040(E) dated 09.11.2020 is produced herewith and marked as **EXHIBIT P-3.**

17. In January 2021, it was reported that the Hon'ble Union Minister of Information and Broadcasting announced that the Ministry will soon release guidelines for OTT platforms, since it had been receiving a lot of complaints against some web series available on the streaming platforms. A copy of the report by Mint, "*I&B Ministry to issue guidelines for OTT platforms, says Prakash Javadekar*" dated 31.01.2021 is produced herewith and marked as **EXHIBIT P-4.**

18. On 25.02.2021, at a press conference, the Hon'ble Union Ministers of Respondent Nos. 1 and 2 Ministries announced issuance of the impugned Rules, which would regulate intermediaries, social media platforms, digital news media and

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OTT platforms. Shortly thereafter, the impugned Rules were officially notified in the gazette.

19. The substantive changes introduced by the Intermediaries Rules 2021 are described in further detail for the convenience of this Hon'ble Court in a document produced herewith and marked as **EXHIBIT P-5.**

Overcompliance and Excessive Censorship by Private Intermediaries

20. In ***Shreya Singhal (supra)***, the Hon'ble Supreme Court recognised and articulated the concept of the "chilling effect". In simple terms, the "chilling effect" refers to a phenomenon where a speech-regulating law is framed in such broad and wide terms, that its direct effect will be to encourage self-censorship, and deter persons from engaging even in lawful speech, for fear of legal consequences. ***New York Times vs Sullivan***, **376 US 254 (1964) -** a judgment of the Supreme Court of the United States that has been accepted and endorsed by the Hon'ble Supreme Court of India in ***R. Rajgopal vs State of Tamil Nadu***, **(1994) 6 S.C.C. 632 -** refers to a situation where the result of a law is to limit the public discourse to only statements which "steer far wider of the unlawful zone."

21. While in its classic sense the concept of the "chilling effect" arose in the context of strict liability for civil defamation, its meaning covers any legal arrangement where the system of incentives and disincentives is likely to cause tangible self-censorship. The impugned Rules, specifically, chill speech by

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effectively compelling intermediaries to perform the role of adjudicatory bodies over legal and illegal speech, with severe penal consequences. The inevitable effect of this is that intermediaries will prefer to take down content that - in their judgment - even appears to stray close to the prohibited line (while being fully legal), rather than allow it to stay up and risk legal consequences. The effect of this - as acknowledged in ***Sullivan (supra)*** - will be an impoverishment of the public discourse.

22. Indeed, there is empirical research to suggest that in the pre-*Shreya Singhal* regime, intermediaries were over-complying with take down requests for censorship, regardless of the legitimacy of a request. The judgment of the Hon'ble Supreme Court in *Shreya Singhal* recognised that intermediaries should not be placed in a position of acting as judges and evaluating the millions of requests they receive to disable access to online content. It, therefore, read down the requirement of "actual knowledge" in Section 79 of the IT Act to mean the actual knowledge from a court order or on being notified by an appropriate government agency. A copy of report titled 'Intermediary Liability in India : Chilling Effects on Free Expression on the Internet' released in 2011 is produced herewith and marked as **EXHIBIT P-6**.

23. However, the impugned Rules, specifically Rules 3(2)(b) and 4(2), have the effect of undoing the basis of ***Shreya Singhal (supra)*** by treating intermediaries as gatekeepers responsible for regulating online conduct and using intermediary liability as a tool to police, monitor, and block

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undesirable conduct. The problem of overbroad censorship by unaccountable private intermediaries has also been noted by the UN Special Rapporteur on Freedom of Expression in his 2018 Report on Online Content Regulation, the relevant extract of which is as follows:

> "17. In the light of legitimate State concerns such as privacy and national security, the appeal of regulation is understandable. However, such rules involve risks to freedom of expression, putting significant pressure on companies such that they may remove lawful content in a broad effort to avoid liability. They also involve the delegation of regulatory functions to private actors that lack basic tools of accountability. Demands for quick, automatic removals risk new forms of prior restraint that already threaten creative endeavours in the context of copyright. Complex questions of fact and law should generally be adjudicated by public institutions, not private actors whose current processes may be inconsistent with due process standards and whose motives are principally economic.
>
> [...]
>
> 68. States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression. They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users."

A true copy of the UN Special Rapporteur on Freedom of Expression's 2018 Report on Online Content Regulation (A/HRC/38/35) dated 06.04.2018 is produced herewith and marked as **EXHIBIT P-7**.

24. The risk of overbroad censorship by private intermediaries is further heightened when there are strict

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timelines for removal of content. In 2017, the UN Special Rapporteur on Freedom of Expression sharply criticized a German legislation called 'Netzdurchführungsgesetz' which required social media platforms to remove blatantly illegal content within 24 hours and other unlawful content within 7 days. The UN Special Rapporteur noted that high fines coupled with such strict deadlines under the German legislation would lead to over-regulation, and such precautionary censorship would undermine the right to seek, receive and impart information on the internet. A true copy of the UN Special Rapporteur on Freedom of Expression's statement titled 'Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' dated 01.07.2017 is produced herewith and marked as **EXHIBIT P-8.**

25. Further, no opportunity has been provided to the user whose speech is censored under Rule 3(1)(d) to be notified of such takedown, or to be heard in this regard. No provision has been made to make such orders of the competent Court or the government authority available to the user, and enable them to challenge such action before a judicial authority. Further, the unfairly short timeline of thirty-six hours provided to intermediaries, within which they must complete the takedown or risk penalties under Rule 7, will create a scenario where intermediaries will be forced to mindlessly comply with takedown orders and cause rampant suppression of free speech.

26. The disproportionate and harsh penalties imposed under Rule 7 will lead to over-policing of content posted on intermediary websites/mobile applications, since Rule 7 provides for the non-application of the exemption provided to intermediaries under Section 79 as a penalty, and hold intermediaries themselves liable for content posted on their websites/mobile applications by the users thereof. In order to avoid such an eventuality, intermediaries will act overzealously and disproportionately to disallow and remove even legitimate expression and speech which may be seen as dissent or displeasurable to the government authorities. This will create an unprecedented chilling effect on fundamental freedoms under the Constitution.

Harms Arising from Automated Censorship

27. Rule 4(4) goes beyond ***Shreya Singhal (supra*)** and the Order of the Hon'ble Supreme Court in ***Re: Prajwala, SMW (Crl) No. 3/15*** by requiring significant social media intermediaries to "endeavour" to deploy automated tools to "proactively identify" and disable access to content depicting rape, explicit or implicit child sexual abuse, and content identifical to information taken down under Rule 3(1)(d) of the Intermediary Rules. This is an example of function creep, where extreme technological measures contemplated for a limited and very serious use are slowly and imperceptibly utilized for other less serious uses. In fact, the reliance on order dated 28.11.2018 in ***Prajwala (supra)*** is misplaced. The said order merely records the suggestion of the Ld. Solicitor General regarding the use of tools for auto-deletion,

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and does not include any direction in this regard by the Hon'ble Supreme Court. However, the difference of opinion among intermediaries to these suggestions is also recorded in the order dated 06.12.2018. It is not the Petitioner's case that intermediaries have the right to host or provide access to child sexual abuse materials or rape imageries However, the deployment of automated tools in the manner contemplated under Rule 4(4) is a disproportionate step to take to combat this issue, and is certainly not justified in respect of the other uses for which such measures are sought to be deployed under the Intermediaries Rules 2021, and may be sought to be deployed in the future.

