BEFORE THE HON'BLE THE HIGH COURT OF KERALA AT ERNAKULAM

Writ Petition (Civil) No. ………………………… of 2021

Praveen Arimbrathodiyil Petitioner

Vs.

Union of India & Another Respondents

SYNOPSIS

The present Writ Petition is being filed under Article 226 of the Constitution of India before this Hon'ble Court, *inter-alia* for quashing part II of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (hereinafter "Intermediaries Rules, 2021") and declaring them violative of Articles 14, 19 and 21 of the Constitution of India. That on 25th February 2021, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, hereinafter referred to as "Intermediary Rules" were notified prescribing guidelines for intermediaries, in exercise of the powers conferred by clause (zg) of sub- section (2) of section 87 read with sub-section (2) of section 79 of the Information Technology Act, 2000 (21 of 2000) and replacing The Information Technology (Intermediaries Guidelines) Rules, 2011. The Intermediaries Rules, 2021 are liable

to be set aside as they exceed the bounds of delegated legislation, place unreasonable restrictions on the exercise of freedom of speech and expression and on the freedom to carry out an online business, as guaranteed by the Constitution of India. The Impugned Rules are also liable to be struck down because of their failure to conform to the statute under which they are made and for exceeding the limits of authority conferred by the enabling Act, the Information Technology Act, 2000 (hereinafter "The Act"). It is humbly submitted that the Intermediaries Rules, 2021 are liable to be struck down as they are vague that it cannot be predicted with certainty as to what is prohibited and what is permitted. They delegate essential executive function to private parties forcing them to censor and restrict free speech and expression of citizens or be denied the "safe harbor" protection as guaranteed by the Information Technology Act, 2000. The Intermediary Rules, 2021 also unfairly impact small intermediaries by placing a heavy compliance burden on them which they might not be able to fulfil.

List of Dates

Dates:	Developments:
17.10.2000	The Information Technology Act of 2000 (hereinafter "IT Act") came into force *vide* Notification No. G.S.R.788(E) issued by the Ministry of Information Technology, Government of India. In its original form, the IT Act provided minimal protection to

	intermediaries by providing a narrow definition insofar as to include only those entities who on behalf of another person receives, stores or transmits any electronic message or provides any service with respect to that message.
08.09.2005	FOSS Community of India was formed (currently known as Free Software Community of India, FSCI)
27.10.2009	The Information Technology (Amendment) Act of 2008 (hereinafter "2008 Act") came into force. The 2008 Act, which amended Section 79 of the IT Act to include safe-harbour protections for intermediaries from "all unlawful acts" and established a due diligence requirement for availing the safe harbour protection.
11.04.2011	The Information Technology (Intermediary Guideline) Rules of 2011 (hereinafter "2011 Rules") were notified by the Ministry of Information Technology, Government of India *vide* Notification No. G.S.R.314(E) and came into force on the same day. The 2011 Rules laid down guidelines for intermediaries to avail safe harbour protections provided under Section 79 of the Act, including, prescribing due diligence standards.
24.03.2015	The Supreme Court delivered the landmark judgment in *Shreya Singhal v. Union of India (2015)5 SCC 1* wherein the Apex Court, as regards intermediary liability, upheld the validity of Section 79, subject to "*Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable*

	to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material ...".
13.03.2017	FOSS Community of India was renamed as 'Free Software Community of India (FSCI)' as it is presently known.
29.05.2017	On 29.05.2017 the Internet Association released a new analysis which indicated that reducing intermediary liability safe harbor protections would cost the United States 4.25 million jobs and reduce the GDP by nearly half a trillion dollars over the next 10 years. The report was conducted by NERA Economic Consulting and represents a measure of the value safe harbor protections hold. Internet intermediaries are the driving force of the (digital) economy and impeding their business structure would have a detrimental effect on jobs and growth.
26.07.2018	The Minister for Electronics and Information Technology, Shri Ravi Shankar Prasad made a statement in parliament in relation to the rising incidents of violence and lynching in the country due to the misuse of social media platforms. He stated that if social media platforms "*do not take adequate and prompt action, then the law of abetment also applies to them*". He further stated that some provisions of the IT Act need to be "revised and

	reinforced so that they can respond to the emerging challenges."
24.12.2018	Respondent No. 2 published the draft Information Technology [Intermediaries Guidelines (Amendment) Rules, 2018. (hereinafter "2018 Draft Rules") with a view to curb the misuse of social media and the spread of fake news. Some key features of the 2018 Draft Rules include, introduction of a new category of information i.e., content threatening "*public health and safety*" to the existing categories of content prohibited from being hosted on the platform; requiring intermediaries to render assistance to any governmental agency within 72 hours; and mandating them to use tech-based automated tools for identifying and removing public access to unlawful information, among others.
October, 2019	Respondent No. 2 submitted before the Hon'ble Supreme Court that it would notify the Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 by January 15, 2020.
09.01.2020	In an open letter addressed to the Hon'ble Minister for Electronics and Information Technology, 27 security and cryptography experts warned the Respondent No. 2 against making the changes which were proposed in the Draft Rules as it could weaken security and limit the use of strong encryption on the internet.
01.05.2021	The Free Software Community of India (FSCI), which is a collective of Free Software users, advocates and developers working tirelessly to maintain communication and collaboration infrastructure for

	everyone that respects their freedom and privacy, started the "FSCI Jitsi Meet Crowdfunding campaign". FSCI runs Jitsi which is a secure, fully-featured video conferencing solution that can be used over mobile devices and desktops. The organization runs a Jitsi instance at meet.fsci.in where it intends to provide the users with privacy and does not hand over user data to anyone. The service is set up and maintained by a group of volunteers who work with the noble intention of spreading the message of software freedom to the world at large and ensuring protection of privacy of users. The “FSCI Jitsi Meet Crowdfunding Campaign” seeks to raise a small sum of Rs. 62,500 which covers the cost of running Jisti on a server for 24 months.
25.02.2021	Respondent No. 2 notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021 (hereinafter “Intermediary Rules 2021”) *vide* Notification No. G.S.R.139(E). Some important features of the 2021 Rules include: segregation of social media intermediaries into the two categories of “social media intermediaries” and “significant social media intermediaries”; requirement to prominently display privacy policy and usage of personal data by the aforementioned Intermediaries; requirement to remove national security sensitive information through exercising due diligence, among others. The

	Intermediary Rules 2021 covered a wide range of issues which were not a part of the Draft Rules, 2018.

Main grounds urged:

1. BECAUSE any unreasonable restriction on users in expressing their views online including restrictions which may have privacy implications, will be a violation of their right to freedom of speech and expression, and right to privacy.

