IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST) NO. 14702 OF 2023

Association of Indian Magazines ...Petitioner

Versus

Union of India & Ors. ...Respondents

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Chronology of Dates and Events

Date	Particulars
2000	The Information Technology Act **("IT Act")** is enacted. Section 79 of the Act provides "safe harbour" to intermediaries, i.e., immunity from prosecution subject to fulfilling certain conditions.
11.04.2011	Under the rule-making power under Section 87 of the IT Act, the Union Government promulgated the Information Technology (Intermediary Guidelines) Rules, 2011 **("IT Rules, 2011")**.
24.03.2015	In *Shreya Singhal & Ors. v. Union of India & Ors.* (2015) 5 SCC 1, the Hon'ble Supreme Court read down Section 79(3)(b) of the IT Act and the IT Rules, 2011 to mean that an intermediary is required to expeditiously take down content only upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency.

25.2.2021	IT Rules, 2011 are superseded by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 **("IT Rules 2021")**.
2021-2022	Challenges are filed to the IT Rules of 2021, in various High Courts of the country.
09.05.2022	In Writ Petition No. 799/2020, the Supreme Court directs a stay of pending proceedings in various High Courts pertaining to challenges to the IT Rules of 2021.
28.10.2022	The Central Government promulgates the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022, which amend the IT Rules, 2021.
06.04.2023	The Central Government promulgates the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 **("Impugned Rules")**, which further amend the IT Rules, 2021. The Impugned Rules create a Fact-Check Unit to determine "fake or false or misleading" information "in respect of any business of the Central Government", and intermediaries risk losing safe harbour under Section 79 of the IT Act if they refuse to remove such information from their platform.

Concise Note of Arguments on Behalf of the Petitioner

Time Sought for Oral Argument: 30 Minutes

1. Petitioner files this note in compliance with the order of this Hon'ble Court dated 7th June 2023, in advance of final arguments.

2. At the outset, Petitioner adopts the arguments advanced by the Petitioner in the lead matter, *Kunal Kamra vs Union of India* (Writ Petition (L) No. 9792 of 2023). In view of this Hon'ble Court's order of 7th June 2023 directing parties to avoid repeating arguments, it is respectfully submitted that this Note of Arguments be taken as supplementing the arguments in Writ Petition (L) No. 9792 of 2023.

3. Petitioner's arguments are structured as follows:

   a. It is submitted, *first*, that the Indian Constitution does not make – and does not allow the State to make – a distinction between "high-value" and "low-value" speech under Article 19(1)(a) of the Constitution. All forms of expression are *presumptively* protected under Article 19(1)(a), and any restriction must be located within one of the specific sub-clauses of Article 19(2). The impugned Amendment fails to do so (**I**).

   b. *Secondly*, and in the alternative, it is submitted that Article 19(1)(a) does not authorise the State, or a State instrumentality, to classify speech as true or false, and enforce that classification through the coercive power of law (**II**). The reasons for this are twofold.

      i. *First*, as has been held by the Supreme Court, the constitutional guarantee of the freedom of speech under Article

19(1)(a) rests upon three principles: free speech as an instrument towards determining the truth, free speech as an expression of individual autonomy, and free speech as a vehicle of democratic self-governance. The first of these principles is based on the assumption that "truth" emerges *through* a robustly-enforced free speech guarantee, and is not something that is determined *in advance* by State fiat. The impugned Amendment short-circuits that process, and is contrary to the founding principles of Article 19(1)(a). (**IIa)**

ii. *Secondly*, the power to determine what is true or false carries with it the power to determine *what expression* falls within a true/false binary, and what does not. It will be demonstrated through examples from comparative jurisdiction that this is by no means an easy determination, and has caused even judges of constitutional courts to disagree with each other while adjudicating such a question. Granting this power to the State, therefore, facilitates over-regulation of speech, and is a disproportionate infringement of Article 19(1)(a). (**IIb**)

4. These submissions should not be taken to mean that the Petitioner is trivialising the corrosive effects of what is colloquially called "fake news" (or "disinformation") on a democratic polity. The constitutional question before this Hon'ble Court, however, lies within a narrow, precise compass: is the State permitted to respond to the problem of "fake news" by arrogating to itself the power to determine "truth", and enforce that power through legal coercion? Petitioner respectfully submits that it is not.