28. For example, law enforcement agencies reportedly compelled intermediaries to use automated tools such as PhotoDNA, which were developed only with the purpose of identifying child sexual abuse material, in criminal investigations entirely unrelated to the serious sexual offences listed in Rule 4(4). A copy of the report of Gadgets 360 by NDTV "*CBI Reportedly Asks Social Media Firms to Use Intrusive PhotoDNA Technology to Track Suspects*" dated 01.01.2019 is produced herewith and marked as **EXHIBIT P-9**.

29. Automated tools to identify and remove unlawful content from online platforms are still in nascent stages of development and there is substantial evidence to suggest that such tools lead to inaccurate and discriminatory censorship. Past experience demonstrates that building automated tools which can accurately filter unlawful content has been difficult even for large social media platforms. Automated tools are unable

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to understand the context in which a word or phrase is used, and therefore, they may even remove content which criticizes the unlawful act in question.

30. Further, the use of automated tools for censorship is especially problematic because some of these tools are trained using large amounts of data which mirrors the hierarchies existing in society. Therefore, an automated tool's determination of whether specific content is lawful or unlawful may be influenced by these biases and prejudices. The *proviso* to Rule 4(4) requiring intermediaries to conduct a periodic review of automated tools does not provide any oversight mechanism to determine if such reviews are being conducted properly.

31. Recognizing the discriminatory impact of algorithms, other countries, such as the United States of America, are considering legislative proposals for algorithmic accountability such as the 'Algorithmic Accountability Act, 2019.' Article 22 of the General Data Protection Law (GDPR) in the European Union also vests all individuals with a right "*not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.*"

32. The use of automated tools for censorship violates the fundamental value of due process because an individual's speech is restricted without any notice, hearing or reasons for the censorship. Neither the intermediary nor the user (such as Petitioner Nos. 2 and 3) have a right to be heard or to appeal the order of the automated tools. The importance of adhering

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to due process before requiring removal of online content has been recognized in Principle 5 of the Manila Principles on Intermediary Liability of 2015. Any obligation to proactively remove unlawful content through the use of technology based automated tools also violates Principle 1(d) of the Manila Principles of Intermediary Liability which states that *"Intermediaries must never be made strictly liable for hosting unlawful third-party content, nor should they ever be required to monitor content proactively as part of an intermediary liability regime."* Article 15 of the European Union E-Commerce Directive (2000/31/EC) similarly prohibits member states from imposing any general monitoring obligation on intermediaries. A true copy of the Manila Principles on Intermediary Liability is produced herewith and marked as **EXHIBIT P-10**.

Consequences of Mandating Traceability

33. Rule 4(2) of the Intermediaries Rules 2021 make it mandatory for every significant social media intermediary to enable tracing of originators of information on its platform, purportedly in furtherance of Section 69 of the IT Act. At the outset, it is relevant to consider that the impugned Intermediaries Rules, 2021 are not framed under Section 69 of the IT Act and the relevant rule-making power under Section 87(2)(y). The parent statute envisages orders passed for "interception, decryption or monitoring in any computer resource by an agency of the appropriate Government." Under Section 69(3), the obligation of an intermediary or a person-in-charge of the computer resource also extends to providing

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the agency facilities and technical assistance for securing access, interception, decryption or monitoring, or provision of information stored in computer resource. However, contrary to the provision, which enables access to specific computer resources covered within the ambit of the order for interception etc, the identification of the 'first originator' may require changes to the technical architecture of messaging platforms which would affect the privacy and security of all users across the board. In fact, from the phrasing of Rule 4(2), it is unclear what changes must be made to product design by intermediaries to satisfy this vague obligation of enabling tracing. However, to the extent that Rule 4(2) may require modifications to tried and tested encryption protocols such as the Signal Protocol to facilitate expansive meta data collection and retention, it would violate the data protection principles endorsed by the Hon'ble Supreme Court in ***KS Puttaswamy v. Union of India,*** **2017 10 SCC 1** and also the provisions of the proposed Personal Data Protection Bill, 2019, besides being beyond the scope of Section 69.

34. Similarly, weakening encryption by creation of backdoors or key escrow systems would also undermine the privacy and security of all users. This view is supported by the UN Special Rapporteur, David Kaye, who in his 2015 Report cautioned against the use of encryption weakening mechanisms because any inbuilt vulnerabilities which are intended to provide access to law enforcement agencies could be exploited by criminals as well.

35. In fact, the Telecom Regulatory Authority of India made Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services to the Department of Telecommunications on 14.09.2020, stating that no regulatory interventions were required in respect of issues related to privacy and security of OTT messaging services. TRAI recommended that it was not an opportune moment to recommend a comprehensive regulatory framework for various aspects of OTT services, beyond the extant laws and regulations, because it was an evolving area of study and any hurried changes could introduce vulnerabilities into these messaging platforms. A true copy of the Telecom Regulatory Authority of India's Recommendations on Regulatory Framework for Over-The-Top Communication Services to the Department of Telecommunications dated 14.09.2020 is produced herewith and marked as **EXHIBIT P-11**.

Regulation of Publishers of News and Current Affairs Content and Publishers of Online Curated Content

36. Rule 8 of Part III of the Intermediaries Rules 2021 makes Part III applicable to a) publishers of news and current affairs content (Digital News Media) such as Petitioner No. 1 and publishers of online curated content- or 'over the top content platforms'. Digital News Media and OTT Platforms are currently subject to the Indian Penal Code and the penal provisions under the IT Act, that prohibit the publication of sexually explicit, obscene, blasphemous content. In addition, OTT Platforms are also subject to self regulation under the Internet and Mobile Association of India (IAMAI)'s *Code for*

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Self-Regulation of Online Curated Content Providers issued in 2020 (which substituted the *Code for Best Practices of Online Curated Content Providers* of 2019).

