

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. OF 2023

Kunal Kamra ...Petitioner

Versus

Union of India & Ors. ...Respondents

SYNOPSISI. Challenge in Brief

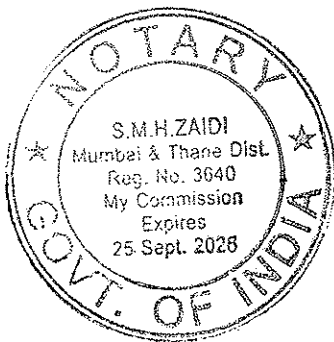
This petition challenges Rule 3(i)(II)(A) and (C) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023, on grounds of Articles 14 and 19(1)(a) and 19(1)(g) of the Constitution of India, and on the grounds of the provision being *ultra vires* Section 79 of the Information Technology Act, 2000 [**"Impugned Rules"**]. The Impugned Rules in effect amends Rules 3(i)(a) and 3(1)(b)(v) of the IT Rules, 2021 as a result of which social media intermediaries are directed to make "*reasonable efforts*" to cause their users - through rules, regulations, and other policies - not to '*host, display, upload, modify, publish, transmit, store, update, or share any information*' which is '*identified as fake or false or misleading by [a] fact check unit of the central government*' in respect of '*any business of the central government*.' In effect, the Impugned Rules require social media intermediaries to censor or otherwise modify content that relates to the Central Government, if a government-mandated fact-checking body directs them to do so. It is submitted that the Impugned Rules are manifestly arbitrary, as they entail



the central government acting as a judge and prosecutor in its own cause, thus violating one of the most fundamental principles of natural justice. Furthermore, the Impugned Rules are over-broad, vague, and constitute unreasonable restrictions to freedom of speech and expression under Article 19(1)(a) of the Constitution, *inter alia*, by making the State the sole arbiter of truth or falsity of speech. The Impugned Rules do not come within the eight enumerated restrictions under Article 19(2), nor do they constitute reasonable restrictions. Further, the Impugned Rules are an unreasonable restriction on the Petitioner's fundamental right to practise trade or profession. The Petitioner is a political satirist who relies on social media platforms to share his content. The Impugned Rules could potentially lead to the Petitioner's content being arbitrarily blocked, taken down, or his social media accounts being suspended or deactivated, thereby irreparably harming him professionally.

II. Dates and Events

S. No.	Date	Particulars	Exhibit
1	2000	The Information Technology ["IT"] Act is enacted. Section 79 of the Act provides "safe harbour" to intermediaries, i.e., immunity from prosecution subject to fulfilling certain conditions.	
2	25.2.2021	The IT Rules of 2011 are superseded by the IT Rules of 2021.	
3	2021-2022	Challenges are filed to the IT Rules of 2021, in various High Courts of the country.	
4	09.05.2022	In Writ Petition No. 799/2020, the Supreme Court directs stay of pending proceedings in various High Courts pertaining to challenges to the <u>IT</u>	B



		<u>Rules of 2021.</u>	
5	28.10.2022	The Government of India promulgates the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022, which Amend the IT Rules of 2021.	C
6.	06.04.2023	The Government of India promulgates the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 [“the Impugned Rules”], which further amend the IT Rules of 2021.	A
7		Hence, the present writ petition.	

III. Points to be urged

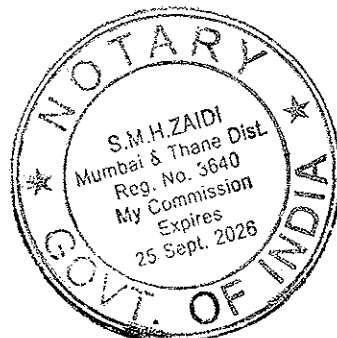
A. Whether Rule 3(i)(II)(A) and (C) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 [**“the impugned Rule”**], that amend Rules 3(1)(a) and 3(1)(b)(v) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 [**“IT Rules, 2021”**] is void for violating Articles 14 and 19(1)(a) and 19(1)(g) of the Constitution, and on account of being *ultra vires* Section 79 of the Information Technology Act, 2000.

IV. Acts

- i. Constitution of India, 1950.
- ii. Information Technology Act, 2000.

