

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL WRIT JURISDICTION
WRIT PETITION (CIVIL) (Diary) No. 10817 of 2020

IN THE MATTER OF:

Foundation for Media Professionals

... Petitioner

vs.

Govt. of U.T. of Jammu & Kashmir & Anr.

... Respondent(s)

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ADVOCATE FOR THE PETITIONER

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THE FACTUAL BACKGROUND

I. THE IMPUGNED ORDERS AND THE COVID-19 PANDEMIC

1. On 04.08.2019, based on the facts on the ground and an apprehension about the prevailing law and order and security situation, mobile phone networks, internet services, landline connectivity were all discontinued in Jammu & Kashmir, with restrictions on movement imposed in several areas.
2. Thereafter, the President issued Constitutional Order 272 on 05.08.2019 applying all the provisions of the Constitution of India to the State of Jammu and Kashmir, and modifying Article 367 (Interpretation) of the Constitution in its application to the State of Jammu and Kashmir.
3. The total communication shutdown in Jammu & Kashmir was challenged before this Hon'ble Court in *Anuradha Bhasin v Union of India*, (2020) SCC Online SC 25 (pg. 91-136 @ 134-135 of the Petition). This Hon'ble Court through its landmark judgment dated 10.01.2020:

- a. held that access to information *via* the internet is a fundamental right under the Indian Constitution;
 - b. clarified that the necessity and proportionality standards apply to suspension or restriction of internet services *and* that telecommunication services cannot be suspended indefinitely. Suspension can only be for a temporary duration; and
 - c. directed Respondent No. 1 to review and publish all orders issued under the Temporary Telecom Suspension (Public Emergency or Public Safety) Rules, 2017 (“**Telecom Suspension Rules 2017**”) in accordance with the proportionality standard.
4. Pursuant to the judgment of this Hon’ble Court, Respondent No. 1 passed various orders starting from 14.01.2020 (**@pg. 169-173 of the Petition**), where it initially provided access to select whitelisted websites at 2G internet speed, while imposing a complete ban on social media and VPNs. Approximately 50 days later, vide Order dated 04.03.2020 (**@pg. 174-176 of the Petition**), the government finally provided access to all websites and removed restrictions on use of social media and VPNs. However, Internet Service Providers were directed to continue slowing down internet speed to 2G for all mobile internet users. This order was continued on 17.03.2020 (**@pg 177-178 of the Petition**).
5. Meanwhile, the number of cases of Coronavirus Disease (“**COVID-19**”) was spreading throughout the country – the first COVID 19 case in India was confirmed on 30.01.2020, and it reached Jammu and Kashmir on 09.03.2020. The J&K Epidemic Diseases (Covid-19) Regulations Act was promulgated by the Lt. Governor on 16.03.2020 (**@pg 179-180 of the Petition**).
6. The unprecedented nature of the COVID 19 pandemic was acknowledged by the Prime Minister in his widely broadcasted speeches on 19.03.2020 and 24.03.2020, where he announced a complete 21 day lockdown across the country, meaning that all commercial and private establishments were to remain closed. The spread of COVID-19 necessitated the issuance of Order No. 40-3/2020-DM-I(A) dated 24.03.2020 (**@pg 201-207 of the Petition**) under the Disaster Management Act, 2005, whereby Respondent No. 1 directed

the Ministries and Department at the Centre, State, and Union Territory level to take effective measures to prevent the spread of COVID-19 in the country, and issued guidelines for the enforcement of the lockdown. The lockdown was subsequently extended on 14.04.2020 till 03.05.2020 and remains in force even today. It has been announced that the lockdown will further extend from 03.05.2020. On account of the lockdown, the following consequences ensued:

- a. People cannot go to school/college/university.
- b. They cannot go to work (unless it has been exempted).
- c. No gyms, malls, restaurants, or any place of public entertainment are open.
- d. Social distancing norms have to be maintained if people step out.
- e. People are advised not to crowd hospitals, or go for non-essential check ups.
- f. Movement generally is heavily regulated.

7. Meanwhile, amidst these conditions – of a national epidemic and a country-wide lockdown (that is being strictly enforced) – Respondent No. 1 passed the following four orders that direct the continuation of the restriction on internet speed in mobile data services for all residents of Jammu & Kashmir to 2G, while providing fixed line internet connectivity only with Mac-binding:

- a. Order No. Home-21(TSTS) of 2020 dated 26.03.2020 [**“impugned order”**] (**@ pg. 59-61 of the Petition**)
- b. Order No. Home-22(TSTS) of 2020 dated 03.04.2020 [**“second impugned order”**] (**@ pg. 20-22 in IA No. 48247/20**)
- c. Order No. Home-28(TSTS) of 2020 dated 15.04.2020 [**“third impugned order”**] (**@ pg. 24-26 in IA No. 48328/20**).
- d. Order No. Home-34 (TSTS) of 2020 dated 27.04.2020 [**“fourth impugned order”**] (**@pg. 40-42 of IA filed on 28.04.2020**).

8. These orders (collectively **“impugned orders”**) have been challenged by way of the captioned petition and interim applications for being violative of Articles 14, 19, 21, and 21A of the Constitution of India. The Petitioner has also sought directions from this

Hon'ble Court to direct Respondent No. 1 to restore the internet speed in mobile data services in Jammu & Kashmir to 4G, in line with the rest of the country, in light of the prevailing COVID-19 epidemic.

9. It is worth noting that as on 30.04.2020, as per the Ministry of Health's dashboard, there are 565 confirmed cases of COVID-19 in Jammu & Kashmir and 8 people have died. This is a drastic increase from the 33 cases that were confirmed at the time of filing the petition on 31.03.2020. During the last few days, in fact, there has been a spike in COVID-19 cases leading to tightening of restrictions in the region by the Government (**@pg 57 of the Rejoinder**). Therefore, Respondent No. 1 is fully aware of the acute threat posed by COVID-19 but it has continued imposing internet restrictions despite this.