37. Part III of Intermediaries Rules 2021 are unconstitutional inasmuch as they exert executive control over the publication of online news or OTT content in the following manner:

    a. The impugned Rules constitute a three tier grievance redressal mechanism which mandates Digital News Media and OTT Platforms to self-censor in accordance with the Code of Ethics and sets up an executive committee, the Inter-Departmental Committee vide Rule 14, that will *decide* complaints by individuals and by Respondent No. 2 itself [Rules 9 to 14]. The Inter-Departmental Committee constituted has been vested with the responsibility of ensuring that Digital News Media complies with the Code of Ethics. However, determination of whether any speech violates any law is a matter of adjudication by an independent judiciary, and cannot be delegated to the Executive.

    b. The impugned Rules permit Respondent No. 2 to issue directions to Digital News Media and OTT Platforms to delete, modify or block content published on their platforms [Rule 14(5)].

    c. The impugned Rules direct Digital News Media and OTT Platforms to register themselves with the Respondent No. 2 and also furnish a compliance report every month

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mentioning the details of grievances received and action taken thereon [Rule 18].

d. The IT Act, 2000 does not contemplate regulation of Digital News Media and OTT Platforms, and the impugned Rules are *ultra vires* the Act.

e. There has been no public consultation and DIGIPUB (an association of digital publishers of news and current affairs representing the largest collection of Digital News Publishers in the country) was not consulted prior to the notification of impugned Rules.

38. To the best of the knowledge of the Petitioner, Part III of the Intermediaries Rules 2021 have been notified without any public consultation. A consultation before notification of any rule, ensures that concerns of the public at large are addressed prior to the notification of the rule and that no stakeholder is disproportionately affected. A consultation is especially necessary for Digital News Media and OTT Platforms, as they were previously unregulated and did not form part of the Draft IT [Intermediary Guidelines (Amendment)] Rules 2018 where public comments had been invited; and the comments of stakeholders would have been valuable. Some of these concerns have already been highlighted by DIGIPUB vide its letter dated 26.02.2021 to Respondent Nos. 1 and 2, produced herewith and marked as **EXHIBIT P-12.**

39. The petitioners have also on 07.03.2021 sent a representation to the Respondents herein praying for an immediate recall of

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the impugned Rules and undertaking a meaningful consultation with all stakeholders. A copy of the representation submitted by the petitioner to the Respondent herein is produced herewith and marked as **Exhibit P-13**.

40. Hence, aggrieved by the Intermediaries Rules 2021 and left with no other remedy but to approach this Hon'ble Court, the Petitioners seek to challenge the Intermediaries Rules 2021 on the following amongst other grounds, which are taken in the alternative and without prejudice to one another:

GROUNDS

I. The Intermediaries Rules 2021 are *ultra vires* the IT Act 2000

A. The Intermediaries Rules 2021 are *ultra vires* the IT Act, and are liable to be quashed. In particular, the Intermediaries Rules are not consistent with, and do not carry out, the purposes of the Act, specifically Sections 79(2)(c), Section 69(2) and Section 69A(2). It is a well-settled proposition of law that the exercise of the Executive's rule-making power (as, for example, under Section 87(1)), is constrained by the condition that the Rules must be consistent with the parent legislation and "carry out the provisions of the [IT] Act." It is equally well-settled that when the legislature delegates rule-making authority, the authorised delegate must work within the boundaries of said authority, and cannot expand the scope of the parent legislation, or of legislative policy. It cannot, under the garb of making Rules, legislate on the field covered by the parent Act, and must restrict itself to the

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mode of implementation of the policy and purpose of the Act.

B. Part II of the impugned Rules have been traced to Section 87(2)(zg) of the IT Act. Thus, the rule-making power concerning the conduct of intermediaries must be limited to the boundaries specified by the Act, and especially Section 79 and Chapter XII, which set out the conditions for exemption from liability enjoyed by intermediaries ("safe harbour") It cannot result in expanding the scope of the Act itself. As evident from the legislative history of Section 79 of the IT Act 2000, this provision was introduced as a "safe harbour" for intermediaries, who do not exercise control over the content on their platform. However, through the Intermediaries Rules 2021, the Respondents are attempting to use a safe harbour provision to impose onerous obligations on intermediaries, including the obligation to enable traceability, take down content with *prima facie* partial nudity within 24 hours of receipt of a complaint, and to proactively identify and censor rape and CSAM content using automated tools, which adversely impacts the fundamental rights of Indian internet users. In particular:

   a. Rule 4(2) requires 'a significant social media intermediary primarily in the nature of messaging' to identify the 'first originator' of messages when a judicial order is passed or on an order being passed by the competent authority under Section 69 of the IT Act, 2000 and the Rules framed thereunder. Section 69 deals with electronic surveillance through interception, monitoring and decryption of information. Under Section

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69(3), the obligation of intermediaries is limited to facilitating or providing technical assistance. On the other hand, the impugned Rule 4(2) requires identification of 'first originator', which is not envisaged under Section 69. It is not clear what changes to the technical architecture of messaging intermediaries is required by Rule 4(2). As such, the requirement to ensure capacity to identify the 'first originator' is beyond the scope of the parent legislation. More pertinently, this expansion of the scope of powers under Section 69 through subordinate legislation is without exercise of the relevant powers under Section 87(2)(y). As such, the impugned Rules is not just *ultra vires* Section 69 of the IT Act, but is also without legal basis.

b. Rule 4(4) which requires intermediaries to proactively filter unlawful content using automated tools violates Section 79(2)(b)(iii) of the IT Act inasmuch as it constitutes a modification of the information being transmitted through the intermediary's platform. Under Section 79(2)(b)(iii), intermediaries can be exempt from liability only if they do not "modify the information contained in the transmission". Therefore, Rule 4(4) forces intermediaries to violate a qualifying condition for exemption from liability included in its parent provision. It is further pointed out that the third proviso to Rule 3(1)(d), which purports to address this problem by stipulating that filtering of content will not amount to a violation of Sections 79(2)(a) and 2(b), is itself *ultra*

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vires: secondary legislation cannot amend or make inoperative primary legislation.

c. The stringent timeline of 36 hours prescribed by Rule 3(1)(d) for intermediaries to remove unlawful content on receipt of a court order or government order is contrary to Section 69A of the IT Act 2000 and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 ("**IT Blocking Rules of 2009**"**).** Section 69A and the Blocking Rules thereunder - as pointed out by the Hon'ble Supreme Court in ***Shreya Singhal (supra)*** **-** are a complete code for blocking access to unlawful content on the internet and they provide a detailed procedure to be followed prior to blocking of content.

C. Part III of the impugned Rules, which governs Petitioner No. 1, has been traced to Section 87(2)(z) of the IT Act. However, there is nothing in the language of Section 87, or in the rest of the Act, from which it can be inferred that the provisions contained therein control the exercise of power by Respondent No. 2 or permit/envisage the regulation of Digital News Media and OTT Platforms, including requiring them to create a self-regulatory mechanism and be subject to exclusive executive oversight via an Inter-Departmental Committee. The object of IT Act, 2000 as mentioned in its Statement of Object and Reasons, is to provide legal recognition of electronic records and digital signatures to facilitate E-Commerce. Therefore, it is clear that the Parliament did not intend the IT Act, 2000 to be used as a mechanism to regulate Digital News Media and

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OTT Platforms; the impugned Rules are therefore contrary to Section 87(1) of the Act.