V. Citations

To be relied upon at the time of arguments



Advocate for the Petitioner

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. OF 2023

In the matter of Article 226 of
the Constitution of India;

-And-

In the matter of Articles 14,
19(1)(a) and 19(1)(g) of the
Constitution of India;

-And-

In the matter of the Impugned
Rule 3(i)(II)(A) and (C) to the
Information Technology
(Intermediary Guidelines and
Digital Media Ethics Code)
Amendment Rules, 2023



Kunal Kamra,

Indian inhabitant,



...Petitioner

versus

Union of India,)
 Represented by the Secretary,)
 Ministry of Electronics and)
 Information Technology)
 Having its office at Electronics Niketan,)
 6 CGO Complex, Pragati Vihar, Lodhi Road)
 New Delhi – 110003.)

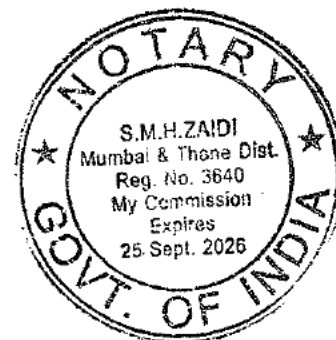
...Respondent

TO,

**THE HON'BLE THE CHIEF JUSTICE
 AND THE HON'BLE PUISNE JUDGES
 OF THIS HON'BLE COURT**

**THE HUMBLE PETITION OF
 THE PETITIONER
 ABOVENAMED**

MOST RESPECTFULLY SHEWETH:



1. The present petition is being filed under Article 226 of the Constitution of India, seeking a declaration that Rule 3(i)(II)(A) and (C) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023, amending Rules 3(i)(a) and 3(i)(b)(v) of the Information Technology Rules 2021 [hereinafter “**the Impugned Rules**”], are *ultra vires* Section 79 of the Information technology Act, 2000 [the “IT Act”], and Articles 14 and 19(1)(a) and 19(1)(g) of the Constitution, and is therefore unconstitutional. A copy of the Gazette Notification dated 6th April 2023, notifying the Impugned Rules is annexed as **Exhibit A**.

2. The Petitioner is a comedian aged [REDACTED] years of age, residing at [REDACTED] Mumbai. The Petitioner’s primary form of comedy is social and political satire. The Petitioner hosts a long-running web-series (eponymously titled “Shut Up Ya Kunal”), where he engages in discussions with prominent activists, political leaders and journalists (amongst others) on various aspects of the Indian socio-political landscape. The Petitioner has also made an Opinion video published by the New York Times regarding the Indian government’s



4

handling of the Covid-19 pandemic. The Petitioner shares his work on various social media platforms including YouTube, Twitter, Instagram and Facebook through his social media accounts.

3. The Respondent is the Union of India, represented through the Ministry of Electronics and Information Technology.

4. In 2000, Parliament enacted the Information Technology Act. Section 79 of the IT Act provided for what is commonly known as "safe harbour for intermediaries": in effect, intermediaries were exempted from liability for any third-party information made available or hosted by them, as long as they observed "due diligence" while discharging their duties under the IT Act, and also observed such guidelines as the Central Government may prescribe.

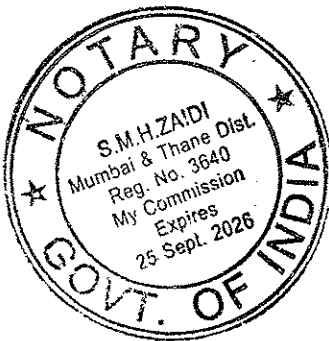
5. Section 79(3)(b) further prescribed that safe harbour would be lost if "*upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the*



intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.”

6. In **Shreya Singhal vs Union of India, (2015) 5 SCC 1**, the constitutional validity of Section 79(3)(b) was challenged before the Supreme Court. The Court upheld the validity of the section, *subject to the caveat that “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).”*

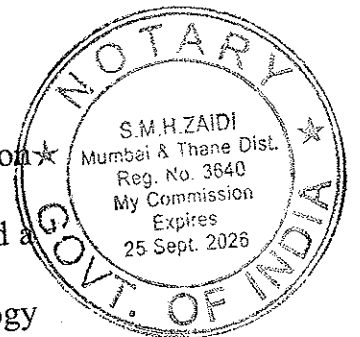
7. In the meantime, in 2011, the Government had exercised its powers under Section 87 of the IT Act, and promulgated the Information Technology Rules of 2011. Rule 3(4) of these rules required an intermediary to act within thirty-six hours of receiving “actual knowledge” that information it was hosting was in breach of the law. In **Shreya Singhal, supra**, the Supreme Court also read this down to mean knowledge communicated by way of a court order.