2. BECAUSE Rule 4 read with Rule 6 of the Intermediary Rules,2021 violates the fundamental right of free speech and expression guaranteed to citizens by Article 19(1)(a) of the Constitution of India and right to privacy as a fundamental right under Article 21 of the Constitution of India and are thus void and unconstitutional in view of Article 13 of the Constitution of India.

3. BECAUSE the terms used in Rule 3(1) of The Intermediary Rules, 2021 are vague and ambiguous.

4. BECAUSE The Intermediary Rules, 2021 violate the right to encryption of citizens which as a subset of right to privacy, is protected under Article 21 of the Constitution.

5. BECAUSE the Intermediary Rules, 2021 draw no intelligible differentia between the not-for-profit FOSS communities and for profit proprietary companies.

6. BECAUSE the Intermediary Rules, 2021 force a huge compliance burden on the Petitioner thus impacting its right to free trade and profession under Article 19(1)(g) of the Constitution.

7. BECAUSE there was a lack of consultation which contravenes the Government of India's Pre-Legislative Consultation Policy.

8. BECAUSE the Intermediary Rules, 2021 are in contravention of Hon'ble Supreme Court's judgment in the *Shreya Singhal* judgment which had recognised the concept of "chilling effect on free speech" due to broad framing of a law.

9. BECAUSE the Intermediary Rules, 2021 prescribe technology based solutions such as automated tools which would bring in inherent societal biases and prejudices leading to more problems than it intends to solve.

10. BECAUSE The Intermediary Rules, 2021 are a delegated legislation and are ultra vires as they are inconsistent with the parent Act.

11. BECAUSE The Intermediary Rules, 2021 aims to introduce traceability and break end to end encryption which violates the fundamental Right to Privacy.

12. Because the Intermediary Rules, 2021 delegates an

adjudicatory role to the Intermediaries which the Petitioner is not equipped to handle.

Acts/rules referred:

Information technology Act, 2000

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021

Constitution of India

Judgments relied:

1. Shreya Singhal v. UOI (2015) 5 SCC 1
2. Kartar Singh v. State of Punjab, ((1994) 3 SCC 569)
3. In Delhi Laws Act, 1912 re , AIR 1951 SC 332
4. Shri Sitaram Sugar Co. Ltd. vs Union of India ((1990) 3 SCC 223)
5. Indian Express Newspapers vs. Union of India ((1985) 1 SCC 641)
6. Vasantlal Maganbhai vs. State of Bombay AIR 1961 SC 4
7. Bennett Coleman & Co. Vs. Union of India (UOI), AIR1973 SC 106, (1972) 2 SCC 788
8. Justice K.S. Puttaswamy v. Union of India) (2017) 10 SCC 1

Dated this the 4th day of January, 2021

Counsel for the petitioner

BEFORE THE HON'BLE THE HIGH COURT OF KERALA AT ERNAKULAM

(Special Original Jurisdiction)

Writ Petition (Civil) No. ………………………… of 2021

PETITIONER:

Praveen Arimbrathodiyil,

S/O Prabhakaran A, Vattamannapuram PO

RESPONDENTS:

1. Union of India, Represented by the Secretary,
Ministry of Electronics and Technology
Electronics Niketan,
6, CGO Complex,
Lodhi Road, New Delhi- 110003
2. Ministry of Information and Broadcasting
Represented by the Secretary,
Room No. 655, A Wing,
Shashtri Bhawan,
New Delhi- 110001.

Address for service of notice and other documents on the petitioner is that of his Counsel Prasanth.S, Varsha Bhaskar and Reesha.N.R, **M/s SUGATHAN & ASSOCIATES**, Advocates,

Address for service of notice etc. on the respondents is as shown above.

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

The above named petitioner respectfully submit as follows:-

1. The Petitioner is a free and open source software developer and is a part of the community that runs various services that act as replacements/alternatives to proprietary applications like Facebook, Zoom and Whatsapp. The Petitioner is aggrieved by certain provisions of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 notified by the Respondent no. 1 and 2 under Section 87(1) and Section 87(2)(z) and 87(2)(zg) read with sections 69A(2) and Section 79(2) of the Information Technology Act, 2000.
2. It is submitted that much of the world's most important and most commercially significant software is distributed under copyright licensing terms that give recipients freedom to copy, modify and redistribute the software ("Free and

Open Source Software”). One could not send or receive e-mail, surf the World Wide Web, perform a Google search or take advantage of many of the other benefits offered by the Internet without free and open source software. Indeed, this petition was written entirely with free software word processors, namely Libre Office and LATEX, each of which are not just competitive with or superior to non-free software programs, but which also provide their users with the freedom to improve the program to fit their needs and reflect their desires. This means that the users have the freedom to run, copy, distribute, study, change and improve the software. Most of the internet is powered by Free and Open Source Software (FOSS). This includes the Apache Web Server, which is the most common web server, databases like Postgres and MariaDB and common applications like the Firefox browser.

3. It is submitted that the Petitioner and other volunteers work tirelessly and selflessly to maintain domains like poddery.com, fsci.in, codema.in and diasp.in. They are part of a collective called the Free Software Community of India(FSCI). This is a community of developers who are driven by the philosophy of FOSS. The Community believes

that people should be free to study, share and improve all the software they use and that this right is an essential freedom for users of computing. Free and Open source is a development method for software that harnesses the power of distributed peer review and development to build better software. The resulting software is globally available, and provides more user flexibility and reliability, at a cost which is substantially lower than traditional, centralized software development methods. The decision of this Court in the present case will have a significant effect on the rights and activities of the developers and users who make up the Free and Open Source movement as it poses an undue burden of compliance on volunteer communities. Such compliance burdens the community with huge financial costs and the community does not have the financial wherewithal to comply with the impugned Rules. The services provided by this community on various domains include:

a. poddery.com offers three services.

i. Diaspora - FOSS replacement/alternative for Twitter/Facebook style social media.

ii. XMPP - FOSS replacement/alternative for WhatsApp/Telegram style instant messaging without being tied to a phone number.

iii. Matrix - Instant messaging service with more features than XMPP.

b. lists.fsci.in - mailing list (email based groups - Free Software replacement for Google Groups/Yahoo Groups).

c. codema.in - Loomio service (discussion forum with decision-making/voting/survey features built in)

d. videos.fsci.in - peertube video sharing service - Free Software alternative for Youtube style social media.

e. meet.fsci.in - Jitsi video conferencing service - Free Software alternative for Zoom/Google Meet

f. diasp.in also has Diaspora, Matrix and xmpp. It is managed by the community groups called Hamara Linux and Indian Pirates. The Petitioner is part of both communities.