5. Indeed, in the submissions advanced in Writ Petition (L) No. 9792 of 2023, it has been demonstrated in some detail that there are less restrictive means of addressing the problem of "fake news" in a democracy. Petitioner will not repeat them here, and respectfully adopts those arguments.

I. The Indian Constitution does not differentiate between "high-value" and "low-value" speech for the purposes of *prima facie* constitutional protection under Article 19(1)(a).

6. At the heart of the Respondent's case – as articulated in its Reply to Writ Petition (L) No. 9792 of 2023 – is the claim that "false speech" or "fake news" is an abuse of the free speech guarantee, has no, or low, constitutional value, and is therefore unprotected under Article 19(1)(a). (**Respondent's Reply, paragraphs 6(v), 36-40**). This is also demonstrated by the fact that the Respondent makes virtually no attempt – in its reply – to locate the impugned Amendments within one of the sub-clauses of Article 19(2), and to demonstrate how the proportionality test for justifying restrictions on free speech has been met.

7. It is respectfully submitted that this argument misunderstands the structure and design of Article 19(1)(a).

8. Constitutional free speech clauses around the world are structured in two broad ways. *First*, a free speech clause might, on its face, guarantee absolute protection to free speech. In practice, no right is absolute. This, then, requires the courts – over time – to develop a jurisprudence around when the State might lawfully restrict speech. One way of doing so is by drawing a distinction between "high-value" and "low-value" speech.

9. An example of this is the First Amendment to the United States Constitution, which states – in absolute terms – that "Congress shall make no law abridging … the freedom of speech." The language of the First Amendment has compelled the US Supreme Court to develop jurisprudence that excludes certain forms of speech and expression from constitutional protection altogether, or subjects them to a more relaxed standard of judicial review.[1] The Supreme Court has done so, *inter alia*, by expressly holding that certain forms of speech – such as "fighting words" – "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[2]

10. In other contexts, and deploying similar logic, the Supreme Court has held – for example – that restrictions upon "commercial speech" are subject to an "intermediate standard of review" instead of the near-fatal "strict scrutiny" that is accorded to restrictions on (say) political expression.[3]

11. *Secondly,* however, a free speech clause might guarantee the right to free speech, and then – in a separate sub-clause – set out an exhaustive list of substantive subjects that can serve as the bases for legal restriction of free speech. Here, the question of high-value and low-value speech is not left to future courts (or legislatures) to address, but is decided *within* the Constitution itself: speech that is not deemed worthy of constitutional protection *by virtue of its substantive content* is explicitly deprived of that protection through the restrictions clause.

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[1] For a full account, see *United States vs Alvarez,* 567 U.S. 709 (2012), pg. 717.
[2] *Chaplinsky vs New Hampshire*, 315 U.S. 568 (1942), pg. 572.
[3] *44 Liquormart Inc vs Rhode Island*, 517 U.S. 484 (1996), pg. 532.

12. In the second category of constitutional provisions, therefore, it is not the province of the legislature or of the Court to incorporate *additional* categories of exclusion into free speech clauses by making judgments about their "value": that decision has *already* been made within the Constitutional text.

13. For example, the South African Constitution has a similar structure to Article 19(1)(a) and 19(2). In ***Islamic Unity Convention vs The Independent Broadcasting Authority,* (2002) 5 BCLR 433;**[4] ***Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another,* (2005) 8 BCLR 743;**[5] ***Qwelane v South African Human Rights Commission and Another,* 2022 (2) BCLR 129,**[6] while interpreting the South African free speech clause, the Constitutional Court of South Africa made clear that Sections 16(1) (the free speech sub-clause) and 16(2) (the restrictions sub-clause) of the South African Constitution create a legal regime where the *boundaries* of what kind of free speech is guaranteed constitutional protection are *definitionally* set out by the restrictions clause. Legislation that went beyond the boundaries of section 16(2) (and was not saved by the general restrictions clause under Section 36[7]) was therefore unconstitutional.