6

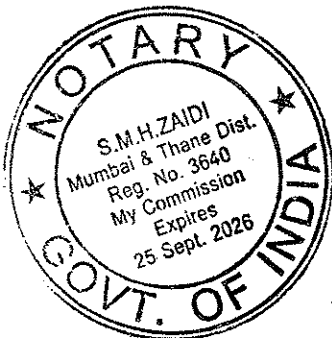
8. In 2021, the Government of India promulgated sweeping amendments to the IT Rules, the result of which was the IT Rules, 2021. In particular, these Rules imposed a significant set of obligations upon social media intermediaries, in order for them to maintain their safe harbour. The IT Rules, 2021 were challenged either in whole or in part by several persons, including those that were defined as intermediaries under the IT Rules of 2021, across High Courts. On 9th May 2022, the Hon'ble Supreme Court also issued notice on one such challenge, and passed an order staying the proceedings in High Courts "....involving challenge to Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and Ancillary Rules, (for short, "Cable T.V. Rules") which is the subject matter in these set of matters." [Emphasis added] A copy of the order of the Hon'ble Supreme Court dated 9th May 2022 is annexed as **Exhibit B.**

9. In October 2022, through a separate gazette notification dated 28th October 2022, the Central Government passed a fresh set of rules (called the Information Technology (Intermediary Guidelines and Digital Media Ethics Code)



Rules 2022, which substantively and significantly amended the IT Rules of 2021 [**“2022 Amendment”**]. In particular, Rule 3(1)(b)(v) was amended, such that the amended rule read, in relevant part: ... *shall make reasonable efforts to cause the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that, ... — (v) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature....*” A copy of the Gazette Notification dated 28th October 2022, notifying the 2022 amendment is annexed as **Exhibit C**.

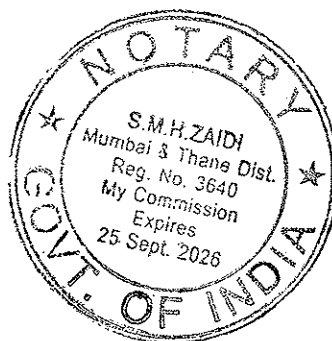
10. Rule 3(1)(b)(v), by virtue of the 2022 Amendment, obligated intermediaries to make reasonable efforts to “cause” users not to upload or share “misinformation” or “misleading information”. This was a significant departure from the IT Rules of 2021, which only required intermediaries to inform users of *their* obligation not to upload or share “patently false or misleading information.”



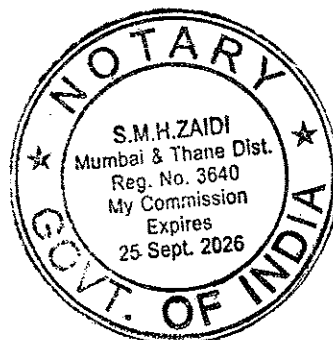
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11. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 ["2023 Amendment"] further substantively amend Rule 3(1)(b)(v). After the amendment, a further qualifier has been inserted to expand the obligation upon intermediaries of making reasonable efforts to cause users to not publish, display, upload, or share information that *"in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify ..."*. Notably, the 'business' of the Central Government has not been defined within the amendment or elsewhere. This is impugned Rule that the Petition seeks to assail.

12. In terms of the functioning of social media intermediaries, although the impugned Rule does not specify what counts as a "reasonable effort", the following actions present themselves as possibilities, arranged along a spectrum of relative greatest to least interference with online speech:



- a. The intermediary will simply take down content, if the government's fact-checking unit identifies it as "fake."
 - b. The intermediary will make the content unavailable to users accessing the internet from India.
 - c. The intermediary will take steps to suspend or deactivate the account of the user whose content has been identified by the central government as "fake or false or misleading".
 - d. The intermediary will "flag" the content as fake, false, or misleading.
 - e. The intermediary may choose to not act upon the marking of any item as fake, and the issue would be considered by the concerned authority under the Rules.
13. Without prejudice to pending challenges to the IT Rules, 2021, the Petitioner, challenges the Impugned Rules on the following grounds which are taken without prejudice to each other, and in the alternative to one another:



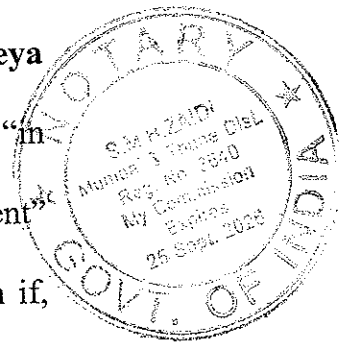
Ultra Vires

A. The impugned Rule is *ultra vires* Section 79 of the parent Act, as it authorises the deprivation of safe harbour for intermediaries on grounds that go beyond Article 19(2), and contrary to the judgment in **Shreya Singhal, supra**.