4. The community takes donations from users to cover costs of hosting. They hire servers from providers like Scaleway.com or Hetzner.de (located in Europe). All activities relating to code development, setting up and maintenance of the services are carried out by unpaid volunteers in the spirit of FOSS development. FOSS

technologies provide a new business model which distills collective and global intelligence. FOSS has become the single most influential body of software around the world. In more than thirty years of its existence, FOSS has taken the world by storm and has driven the majority of the world's technological advancement in computer programming. FOSS lives under the hood of it all—from desktops and servers, to laptops, netbooks, smartphones, and "the cloud." Linux, distributed under the GNU General Public License of the Free Software Foundation, is the operating system kernel in devices such as mobile phones, networking equipment, medical devices, and other consumer electronics. Android, which relies on Linux and includes the Java programming language and other software under the Apache Software Foundation's ALv2 license, currently has far and away the largest market share in smartphone operating system software. There is no major or minor computer hardware architecture, no class of consumer electronics, no form of network hardware connecting humanity's telephone calls, video streams, or anything else transpiring in the network of networks we call "the Internet" that doesn't make use of FOSS. The most important innovations in human society

during this generation, the World Wide Web and Wikipedia, were based on and are now dominated by free software and the idea of free knowledge sharing it represents.

5. It is submitted that the above software services managed by the Petitioner and other volunteers like him provide a platform to users to post content and thus fall within the definition of an "intermediary" under Section 2(1)(i) of the Information Technology Act, 2000.

<u>What are intermediaries and what is the safe harbour protection?</u>

6. That the Intermediaries are entities that provide services enabling the delivery of online content to the end user. This includes internet service providers, search engines, DNS providers, social media platforms, cyber cafes. The Information Technology Act, 2000 (hereinafter "IT Act") defines an intermediary as:

"*intermediary*" *with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes Telecom service providers, network service providers, internet service*

providers, web-hosting providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafe.”

7. Intermediaries like the ISPs, social media websites, search engines play an important role in the dissemination of information but do not have any editorial control over the content which is being exchanged upon their platform. They act as a mere conduit for facilitating the exchange of information. Therefore, they are given protection from any legal liability arising out of third party content in the form of a safe harbour provision. The safe harbour provision in India can be found under S. 79 of the IT Act. Section 79 of the Information Technology Act, 2000 is reproduced below:

Section 79: Exemption from liability of intermediary in certain cases:

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not-

i.1 (i) initiate the transmission,

i.2 (ii) select the receiver of the transmission, and

i.3 (iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) 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.

Explanation. -For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.]

8. That the safe harbour provision in India is conditional in nature i.e. intermediaries can only avail benefits of this provision when they comply with the conditions mentioned in the aforementioned section with the due diligence requirements laid down in the guidelines notified under S. 79.

9. Section 79 as it stands now was incorporated as per an amendment to the Information Technology Act, 2000 as per the provisions of the Information Technology(Amendment) Act, 2008.

10. The Information Technology (Intermediary

Guideline) Rules of 2011 (hereinafter "2011 Rules") were notified by the Ministry of Information Technology, Government of India *vide* Notification No. G.S.R.314(E) and came into force on the same day. The 2011 Rules laid down guidelines for intermediaries to avail safe harbour protections provided under Section 79 of the Act, including, prescribing due diligence standards.

11. The Supreme Court considered the issue of intermediary liability and the validity of the 2011 Rules in the landmark judgment in *Shreya Singhal v. Union of India (2015)5 SCC 1*. The Apex Court, as regards intermediary liability, upheld the validity of Section 79, subject to "*Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material ...*". Thus, an intermediary is mandated to take down content only on the basis of a court order or on being notified by the appropriate Government agency.

12. It is submitted that Respondent 2 published the

draft Information Technology [Intermediaries Guidelines (Amendment) Rules, 2018. (hereinafter "2018 Draft Rules") with a view to curb the misuse of social media and the spread of fake news. Some key features of the 2018 Draft Rules include, introduction of a new category of information i.e., content threatening "public health and safety" to the existing categories of content prohibited from being hosted on the platform; requiring intermediaries to render assistance to any governmental agency within 72 hours; and mandating them to use tech-based automated tools for identifying and removing public access to unlawful information, among others. True copy of the draft Information Technology [Intermediaries Guidelines (Amendment) Rules, 2018 dated 24-12-2018 is produced and marked as **Exhibit P1**.

13. It is submitted that various organisations and individuals submitted feedback on Ext.P1 draft rules. In an open letter addressed to the Hon'ble Minister for Electronics and Information Technology, 27 security and cryptography experts warned the Respondent-2 against making the changes which were proposed in the Draft

Rules as it could weaken security and limit the use of strong encryption on the internet. True copy of the open letter dated 09-01-2020 addressed to the Hon'ble Minister for Electronics and Information Technology is produced and marked as **Exhibit P2**.

14. It is submitted that the proposal of traceability of encrypted communication was considered in an Experts' Workshop series on Encryption in India organised by the Internet Society. Experts have highlighted the problem with traceability proposal like vulnerability of digital signatures and cross-platform functionality, The issue of cross platform functionality is a major issue for federated systems like the services offered by the petitioner and group of volunteers. A true copy of the report on Experts' Workshop series on Encryption in India organised by the Internet Society dated November 2020 is produced and marked as **Exhibit P3**.

15. It is submitted that Respondent-2 notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021 (hereinafter "Intermediary Rules 2021") vide Notification No. G.S.R.139(E) dated 25-02-2021. Some important

features of the 2021 Rules include: segregation of social media intermediaries into the two categories of “social media intermediaries” and “significant social media intermediaries”; requirement to prominently display privacy policy and usage of personal data by the aforementioned Intermediaries; requirement to trace the first originator of information for significant social media intermediaries among others. The rules also brought in a regulatory framework for publishers of online curated content and publishers of news and current affairs content. The Intermediary Rules 2021 covered a wide range of issues which were not a part of the Draft Rules, 2018. The Intermediary Rules 2021 supersede the decade old Intermediary Guidelines 2011. True copy of the Information Technology (Intermediary Guideline and Digital Media Ethics Code) Rules, 2021 is produced and marked as **Exhibit P4**.

What is Free and Open Source Software (FOSS)?