II. 2G v 4G INTERNET SPEEDS

10. The technical distinction between 2G and 4G can be explained through the table below (**@pg 12, 167 of the Petition and @pg 62, IA No. 48309/2020**)

2G	4G
2G (2 nd generation) or GSM is a digital cellular mobile technology that provides voice call service & data services.	4G stands for the fourth generation of mobile connection speeds. 4G or LTE is upgraded mobile data technology that has a unified IP and seamless combination of broadband of LAN, WAN, and WLAN.
2G was deployed in India in 1989	4G was deployed in India in 2010
Voice calls in 2G (and 3G) take place over circuit switched networks (i.e. circuit and packet)	Voice call service in LTE is provided over data/packet network (VoLTE- voice over LTE)
2G has a download speed of up to 384 Kbps	4G has extremely high download data speed upto 150 Mbps and advanced LTE can provide download speeds upto 300 Mbps

11. To illustrate the impact of the restriction of mobile internet speed in Jammu & Kashmir to 2G only, the Petitioner filed the affidavit of a technical expert, Mr. Prateek Waghre. Mr. Waghre along with his co-author, Ms. Rohini Lakshane had previously also conducted a technical analysis of usability of white listed websites in Jammu & Kashmir. To test web performance in Jammu & Kashmir at 2G speed, he conducted a theoretical and simulated comparison of the impact on 2G and 4G network speeds on the accessibility of internet services and found the following (**@pg. 24-25, IA No. 48309/2020**):
- a. Tasks on observed 2G speeds, such as downloading a 5 MB file, can theoretically take up to 50 times longer than they would on observed 4G speeds (**@pg 68, IA No. 48309/2020**)
 - b. As a security best-practice, the Open Web Application Security Project recommends setting the server timeout to the minimal possible value based on the context of the application. In addition, intermediaries and clients impose timeouts on connections too. There is no universal value for these settings. The higher the time required to download content, the greater is the likelihood of such timeouts being encountered. (**@pg 68, IA No. 48309/2020**)
 - c. Video streaming and Video conferencing/communication services should be expected to perform poorly on 2G speeds, as observed 2G network conditions are well below the minimum requirements published by leading video streaming /video communication platforms like YouTube, Zoom and Skype. Thus, the video viewing/conferencing experience at 2G speeds will be subject to significant degradation as compared to 4G speeds (**@pg 69-73, IA No. 48309/2020**).
 - d. Simulated tests for select use-cases took up 37 times longer on 2G speeds than they did on 4G, if they worked at all. This ratio may increase in real world scenarios once congestion, packet-loss, signal strength etc. are accounted for. Some interactive interfaces like the World Health Organization's Situation Tracker did not function at Observed 2G speeds. (**@ pg.75-80, IA No. 48309/2020**)
 - e. Based on YouTube as a test case, video playback was subject to significant degradation with videos taking up to 60 times longer to start playback and

experiencing up to 3.8s of buffering for every 1 second of playback i.e. a 20 minute video could take up to 1 hour and 36 minutes to watch completely. **@pg. 80, IA No. 48309/2020)**

12. It is important to note that in its counter affidavit dated 29.04.2020, Respondent No. 1 *has not denied or contested* these findings or the statements of people who confirmed that various essential tasks on the internet could not be carried out using 2G.

13. Moreover, the counter affidavit contains several material contradictions in respect of the capabilities of 4G v. 2G technology. The Respondent has sought to justify the restriction on the internet speed on the ground that the uploading or downloading of heavy data files “increase the time taken or lead to failure” (due to a time-out), “frustrating the evil designs of terrorists.” **(para 20 of the Counter-affidavit)**. However, the Respondent has subsequently tried to justify the impugned orders by stating that it is possible to use 2G services to run Tele-classes on WhatsApp **(para 36 of the Counter-affidavit)**, access lessons by experts through WhatsApp and YouTube **(para 40 of the Counter-affidavit)**, download E-learning apps and videos, access E-learning websites, download E-books, upload teaching videos **(para 41 of the Counter-affidavit)**, use e-commerce and banking applications **(para 45 of the Counter-affidavit)**, and communicate grievances through social media platforms like Twitter, Facebook and WhatsApp **(para 45 of the Counter-affidavit)**. It is submitted that if the contention of the Respondent No. 1 in para 20 is accepted, it would mean that the contention of the Respondent in the subsequent paragraphs mentioned above are false. Similarly, if the contention in para 20 is incorrect, then the measure of speed restriction resorted to by the Respondent fails the suitability test as terrorists can still send messages.

14. There is another contradiction in Respondent No. 1’s counter. Although it claims **@para 27 of the Counter** that “access to social media has been allowed”, the second and third impugned orders dated 03.04.2020 and 15.04.2020 were justified on the ground that it “checked the unfettered misuse of social media... ..” and since there had been instances of “usage of social media applications for circulation of photographs of terrorists....”

III. FIGURES RELATING TO JAMMU & KASHMIR

15. Before demonstrating the impact of the four impugned orders on the enjoyment of fundamental rights by citizens of Jammu & Kashmir, it is important to set out a few data points about the availability of various services in the Union Territory
- a. As per the 2011 census, the population of Jammu & Kashmir is 1,25,41,302.
 - b. There are only **1,32,743** wireline subscribers (using fixed line connectivity) in Jammu and Kashmir as on 30.12.2019, which is nearly 1/100th times the number of wireless subscribers, at **1,03,20,749** (using mobile (2G) data to access the internet) (TRAI data @ **pg. 223-225 of the Petition**). This implies that almost the entire population of Jammu & Kashmir is limited to relying on 2G speeds on their mobile phones to access the internet, and cannot access the benefits of 4G speeds permitted on fixed line connections. (Hence, Respondent No. 1's contention (@para 27, pg 17, Counter Affidavit) that broadband and fibre internet connectivity are available throughout the UT is irrelevant).
 - c. Senior citizens comprise 9.3% of the entire Union Territory's population, which is higher than the national average of 8.2% as per the 2019 National Health Profile released by the Ministry of Health and Family Welfare. (See **National Health Profile, 2019 available at <<http://www.cbhidghs.nic.in/showfile.php?lid=1147>>**) This is extremely relevant as a COVID-19 risk factor.
 - d. Healthcare infrastructure in Jammu & Kashmir on average is worse than the national average, in part because people have to travel long distances to access healthcare (thus, making telemedicine even more important). As per the data available on Respondent No. 1's website (See **Department of Health and Medical Education, Government of J&K, available at <<http://jkhealth.org/new2017/healthprofile.php>>**):

Health Institutions	Average Rural Area (sq.Km) covered by a Health Intuitions		Average Radial Distance (Kms) covered by a Health Institutions	
	J&K	All India	J&K	All India
Sub Centre	117.21	21.47	6.111	2.61
Primary Health Centre	591.67	139.40	13.72	6.66
Community Health Centre	2766.07	770.90	29.67	15.66

- e. 11.3% of the adult population of Kashmir Valley has a mental health disorder, which is higher than the national average of 7.3%. (See **Action Aid and IMHANS Kashmir, “Mental Health Illness in the Valley: A Community Based Prevalence Study of Mental Health Issues in Kashmir” (2016), available at <<https://www.actionaidindia.org/wp-content/uploads/2018/06/Mental-Health-Illness-in-the-Valley-Final-Report-Web.pdf>>**, at 41).