Article 19(1)(a)

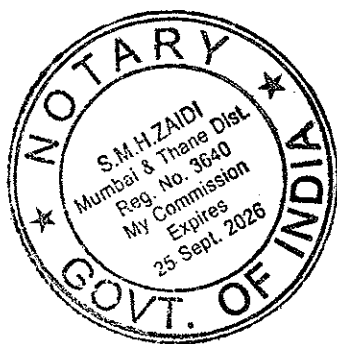
B. By directing social media intermediaries to effectively censor or otherwise modify content, the Impugned Rules infringe Article 19(1)(a) of the Constitution, and are not saved by Article 19(2).

C. Restrictions upon the right to freedom of speech and expression have been held to be unconstitutional on grounds of *over-breadth* or *vagueness* (**Shreya Singha vs Union of India, supra**). The phrase “in respect of any business of the Central Government” is unconstitutionally overbroad and vague. Even if, for the purposes of argument, it was to be assumed that the government has some manner of a right of reply with respect to certain kinds of speech, “in



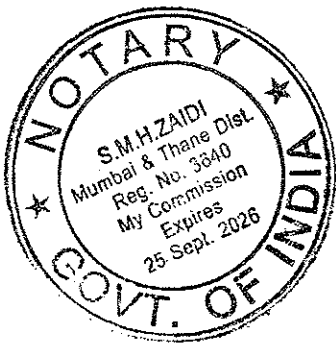
respect of any business” is a boundless and boundlessly manipulable term, which can encompass almost any aspect of modern life under a welfare State.

D. Broad and vaguely worded laws, further, have a chilling effect upon the freedom of speech and expression (**Shreya Singhal vs Union of India, supra**). The “chilling effect” refers to a scenario where imprecise speech-restricting laws leave a large grey area within which citizens are guessing where the line between legality and illegality lies. Citizens then self-censor even lawful speech, in an effort to stay well clear of the grey area. The result is overregulation and a stifling even of lawful speech. It is respectfully submitted that the imprecision of “in respect of any business”, along with the imprecision of “reasonable efforts”, shall undoubtedly create a chilling effect where intermediaries will resort to take down of *any* information flagged by the central government’s fact-checking unit, rather than risk losing safe harbour.



E. It is respectfully submitted that the Impugned Rules infringe the guarantee of freedom of speech by making the Central Government the *sole arbiter of truth* "in respect of any business" related to itself, and obliging private parties (social media intermediaries) to impose that version of the truth upon all users of the said intermediary. This provision, therefore, makes the government the sole gatekeeper of the marketplace of ideas, and constitutes a clear breach of Article 19(1)(a). To add to this, the Impugned Rules leave it to the subjective satisfaction of the central government, which is unanswerable to anyone, other than itself.

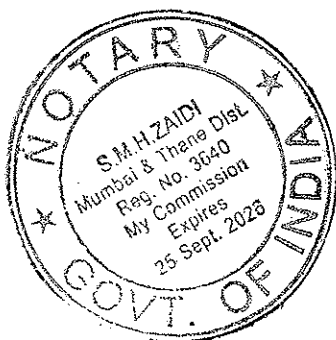
F. It is submitted that government-mandated censorship is specifically problematic from the perspective of Article 19(1)(a), as, by virtue of its very position, the government possesses by far the largest megaphone available in society. A government that is aggrieved by allegedly fake or misleading news about "its business" has access to every available infrastructure, with the largest possible reach, to set the record



straight. Consequently, the well-worn argument - that the remedy to speech is counter-speech - applies with even greater force to the government than it does to individuals.

G. Furthermore, the impugned Rule does not fall within any of the eight, specifically enumerated categories of Article 19(2), and is therefore *ex facie* void *ab initio* and unconstitutional. It is well settled that in order to restrict speech, no grounds outside Article 19(2) could be imported into its text.