16. Free and Open Source Software (*hereinafter,* “FOSS”) refers to software, whose source code is publicly shared and licensed in such a manner that it

can be freely used, modified and shared. It offers several crucial benefits over proprietary or closed-source software such as improved security, stability, privacy due to community oversight, and greater control over the technologies used by people. Free in FOSS stands for freedom. As FOSS is underpinned by the sharing economy and collaborative innovation, it makes for software that works for the benefit of the larger society rather than profit-driven interests of corporations. Services like Linux, Ubuntu, Mastodon, Signal messaging app are examples of FOSS.

17. A program or service is considered to be free software if it offers a user the four essential freedoms:

a. The freedom to run the program as the user wishes (freedom 0)

b. The freedom to study how the program works (freedom 1)

c. The freedom to redistribute copies (freedom 2)

d. The freedom to distribute copies of modified version to others (freedom 3)

(Source: Free Software Foundation)

FOSS has become the single most influential body of software around the world. In the more than thirty years of its existence, FOSS has taken the world by storm and has driven the majority of the world’s technological advancement in computer programming. This explosion of technical innovation has occurred for two primary reasons. First, the principal rule of free software, the sharing of computer program source code, has allowed young people around the world to learn and to improve their skills by studying and enhancing real software doing real jobs in their own and others’ daily lives. Second, by creating a “protected commons” for the free exchange of ideas embodied in program source code without rent-seeking by parties holding state-granted monopolies, FOSS has facilitated cooperative interactions among competing firms. Google, Facebook, Twitter, IBM, Microsoft, Oracle and other information services used by billions of individuals worldwide could not exist without FOSS and the collaboration it has spawned.

How is FOSS different from Proprietary Software?

18. In proprietary software, the source code is not available in the public domain and only the company which has created the source code can modify it. The software is tested only by the organisation or individuals who have developed it. Therefore, it is not available for public scrutiny. In order to use this software, the company provides licenses with some restrictions like number of installations of this software on computer, sharing the software illegally, time-period of software's validity.

Examples of such software would include Microsoft Windows, MacOS, Adobe Photoshop, Microsoft Office.

19. **Centralised and Decentralised (federated) services :** That in centralised systems, the client/server architecture deployed has one or more client nodes directly connected to a central server. For example: Facebook, WhatsApp.

In decentralised systems, there is no central server. Instead, there are several nodes making their own

decisions. For example: Mastodon, Matrix (available on PlayStore as Element), Diaspora. In simple terms, it means that each of these services work on interoperability and have multiple servers hosted by multiple individuals, volunteers and organisations. These servers can be crowdfunded too like Poddery.com.

Decentralised or federated services can be understood simply by using the analogy of emails. Federated Networks are those that allow communications across different clients and platforms similar to the way email allows people to communicate regardless of which e-mail client they choose to use. Just like various email services such as Gmail, Yahoo, Outlook, Hotmail interact with each other but are offered by different services, federated services work in a similar manner. They are offered by various individuals operating various servers wherein users of different servers can interact with each other.

Many federated Instant Messaging networks communicate using an open standard, such as

Jabber/XMPP. Networks using XMPP provide open communications with other XMPP-based networks. Some federated networks work on the basis of interoperability where the software from different providers share data between the different platforms.

Importance of FOSS in tech-ecosystem

20. FOSS is the building block of several proprietary software used by tech giants. For instance, WhatsApp which is owned by Facebook Inc. is based on a variant of the open-source cryptographic protocol known as the Signal Protocol. Similarly, Amazon Web Services which is a cloud storage service, allegedly has numerous open-source projects which it did not create. These open-source services hosted by Amazon Web Services bring in billions worth of revenue to Amazon every year.

FOSS allows innovation and modification in pre-existing source codes. FOSS provides an alternative to tech giants like WhatsApp which impose their terms of services and privacy policies on users. Such “federated” services reduce centralised power and increase autonomy and self-development. Services are created

and delivered not where the hardware is, but where the smart, creative and communicative people are. India's immense technological talent uses FOSS to build world class software tools that can offer alternatives to large technology giants that strip the human race of its privacy.

Signal has emerged as a privacy-friendly alternative to WhatsApp and is a member of FOSS community, run by a not for profit organisation with the same name.

<u>What are Social Media Intermediaries?</u>

21. That the Rule 2(1)(w) of the Rules 2021 defines a social media intermediary as:

"Social media intermediary means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services;"

<u>What are Significant Social Media Intermediaries?</u>

22. That the 2021 Rules have introduced a new class of intermediaries known as the Significant Social Media

Intermediaries. As per the definition under S. 2(1)(v) of the Rules 2021, a significant social media intermediary means:

“a social media intermediary having a number of registered users in India above such threshold as notified by the Central Government.”

The Respondent-2 subsequently notified a threshold of more than 50 lakh users for a social media intermediary to be classified as a significant social media intermediary. A true copy of the notification No. S.O.942(E) dated 25-02-2021 issued by the 1st Respondent is produced and marked as **Exhibit P5.**

1. The Petitioner is a free software developer who provides along with other volunteers privacy respecting, federated social media services to users as an alternative to centralised systems. Petitioner is aggrieved by certain provisions of the Intermediary Rules, 2021 as he will no longer be able to operate these services as the compliance burden of these Rules cannot be borne by the Petitioner. The Petitioner has no other effective and alternative remedy for the redressal of his grievances than to approach this Hon’ble Court and seek to

invoke its extra-ordinary jurisdiction under Article 226 of the Constitution of India on the following among other:-

GROUNDS

A. BECAUSE Article 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by Part III of the Constitution of India

B. BECAUSE Article 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by Part III of the Constitution of India and declares that any law made in contravention of that clause shall, to the extent of such contravention, be void.

C. BECAUSE the Hon'ble Supreme Court in a catena of decisions has laid down that in interpreting a constitutional provision, the court should keep in mind the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation. The services offered by the FOSS community and its volunteers like the Petitioner provide citizens to voice their opinions in a private secure manner knowing they are not watched. These services offer

an alternative to users who do not want to use proprietary applications like Facebook and Twitter. As such the impact/ repercussion of the impugned Rules caused to the Petitioners as intermediaries is not academic or theoretical but palpable and threatening.

D. BECAUSE any unreasonable restriction on users in expressing their views online including restrictions which may have privacy implications, will be a violation of their right to freedom of speech and expression, and right to privacy.

E. BECAUSE Rule 4 read with Rule 6 of the Intermediary violates the fundamental right to free speech and expression guaranteed to citizens by Article 19(1)(a) of the Constitution of India and right to privacy as a fundamental right under Article 21 of the Constitution of India and are thus void and unconstitutional in view of Article 13 of the Constitution of India.