D. Part III of the impugned Rules is also *ultra vires* Section 69A inasmuch as it has not been drafted to provide procedures and safeguards for blocking of access to online content, especially since there has been no amendment to either Section 69A or to the 2009 Blocking Rules thereunder. Evidently, Section 69A does not contemplate regulation of Digital News Media and OTT platforms, let alone establishment of a three-tier adjudicatory mechanism introduced via Rules 9 to 13. Section 69A only permits the Central Government to direct any agency or intermediary to block access by the public to any information hosted on a computer resource. However, through Rules 14-16, the Central Government has conferred upon itself the power to even direct publishers (Digital News Media and OTT Platforms) to block content; while also prescribing a *new* provision for emergency blocking of content, without amending the parent provision, i.e. Section 69A. Additionally, Respondent No. 2 has no jurisdiction to notify Part III of the Rules, since it is contrary to the Notification dated 09.11.2020, which vests jurisdiction over Digital News Media with Respondent No. 3.

E. Part III of the impugned Rules must be struck down since under the guise of issuing Rules under Section 87 of the IT Act, the Respondents have brought Petitioner No. 1 and other Digital News Media under the purview of the Press Council of India Act and the Cable Television Networks (Regulation) Act, 1995, without amending either of the latter two legislations. Rules 8 and 9 read with the Code of Ethics obliges Digital

News Media such as the Petitioner No. 1 to mandatorily comply with Norms of Journalistic Conduct of the Press Council of India and the Programme Code and to not publish "content which is prohibited under any law for the time being in force". This amounts to the Central Government conferring upon itself powers which are not provided in the parent acts (whether IT Act, Press Council of India Act, or Cable TV Networks (Regulation) Act) through a delegated legislation.

F. Part III of the impugned Rules, in so far as they require classification of content based on presence of nudity, sex, expletive language, substance abuse etc. and mandate creation of access control and age verification mechanisms to prevent viewing of such content, are beyond the purview of Section 69A of the IT Act which deliberately omits *"decency or morality"* as a ground for restricting online content. "*Decency or morality*" is a ground for restricting free speech under Article 19(2) of the Constitution but it finds no mention under Section 69A of the IT Act which empowers the Central Government to issue directions *only* in the interest of *"sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above."*

G. The Intermediaries Rules 2021 also contravene the existing scheme of the IT Act 2000 which already contains separate provisions for interception, monitoring and decryption of electronic communication under Section 69 and prescribing standards for encryption under Section 84A, apart from the

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fact that the Respondents have failed to exercise their rule making powers under Section 87(2)(y) or Section 87(2)(zh). For instance, Rule 3(1)(j) which requires intermediaries to provide information or assistance to any government agency within 72 hours is inconsistent with Section 69 of the IT Act 2000 and Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009. The term "information or assistance" used in Rule 3(1)(j) is wide enough to include requests for interception, monitoring or decryption of communication, which are strictly governed by Section 69 of the IT Act 2000 and the Rules notified thereunder. Rule 3(1)(j) is thus an attempt by the Respondents to expand the scope of electronic surveillance by notifying rules under Section 79, without following the deliberative parliamentary process to amend Section 69 of the Act. Similarly, Rule 4(2) in so far as it requires modifications to the technical design of encrypted platforms to enable traceability is beyond the scope of the parent provision, i.e., Section 79 of the IT Act 2000. It is important to note that the power to prescribe encryption standards and methods originates from Section 84A of the IT Act 2000, and not Section 79, which is a safe harbour provision.

H. It is well settled that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than what has been prescribed (the rule in ***Nazir Ahmed's Case, AIR 1936 PC 253, 257***). Accordingly, the Respondents' failure to follow the procedures prescribed

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by Sections 69, 79 and 87(1) of the IT Act 2000 renders the impugned Rules unconstitutional.

II. The impugned Rules seek to overrule the effect of the judgment passed by the Hon'ble Supreme Court in *Shreya Singhal v Union of India*, (2015) 5 SCC 1

I. The Hon'ble Supreme Court in ***Shreya Singhal (supra)*** upheld Section 69-A of the IT Act, on the basis of the safeguards enshrined in the provision and the Rules notified thereunder and compliance with principles of natural justice. While upholding Section 79 of the IT Act, however, the Hon'ble Court read down the provision to exclude a direct complaint from an aggrieved user within the purview of 'actual knowledge' in the following manner:

> "121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69A…..The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69A read with 2009 Rules."
>
> 122. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to

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> certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made, and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront.Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).
>
> **123.** The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid.."

It is thus clear that the Hon'ble Supreme Court read down Section 79(3)(b) expressly to avoid a situation where private intermediaries such as Google and Facebook could act as a judge to determine the legitimacy of a request and decide whether to take down certain content. Rule 3(4) of the Rules that were in force at the time was also similarly read down. Rule 3(1)(d) seeks to incorporate the standard laid down in ***Shreya Singhal (supra)*** by requiring "actual knowledge" of an order of Court or an order passed by the appropriate government or its agency under Section 79(3)(b) of the IT Act 2000.

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J. However, Rules 3(2)(b) and 4(4) seek to overrule the judgement in ***Shreya Singhal (supra)*** by requiring the intermediaries to exercise their own judgment over whether information is to be taken down or not, instead of receiving actual knowledge in the form of a court order, or an order for blocking under Section 69-A. This is contrary to well-established principles of law that the government cannot, by way of an amendment, effectively overturn a binding judicial pronouncement, rendering it a nullity. By introducing Rules 3(2)(b) and 4(4), the Respondents are introducing new provisions that aim to undo the effect of ***Shreya Singhal (supra)*** by requiring intermediaries to take decisions on what content constitutes *prima facie* partial nudity or sexual conduct. This will inevitably result in over-censorship, as EXHIBIT P-6 demonstrates, thereby violating the freedom of speech and expression of users such as Petitioner Nos. 2 and 3, and even photos such as for breast cancer awareness or the Vietnam War of Terror photo. Rules 3(2)(b) and 4(4) must be struck down on the ground that they breach the doctrine of separation of powers and negate the fundamental right to equality under Article 14 of the Constitution.

K. Similarly, it is clear from the judgment that intermediaries are required to block access to content only after the necessity of blocking has been determined by the competent authority under Section 69-A or a Court order and due safeguards are followed, namely, the opportunity of hearing for both the intermediary and the originator. The grievance redressal mechanism under Part III of the impugned Rules in its entirety negates the judgment by creating an alternate

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mechanism for the censorship of content in case of a publisher of news and current affairs content as well as a publisher of online curated content. Rule 9 provides for a Code of Ethics which is beyond the scope of necessity under the grounds in Section 69-A. This Code of Ethics is enforced through a self-regulation body at two levels (Rules 10-12) and a Government Oversight Mechanism and Inter-Departmental Committee (Rules 13-14). Each of these bodies has powers beyond blocking, including 'requiring apology'. However, under Rule 14, the Inter-Departmental Committee is empowered to 'delete content' without recourse to Section 69-A. Rule 16 further allows for blocking without an opportunity of hearing or passing orders under Section 69-A "in cases of emergency." It is, therefore, clear that the impugned Rules nullify the requirements of the judgment in upholding the constitutionality of Section 69-A. Part III of the Rules also, therefore, seeks to overturn the judgment and is in breach of the doctrine of separation of powers.