IV. THE IMPACT OF RESTRICTING MOBILE INTERNET SERVICES TO 2G ON HEALTH, EDUCATION, WORK, AND ACCESS TO JUSTICE

16. At the outset, it is pertinent to state that the second and third impugned orders dated 03.04.2020 and 15.04.2020 at least, sought to aver that “*internet speed restrictions have, while enabling access to essential services and sites, not posed any hindrance to COVID-19 control measures or to access online educational content*” (even though this is clearly contrary to the affidavit of Ms. Revati Laul filed by the Petitioner in IA No. 48309/2020, or the media reports annexed to the writ petition bringing out the widespread and unprecedented impact of the internet speed restrictions on the people of Jammu & Kashmir.) However, the fourth impugned order dated 27.04.2020, makes no such mention.

This is an implied admission of the fact that restriction of internet speed *does* have a bearing on the life and limb of citizens post the lockdown.

17. It is further submitted that the Respondent No. 1, in its counter affidavit, has wholly failed to address and respond to the impact of the restriction of the speed of the internet on
- a. the right to health under Article 21, as internet is needed for tele-medicine (whether for COVID-19 or any other health related concern);
 - b. the impact of these restrictions coupled with a lockdown on the mental health of people in the entire Union Territory.
 - c. the right to an occupation/profession and the right to livelihood under Articles 19 and 21 respectively, as the internet is needed to work from home to carry out any kind of economic activity during a lockdown
 - d. the inability of people in Jammu & Kashmir to connect with their friends and family through video calls (unlike the rest of the country) which becomes especially important during a pandemic;
 - e. the right of persons to access information and forms of recreation from all sources; and
 - f. the right of the people of Kashmir to obtain information from varied sources, not limited only to the pandemic.

This is apart from the Respondent's failure to evaluate the impact of the continuation of restrictions in spite of the internet having become indispensable for education, health care, economic activities, and the right to information owing to the pandemic and lockdown.

18. In accordance with the long-standing jurisprudence of this Hon'ble Court, once it has been *prima facie* established that a fundamental right has been infringed, the *evidentiary and legal burden of justification* shifts to the State. It is for Respondent No. 1 to demonstrate - and not merely assert - either that (a) *as a matter of fact*, the petitioner's claim that a right has been infringed is false, or (b) *as a matter of law*, the infringement is justified. [In

applying the proportionality standard, a Court is not expected to mechanically defer to the State's factual assertions, and given the intrusive nature of regulation herein, the usual judicial deference to legislature is inappropriate. [See **Powell J.** in *Moore v City of East Cleveland*, 431 US 494 (1977) and *S & Marper*, (2008) ECHR 1581 (GC), paras 101, 102. On the application of compelling State interest test, see *Gobind v State of MP*, (1975) 2 SCC 148, paras 22 and 31].

A. The impact on the right to health

19. Contrary to the Respondent's bald assertion that there has been no hinderance to healthcare professionals, there is ample evidence to suggest that activities of healthcare professionals have been hampered due to slowdown of internet services in Jammu & Kashmir. For instance, doctors have reported that they are unable to download the latest studies, protocols, manuals and advisories due to slow internet speed. Dr Iqbal Saleem who works at Srinagar's Government Medical College shared these problems stating "*This is so frustrating. Trying to download the guidelines for intensive care management as proposed by doctors in England. It is as many as 24 MBs. It has been one hour...still not able to do so*" (@pg. 11, IA No. 48309/20).
20. Further, patients in Jammu & Kashmir are being forced to flock at hospitals which are hotbeds of infection and subject themselves to the risk of contracting COVID-19 because telemedicine is virtually impossible at 2G speed. The difficulties faced due to lack of telemedicine were described in great detail by doctors in Jammu & Kashmir who spoke to the Petitioner-Society's Director, Ms. Revati Laul, who has filed an affidavit.
21. Dr. Suhail Naik, the President of Doctors Association of Kashmir emphasized that video facilities were necessary for telemedicine because "*The treatment of patients doesn't need only the patient's history but also a physical look. The face is a very important index of disease and how much illness he or she has*" (@pg. 10-11 , IA No. 48309/20). Dr. Iqbal

Saleem expressed similar concerns and offered a practical example to demonstrate how difficult it is to diagnose and treat patients without video facilities. *“I have so many patients who are just able to call me this time. I can’t understand what they are trying to tell me exactly...One said, ‘I have pain in the tummy.’ The tummy is big. It has around 20 organs inside. So then I ask – is it the upper part of the tummy, is it the right side, is it lower? And it becomes very difficult. It’s not possible to accurately pin-point what they’re saying”* he stated (**@pg. 11, IA No. 48309/20**). The low density of healthcare facilities in Jammu & Kashmir further aggravates the problem because patients have to travel long distances to consult a doctor if there is no telemedicine. These difficulties were highlighted by Dr Sajjad H Qanungo, an eye surgeon who stated *“I am an ophthalmologist and we have to see patients very far away. With video conferencing it makes it much easier to tackle issues of the eyes. It gives us 90% of the diagnosis. In this scenario we are suffering a lot”* (**@pg. 11-12, IA No. 48309/20**).