H. Finally, even if the impugned Rule does fall within the scope of Article 19(2), it fails the test of proportionality. The third limb of the proportionality standard requires that the “least restrictive” alternative be chosen. There are a range of less restrictive alternatives – such, as for example, government-issued clarifications or corrections with respect to information the government believes is incorrect with “respect to its business” – that are less restrictive than obligating social media

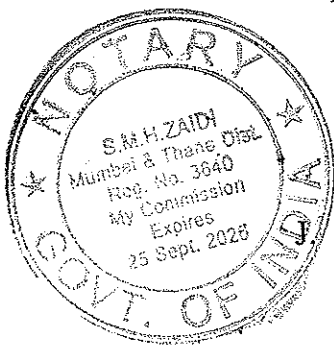


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intermediaries to require their users to take down material.

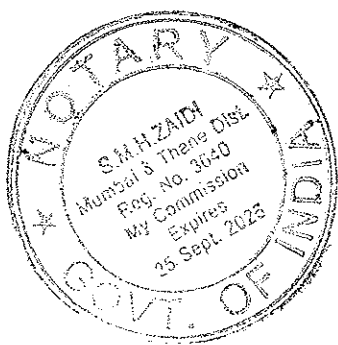
Article 19(1)(g)

I. The Impugned Rules are *ex-facie* not in the public interest. In fact, they are expressly designed to only serve the interests of the Central Government and its vast personnel. It is a purely self-serving attempt by the executive to shield the Central Government (i.e. the executive itself), from what it and it alone in its purely subjective opinion, perceives as false or fake or misleading news/comment. The Impugned Rules by no stretch of imagination can be said to be in the public interest. Further, the Impugned Rules constitute a patently unreasonable and excessive restriction on the right conferred by Article 19(1)(g) and are therefore not protected by Article 19(6).



The Impugned Rules violate the Petitioner's fundamental right under Article 19(1)(g). The Petitioner, as a political satirist, necessarily engages in commentary about actions of the Central

Government and its personnel. The Petitioner relies on the wide reach of the internet, through social media platforms, to share his work. The Petitioner's ability to engage in political satire would be unreasonably and excessively curtailed, if his content were to be subjected to a manifestly arbitrary, subjective "fact check" by a hand-picked unit designated by the Central Government. The Petitioner submits that satire, by its very nature, does not lend itself to such a fact checking exercise. It would entirely defeat the purpose of political satire, if it were to be scrutinised by the Central Government, and censored on the grounds of being "fake, false or misleading."



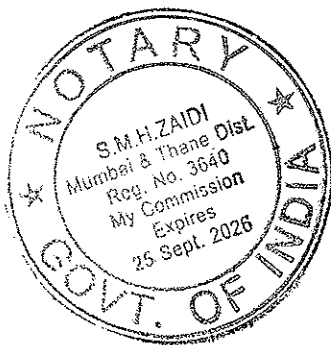
K. Political satirists would be constrained to self-censor, or restrict their engagement with political commentary for fear of action under the Impugned Rules. The Impugned Rules if applied to content created by political satirists/comedians, could potentially result in the suspension or deactivation of their social media accounts. Social media platforms

16

are the primary medium through which political satirists/comedians such as the Petitioner share their art. Should access to such media be restricted or policed by the Central Government (through the Impugned Rules), it would unreasonably restrict their constitutionally guaranteed right to practise their profession/trade.

Article 14

L. It is further submitted that the impugned Rule violates Article 14 of the Constitution in multiple respects. *First*, by having the Central Government act as the umpire for material that relates to its “business”, the impugned Rule is a classic example of making an entity (in this case, the government) a prosecutor and judge in its own cause. This is manifestly arbitrary, inimical to the rule of law, a violation of one of the most fundamental principles of natural justice and will naturally create a situation where material critical of the government will be particularly vulnerable to being flagged as “misleading” by the government’s own handpicked



and designated fact-checker. Embedded in the impugned Rule is the real likelihood of gross abuse, and the exercise of the impugned Rule in a manifestly arbitrary and unreasonable manner.