III. The Intermediaries Rules 2021 violate Article 19(1)(a) and they cannot be justified as reasonable restrictions under Article 19(2)

(i) Part II unreasonably restricts the right to freedom of speech and expression under Article 19(1)(a) of the Constitution

L. It is well-established through a long line of judicial precedent that fundamental rights cannot be restricted through vaguely

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phrased laws. Vague laws, by their very nature, are overbroad and they cover within their ambit both unlawful and legitimate speech. The existence of a vague and overbroad law has a chilling effect on freedom of speech because citizens lack clarity about whether the content of their speech is prohibited, and therefore, they engage in self-censorship to avoid unintentionally violating the law. For instance, Rule 3(1)(b)(x) requiring intermediaries to warn users against posting content that is "patently false and untrue…with the intent to… cause any injury to any person" is void because the use of such vague and undefined terms makes it impossible to foresee the application of the Intermediaries Rules 2021. The cumulative impact of Rules 3(1)(b) and 3(1)(c) and the threat of termination of access or usage rights induces a chilling effect on the users and causes them to alter the content of their posts online. The ensuing chilling effect, thus, affects the rights of the users and the general public, to know and to receive information, which is guaranteed under Article 19(1)(a).

M. In addition to vagueness, it is also established that the test for reasonableness under Article 19(2) is the test of proportionality (**Justice K.S. Puttaswamy vs Union of India, (2017) 10 SCC 1; Anuradha Bhasin vs Union of India, (2020) 3 SCC 637**). Proportionality has the following four elements:

(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).

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(b) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(c) There must not be any less restrictive but equally effective alternative (necessity stage).

(d) The measure must not have a disproportionate impact on the right holder (balancing stage).

It is respectfully submitted that, for the reasons adduced below, the impugned Rules fail both the necessity and balancing stages of the proportionality test: they infringe rights to a greater extent than necessary to achieve the legitimate purposes of intermediary regulation, and disproportionately burden both intermediaries and users.

N. The stringent timeline of 24 hours imposed under Rule 3(2)(b) for making a *prima facie* determination of whether any material (a) exposes (the undefined) private area of an individual; (b) shows partial or full nudity; (c) depicts sexual conduct or sexual acts; or (d) is in the nature of impersonation and to remove or disable access to such content will lead to overbroad and excessive censorship by intermediaries who have a commercial incentive to avoid potential liability by erring on the side of shutting down speech (see also Exhibit P-6 in this regard). Given that the Rule 3(2)(a) provides the intermediaries with 15 days to dispose of an aggrieved person's complaint, forcing them to take an interim decision within 24 hours will result in over-censorship and the take down of legal and lawful content as well. The imposition of such stringent deadlines on social media intermediaries in other countries (such as Germany's 'Netzdurchführungsgesetz' referred above) has also been

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severely criticized by the UN Special Rapporteur, David Kaye in 2017 (Exhibit P-8 herein), noting that high fines coupled with such strict deadlines would lead to over-regulation, and such precautionary censorship would undermine the right to seek, receive and impart information on the internet.

O. The risk of over-censorship is further borne from the fact that Part II of the impugned Rules fail to comply with principles of natural justice and due process, since there is no provision that allows the the original content creator (whose content has been complained against) to be heard in response to a complaint filed under Rule 3(2) or to appeal against the interim and/or final decision of an intermediary disabling access to their content under Rule 3(2).

P. Rule 3(1)(d) goes beyond the erstwhile Rule 3(4) of the IT (Intermediaries Guidelines) Rules, 2011 and suffers from similar overbreadth problems, causing an ensuing chilling effect. The erstwhile Rule 3(4) read with the clarification dated 18.03.2013 (Exhibit P-2) and ***Shreya Singhal (supra)*** made it clear that the intermediary had to *acknowledge* the complaint and had to take action within 30 days from the receipt of the complaint. However, Rule 3(1)(d) of the impugned Rules requires intermediaries to *act* within 36 hours to disable access to the specified content. Such a short time period makes it virtually impossible for intermediaries to scrutinize requests received from law enforcement agencies to ascertain their legitimacy, competency, and whether they *prima facie* comply with Articles 19(2) of the Constitution. It is inevitable that there will be over-compliance with requests

received from government agencies, which in turn will violate the fundamental rights of users such as Petitioner Nos. 2 and 3 to receive information, especially since Part II fails to provide any appeal provision whereby the intermediary can appeal against, or even engage with, a government order seeking take down of certain content under the broad heads of Rule 3(1)(d). This virtually permits the executive branch to have unbridled discretion in taking a decision to take down certain content online, and risks affecting speech that is politically sensitive or in the nature of advocacy or criticism.

Q. Rule 4(1) will adversely impact the fundamental right of Indian citizens to receive access to information by increasing the cost of compliance for foreign intermediaries who may decide to withdraw their services to the Indian market. It has long been established that the right under Article 19(1)(a) includes the right to seek and receive information (***LIC vs Manubhai D. Shah*, (1992) 3 SCC 637**); thus, laws that disproportionately limit access to information fall foul of Article 19(1)(a), and are not saved by Article 19(2).

R. Rule 7 lays down harsh and disproportionate punishment on intermediaries, including loss of safe harbour protection under Section 79 of the IT Act and even potential criminal prosecution, for failure to comply with the Rules. There is no gradation in the penalty based on the nature or seriousness of the violation of the impugned Rules 2021. This will lead to overzealous implementation of the Rules by the intermediaries, which will restrict the free speech and privacy of the users.

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(ii) Part III violates Article 19(1)(a) of the Constitution

S. The freedom of the press is an integral part of Article 19(1)(a) of the Constitution, given that the press and Digital News Media such as Petitioner No. 1, provide the principal vehicle of expression of information and views to citizens, and this has been recognised by the Hon'ble Supreme Court in ***Express Newspapers (P) Ltd. v. Union of India*** **(1986) 1 SCC 133** and ***Bennett Coleman & Co. v Union of India*** **(1978) 1 SCC 248.** Further, the right to know and receive information, recognised as part of Article 19(1)(a) also includes the right to receive, propagate, and circulate one's views in different media, including online media. Petitioner No. 1's right to freedom of speech and expression is violated by virtue of Part III of the impugned Rules.

T. The definition of "publisher of news and current affairs content" under Rule 2(1)(t) is very broad, yet vague, given that what constitutes "current affairs content" has not been defined, although it likely includes Petitioner No. 1. Petitioner No. 1 is currently regulated by the penal provisions of the IT Act and the Indian Penal Code. However, the Code of Ethics in Part III mandates Digital News Media to comply with Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978; Programme Code under Section 5 of the Cable Television Act; and restrains it from publishing any content "which is prohibited under any law for the time being in force." Requiring Digital News Media to determine what content is unlawful – without a judicial determination or

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government order (as required for intermediaries by ***Shreya Singhal***) – will result in over-censorship and violate the Article 19(1)(a) rights of the users.