22. In addition to hampering telemedicine, the slowdown on internet speed has also prevented dissemination of latest and accurate information about COVID-19 among the residents of Jammu & Kashmir. Stressing on the need for 4G internet services to facilitate effective public outreach, Dr Riyaz Ahmad Daga, the spokesperson for the Doctors Association of Kashmir stated *“Until we can make the common person educated and aware about this disease, she cannot fully protect herself from it. But it’s impossible to upload videos at the moment, upload information on COVID 19, what precautions can people take...It’s not just COVID. There are medical emergencies which are beyond COVID. Everyday medical science is changing. There are fresh contradictions that emerge everyday in medical science”* (**@pg. 12-13, IA No. 48309/20**).

23. Technical analysis conducted by Mr. Prateek Waghre, a technologist and policy researcher with the Takshashila Institution in his independent capacity, also demonstrates that interactive resources like the World Health Organization’s Situation Tracker do not function at Observed 2G speeds at all. Similarly, the Ministry of Health’s website takes 24 times longer to load and the World Health Organization’s website takes 27 times longer to

load on 2G speed compared to 4G speed. (@pg. 75-80, IA No. 48309/20). Therefore, Respondent No.1's contention that government and WHO websites can be easily accessed at low internet speed (@para 31 of Counter-affidavit) is wholly unfounded, especially because it has failed to respond to the technical affidavit filed by the Petitioner. Without access to such reliable resources, there is greater opportunity for misinformation to spread in Jammu & Kashmir. These concerns were echoed by Manzoor Ul Hasan, a health journalist who stated *"WhatsApp has a lot of fake news. WhatsApp is full of fake stuff. People get confused. For that you need authentication information and to access authentic information, you need high speed internet."* (@pg.14, IA No. 48309/20).

24. Respondent No. 1 has claimed that it has established call centres to address people's queries, receive information about suspected cases and contact tracing (@para 33 of Counter-affidavit). However, the Respondents have not provided the number of such call centers established and the training that representatives have been given. For instance, if representatives do not have medical training, they will be unable to address the persons queries regarding the same.
25. Respondent No.1 has further claimed that it is disseminating necessary information to the public through print and electronic media including newspapers, pamphlets, TV channels and radio channels (@para 34 of Counter-affidavit). However, the nature of the pandemic is such that multiple developments may take place through the day. Information is not limited only to the pandemic but to other related issues owing to the lockdown – for instance the opening of private shops and their specific timings, the availability of specific medicines in a particular chemist. Many of these queries are too personal and localized to be catered to through print and electronic media.

B. The impact on right to education

26. Respondent No.1 has surprisingly claimed that because a vast majority of students in Jammu & Kashmir study in government schools, they do not have access to smartphones/laptops (@para 37 of Counter-affidavit). However, it cannot be claimed

without evidence that merely because people belong to Government schools, they or their parents do not have access to smartphones. Further, it is the responsibility of the Government to provide them with necessary infrastructure such as tablets to enable education to carry on due to the lockdown.

27. Respondent No.1 has further cited video classes being broadcast on television, audio classes being broadcast on radio channels, phone conferencing and free distribution of textbooks till elementary level as sufficient ameliorative measures to prevent any adverse impact on the education of children (**@para 37-39 of Counter-affidavit**). However, the Respondent has completely failed to appreciate that a video or audio lecture series broadcast through TV or radio is one sided and does not allow a question and answer environment that is necessary for children to learn and clarify their doubts, which can instead be provided through video conference calls. Further it is impossible for the entire class to be on a WhatsApp call or a conference call, since there exists a limit of 4 people in the former and around 6 people on the latter.

28. In any case, their suitability notwithstanding, as per Respondent No. 1's own admission there is only a proposal to begin classes on 16 DD channels and the same does not exist at the moment. As of now, there exist only tele-classes between 4:00 pm and 5:30 pm. The State must explain how classes for students from 1st to 12th who usually have 6 hours of class each day are all adequately taught in a one and a half hour of broadcast every day. The Petitioner Society has also produced accounts of teachers and professors in Jammu & Kashmir which clearly show that they cannot teach students remotely without access to high speed internet which is capable of supporting video conferencing facilities. For instance, Professor Bari, Assistant Professor at the GDC Government College in Kulgam explained how difficult it has been to teach his subject - geography- remotely via 2G. *"We are talking of the 3 D view of the interior of the earth. How can we explain that on just voice? With just voice, how can I explain to them that the earth is like an onion? It has layers. I have to show the onion, I have to cut the onion diagonally so that I can explain the layers of the earth. That can be possible only when there is interaction through a video*

conference or a video call...Then they have to close 4G in all of India. If they treat us as part of India, we are citizens of India then why different treatment between citizens of Kerala and Kashmir, why are we ill- treated?” he stated (@pg. 19-20, IA No. 48309/20).

29. Respondent No.1 has claimed that lessons can be provided to students in Jammu & Kashmir through WhatsApp and YouTube and this bald assertion is vehemently denied. As per the affidavit of Mr. Prateek Waghre, YouTube performs poorly on 2G networks as “2G network conditions are well below the minimum requirements published by leading video streaming / video communication platforms like YouTube, Zoom and Skype.” (@pg.24 of IA No. 48309/2020).

30. Denial of 4G internet services has made it practically impossible for students in Jammu & Kashmir to continue their education through online tools like Google Classroom or Zoom. (@pg. 248 of the Petition) These students are already at a disadvantage due to prolonged school closures after 05.08.2019 and are deeply anguished by the prospect of being left behind while students in other parts of the country continue their education. Zarin, an Advocate and UPSC aspirant explained how on account of not being able to download reference material for her cases or for her UPSC exam classes, she has been struggling. “I am not able to go for online classes or read different things. Everyone is in depression. We have no source of entertainment. We want to go outside but that is not possible because of the lockdown. When we stay at home, entertainment is also important. There should be a difference between animals and humans. They have treated us like animals, literally. How will we compete with other parts of the country with just 2G? How can we?” she said (@pg. 18, IA No. 48309/20). Tabish, a student at Degree College in Bemina expressed similar fears and stated “The universities will hold their exams on time. Then no one will speak on our behalf to say to them – oh, there was no 4G, there were no classes. There will only be exams. Did we get any education? Are teachers being sent to our homes? Is there a door to door drive to ensure that students’ education won’t be affected?(@pg. 17, IA No. 48309/20).