14. The trajectory of Indian constitutional jurisprudence on Article 19(1)(a) suggests the same underlying reasoning. In ***Hamdard Dawakhana vs Union of India,* (1960) 2 SCR 671**, the Supreme Court upheld a restriction on misleading advertisements on the premise that commercial speech was not

[4] *Islamic Unity Convention vs The Independent Broadcasting Authority*, (2002) 5 BCLR 433, para 32.
[5] *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* (2005) 8 BCLR 743, para 47.
[6] *Qwelane v South African Human Rights Commission and Another*, 2022 (2) BCLR 129, para 76, 126.
[7] Ibid., para 34.

protected at all by Article 19(1)(a), as it did not involve the "propagation of ideas – social, political or economic or furtherance of literature or human thought."[8] This articulation has, however, been eroded over the years, and was finally abandoned by the Supreme Court in ***Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.,* (1995) 5 SCC 139**, where the Court held that commercial speech *was* protected by Article 19(1)(a), and restrictions on misleading or deceptive advertising – while constitutionally permissible – would have to pass the test of Article 19(2).[9]

15. Following this, in ***Shreya Singhal v. Union of India,* (2015) 5 SCC 1**, the Supreme Court clarified (following ***Sakal Papers v. Union of India*, (1962) 3 SCR 842** that Article 19(2) was exhaustive of the categories under which freedom of speech could be restricted under the Indian Constitution.[10] In ***Kaushal Kishore v. State of Uttar Pradesh*, (2023) 4 SCC 1**, the Supreme Court has reaffirmed the well-established proposition that the "grounds lined up in Article 19(2) for restricting the right to free speech are exhaustive", and that speech cannot be restricted in pursuit of a ground unavailable under Article 19(2).[11]

16. This is not to suggest that the State cannot restrict false information under *any* circumstances. It can do so, but its restriction must (a) be traceable to one of the eight sub-clauses under Article 19(2), and (b) pass the test of proportionality.

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[8] *Hamdard Dawakhana v. Union of India,* (1960) 2 SCR 671, para 17.
[9] *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.,* (1995) 5 SCC 139, para 17-19.
[10] *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, para 15-17, 24; *Sakal Papers (P) Ltd. v. Union of India,* (1962) 3 SCR 842, para 36.
[11] *Kaushal Kishore v. State of Uttar Pradesh*, (2023) 4 SCC 1, para 50.

17. For example, one of the sub-clauses under Article 19(2) is "public order", which has been defined with some precision through a series of cases. Another line of cases has, likewise, held that the "reasonableness" (or proportionality) requirement under Article 19(2) mandates a proximate relationship between speech and public disorder. Consequently – to take a hypothetical example – a narrowly-tailored restriction on "fake news" that caused incitement to violence would undoubtedly be constitutionally compliant. The restriction on falsity *per se,* however, is not, for the reasons explained above.

18. Indeed, the Respondent's arguments might succeed in the United States, which subscribes to the high-value/low-value distinction. It is important to note, however, that even in the United States, attempts to penalise lying *per se* were held to be unconstitutional.[12] In ***United States vs Alvarez*, 567 U.S. 709 (2012)**, the issue confronting the US Supreme Court was whether a law that punished someone who falsely claimed that they had received military medals or decorations, was constitutional.

19. The US Supreme Court held that it was not. Specifically, it distinguished between bare falsehoods, and falsehoods that led to a *legally cognisable harm* (such as defamation).[13] Notably, in doing so, it specifically referred to a case that Respondent has placed reliance upon in its reply: ***Hustler Magazine vs Falwell*, 485 U.S. 46 (1988)** (**Respondent's Reply, paragraph 21**). Indeed, in ***Alvarez*, *supra***, the State attempted to use ***Falwell*, *supra***, in the same manner that the Respondent is attempting in this case: for the proposition that false speech has no value, and therefore can have no constitutional protection. The Supreme Court *distinguished* ***Falwell*** on the precise basis that is being

[12] *United States vs Alvarez*, 567 U.S. 709 (2012).
[13] Defamation is also one of the eight sub-clauses under Article 19(2) of the Constitution.

advanced here: namely, that ***Falwell***, and other similar cases, were dealing with laws where falsity was linked with a *legally* cognisable harm, and not with *bare falsehoods*.[14] Thus, Respondent's argument has been rejected even in the only jurisdiction where, conceptually, it might have some purchase: the United States.