M. It is submitted that the impugned Rule is irrational and contrary to the rule of law, as it accords to one entity - the Central Government - a privilege accorded to no other (including state and local governments). *Only* the central government is granted the power to have private entities censor or modify speech in response to the verdict of its own fact-checker. Neither other governments, nor - importantly - individuals - are granted this right. It is respectfully submitted that this is the very definition of class legislation - with the central government constituting the privileged class - which Article 14 is bound to prohibit.



N. The Impugned Rule is also manifestly arbitrary and contrary to the basic principles of natural justice as it fails to afford the user any opportunity to be heard

18

before a decision as to the “fake, false or misleading” nature of the content is made. Further, the Impugned Rules are unreasonable, as there is no safeguard contemplated against the exercise of discretion by the Central Government, purely on its subjective satisfaction. The Impugned Rules do not provide for any mechanism by which the user has the right to have recourse for establishing the contrary or assailing such decision before a court.

O. The Impugned Rules directly encroach on the role conferred exclusively on the courts: to be the arbiter in disputes, including between the State and its citizens, and the determination of facts in respect of such disputes. The Impugned Rules constitute a usurpation by the central government of this role conferred exclusively on the courts under the Constitution.



14. The Respondent, being State under Article 12 of the Constitution of India, owes a duty to act legally, reasonably,

without arbitrariness and in accordance with law. The Impugned Rules, promulgated by the Respondents, for the reasons mentioned above, are perverse, arbitrary and unjust, and unconstitutional and require the urgent and immediate intervention by this Hon'ble Court under Article 226 of the Constitution.

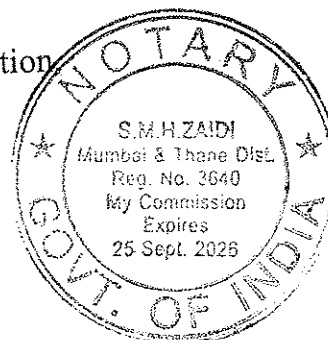
15. The Respondent had on 17th January 2023, for the purpose of public consultation, released a proposed draft of what has now been notified as the Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 (IT Rules 2023). Numerous stakeholders had raised serious, well-considered objections to the proposed draft (although the Petitioner had not himself preferred any objections). However, the Respondent proceeded to notify the IT Rules, 2023, with only minor (inconsequential) amendments. In the circumstances, it is clear that a demand for justice would be unavailing. Given the grave urgency, and the clear futility of any demand for justice being made to the Respondent, the present petition has been filed seeking the urgent intervention of this Hon'ble High Court.



20

16. For all the reasons aforesaid the Petitioner submits that the Impugned Rules are unconstitutional and void. They strike at the very rule of law and our democratic polity, as they constitute a direct assault by the Respondent on freedom of thought, speech and expression, referred to by the Supreme Court as one of the three pillars of our Constitution. They are also manifestly arbitrary and discriminatory and thus ultra vires Article 14 referred to by the Supreme Court as one of the other three pillars of our Constitution. Grave and irreparable harm, injury and prejudice will therefore be caused to the Petitioner and to the citizens of India, amongst others, unless interim and ad interim relief prayed for below are granted. It is submitted that no harm, injury or prejudice will be caused to the Respondent if interim and ad interim relief prayed for below are granted. The balance of convenience is overwhelmingly in favour of the Petitioner and against the respondent.

17. The Petitioner submits that he is a resident of Mumbai, which is within the territorial jurisdiction of this Hon'ble Court, and therefore, this Hon'ble Court has jurisdiction to entertain and try the present Petition.



18. The Petitioner has not filed any other Petition concerning the subject matter of this Petition either in this Hon'ble High Court or the Supreme Court of India or in any other Hon'ble High Court.

19. The Petitioner has no other adequate, alternative or equally efficacious remedy available to him, and the reliefs claimed herein, if granted, will be complete.

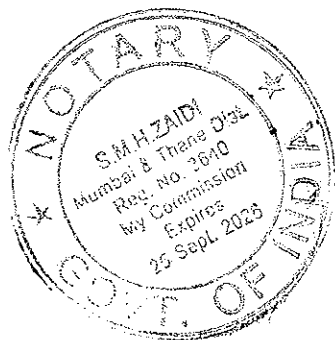
20. This Writ Petition is filed within time and there is no delay or laches in filing the petition, and the Petitioners have made out a strong case for the grant of relief as prayed for, including the grant of ad interim relief.