31. Further, parents in Jammu & Kashmir are in a state of despair about discontinuation of education in the region and its impact on the mental health of their children. M. R. Farooq, a parent and the General Secretary of the Travel Association of Kashmir lamented that he had noticed behavioural changes in his children because despite their best efforts, they were unable to access online classes. *“Since we are in lockdown from August 2019, our kids have been indoors. It has affected their education very badly...I am a single parent and for the whole day I have to sit with my kids downloading audio lectures. One of my kids is in 10th standard and the other is in the 9th standard. For the whole day, they keep using smartphones and other gadgets and they keep trying to download smart classes. But at the end of the day when they feel they aren’t able to study, they feel frustrated. Their temperament has changed. They were very sober, gentle kids. But I can see for the last two weeks, a change in them. They’ve become hyper-active. They keep shouting at elders and fighting with each other. The only reason being they are not able to study”* he stated (@pg. 15-16, IA No. 48309/20).

32. In a similar vein, Dr Zahoor Bhat, a teacher at the Civil Service Academy for Competitive Exams stated *“If we really want the students of Jammu and Kashmir to grow, they should be part of the world developments in education etc. This has other consequences if we don’t. After the abrogation of article 370 students were saying - ‘We thought we will be like Delhi students.’ So there should be complete 4G. It should never be suspended. Because 90% of the education nowadays is through online. You have to give them notes, sites. We are taking them to the world. When students aren’t given this, they begin to think - ‘We are second class citizens.’”* (@pg.18-19, IA No. 48309/20).

C. The impact on the right to one’s profession, occupation, and business

33. Denial of 4G internet services in Jammu & Kashmir is preventing businesses in the region from following the government mandated work from home policy and disrupting their operations. M R Farooq, the General Secretary of the Travel Association of Kashmir explained that four operators in Kashmir were finding it difficult to communicate with

customers because of the internet slowdown. *“With 2G, as a tour operator and secretary of the biggest travel association of Kashmir, I’ve received complaints from all the stakeholders as well as my members that they are not even able to communicate to people through email. It’s very difficult to send an email. It takes a long time. We have to send attachments to promote our products which they’ve not been able to do till now unfortunately,”* he stated (**@pg. 16, IA No. 48309/20**).

34. In its counter-affidavit, Respondent No.1 has claimed that 2G internet is sufficient to access e-commerce, online banking and emails (**@para 45 of Counter-affidavit**). However, as noted by in the preceding paragraph, this does not reflect the situation on the ground where business persons are even unable to share email attachments to promote their products and services. Difficulties may also arise in accessing e-commerce and online banking due to timeouts imposed by website administrators, which become more likely at 2G internet speed.

D. The deprivation of access to justice

35. Due to the COVID-19 related lockdown, the Jammu and Kashmir High Court premises have been shut down and the Registry has indicated that judges will hear matters of extreme urgency through virtual mode only. As a result, advocates and litigants are entirely dependent on internet services for filings and hearings but the internet speed is too slow for uploading files and case law research. These difficulties were detailed by Advocate G H Nabi Khan who stated *“When we call the high court for listing of urgent matters it takes very long to send files, to send video. Calls keep getting disconnected and finally we cannot make our point. That’s why we need 4G...Right now no library is updated in the Kashmir valley as far as law is concerned. Earlier I could google these and get around that. And file it in the court...With 4G being snapped, I recently put in an order for books for near about one lakh rupees”* (**@pg. 20, IA No. 48309/20**).

36. Further, even if the government provides designated computers with fixed line connectivity as has been suggested by Respondent No.1 (**@para 46 of Counter-affidavit**), the provision of computers may be inadequate if lawyers are not located in cities as travel will be difficult owing to the lockdown.

LEGAL SUBMISSIONS

I. THE RIGHT TO EFFECTIVE INTERNET ACCESS IS A FUNDAMENTAL RIGHT GUARANTEED UNDER ARTICLES 19 AND 21 OF THE CONSTITUTION, ESPECIALLY IN TIMES OF A PANDEMIC

37. In **para 13** of its **counter** dated 29.04.2020, Respondent No.1 has erroneously argued that the right to access the internet is not a fundamental right. It is submitted that this Hon'ble Court in *Anuradha Bhasin* (**para 31 @ pg 102 of the petition**) made it clear that it was "not expressing any view" on whether the right to access the internet is a fundamental right since "none of the counsels had argued for declaring" it so. It is thus incorrect and misleading to argue that the right to access the internet is not a fundamental right.
38. Access to the internet is a basic and essential facet of the freedom of speech and expression and the Right to Know (including the right of the media to report freely). In addition, access to the internet is an indispensable requirement for access to various other fundamental rights, such as access to healthcare and statutory welfare schemes, to which persons are entitled in law. Today, the internet is an essential and basic attribute of news-reporting. Consequently, any interference with access to the internet is a direct violation of the right itself. As this Hon'ble Court has long held, fundamental rights guaranteed under the Constitution also include ancillary guarantees that make those rights meaningful (*PUCL v Union of India*, (2013) 10 SCC 1, **para 97**).
39. This Hon'ble Court in *Anuradha Bhasin* (**para 163(b) @pg. 134 of the Petition**) was pleased to recognise that the right to freedom of speech and expression and the right to freedom of trade and commerce through the medium of the internet are constitutionally

protected under Article 19(1)(a) and Article 19(1)(g) of the Constitution respectively. Any restriction on such rights have to be satisfy the test of proportionality, as well the mandate under Articles 19(2) and 19(6) of the Constitution (*Anuradha Bhasin (supra)*, **para 77-79, 163(D) @ pg. 113, 135 of the Petition**).