20. Many statutes prohibit the act of making false statements. However, most of these statutes are not aimed at making false statements unlawful per se; instead, they are narrow in scope and require proof of specific harm.

Statute which penalise falsehoods	**Link of statute to cognisable harm**
Section 123(4) of the Representation of the People Act, 1951	Section 123(4) of the Representation of the People Act, 1951 prohibits the publication of false statements that are "reasonably calculated to prejudice the prospects of that candidate's election".
Section 3(r), (s), (u) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 **("SC/ST Act")**	Section 3(r), (s) and (u) of the SC/ST Act prohibit "intentionally insult[ing] or intimidat[ing]...a member of a Scheduled Caste or a Scheduled Tribe..."; "abus[ing] any member of a Scheduled Caste or a Scheduled Tribe by caste name..." and "promot[ing]...feelings of enmity, hatred or ill-will against members of the Scheduled Castes or the Scheduled Tribes". The section may also bring within its prohibition the making of false statements connected to the grounds under Section 3 –

[14] Importantly, this proposition was accepted even by the dissenting opinion in *U.S. vs Alvarez*, *supra*, which upheld the impugned statute on the basis that it sought to penalise false speech that caused "real harm", and not falsity per se.

	but aims to uphold dignity and prevent harm to members of the Scheduled Castes and Tribes.
Section 499 of the Indian Penal Code, 1860	Section 499 Indian Penal Code, 1860 **("IPC")** prohibits the publication of "false statements" concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person.
Section 191 of the Indian Penal Code, 1860	Section 191 of the IPC prohibits knowingly making false statements when legally bound by oath or a provision of the law to state the truth. It aims to prevent harm to the administration of justice.
Section 53 of the Food Safety and Standards Act, 2006	Section 53 of the Food Safety and Standards Act, 2006 prohibits the publication of false/misleading advertisements concerning food items. It aims to prevent harm arising from consumption of improper food substances.
Section 89 of the Consumer Protection Act, 2019	Section 89 of the Consumer Protection Act, 2019 prohibits the publication of false or misleading advertisements prejudicial to the interest of consumers.
Section 107 of the Trade Marks Act, 1999	Section 107 of the Trade Marks Act, 1999 prohibits a person from, inter alia, making representations of ownership of a trademark that they do not own. Trade marks play a crucial role in identifying the origin of goods, and when infringement takes place, it causes harm by creating confusion among potential consumers and diluting the value of the mark to its owner.

Section 63 of the Copyright Act, 1957	The section prohibits a person from infringing the copyright owned by another. Harm to the owner of the copyright is prevented by such prohibition.

21. While not exhaustive, this list highlights that statutes do not prohibit false statements per se. Instead, they incorporate contextual limitations, requirements for demonstrating harm, and other relevant factors. These limitations are in place to specifically address false statements that are likely to cause harm. By doing so, these statutes avoid being overly broad and discourage or prohibit lying in situations where harm is unlikely or where the need for prohibition is minimal.

22. In any event, for the reasons advanced above, these arguments cannot succeed in the context of the Indian Constitution.

23. Interestingly, a perusal of the Respondent's Reply indicates that the Respondent concedes this point. In **paragraph 38,** the Respondent itself argues that it was Article 19(2) that was inserted into the Constitution – and then amended – in order to prevent "the abuse" of the free speech right. This argument, however, is made within a section titled "patently false, untrue, or misleading information do not (sic) enjoy constitutional protection" – which, for the reasons advanced above – is an incorrect position. Indeed, other than make a bald reference to "national security", the Respondent makes no further attempt to even demonstrate how the impugned Amendment meets the long-established tests under Article 19(2). This argument has been advanced in some detail in Writ Petition (L) No. 9792, and will not be reiterated here.

II. In any event, the Constitution does not grant to the State the power to determine truth and falsity, and support its determination with legal coercion

24. At the outset, Petitioner respectfully adopts the submissions in Writ Petition (L) No. 9792 of 2023, with respect to the legal coercion wrought by the impugned Amendment, when it comes to depriving intermediaries of their safe harbour. Petitioner, therefore, will not repeat the arguments on how the impugned Amendments constitute a *restriction* on Article 19(1)(a), and will proceed on the assumption that that proposition has been established; were that proposition to fail, then these arguments would, *ipso facto*, fail as well.