Ambiguous terms

F. That in the sub rule 1 (b) (2) of rule 3 it has been stated that

"The rules and regulations, privacy policy or user agreement

of the intermediary shall inform the user of its computer resource not to host, display, upload, modify, publish, transmit, store, updateor share any information that,— (i)belongs to another person and to which the user does not have any right;(ii)is defamatory, obscene, pornographic, paedophilic, invasive of another's privacy, including bodily privacy, insulting or harassing on the basis of gender, libellous, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force."

G. It is submitted that the terms 'defamatory', 'obscene' 'invasive of another's privacy' , 'racially or ethnically objectionable', 'harmful to child' lack encompassing definitions leaving them open to ambiguity. The term 'harmful to child' is a broad phrase and could end up in censoring legitimate content. In *Shreya Singhal v. UOI* (2015) 5 SCC 1, it was argued that the vague and ambiguous phrases used in Section 66A were ambiguous in nature. Similar phrases have been used in Rule 3 of the Intermediary Rules, 2021 without any guidance provided in the parent Act or in the Rules. The vagueness of these terms will lead to self censorship thus

violating the constitutionally guaranteed right to free speech and expression under Article 19. The apex court while declaring Section 66A of the Information Technology Act, 2000 unconstitutional had observed:

“Information that may be grossly offensive or which cause annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary,scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by“liberal views” – such as the emancipation of women or the abolition of the caste system or whether certain members of anon proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things

may be grossly offensive, annoying, inconvenient,insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within itsnet. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total. "

The court in *Shreya Singhal* (2015) had further held:

"It has been held by us that Section 66A purports to authorize the imposition of restrictions on the fundamental rights contained in Article 19(1)(a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. We have held following K.A.Abbas' case (Supra) that the possibility of Section 66A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void.

The terms 'invasive of another's privacy', racially or 'ethnically objectionable', 'insulting' under subrule 1(b) of

Rule 2 suffer from the same vice of being vague.

It was further held in **Kartar Singh v. State of Punjab, ((1994) 3 SCC 569) at para 130-131**, *"It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen andalso judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone... than if the boundaries of the forbidden areas were clearly marked.131.Let us examine clause (i) of Section 2(1)(a).This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned counsel, even an innocent person who ingenious and undefiled communicates or associates without any*

knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or disruptionists, can be arrested and prosecuted by abusing or misusing ormisapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innoxious innocent person may also be convicted."

Breaks End-to-End Encryption

H. BECAUSE Rule 3(2) of the Intermediary Rules, 2021, by mandating intermediaries to take all practicable and reasonable measures to remove or disable access to a certain kind of imagery from its platform, consequently mandates that "intermediaries" should also moderate content that forms part of private communication of its users, which in a lot of instances, is protected with end-to-end encrypted or other varieties of encryption.

I. BECAUSE Rule 3(2) disregards the fact that Encryption and anonymity are useful for development and sharing of opinions which are exchanged online. Encryption ensures security in a manner that individuals are able to verify that their communications are received only by their intended

recipients, without interference or alteration and the communications they receive are free from any sort of intrusion. This becomes particularly useful for journalists, researchers, academicians and citizens or dissidents who are raising their voice against their government.

J. BECAUSE Rule 4(2) violates the right to encryption of citizens which as a subset of right to privacy, is protected under Article 21 of the Constitution, read with the principles laid down in the *Puttaswamy* judgment.

K. BECAUSE the Respondents have made an attempt to burden intermediaries with compliances under Rule 4(2) which impacts the right to privacy.

L. BECAUSE encryption as a tool further enhances the quality of products and services which are offered by the intermediaries. Rule 4(2) of the Intermediary Rules, 2021 puts unreasonable restrictions on the ability of intermediaries to strengthen the security of communications, thereby violating the right to freedom of trade and profession under Article 19(1)(g) of the Constitution of India.

M. BECAUSE the Intermediary Rules, 2021 being a piece of delegated legislation, seek to illegally and unconstitutionally fill the regulatory vacuum on the regulation of Encryption in India.

N. BECAUSE an intermediary cannot fulfill its obligations under Rule 4(2) of the Intermediary Rules, 2021, without snooping on the private communication of its users, which is a flagrant violation of the right to privacy of its users, protected under Article 21 of the Constitution of India.

Intelligible Differentia: Need of Reasonable Classification Between FOSS Community and proprietary software based intermediaries like Facebook, WhatsApp, LinkedIn

O. BECAUSE contrary to for-business or for-profit companies, the FOSS community across the world comprises FOSS enthusiasts, technologists contributing in their individual capacities, small not for profit organisations such as Signal, Tor, OONI project. The community offers its services via crowd-funding by public and individuals interested in

safeguarding their privacy.

P. FOSS services which provide an alternative to proprietary social media applications give users a secure and private means of communication. They do not retain a large amount of metadata or surveil upon their users unlike most of the for-profit companies offering similar services. It is pertinent to note that the FOSS community does not make profit out of the data gathered by its users unlike proprietary services such as Facebook or Google.

Q. The Intermediary Rules, 2021 fail to take into consideration the fact that several of these services have been built on top of protocols and are decentralised in nature. For instance, Matrix which is an open standard and communication protocol for real-time communication has multiple service providers operating various servers. The Petitioner operates the crowd-funded Poddery.com server on Matrix. Another feature of these services is that they are located at various geographical locations across the globe and a few of the server operators/ owners

are based in India like the Petitioner. These servers interact with each other to ensure interoperability. This means that the FOSS services are different from for-profit proprietary products on the following counts:

a. They largely operate on a volunteer basis unlike the employees of large corporations, they don't have full time employees.

b. Most of these services do not make profit from these services including the Petitioner’s whereas large proprietary corporations make profit out of the services offered by them;

c. They are mostly de-centralised in nature;

d. That FOSS community volunteers do not mine data for revenue or show targeted advertisements to generate revenue unlike large corporations;

R. That a significant number of these services, particularly all the services of the community which the Petitioner is a part of, are decentralised in nature. Therefore, they have servers across the world and have entirely different technical architecture from the centralised services like Facebook, WhatsApp,

Instagram.

S. The Petitioner humbly submits before the Court that owing to these significant differences between the services offered by FOSS community and the large corporations, they fall under separate classes of intermediaries despite performing similar functions.

T. Rule 6 of the Rules, 2021 arbitrarily empowers the executive to issue an order and require any intermediary to comply with any or all the provisions of Rule 4. Unlike Rule 4, there is no specific timeline to comply with Rule 6(1) read with Rule 4 of the Rules, 2021 meaning that the executive can pass an order under Rule 6 and expect an intermediary to comply with the provisions of Rule 4 immediately.