40. Access to the internet has also been judicially recognized as a fundamental right in a recent decision of the Kerala High Court in *Faheema Shirin v. State of Kerala (W.P. Civil No. 19716 of 2019)*, recognising that “*the usage of mobile phones in order to enable the students to have access to internet will only enhance the opportunities of students to acquire knowledge from all available sources based on which they can achieve excellence and enhance quality and standard of education.*” While reaching its conclusion, the Hon’ble High Court relied on the resolution dated 14.07.2014 passed by the Human Rights Council at the United Nations General Assembly that access to Internet is a fundamental freedom and a tool to ensure right to education.
41. The importance of the internet has also been recognised by the government in its National Telecom Policy, 2012, which specifically states that broadband internet connectivity is a “basic a basic necessity like education and health.” (**@pg 188 of the Petition**). This Hon’ble Court too, in *Swaraj Abhiyan v. Union of India, 2016 SCC Online SC 485, para 109(6)*, has observed that “*It is high time that State Governments realize the vast potential of technology and the Government of India should insist on the use of such technology in preparing uniform State Management Plans for a disaster.*”
42. The importance of speedy and effective internet in securing our fundamental rights has become even more evident during the COVID-19 pandemic and the consequent lockdown. The inextricable importance of the internet to our right to life, health, education, profession, and access to justice requires this Hon’ble Court to recognise the right to internet access as part of Article 21 of the Constitution. Recognising the value of the right to an efficient and effective digital infrastructure, the government is using the internet in its fight against COVID-19 in the following ways:

- a. Para 4(d) of the lockdown guidelines, Order No. 40-3/2020-DM-I(A) dated 24.03.2020, as well as the addendum, Order No. 40-3/2020- DM-I(A) dated 25.03.2020 issued by Respondent No. 2 contain an exemption for “telecommunications and internet services”, “IT and IT enabled Services only (for essential services)”, IT vendors for banking operations; and permit these entities to continue operating despite the lockdown (**@pg 202 and 209 of the Petition**)
- b. Accurate information is being disseminated by Respondent No. 2 though laudable initiatives such as the Ministry of Health and Family Welfare’s COVID 19 dashboard and MyGovIndia’s WhatsApp chatbot which responds to queries relating to COVID 19 with text, infographics and videos (**@pg 243-245 of the Petition**). Incidentally, even private enterprises such as Apollo Hospitals have launched tech tools to enable individuals to assess their risk of developing COVID 19.
- c. Respondent No. 2 has also launched a contact tracing app for COVID 19, called *Arogya Setu*, which has become extremely popular and witnessed 5 million downloads in the first three days alone (**@pg 23, IA No. 48247/20**)
- d. The Hon’ble Prime Minister has recognized the importance of staying connected and harnessing the potential of technology during the COVID-19 crisis. Even prior to imposition of the nationwide lockdown, the Prime Minister urged citizens to work from home in his speech on 19.03.2020. Subsequently, in his speech on 23.03.2020, the Prime Minister praised people for disseminating information in an innovative manner on social media while staying indoors. In his Mann Ki Baat radio address on 29.03.2020, the Prime Minister urged people to increase social distancing but reduce emotional distancing (**@pg.24 of I.A. No. 48247/2020**). In his most recent speech on 14.04.2020, the Prime Minister encouraged the public to download the Aarogya Setu Mobile App to help prevent the spread of the virus and to inspire others to download the app as well. However, due to the internet slowdown, it is very difficult for the residents of Jammu & Kashmir to work from home, share innovative content on social media, video conference with their loved ones or download the Aarogya Setu app.

- e. Even this Hon'ble Court in its circular dated 15.04.2020 has acknowledged the importance of "dedicated 4G internet" (minimum 2mbps) for the frictionless use of videoconferencing facilities (**@pg 47, IA No. 48328/20**)

Nevertheless, the residents of Jammu and Kashmir are unable to access potentially life-saving information by using these services, on account of limited internet speeds, and thus, are suffering a violation of their fundamental rights under Articles 14, 19, and 21 of the Constitution.

43. It is submitted that restricting mobile internet speed to 2G does not satisfy the requirement of an effective and properly functioning internet (See the affidavit of Mr. Prateek Waghre **@pg 22-26 and 61-80 of IA No. 48309/2020**)

II. THE IMPUGNED ORDERS VIOLATE THE RIGHT TO LIFE AND RIGHT TO HEALTH GUARANTEED UNDER ARTICLE 21 OF THE CONSTITUTION

44. The guarantee of the right to life under Article 21 and the attendant right to dignity comprises the right to health, including the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health (*Vincent Panikurlangara v. Union of India*, (1987) 2 SCC 165, para 16).
45. The protection under Article 21 extends to requiring the State to do "whatever is necessary.... to be done" to ensure the provision of adequate medical services and medical aid to the people (*Paschim Banga Khet Mazdoor Samity v. State of W.B.*, (1996) 4 SCC 37, para 16). In the present case, the Petitioners while asking the State to do "whatever is necessary" to secure the right to health and the right to life to the people of Jammu & Kashmir are not requesting the Union Territory to create *new* infrastructure or re-organise the budget to provide *additional* medical services/facilities. The State is only being asked not to deprive citizens in Jammu & Kashmir of facilities (digital infrastructure) that are already available to Indians across the country - i.e., effective and speedy internet, which

is an indispensable tool in the struggle against the COVID-19 epidemic. It is submitted that on the principle of non-retrogression the rollback of rights that were hitherto guaranteed to the people of Jammu & Kashmir is unconstitutional. In *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paras 201 and 202, this Hon'ble Court was pleased to hold:

“**201.** The doctrine of progressive realisation of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights. In a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead.

202. The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.”

46. During the twin conditions of a national and global epidemic as well as a full lockdown, the deprivation of speedy and efficient internet access (4G) amounts to a retrogression and an effective negation of the right to health, and hence, the right to life. The right to health goes beyond the mere absence of disease and infirmity or the provision of medical care and health facilities. It extends to a state of complete physical, mental and social well being (*CESC Ltd. v. Subhash Chandra Bose*, (1992) 1 SCC 441 @ para 32). In a similar vein, the Supreme Court of Canada in its seminal judgment *Eldridge v Canada*, [1997] 3 S.C.R. 624 (@para 94) has held that it unconstitutional to deny sign language interpreters to deaf individuals under the publicly-funded healthcare scheme, as that would render their statutorily guaranteed right of access to healthcare effectively illusory. In reaching its conclusion, the Court observed, “*Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives.*”

47. The impact of the restriction on mobile internet speeds to 2G on the right to life and right to health of an individual can be demonstrated in the following manner, as brought out in news reports and the affidavit of Ms. Revati Laul and Mr. Prateek Waghre filed by the Petitioner:

- a. Unlike 3G and 4G speeds, 2G does not facilitate the effective use of any smart phone technology such as web browsing, email, video conferences, and downloading and picture sharing. In fact, based on a simulated test conducted by a technology expert, it was found that websites such as the World Health Organization's Situation Tracker/Dashboard did not function at Observed 2G speeds (**@pg. 25, 76, 79 of IA No. 48309/2020**). Similarly, tasks on Observed 2G speeds, such as downloading the Arogya Setu App, accessing the website of the World Health Organisation and the Ministry of Health and Family Welfare, and downloading a sample PDF from the latter website, took 11-37 times longer than they did on Observed 4G speeds in the simulated environment. (There is an apprehension that this ratio may increase in real world scenarios once congestion, packet-loss, signal strength etc. are accounted for) (**@pg 24-25, 75-76, 79 of IA No. 48309/2020**).
- b. At 2G internet speeds, doctors, patients, and the general public are impeded from accessing the latest information, guidelines, advisories, and restrictions about COVID-19 that are available and continuously updated online. Doctors in the Union Territory have expressed their inability to download PDF files containing guidelines for intensive care management in hospitals or the damage caused by delays in receiving and accessing the latest protocols, studies, manuals, advisories, and containment strategies (**See the statement of Dr. Iqbal Saleem @pg 11 of IA No. 48309/2020 as well as news reports @pg 231-234 and 235-238 of the Petition**).
- c. The lack of a properly functioning internet also hampers, and renders virtually impossible, telemedicine and online video consultations. These avenues are essential to achieve social distancing and reduce the number of in-patient visits to hospitals, for patients who are desperate to meet doctors in order to understand their COVID-19 symptoms; or come in for treatment of other medical and psychological problems, including anxiety, which require counselling. (**See the statements of Dr. Suhail Naik (Chief of the Doctors Association in Kashmir, Dr. Iqbal Saleem, and Dr. Sajjad H. Qanungo @pg 10-11, IA No. 48309/2020 as well as**

news reports @239-242 of the Petition). Thus, the restriction of mobile internet speed can indirectly and unwittingly contribute to the spread of COVID-19.

- d. An effective digital infrastructure (comprising 4G internet) is essential to enable people to share information (text, videos, PDF files) with each other, especially since the medical science around COVID-19 changes drastically as more research is done on the disease. The restriction of mobile internet to 2G is limiting the ability of the citizens of Jammu & Kashmir from being up to date and informed about the latest scientific developments and advisories surrounding COVID-19 (See **the statement of Dr. Riyaz Ahmad Daga @pg 12-13 of IA No. 48309/2020).**

48. In contrast, as elaborated above, Respondent No. 1 has failed to respond these specific averments in its Counter Affidavit. Respondent No. 1 has claimed that health related and other important documents regarding COVID-19, including government advisories, are being accessed by over 100,000 professionals in various health facilities in the UT “through fixed line internet (**@para 31 of the Counter-Affidavit**). This averment itself indicates that government advisories are only accessible via fixed line high speed internet, thus impliedly admitting that for such essential health related services, 2G is inadequate. Moreover, information is not limited to government advisories; it is respectfully submitted that the Respondent No. 1 cannot argue that restricting access to the internet is justified because it is providing everything that could be required. The world over, doctors and scientists are collaborating over the internet to come up with treatments and vaccinations. By restricting the internet, the Respondent authorities are depriving doctors and consequently patients the right to healthcare.

49. It is submitted that the aforesaid denial of access to critical information and an *existing digital infrastructure* during the time of a pandemic and a lockdown is a violation of the State’s constitutional obligation to ensure the presence of adequate (physical and digital) infrastructure to create conditions conducive to public health, as well as a violation of the right to health and right to life of the citizens of Jammu and Kashmir.

III. THE IMPUGNED ORDERS VIOLATE THE RIGHT TO EDUCATION OF CHILDREN AND STUDENTS OF JAMMU & KASHMIR UNDER ARTICLES 14 AND 21 OF THE CONSTITUTION

50. The right to education is guaranteed both under Article 21A (in specific terms) and, more generally, as a subset of the right to life under the Constitution.
51. The right to dignity under Article 21 has to be seen along with Articles 39(e)-(f) and Article 41 of the Directive Principles of State Policy, which require the State to take measures to ensure that children are provided with the opportunities and facilities to develop in a healthy manner in conditions of freedom and dignity. *“No State Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials”* (***Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, para 10***)
52. School students in Jammu and Kashmir are being deprived of an opportunity to continue their education and to develop thinking and curious minds, necessary for their intellectual, mental, and emotional growth, after they have already unfairly and disproportionately borne the brunt of the eight month communication shut down. Apart from a violation of their fundamental right to education, the 2G restriction has also affected the mental health and well-being of many students, leading to increasing levels of anxiety (**See the statement of M.R. Farooq @ pg 15-16, IA No. 48309/2020**). It is important to bear in mind that the impugned orders have also disproportionately affected college students and those studying for various entrance exams, who are unable to access the wealth of education information available online, making many of them feel like “second class citizens” (**See the statements of Tabish, Zarin, and Dr. Zahoor Bhatt @ pgs 17-19, IA No. 48309/20**)
53. In the specific context of the ongoing lockdown, where all schools and colleges are shut, the mode of instruction has shifted exclusively to online classes through the use of video

conferencing services and apps such as Google Hangouts or Zoom. Simultaneously, educational apps such as Google Classrooms and ABCmouse have witnessed spikes in their download rates (@pg 28, IA No. 48247/2020). However, restricted mobile internet speeds in this lockdown has meant that children in Jammu and Kashmir are specifically prevented from exercising their fundamental right to education through the use of e-learning services. This could manifest itself in the form inability to download or upload online classes (See statement by **Dr. Raja Muzzafar Bhat** stated @ pg. 16-17, IA No. 48309/2020); in the near impossibility of teaching subjects such as Geography (which requires a 3D model of the earth) via 2G internet (See statement by **Professor Bari at GDC Government College, Kulgam @ pg 19-20, IA No. 48309/20**) or the limitations faced by private schools from facilitating online lesson plans, despite having the “readiness to do so” (@pg 248-249 of the Petition).