25. In this context, the Petitioner submits that the impugned amendments are unconstitutional for two reasons: that they give to the State the power to determine truth and falsity (**a)**; and that they give the State the power to determine what kinds of statements fit within the true-false binary (and which, therefore, can potentially be labelled "false") (**b**).

26. At the outset, it is respectfully submitted that neither of the two arguments commit the Petitioner to the nihilistic – or, to use a word beloved of the Respondents – the "anarchist" – proposition that there are no such things in the world as "true" and "false". To reiterate, the issue in this case falls within a narrow compass, and is restricted to the question of whether the *State* can be granted the power to determine what is "true" and "false".

A. The determination of "true" and "false"

27. Constitutional free speech guarantees are justified by invoking three principled arguments. The first principle – which goes back to the time of John Milton – is that free speech is indispensable to the search for truth. In

***Bennett Coleman & Co. vs Union of India*, (1972) 2 SCC 788,** the Supreme Court quoted the two most famous exponents of this view – John Milton and John Stuart Mill – with approval, noting in particular Milton's poetic formulation that "though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?"[15]

28. Furthermore, in ***Bennett Coleman, supra***, the Supreme Court noted with approval John Stuart Mill's pragmatic justifications against granting to the State the power to suppress what it considered to be "falsehoods": as Mill argued, history is replete with examples where progress was set back by centuries because the State held on to certain dogmas in the name of "truth", and enforced those dogmas through coercion and violence (the heliocentric theory of the universe is the best example of this).

29. However, as Mill *also* pointed out, *even when* the State was right, *enforcing* truth through coercion was counter-productive, as it would turn truth into a "dead dogma."[16] This is closely linked with another argument: namely, in the course of an "open and vigorous" public debate, some false statements are inevitable, and to clamp down on them would result in stifling the debate itself. Indeed, Respondent recognises and concedes this point in **paragraph 22** of its reply, when it admits that the "breathing space" that free speech requires would necessitate the tolerance of a certain amount of falsity in the public sphere. Respondent tries to mitigate this by adopting the US "actual malice" standard – i.e., that a statement must not only be false, but that the

[15] John Milton, Areopagitica, c.f. *Bennett Coleman & Co. vs Union of India*, (1972) 2 SCC 788, para 96. See also John Milton, *Areopagitica* (Arc Manor 2008) 55; John Stuart Mill, *On Liberty* (Floating Press 2009).
[16] Mill, *supra*, pg. 58-9.

speaker must have made it either knowing that it was false, or with reckless disregard for whether or not it was false.

30. However, even if accepted, the adoption of this standard fail to resolve the issues pointed out in these submissions: as the concurring opinion in **United States v. Alvarez, supra**, noted – after accepting an actual malice standard, by way of argument – that this would not prevent the risks of "censorious selectivity" by State organs, the chilling effect that would follow.[17]

31. In any event, it is submitted that this standard is nowhere spelt out or implied by the impugned Amendments themselves. The Respondent cannot paper over the cracks in its law by making promises about how the law will be implemented in court pleadings.

32. In ***Raghu Nath Pandey v. Bobby Bedi,*** **ILR (2006) 1 Del 927,** the High Court of Delhi cited a more contemporary gloss on this argument, noting Justice Oliver Wendell Holmes' famous dictum that the best test of truth is its ability to find acceptance in the "marketplace of ideas".[18] It is important to note that Justice Holmes was not claiming that a contest in the "marketplace" of ideas would *necessarily and at all times* yield the truth: he was making the more modest claim *relative* to granting to the State the power to decide truth, contest in the marketplace of ideas was a *better* way of arriving at it (and also ensuring that it would be revisable, given new evidence).

33. Reading ***Bennett Coleman, supra***, and ***Raghu Nath Pandey, supra***, together, what emerges is that Indian free speech doctrine is committed to the twin

[17] *U.S. vs Alvarez, supra*, pg 736.
[18] *Raghu Nath Pandey v. Bobby Bedi*, ILR (2006) 1 Del 927, para 32. This should not be taken as an unqualified faith in "markets" per se, which have problems of equality and access.

principles that (a) freedom of speech is essential for discovering – or uncovering – truth; and (b) the first principle is defeated if the State is granted the power to *determine* what is "truth", and to enforce its determination through legal coercion.