U. Part III of the impugned Rules also creates a regulatory framework of executive oversight, since the enforcement of the above Code of Ethics is left to an Inter-Departmental Committee, consisting only of members of the executive, under Rule 14, which requires the final approval of the Secretary of Respondent No. 2 Ministry. The Inter-Departmental Committee can recommend to Respondent No. 2 to require an apology from a Digital News Media entity or require it delete or modify content published by it and there is no provision for the publishers to appeal this decision. Respondent No. 2, therefore, is made the arbiter of what is permissible speech. This violates the principle of separation of powers, and also has a chilling effect on free speech as publishers will effectively self-censor to make their speech palatable to Respondent No. 2. Petitioner No. 1, LiveLaw, as an organization, seeks institutional accountability and is often called upon to take critical stances against institutions. The impugned Rules, especially the executive control over the grievance redressal and Oversight Mechanism, will have a chilling effect on the functioning of Petitioner No. 1 since it would effectively discourage any reporting that may not be palatable to Respondent No. 2. Digital News Media outlets such as Petitioner No. 1 may be forced to self-censor content that even appears to stray close to the prohibited line (while

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being fully legal) rather than publish the content and risk legal consequences.

V. Part III of the impugned Rules fails to provide any mechanism for Digital News Media and OTT Platforms to judicially challenge the decision of the executive-constituted Inter-Departmental Committee. The provision for 'review' of the orders of the Committee by the Review Committee under Rule 17 completely violates due process since, *first,* the Review Committee also comprises only members of the executive, who are in fact, already a part of the Inter-DepartmentalCommittee. Any such 'review' is therefore meaningless and mere lip service since it amounts to serving as a judge in your own cause. *Second,* Rule 17 does not provide the aggrieved publisher to be heard before the Review Committee and *third,* the Rule 17 fails to provide any judicial oversight over the action of the executive to censor content, thus leading to a chilling effect.

W. The chilling effect extends not only to the opinions published by Petitioner No. 1, but also to its factual reporting and live-reporting of court proceedings. Individuals with vested interests may utilize the impugned Intermediary Rules to file baseless complaints. Even if these complaints do not result in any action because they lack merit, it would impose a huge financial and resource burden on a small organisation such as Petitioner No. 1 of responding to every complainant in 15 days, and then defending the publication before multiple appellate forums (Self-Regulatory Body and Oversight Mechanism). The impugned Rules would effectively force

small Digital News Media entities to self-censor than publish any controversial or critical speech, regardless of its permissibility under law. The problem is further exacerbated by the fact that under the self-regulatory mechanism prescribed in Part III, if a complaint is filed with respect to an opinion piece published by Petitioner No. 1, the author of the particular opinion piece has no right to be heard, and their rights under Article 19(1)(a) will be infringed.

X. Apart from this, Rule 18(3) and Rule 19(3)'s requirement to publish a monthly compliance report would also have a chilling effect on Petitioner No. 1's speech and thereby violate Article 19(1)(a) of the Constitution. Rule 18(3) requires LiveLaw to publish a compliance report every month mentioning the details of grievances received and action taken thereon. This allows the Central Government to examine the decisions taken by Petitioner No. 1 on grievances, including those decisions which complainants have not appealed under Rule 10(e). Rule 19(3) requires Petitioner No. 1 to preserve records of content transmitted by it for sixty days and make it available to the Central Government on demand. The consequence of these rules is that Petitioner No. 1 will have to be mindful of the response of the Central Government for any content it produces, which is especially a problem given the nature of work being carried out by it .

Y. Part III of the impugned Rules inasmuch as they require OTT Platforms to comply with the detailed Code of Ethics draw a false equivalence between online video streaming platforms and television and film broadcasting. Online platforms are an

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Over the Top service ('OTT') and they are not a limited public resource like telecommunication spectrum because they run on top of existing telecommunication networks. Heavy handed regulation which is applicable to traditional mediums does not apply in the same manner for content on the internet because of its unique technical features and emphasis on private viewing experiences available online. Adopting a one-size-fits-all approach for these online platforms would destroy their ability to create unconventional, thought-provoking and innovative content.

Z. Apart from the above, the Code of Ethics also mandates OTT Platforms to '*take into consideration India's multi-racial and multi-religious context and exercise due caution and discretion when featuring their activities, beliefs, practices, or views of any racial or religious group.'* This requirement is vague as there is a lack of clarity on what constitutes taking '*into consideration'* India's multi-racial and multi-religious context, and any statement could be offensive, annoying or inconvenient to certain groups. This vagueness in the Code of Ethics, which is enforced by the three-tier mechanism, has a chilling effect on free speech over the internet and is in stark violation of ***Shreya Singhal's (supra)*** observation that speech could be offensive to various groups and that should not be the basis of prohibiting speech. That is, publishers will be discouraged from speaking because of fear of non-compliance with the Code of Ethics. In this context, the Hon'ble Supreme Court in ***Indibly Creative v. Government of West Bengal,*** **(2020) 12 SCC 436** has in fact affirmed

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that the State has a positive obligation to protect freedom of speech and that "*unless we were to read a positive obligation on the State to create and maintain conditions in which the freedoms guaranteed by the Constitution can be exercised, there is a real danger that art and literature would become victims of intolerance.*"

AA. Rule 16 also adversely impacts the freedom of speech and expression by permitting the Authorized Officer to block content "in case of an emergency." The parameters of such an emergency or the exercise of power therein are not curtailed by the said provision. There is also no requirement to provide an opportunity of hearing. In several cases, the Hon'ble Supreme Court has held that it is the duty of the State to maintain law and order, and apprehensions regarding law and order cannot be the basis of censorship of artistic expression by the executive [see ***Union of India v. K.M. Shankarappa,*** **(2001)1 SCC 582;** ***Prakash Jha Productions v. Union of India,*** **(2011) 8 SCC 372;** ***Viacom 18 Media Pvt. Ltd v. Union of India,*** **(2018) 1 SCC 761**].

The Intermediaries Rules 2021 violate Article 19(1)(g), and they cannot be justified as a reasonable restriction under Article 19(6)

BB. The Intermediaries Rules violate the right to carry on any trade guaranteed by Article 19(1)(g) of the Constitution because they impose onerous and irrational obligations on intermediaries and compel modifications to the underlying technical architecture of platforms and are thus beyond the

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scope of Article 19(6), but also manifestly violative of the right to privacy of users by requiring changes to tried and tested technical standards to ensure compliance. It is important to note that the test of proportionality - as set out above - applies equally to Article 19(1)(g) and 19(6) as it does to Article 19(1)(a).

CC. Rule 4 imposes additional obligations on intermediaries having more than 50 lakh registered users but there is no clarity regarding intermediaries where the users do not register themselves with the intermediary. The Rule also fails to clarify what must be done in circumstances where the number of users for an intermediary is fluctuating.