U. Rule 4(1)(a), (b) and (c) make it mandatory for a significant social media intermediary to appoint a chief compliance officer, a nodal contact person and a resident grievance officer in India. It is required that all these officers would be residents of India. Petitioner is an individual who volunteers with FSCI and hosts certain servers on Matrix, Diaspora and

Mastodon. The Petitioner, if required to comply with Rule 6(1)/ Rule 4 would find it financially and resource-wise unviable to continue operations of its servers which has a user base of around 5200 users.

V. Rule 4(4) makes it de-facto mandatory for significant social media intermediaries to deploy automated tools for proactive identification of any act or simulation of explicit or implicit rape or child sexual abuse or conduct, by the use of phrase *“shall endeavour”*.

That firstly, the Rule 4(4) is non-exhuastive in nature as it is limited to only rape and child sexual abuse material and does not include any other sexually explicit material such as pornographic content which would amount to offences of similar nature as listed under the Indian Penal Code or other extant laws.

This has a potential of leading to confusion on takedown by automated filters by the significant social media intermediaries or intermediaries notified under Rule 6 who would have to adhere to Rule 4.

In addition to this, there are technological barriers to the correct implementation of automated filtering even by large corporations like Facebook. Therefore, the volunteers like the Petitioner running individual servers with limited resources would find it particularly challenging to implement these measures.

W. The first proviso to Rule 4(4) mandates that the measures taken by the intermediary have to be proportionate in nature having regard to the interests of free speech and expression and privacy of users. It disregards the fact that automated filters are not yet sophisticated enough to differentiate between what would be child sexual abuse material and journalistic reporting. For instance, the automated filters of Facebook once took down the iconic Napam girl picture clicked during the Vietnam war. The picture showed a naked girl child running away from a chemical bomb. Facebook's algorithm, however, construed it as violative of community guidelines and took down the picture.

X. The second proviso to Rule 4(4) requires the

significant social media intermediary or intermediary notified under Rule 6 to deploy appropriate human oversight mechanism for the same. However, for a server maintained by a volunteer i.e. the Petitioner, the burden of what constitutes appropriate human intervention cannot be equal to that of a large corporation.

Y. That the deployment of algorithmic tools would bring in inherent societal biases and prejudices in the algorithmic system making it a case of unfettered tech-solutionism leading to more problems than it intend to solve.

Z. The Petitioner humbly submits that the while Rule 4(4) has propounded de-facto imposition of automated filtering, the impugned rules do not provide any safeguards against the discriminatory algorithmic decision making. The concept of algorithmic accountability has already been enshrined in Article 22 of the General Data Protection Regulations in Europe.

AA. That Rule 4(7) read with Rule 6(1) would require

the Petitioner to set up the capacity and infrastructure to voluntarily verify their users by getting access to their users personal data. Several services like Mastodon offer verification via email. The voluntary verification of users can be easily bypassed using temp email functionality making the entire process useless. The provision does not address such concerns which may arise during the voluntary verification process. It also does not lay down any guidelines on voluntary verification by intermediaries.

This would also negatively impact the anonymity offered by these platforms thereby undermining privacy of its users.

Excessive Delegation

AB. Unlike an Act, enactment or statute which is made by a legislature, subordinate legislation, is created by an executive or administrative function. It is noted that essential and primary legislative functions cannot be delegated to the executive. In *Delhi Laws Act, 1912 re* , AIR 1951 SC 332 , it was observed:

"essential legislative functions consist of

determination of legislative policy and its formulation as a rule of conduct. In other words, a legislature has to discharge the primary duty entrusted to it. Once essential legislative powers are exercised by the legislature, ***all ancillary and incidental functions can be delegated to the executive."***

AC. BECAUSE the power delegated by a statute is limited by the terms of the statute and subordinate to its objects. In *Shri Sitaram Sugar Co. Lts. vs Union of India* ((1990) 3 SCC 223), the Supreme Court had observed that *"the Parliament never intended to give authority to make such rules, they are unreasonable and ultra vires."*

AD. There is no provision in the parent legislation i.e. the Information Technology Act, 2008 which specifically authorises traceability (Rule 4(2)) and de-facto imposition of automated filtering (Rule 4(4)).

AE. In the *Indian Express Newspapers vs. Union of India* ((1985) 1 SCC 641), it was observed:

" A piece of subordinate legislation does not carry

the same degree of impunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislature may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the statute under which it is made...That it is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable , unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary."

In the present case, the delegated legislation i.e. the Intermediary Rules, 2021 is ultra vires as it is inconsistent with the parent Act, and on account of being unconstitutional.

AF. That in *Vasantlal Maganbhai vs. State of Bombay* AIR 1961 SC 4, it was held that *"A statute challenge on the ground of excessive delegation must be subjected to two tests:*

a. *Whether it delegates essential legislative function; and*

b. *whether the legislature has enunciated its policy and principle for the guidance of the executive;*

This is humbly submitted that an act of invasion of user's privacy is impermissible delegation as it constitutes essential legislative function. In the context of Rule 4(2) and Rule 4(4), the Parliament has not provided any guidance on traceability and automated filtering, therefore, making the impugned rules a case of excessive delegation.

AG. In *Vasantlal Maganbhai vs. State of Bombay* AIR 1961 SC 4, it was observed that *"the essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct."* This means that substantive part of law as currently enumerated in Rule 4(2) and Rule 4(4) cannot be delegated to the executive. It is only the procedural aspects of it which can be delegated.

AH. That the Parliamentary control over delegated legislation must be a living continuity as a constitutional necessity.[1] However, in the present case, Rule 4(2) and Rule 4(4) have bypassed legislative scrutiny.

1Avinder Singh vs. State of Punjab (1979) 1 SCC 137.

AI. Rule 4(2) of the impugned Rules is vague and arbitrary in nature. It goes against the data protection principles of data proportionality, necessity and minimality as enshrined in *Justice K.S Puttaswamy vs Union of India* . The Intermediary Rules, 2021 have left it to the whims and fancies of the intermediary to ascertain how the technical requirements to trace an originator would be deployed.

AJ. BECAUSE the notification of the traceability provision or Rule 4(2) under S. 79, Information Technology Act, 2000,is in conflict with the corresponding or the relevant provision in the parent act, i.e. S. 69 which provides for decryption, monitoring and interception of communication read with S. 87(2)(y) of the Information Technology Act, 2000. Rules notified under S. 69 are known as the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009.