34. It is respectfully reiterated that this is not an argument that claims there is no such thing as "truth", or that falsity is equally valuable to society as truth. Rather, it is submitted that it is the grant to the State of the *power* to make these determinations that is fundamentally inconsistent – as a matter of principle – with the basic premises underlying the constitutional free speech guarantee.

35. This point is perhaps best expressed in ***American Booksellers vs Hudnut*, 771 F.2d. 323 (7th Circuit 1985)**. At issue was the constitutionality of the Indianapolis Anti-Pornography Ordinance, which sought to impose civil liability for certain forms of pornography premised on sexual subordination. In considering the constitutionality of the Ordinance, the 7th Circuit noted that social prejudice – articulated through speech and expression and in popular culture – was not directly answerable by counter-speech; this was, however, not germane to the question of whether that speech was constitutionally protected, as "any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us....a power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth ... if the government may declare the truth, why wait for the failure of speech?."[19]

[19] *American Booksellers vs Hudnut*, 771 F.2d. 323, 330-331 (7th Circuit, 1985).

36. As the 7th Circuit correctly noted, the question that such laws posed were not whether false speech was good or bad for society, but whether the *State* was constitutionally vested with the power to "declare" truth; and, as the Court further noted, granting to the State that power fundamentally undermined the reason why freedom of speech is a guaranteed *right* in the first place.

37. It is submitted that this addresses a further argument raised by the Respondent, i.e., that Article 19(1)(a) guarantees a right to citizens to "know true and accurate information" (**Respondent's Reply, paragraph 6(vi))**This is a non-sequitur: the proposition that there exists a "right to know true and accurate information" (whatever its constitutional status) does not, as a corollary, lead to the proposition that the State is entitled to arrogate to itself the power to determine what constitutes "true and accurate information", and enforce that through legal coercion. The latter power requires *independent* justification, and - as the arguments advanced above have demonstrated - it cannot be justified, as it undermines the principled basis of Article 19(1)(a). The observation in ***United States vs Alvarez, supra* –** that "our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth"[20] – is equally applicable to the Indian constitutional tradition.

B. The classification of expression within the true/false binary

38. It is respectfully submitted that the impugned Amendment is unconstitutional not merely because it grants the State the power to determine truth and falsity, but also – by necessary implication – the power to determine which forms of expression fall within the true/false binary in

[20] *U.S. vs Alvarez, supra*, pg 723.

the first place. This power – it is submitted – is over-broad and will cause a chilling effect on speech.

39. Consider the following statements:

a. 2 + 2 = 4.

b. Ngugi wa Thiong'o ought to win the Nobel Prize for Literature.

40. The first statement must be *either* true or false (in this case, it is true). The second statement is *neither* true nor false, as it is an expression of opinion (it may be ill-founded, unreasoned, or unconvincing, but it is not "false"; it may be well-founded, reasoned, and convincing, but it is not "true").

41. It is respectfully submitted that statements exist on a spectrum from (a) to (b), and along the spectrum, there is a significant grey area where a particular statement could fall into either category, to the extent that *reasonably* individuals can disagree which category it falls within.

42. To take an example from comparative jurisprudence, consider the case of ***Democratic Alliance vs African National Congress*, (2015) 3 BCLR 298,** decided by the Constitutional Court of South Africa. In *DA vs ANC*, the issue was a bulk text message sent by the Democratic Alliance political party to voters, which said that the findings of an independent report had shown that South African President Jacob Zuma "*stole your money"* to build his home.[21]

43. It was common cause that the independent report had not made a finding that President Zuma had committed the crime of theft. What the independent report had done was to flag various ethical and moral lapses in the President's

[21] *Democratic Alliance vs African National Congress*, (2015) 3 BCLR 298, para 13.

lavish expenditures upon his home. The question was whether – by virtue of being *false* speech – this SMS amounted to an unfair electoral practice under South African law.