DD. Furthermore, obligations under Rule 4 can also be imposed on any intermediary included in the list notified by the Central Government, under Rule 6, even if the intermediary does not have 50 lakh registered users. However, there is no objective criteria mentioned for inclusion in the list notified by the Central Government. The criteria enumerated in Rule 6 for intermediaries, i.e. if the services of that intermediary permits publication or transmission of information in a manner that may create a material risk of harm to the sovereignty and integrity of India, security of the State, friendly relations with foreign States or public order are vague and overbroad.

EE. Rule 4(4) which pushes for technology-based automated tools or appropriate mechanisms with appropriate controls to proactively identify and remove unlawful content rests on the faulty assumption that building and deploying these tools is

technologically and economically feasible for all intermediaries. If this obligation was imposed on all intermediaries, as is possible due to the potential of misuse contained in Rule 6, smaller businesses which do not have the resources to develop, upgrade and maintain such technology will be driven out of the industry.

FF. Part III of the impugned Rules interfere with the Petitioners' freedom of business and trade by imposing onerous obligations through the three tier regulatory framework. The Petitioner No.1 will have to devote significant resources in resolving each complaint received within 15 days and in defending itself before multiple forums. As a consequence, even if it is able to continue its operations, the volume of content produced by the Petitioner No.1 will be reduced due to diversion of resources which itself amounts to an infringement of the rights guaranteed under Article 19(1)(g) and also Article 19(1)(a) (See ***Sakal Papers v. Union of India,*** **AIR 1962 SC 305**)

The Intermediaries Rules 2021 violate the fundamental right to privacy under Article 21 of the Constitution.

GG. Rule 4(2) requires significant social media intermediaries to enable the identification of the "first originator" of information on its computer resource. In layperson's terms, this means that significant social media intermediaries are required to alter their existing infrastructure to "fingerprint" each message and this may defeat end-to-end encryption of users' messages.

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HH. It is crucial to understand that while Rule 4(2) is meant to apply only to a specific range of cases, in order to be in position to implement it, significant social media intermediaries will have to change their technical infrastructure for *every* user, thus compromising the privacy of *every* user, in order to investigate the crimes that may be committed by a minuscule minority. In real-world language, this is akin to requiring every person to submit a pair of their house-keys with the local police station, on the ostensible basis that *if* a crime is committed, the police can immediately search suspected premises. In the digital world, this is equivalent to requiring every individual with an email account to reveal their password to the State, so that if someone engages in spamming of phishing, their account can be searched. Compromising the rights of *every* citizen to privacy in order to effectively prosecute crimes committed by a few is *per se* disproportionate, as it imbues the entire citizenry with a *presumption of criminality*. In ***K. S. Puttaswamy v. Union of India*, (2019) 1 SCC 1**, the Hon'ble Supreme Court made this clear when it struck down the mandatory linking of everyone's mobile phones with Aadhaar; the State's argument that this was needed to check terrorism was rejected, on the specific basis that every person's privacy could not be compromised on the putative basis that it would be easier to identify a few potential terrorists (who could also be identified through other means).

II. Petitioners' submissions in this regard are buttressed by Section 84A of the IT Act, which specifically empowers the

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Central Government to prescribe modes and methods of encryption for the purpose of "secure use of the electronic medium and for promotion of e-governance and e-commerce." It is respectfully submitted that any attempts to weaken encryption to enable traceability would not satisfy the objective of ensuring secure use of the electronic medium. On the contrary, modification of tried and tested encryption protocols such as the Signal Protocol or creation of backdoors and key escrow systems would undermine the privacy and security of all users. This view is supported by the UN Special Rapporteur, David Kaye, who in his 2015 Report cautioned against the use of encryption weakening mechanisms because any inbuilt vulnerabilities which are intended to provide access to law enforcement agencies could be exploited by criminals as well. A similar observation has also been made in the Report of the Justice Srikrishna Committee on Data Protection where the Committee criticized the Government for mandating low encryption standards in license agreements with telecom service providers because "this poses a threat to safety and security of the personal data of data principals."

JJ. Additionally, the Hon'ble Supreme in ***K.S. Puttaswamy (supra)*** held that "*Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual. (...) Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can*

originate not only from the state but from non-state actors as well.". In this context, the Hon'ble Supreme Court also referred to the report of a Group of Experts on privacy, constituted under the erstwhile Planning Commission, which recommended nine privacy principles, including the following:

a. Collection limitation: A data controller shall only collect personal information from data subjects as is necessary for the purposes identified for such collection.

b. Purpose Limitation: Personal data collected and processed by data controllers should be adequate and relevant to the purposes for which it is processed. A data controller shall collect, process, disclose, make available, or otherwise use personal information only for the purposes as stated in the notice after taking consent of individuals. If there is a change of purpose, this must be notified to the individual.

In contravention of these principles, by virtue of Rule 4(2), significant social media intermediaries will be forced to collect and retain data about all their users simply to be able respond to an order in relation to the first originator passed by a competent authority. As per Rule 3(1)(h), data retention would be required for 180 days even after closure of accounts. Such mass retention of information of all the users is *per se* contrary to the principle of proportionality set out in ***K.S Puttaswamy (supra)***, but in the absence of any data

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protection regime also permits the unlawful retention and use of such personal data for *inter alia* profiling users without their consent, which is most apparent in cases where the user has deleted her account but is denied a right to remove her presence from the intermediary for six more months.

KK. Next, Rule 4(4) requires significant social media intermediaries to develop automated tools for censorship. To the extent that such tools may rely on artificial intelligence technologies, they are problematic because artificial intelligence "learns" by examining vast amounts of data, making decisions in relation to such data on the basis of pre-defined objectives, and reviewing the outcomes. To achieve an artificial intelligence model that can detect offending posts, and automatically remove them, these intermediaries will have to collect large amounts of user generated data, including all activities of its users on the intermediary's website/mobile application, in disproportionate violation of the right to privacy.

LL. Although Rule 4(4) contemplates only three cases where automated censorship of information can occur, the very nature of automated censorship contains high risks of error which will result in removing legitimate commentary; furthermore it opens the door for function creep and spread of this technology to censor information on other grounds, including law enforcement agencies compelling intermediaries to use tools such as PhotoDNA in criminal investigations entirely unrelated to the serious sexual offences listed in Rule 4(4).

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MM. Rule 4(7) requires significant social media intermediaries to set up the capacity to "voluntarily" verify themselves by submitting personal data to the intermediary. Once the significant social media intermediaries are able to handle such large-scale verification of millions of users, Rule 4(7) leaves the door open to make such verification mandatory, thereby destroying anonymity and user privacy.

The 2021 Rules violate Article 14 of the Constitution.