AK. BECAUSE Rule 6 of the impugned Rules arbitrarily gives the power to the State to notify any other intermediary, which is not a significant social media intermediary, to comply with the provisions of Rule 4 on grounds including the "material risk of harm to the sovereignty and integrity of India", "security of

state", "friendly relations with foreign states" or "public order".

AL. That the Rule 4(2) read with Rule 6(1) has particularly made it difficult for FOSS organisations or entities or volunteers like the Petitioner to comply with it. The Rule is particularly vague on the following counts:

a. Applicability on federated services: The applicability of Rule 4(2) on services with federated architecture is unclear. It is not clear from the Rule if it would be applicable on independent servers or on the entire platform. For instance, Matrix is an end-to-end encrypted open source messaging protocol which is federated in nature. Matrix is also interoperable meaning that it has ‘n’ number of servers hosted by people or entities or organisations across the world.

   There are several federated servers maintained by individual volunteers of the FOSS community like the Petitioner. Such individuals as well as the Petitioner would be forced to alter the technical infrastructure of their servers at the whims of an executive notification under Rule 6.

This also needs to be kept in mind that the host of one server, like the Petitioner, might alter its server's technical infrastructure to incorporate traceability, the volunteers across the world hosting other servers of the same service may not do so. This would break seamlessness in interoperable functioning of these services. This would essentially force the Petitioner to shut down its server.

b. The other challenge the Petitioner and the entire FOSS community would face, if required to comply with this provision, is that the Petitioner cannot maintain the metadata trail of communications as other servers hosted by residents/citizens of different countries cannot be compelled to share metadata trail of communication. This would either lead to shutting down of federated FOSS services in India or the Petitioner shutting down its server.

c. That the Rule 4(2) read with Rule 6(1) would prove to be a dent on meagre resources of FOSS

entities. The Rule 4(2) does not enunciate as to how intermediaries shall comply with it i.e. by retaining humongous amounts of metadata or removing end-to-end encryption service from their platform.

d. Rule 4(2) creates an either/or situation for the law enforcement agencies wherein they can choose to bypass judicial scrutiny by relying on a Section 69, IT Act, 2000 order. Section 69 of the IT Act, 2000 does not require the authority to get a judicial sanction before passing a decryption order.

e. The use of the phrase *"less intrusive means"* in proviso 2 is vague in nature and cannot be left at the whims of law enforcement agencies particularly when S. 69 does not provide adequate procedural safeguards.

f. The proviso 4 to rule 4(2) does not take into account that intermediaries cannot make changes in technical infrastructure at a territorial level. The said rule read with proviso 4 would mean breaking

metadata trail of communications at a global level and thereby, severely impinging the right to privacy of Indian citizens as well as people across the globe.

g. The aggregation of metadata by intermediaries can lead to profiling of the population. Such methods of data collection have a chilling effect on free speech, and right to privacy under Article 19(1)(a) and Article 21.

h. Rule 4(2) of the impugned Rules does not meet the principles deduced in *K.S. Puttaswamy vs. Union of India (2017)* which govern the permitted circumstances and requirements when the state can legally infringe the right to privacy. The principles deduced were the *principle of legitimate state aim; the principle of necessity; principle of adequacy; and the principle of proportionality*. The Hon'ble Supreme Court had laid down that:

> *"1) There must be a law in existence to justify an encroachment on privacy by the State.*

2) There must be a legitimate state aim.

3)The means which are adopted by the legislature must be proportional to the object and needs of the legislation/ provision."

Thus, there must be a law in existence to justify an encroachment on privacy.

AM. The Petitioner humbly submits that while the Rules, 2021 do have valid effect of law, they do not go through similar legislative scrutiny as a parent legislation does. These rules are only tabled in the Parliament and are not debated upon.

AN BECAUSE Rule 4(2) is in contravention of Hon'ble Supreme Court's judgment in the *Shreya Singhal* (2015) judgment which had recognised the concept of "chilling effect on free speech" due to broad framing of a law.

AO. The Petitioner humbly submits that the Intermediary Rules, 2021 do not adhere to the four-pronged test laid by Justice Kaul in *K.S. Puttaswamy* case. Expanding on the test laid down by Chandrachud, J., Kaul, J. articulated:

"The concerns expressed on behalf of the

petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

a) The action must be sanctioned by law;

b) The proposed action must be necessary in a democratic society for a legitimate aim;

c) The extent of such interference must be proportionate to the need for such interference;

d) There must be procedural guarantees against abuse of such interferences."

Rule 4(2) and 4(4) do not justify their necessity or that the interference with user's privacy via traceability and automated filtering would be proportional in nature. There is also a lack of robust procedural safeguards against the misuse of Rule 4(2) and the Rule 4(4).

AP. It is most humbly submitted that while judging if a statute is constitutional, it is important to ascertain it by examining its potential impact on fundamental rights of citizens. The effect of impugned rules will lead to self-censorship of users as well as strict censorship by intermediaries. Such an action by the

intermediaries will affect the fundamental right of freedom of speech and expression guaranteed by Article 19(1) of the Constitution of India. A five-judge bench of the Hon'ble Supreme Court held in *Bennett Coleman & Co. Vs. Union of India* (UOI), AIR1973 SC 106, (1972) 2 SCC 788 has held that:

> “*The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgment of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject matter of the impeached law or action.”*

AQ. Because the impugned rules impose unreasonable restrictions on the Petitioner’s right to practice any profession, or to carry on any occupation, trade or business as guaranteed by Article 19(1)(g) of the Constitution of India by forcing upon it to acquire an adjudicative role which leads to censorship or suffer litigation or criminal liability or both at the hands of

Respondents and private parties.

AF. Because the impugned rules impose a significant burden on the Petitioner and other volunteers to alter the technical infrastructure, verify users for the federated services offered by them. This would lead to a risk of losing the user base for the services offered by the FOSS community, addition of compliance costs, exercise of censorship by the FOSS community and incurring legal costs as well as facing criminal action for third party, user generated content in case of non-compliance of Rule 4 read with Rule 6.

AR. That this would mean difficulties for the Petitioner to run its server on the federated services. That the Petitioner is not well-positioned to make these types of alterations and determinations on its technical infrastructure.

AS. Rule 6 gives unfettered power to the Government to declare any intermediary as a Significant Social Media Intermediary irrespective of the threshold. Such a power is given without any safeguards to protect the intermediary or the rights of the users. Rule 6 of the Intermediaries Rules 2021 is thus arbitrary and illegal.