44. It is notable that the case yielded conflicting judgments from the High Court and the Supreme Court of Appeal, and finally, a three-way split judgement at the Constitutional Court. One set of judges – looking at the text message in its context – took the view that the Democratic Alliance had made the *false* claim that the President had been found guilty of theft. The other set of judges – looking at the *same* text message in the *same* context – took the view that the word "stole" was to be properly understood not as an allegation of theft, but as a broader, *political* attack on President Zuma's honesty and integrity, and would likely have been understood by its recipients as such. They held, therefore, that the text message effectively communicated the Democratic Alliance's *opinion* about the character of a political opponent, and that it was not a statement that was *capable* of being classified as either true or false.

45. It is therefore submitted that there is a range of statements that occupy a grey zone where the issue is not simply whether they are true or false, but even before that is addressed, whether they are *capable* of being true or false; and that this is often an indeterminate question, about which reasonable individuals, with access to the same set of facts, can reasonably disagree.

46. In this context, vesting in the State the power not simply to determine truth and falsity, but the power to *categorise* what counts as expression *capable* of being true or false, amounts to overbreadth and a chilling effect upon speech. The chilling effect, in particular, occurs when broad and vaguely worded laws create a climate of self-censorship, where individuals refrain even from engaging in lawful speech for fear of straying too close to an

indeterminately-defined line of legality and illegality. It is respectfully submitted that the impugned Amendment is unconstitutional precisely by virtue of these reasons.

47. Indeed, this proposition is implicitly conceded by the Respondent in its Reply. In an attempt to atone for the unconstitutionality of the impugned Amendments, the Reply seeks to clarify that satire with "an element of falsity" will remain protected speech "unless it crosses the boundary and becomes *per se* false." (**Respondent's Reply, paragraph 22**) Apart from the fact that a court pleading cannot be used to improve a flawed statutory scheme, the Respondent here attempts to defend an untenable provision by adopting an "untenable" clarification: i.e., a distinction between speech with an "element of falsity", and speech that is "*per se* false." The inherent vagueness underlying this distinction establishes the Petitioner's point: that any attempt by the State to monopolise the determination of "truth" and "falsity", and the power to classify expression along the spectrum of "true/false" and "justified/unjustified opinion", will only have the effect of delegating speech-restricting power to executive authorities, and cause a chilling effect on constitutionally guaranteed rights.

III. Conclusion

48. It is respectfully reiterated that the Petitioner adopts the submissions in Writ Petition (L) No. 9792 of 2023. Specifically, Petitioner submits that:

a. By depriving intermediaries of safe harbour, the impugned Amendments restrict the right to freedom of speech and expression, and therefore infringe Article 19(1)(a). Consequently, they can only be saved if they are "reasonable" restrictions under the standard set out by Article 19(2).

b. The impugned Amendments constitute a disproportionate infringement of the right to free speech, and are therefore not saved by Article 19(2). There exist other, less invasive measures to address the problems of "fake news" and online disinformation.

c. The impugned Amendments are arbitrary and lack a determining principle under Article 14.

d. The impugned Amendments lack legislative competence.

49. By way of these submissions, Petitioner seeks to supplement the arguments above, as follows:

a. The Respondent's attempt to avoid the application of Article 19 altogether by arguing that falsity is "low-value speech" that does not merit the protection of Article 19(1)(a) is flawed. Article 19(1)(a) does not distinguish between high and low-value speech, and prohibits the State from doing so. All forms of expression have *prima facie* protection under Article 19(1)(a), and restrictions must be traced to 19(2). The State has failed to discharge its burden of showing reasonableness under Article 19(2); in fact, it has not even pleaded it.

b. The basis of the impugned Amendments – that there exists an identifiable category of speech called "false speech", and that the State be granted the power to identify and suppress it, is contrary to the underlying principles of Article 19(1)(a). Therefore, conceptually, it cannot be traced back to any of the sub-clauses of Article 19(2).

c. Granting to the State the power to determine truth and falsity, *and* to determine which categories of statements are capable of being true or false, is unconstitutionally overbroad, and will have a chilling effect on Article 19(1)(a) rights.

50. It is therefore respectfully submitted that this Hon'ble Court hold and adjudge the impugned Amendments to be unconstitutional.

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST) No. 14702 of 2023

Association of Indian Magazine ...Petitioner

Versus

Union of India & Ors. ...Respondents

NOTE OF ARGUMENT ON BEHALF OF THE PETITIONER

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