21. The Petitioner has paid the requisite court fees of Rs. _____/- on the present Petition.

22. The Petitioner submits that he is aware of the facts of the present case and has signed and verified the Petition.

23. The Petitioners have not received any caveat from the Respondents as on the date of filing this Petition.

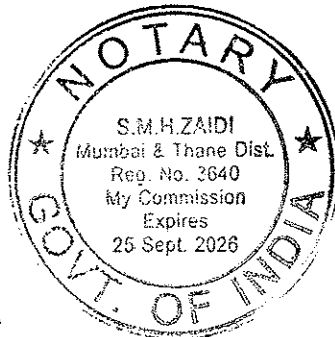
24. The Petitioner shall rely on documents, list whereof, is annexed hereto.



PRAYER

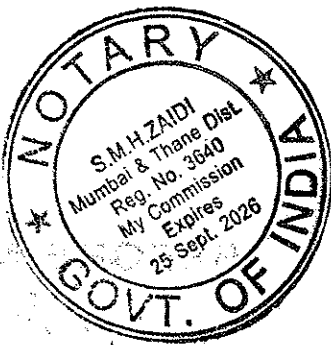
25. The Petitioner therefore prays:

- a. That this Hon'ble Court be pleased to declare that Rules 3(i)(II)(A) and (C) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 - that amend Rules 3(1)(a) and 3(1)(b)(v) of the IT Rules, 2021 - is unconstitutional, being *ultra vires* Article 14, Article 19(1) (a) and Article 21 and void *ab initio*;
- b. That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ, order or direction against the Respondent restraining the Respondent by itself, its servants, agents, officers and subordinates or any other persons acting by, through or under them from in any manner whatsoever acting upon or implementing or enforcing Rules 3(i)(II)(A) and (C) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 (that



amend Rule 3(1)(a) and 3(1)(b)(v) of the IT Rules, 2021);

- c. Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to pass an appropriate orders and injunctions restraining the Respondent by itself, its officers, agents, servants, representatives or any other persons acting by, through or under them from acting upon, pursuant to or in furtherance of the Impugned Rules, or in any manner whatsoever enforcing them;
- d. Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to pass an appropriate order and injunction restraining the Respondent by itself, and/or by its officers, agents, servants, representatives or assigns or any other persons acting by, through or under them from acting upon, pursuant to or in furtherance of the Impugned Rules.
- e. For ad-interim relief in terms of prayer clauses (c) and (d) above;
- f. For costs;



24

g. For any other order or relief that this Hon'ble Court may deem fit in the facts and circumstances of the case.

[Redacted]

Advocate for the Petitioner

[Redacted]

Petitioner

VERIFICATION

I, **Kunal Kamra**, Indian inhabitant, aged [Redacted] years, Residing at [Redacted]

[Redacted] do

hereby state and solemnly declare that what is stated in the petition in paragraph No. 1 to 12 is true to my knowledge and belief and whatever is stated in the remaining paragraphs is based on information and legal advice that I believe to be true.

Solemnly declared at Mumbai)

On this 10th day of April, 2023)

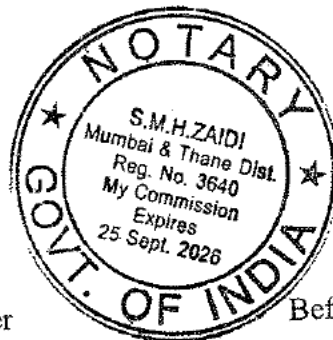
[Redacted] Petitioner

Identified by me

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Meenaz Kakalia

Advocate for the Petitioner

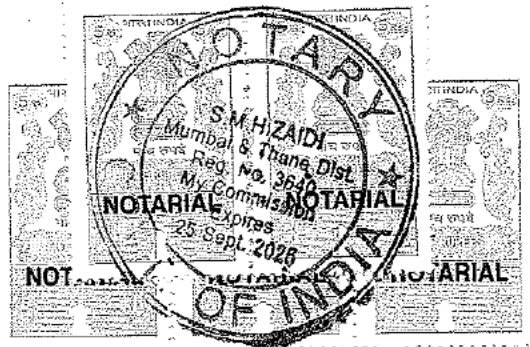


BEFORE ME

S.M.H. ZAIDI
S. M. H. ZAIDI
NOTARY 10/4/23

Before me, Government of India
Mumbai & Thane Dist.

10 APR 2023



NOTED & REGISTERED
Sr. No. 225... Page No. 76...
Book No. 20... 10 APR 2023