Lack of Consultation

AT. That the draft Information Technology (Intermediary Guideline) Rules, 2018 were published in December, 2018 for public consultation by MeitY to review the Information Technology(Intermediary Rules), 2011. In response to the 2018 consultation, MeitY had received 171 comments and 80 counter-comments. However, since then, the Respondents decided to notify the OTT Regulations and Code of Ethics for Digital Media along with the Intermediary Guidelines, 2021 without any consultation with the relevant stakeholders. This is in contravention of the Government of India's Pre-Legislative Consultation Policy which prescribes that a government department or ministry must release draft legislation in public domain and explain key provisions in simpler language for at least a minimum period of 30 days. A true copy of the pre-legislative consultation policy issued as per D.O.No. 11(35)/2013 -L.1 dated 05-02-2014 by the Secretary, Legislative Department, Ministry of Law & Justice is produced and marked as **Exhibit P6**.

Private Adjudication

AU. BECAUSE the Hon'ble Supreme Court in *Shreya Singhal*

had also noted that as the Rules required the intermediary to apply a subjective interpretation of similar phrases under now repealed Section 66A of the Information Technology Act in exercising the obligation to de-host content on the basis of such undefined and superfluous criteria without any legislative or regulatory guidance, it amounted to an impermissible and unconstitutional delegation of state authority to private intermediaries. The Intermediary Rules, 2021 delegate an adjudicatory role to the intermediaries which is not contemplated under Section 79. While any affected person can allege that certain content is defamatory or infringes copyright, such determinations are usually made by judges and can involve factual inquiry and careful balancing of competing interests and factors, whereas the Petitioner is not well-positioned to make these types of determinations but is being forced to adopt an adjudicative role in making such determinations.

AV. BECAUSE ‘obscenity’, ‘defamation’, ‘racially or ethnically objectionable’ are terms which suffer from cultural relativism. These terms appeal to different sensibilities across the world in a different manner. The nature of the internet is such that

there are no geographical boundaries thus making the reach far and wide. For example, “obscenity” is defined variously in different jurisdictions which can lead to content being viewed differently in different places impacting the legal rights and remedies associated with it.

AW. BECAUSE the Petitioner is part of a community that has members from across the world which makes it cumbersome for the Petitioner to monitor speech by catering to the sensibilities of people across the world. In *Shreya Singhal V. Union* of India (2015) 5 SCC 1, the Honorable court had noted

> “*Quite apart from this, as has been pointed out above,every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression“persistently” is completely imprecise – suppose a message issent thrice, can it be said that it was sent “persistently”? Does message have to be sent (say) at least eight times, before it can be said*

that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions –and that is what renders the Section unconstitutionally vague"

AX. BECAUSE Rule 3(1)(j) states that an Intermediary has to furnish information within a period of 72 hours when called upon by a government agency through an order. It is hereby submitted that this time period is insufficient for a small intermediary run on unpaid volunteers with limited manpower to furnish details. Smaller intermediaries such as FSCI which the Petitioner manages himself will face considerable hardship in furnishing such details at such a short notice.

AY. BECAUSE the proviso 1(k) of Rule 3 states that technical configuration of a computer resource cannot be changed which can circumvent a law in force at that time. This clause is ambiguous in nature and through the wordings of this section, there is a lack of clarity in what this section aims to achieve. This provision is enacted keeping in mind how conventional intermediaries function but ignores alternative intermediaries such as that operated by the Petitioner.

AZ. BECAUSE Rule 3(2) of the Intermediary Rules, 2021 on

grievance redressal mechanism states that the name and details of the grievance officer needs to be published on the Intermediary's website. In case there is any complaint which can be made by any citizen it has to be acknowledged within 24 hours of its receipt and disposed of within 15 days. This places a heavy compliance burden on small intermediaries such as the one managed by a group of volunteers including the Petitioner effectively making their operation untenable and closing the door for innovation.

BA. BECAUSE the Petitioner in this case is part of a small community movement which does not have full time employees or the financial wherewithal to implement a parallel grievance redressal mechanism staffed with sophisticated employees that can address the complicated matters of content moderation. The Petitioner's organization does not have any resources and/or human resources to comply with sub-rule 2 of Rule 3. To fulfil the compliances under sub-rule 2 of Rule 3 will force the Petitioner to stop providing any of the services, thus having an impact on its constitutionally guaranteed right to free trade and profession under Article 19(1)(g) of the Constitution of India. The heavy compliance

burden will make it difficult for the Petitioner to run the Free Software Community of India (FSCI) thereby depriving the civil society and Indian technology community of crucial technological tools of development and communications.

BB. Petitioner is not well positioned to make the kind of determinations expected by the impugned Rules and is being forced to adopt an adjudicative role in performing compliance. The compliances under Rule 3, sub rule 2 will force the Petitioner to discontinue his work. As such the Petitioner is made to choose between the option of complying with the heavy compliance burden placed on them under the Intermediary Rules, 2021 or taking a legal risk of not responding within 24 hours to the numerous requests it might be getting from the public. It is not possible for the Petitioner who manages a volunteer driven community to be able to respond to the sheer volume of legal requests. Thus, the Intermediary Rules, 2021 make it difficult for the Petitioner to run its service.

Hence it is humbly prayed that this Hon'ble Court may be pleased to call for the records of the case and:-

i To issue an appropriate writ, order or direction in the nature of Writ of Certiorari quashing Part II of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021 as illegal, null and void as the same are ultra vires of the Constitution;

ii To issue an appropriate writ, order or direction directing the Respondents to promulgate Rules relating to guidelines to be followed by intermediaries in line with the statement and objectives of the Information Technology Act, 2000 and in tune with the law laid down by the Apex Court in *Shreya Singhal v Union of India* (2015)5 SCC 1.

iii Declare that the Right to encryption as a subset of Right to Privacy is a Fundamental Right

enshrined under Article 21 of the Constitution of India;

iv To issue such other appropriate writ, order or direction as this Hon'ble Court may deem just and proper to issue in the circumstances of the case.

INTERIM RELIEF PRAYED FOR

This Hon'ble Court be pleased to issue an interim order:

1. Staying the operation and implementation of Part II of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021, or;

2. In the alternative directing the Respondents that no coercive action be initiated against the Petitioner or other volunteers running poddery.com, diasp.in, codema.in and fsci.in or any FOSS developer offering software products in relation to the Information Technology

(Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021 during the pendency of the current Writ Petition.

Dated this the 8th day of April, 2021

Praveen Arimbrathodiyil

PETITIONER

Counsel for the Petitioner.