(i) Manifest Arbitrariness

NN. In ***Shayara Bano vs Union of India & Others*** **(2017) 9 SCC 1,** the Hon'ble Supreme Court laid down the test to determine if a provision is manifestly arbitrary as:

> "52. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

The Hon'ble Supreme Court has also recognised that this doctrine may also be used to strike down subordinate legislation (see also ***Indian Express Newspapers vs Union of India*** **(1985) 1 SCC 641**). It is respectfully submitted that Rule 14(1)(b) r/w Rule 14(1)(6) is manifestly arbitrary as it permits Respondent No. 2 Ministry to be a 'judge in its own cause'. The Rules permit the said Ministry to make a

complaint and also decide upon that complaint, with the Secretary of Respondent No. 2 Ministry approving *every* order issued by the Committee. The effect of this is that the Inter-Departmental Committee which has to provide a hearing to the publisher against whom a complaint is made [Rule 14(4)] is only an advisory body to Respondent No. 2.

(ii) Excessive Delegation

OO. It is a well-established proposition of law that delegation of a core legislative function renders a statute or rules unconstitutional, and that a legislature cannot delegate its essential legislative function. The legislature must lay down the legislative policy and principle so as to afford the delegate proper guidance in implementing the same. It is also well settled that the executive cannot sub-delegate rule making powers unless such a power is expressly granted by the parent legislation. In the present case, Rule 4(2) requires messaging-related significant social media intermediaries to enable the identification of the "first originator" of information on their platform. However, neither the parent statute nor the impugned Rules provide any guidance on how to interpret this obligation or what changes significant social media intermediaries need to make to their product design, apart from the fact that the term "first originator" has not been defined. The Rules are impermissibly vague and leave it up to the intermediaries to determine whether Rule 4(2) requires them to (a) compulsorily collect the real-name/identity

information of all its users and prohibit anonymity online; (b) compulsorily verify the identity of their users through KYC processes, which were earlier only required for intermediaries offering services such as banking; (c) mandatorily increase their collection and storage of metadata that will enable them to trace the origin of a message; (d) create backdoors or key escrow systems to enable traceability of the originator; or (e) stop the practice of end-to-end encryption and disappearing messages on their platform. Therefore, Rule 4(2) must be struck down since the legal discretion that the Executive confers on private intermediaries does not have sufficient clarity as to the scope of the discretion and manner of its exercise.

PP. Rule 4(4) must be struck down on the grounds of excessive delegation inasmuch as the Respondents are attempting to sub-delegate the power to remove unlawful content to private and unaccountable intermediaries, without providing any guidance on the kind of automated tools that may be deployed; how consensual sexual conduct can be distinguished from rape; and how factors such as accuracy, fairness, privacy, propensity of bias and discrimination in the use of automated tools will be evaluated. Intermediaries have been provided unbridled discretion to determine what are appropriate technological measures for proactive removal of rape and child sexual abuse content.

QQ. Rules 9-14 of the impugned Rules must be struck down because the creation and specification of a three tier grievance redressal system for Digital News Media and OTT Platforms,

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when there is no mention in the parent legislation, confers an extraordinary and arbitrary power on the executive to travel beyond the scope of what the Parliament intended and amounts to the self-effacement of legislative power. Rule 14 has impermissibly delegated the exercise of judicial functions, specifically serving as an appellate body for grievances against decisions taken at the Level I or II of the three tier structure, to an exclusive body, the Inter-Departmental Committee consisting of representatives from all the Respondent Ministries, Ministry of Women and Child Development, Ministry of Home Affairs, Ministry of External Affairs, Ministry of Law and Justice, Ministry of Defence.

Failure to consult stakeholders

RR. The Hon'ble Supreme Court has emphasised on the importance of public consultation when proposals are still at a formative stage, to hear the voices of affected communities, build confidence, and improve accountability. Any consultation process must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response. Adequate time must be given for this purpose, and the product of consultation must be conscientiously taken into account when the ultimate decision is taken. It is well settled that at a minimum, transparency obligations enshrined in the Constitution require the Respondents to have: (a) held due consultations with all stakeholders; (b) allowed all stakeholders to make their submissions; and (c) made all decisions fully documented and explained. However, none of these fundamental tenets of

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public consultation were satisfied in the present case for Part III of the Intermediaries Rules 2021 which regulates Digital News Media and the Petitioners were never consulted by the Respondents despite the impugned Rules 2021 severely affecting their operations.

On these and other grounds to be urged at the time of hearing, it is most humbly prayed that this Hon'ble Court may be pleased to allow this Writ Petition by granting the following:

<u>RELIEFS</u>

1) Issue a Writ in the nature of mandamus or any other appropriate Writ, Direction or Order to declare the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 as illegal and violative of Articles 13, 14, 19(1)(a), 19(1)(g), and 21 of the Constitution of India;

2) Issue a Writ in the nature of mandamus or any other appropriate Writ, Direction or Order to declare that the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, is ultra vires the provisions of the Parent Act, ie. the Information Technology Act, 2000;

3) Issue a Writ in the nature of mandamus or any other appropriate Writ, Direction or Order, declaring that the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, are illegal, unjust, unfair,

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manifestly arbitrary, for colourable exercise of power and also contrary to the basic structure of the Constitution; and

4) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

INTERIM RELIEFS

1) Injunct Respondent Nos. 1 and 2 and their authorised officers from enforcing Part II and Part III of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021;

OR IN THE ALTERNATIVE

2) Restrain Respondent Nos. 1 and 2 from taking any coercive steps against the Petitioner No. 1 or its employees, directors, shareholders, or any persons who contribute articles to Petitioner No. 1 for publication for failure to comply with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021;

OR IN THE ALTERNATIVE

3) Restrain Respondent Nos. 1 and 2 from enforcing any provisions of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 till the constitution and designation of the authorities required to implement the provisions of the said Rules and till an effective

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and adequate and effective grievance redressal mechanism and appellate remedy is provided to entities such as Petitioner No.1 to challenge orders passed under the said impugned Rules.

Dated this the 9th day of March, 2021.

PETITIONER No.1. Sd/-

PETITIONER No.2. Sd/-

PETITIONER No.3. Sd/-

Sd/-
COUNSEL FOR THE PETITIONERS

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BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

W.P.(Civil) No. 6272 of 2021
(Special Original Jurisdiction)

Live Law Media Private Limited and others : Petitioners
v.
Union of India, represented by Secretary to Government and another : Respondents

AFFIDAVIT

I, Manu Sebastian, do hereby, solemnly affirm and state as follows:-

1. I am the 3rd Petitioner in the above Writ Petition and the Managing Editor of 1st Petitioner, Live Law Media Private Limited. I know the facts of the case. I am swearing to this affidavit on my own behalf and on behalf of the 1st and 2nd petitioners as I am duly authorised by them.

2. The averments contained in the above Writ Petition (Civil) are true to the best of our knowledge, information and belief.

3. The Exhibits produced along with the above Writ Petition (Civil) are true copies of its originals.

4. The Petitioners have not filed any other Petition before this Hon'ble Court, seeking the same relief earlier.

5. It is therefore prayed that this Hon'ble Court may be pleased to grant the reliefs prayed for in the above Writ Petition (Civil).

The above facts are true,

Dated this the 9th day of March, 2021.

Sd/-
Deponent

Solemnly affirmed and signed before me by the deponent on this the 9th day of March, 2021, in my office at Ernakulam.

Sd/-
Advocate