54. It is submitted that it is not possible to effectively impart education through one way communication channels such as TV and radio broadcasts because students can learn properly only in an interactive environment where they are provided an opportunity to ask questions and clarify doubts. Further, merely because some students may not have access to smartphones/tablets does not justify denial of 4G internet services to other students who have access to these resources. In fact, Respondent No. 1 should instead endeavour to ensure that all students in Jammu & Kashmir have access to electronic devices necessary to continue their education. The impact of the impugned orders thus, has been to discriminate between the students of Jammu & Kashmir, who have almost no opportunity/ability to access e-learning facilities and the students of the rest of the country, and is thus a violation of their fundamental rights under Articles 14 and 21A of the Constitution.

IV. THE IMPUGNED ORDERS VIOLATE THE RIGHT TO ACCESS JUSTICE GUARANTEED UNDER ARTICLE 21 OF THE CONSTITUTION

55. This Hon'ble Court in *Anita Kushwaha v Pushap Sudan*, (2016) 8 SCC 509, paras 29-31 has held that access to justice (premised on the ancient Roman maxim, *ubi just ibi remedium*), is recognised as a part and parcel of the right to life and as a basic and inalienable human right to ensure equal protection of laws guaranteed under Articles 14 and 21 of the Constitution in India.
56. Vide Circular No. 15/GS dated 26.03.2020 (@251), the Hon'ble Chief Justice of the Jammu & Kashmir High Court was pleased to direct that access to all court complexes in the Union Territory would remain closed during the period of the lockdown and any "urgent business", whether in the High Court or in the Trial Courts, "shall be transacted on the virtual mode". Any interactions on the virtual mode, i.e. video conferencing would require the litigants and the lawyers to have access to a wireline connection (which only 1.03 lakh people (less than 1% of the population) have in the Union Territory), since as demonstrated earlier, it would be impossible to have an effective hearing via video conference using 2G mobile internet. Notably, even this Hon'ble Court's circular dated 15.04.2020 has acknowledged the importance of "dedicated 4G internet" (minimum 2mbps) for the successful use of videoconferencing facilities (@pg 47, IA No. 48328/20). Respondent No. 1's solution that any difficulties in participating in video conference hearings can be ameliorated by the UT by providing designated computers, which can be used by lawyers (para 46 of the Counter Affidavit). However, this does not take into account the difficulty, if not virtual impossibility, of lawyers being permitted to travel through the city, or between cities to reach court to access the computer.
57. Additionally, as pointed out by Advocate G.H. Nabi Khan, without 4G internet, even legal research is made difficult, especially since law libraries in the Kashmir Valley have not been updated (@pg 20, IA No. 48309/2020)
58. Thus, the inability of the people of Jammu & Kashmir – both lawyers and litigants – to easily access virtual modes of communication/video conferencing facilities, on account of restricted 2G mobile access, to get any matter urgently heard by the Hon'ble High Court

results in a denial of access to justice, and is violative of the fundamental rights under Articles 14 and 21.

V. THE IMPUGNED ORDERS VIOLATE THE FREEDOMS GUARANTEED UNDER ARTICLE 19(1)(A) AND 19(1)(G) OF THE CONSTITUTION

59. It is well settled that that the freedom of speech and expression under Article 19(1)(a) of the Constitution is a vital fundamental right, central to guaranteeing individual autonomy as well as a thriving democracy based upon a marketplace of ideas (*Indian Express Newspapers (Bombay) Private Ltd. vs. Union of India & Ors., (1985) 1 SCC 641*).
60. This Hon'ble Court in *Anuradha Bhasin (supra)* has expressly recognised that expression through the internet has gained “contemporary relevance” and is one of the “major means of information diffusion”. Therefore, it was pleased to hold that “*the freedom of speech and expression through the medium of internet is an integral part of Article 19(1)(a) and accordingly, any restriction on the same must be in accordance with Article 19(2) of the Constitution.*” It is submitted that access to the internet is a basic and essential facet of the freedom of speech and expression and the right to know, including the right of the media to report freely. International fora have taken a similar position for instance, In **Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2), the European Court of Human Rights (Application No. 3002/03 and 23676/03 (10 March 2009)** held “*In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general*”.
61. Severe restrictions on the speed of internet services directly limits the right of the public to know the latest information about the spread of COVID-19, the measures being taken to address it, and the restrictions imposed on the general public. For instance, under 2G network, the residents of Jammu & Kashmir will not be able to watch the Prime Minister’s speeches live on their mobile phones. In fact, the Hon'ble Prime Minister has also praised

social media platforms like Google and Twitter for their help in combating misinformation about COVID-19 (**@pg 243-245 of the Petition**).

62. The impugned orders have also resulted in the media being unable perform its role effectively in Jammu and Kashmir because journalists cannot share audio-visual content including information from the government itself, and thus are unable to effectively fact-check fake news and reduce rumour mongering (See the statement of Manzoor ul Hasan **@pg 13-14, IA No. 48309/2020**). Due to the lockdown, it is also difficult for journalists to access fixed line connections at their offices or government established kiosk. The media can play an important role in highlighting the humanitarian impact of the lockdowns (**@pg 246-247 of the Petition**), which can spur policy action.
63. The impugned order has also resulted in unwarranted restrictions on the dissemination of essential medical information and updates by the State and doctors. Given the rapidity with which the situation is changing and developing, updates are being issued multiple times a day through online platforms such as “Twitter” and newspaper websites, which are becoming impossible to access for people in Kashmir in the absence of high speed internet. These updates include the location of testing centres, the nature and extent of restrictions on movement, the inclusion and exclusion of services in essential services and the manner of availing these services, the nature of relief packages being announced by different ministries and institutions such as the Reserve Bank of India, the location of relief shelters, information regarding areas in which positive cases have been found which enables persons in the area to self-isolate, voluntary contact tracing by keeping in touch with one and another, healthcare advisories such as symptom tracking and advisories against taking certain medicines.
64. Respondent No.1 has claimed that it is disseminating necessary information to the public through print and electronic media including newspapers, pamphlets, TV channels and radio channels (**@para 34 of Counter-affidavit**). However, many types of information is too personal and localized to be shared through print and electronic media. Moreover, it is a long-standing principle of our constitutional jurisprudence that the State does not exercise

a monopoly over truth, or over the range of perspectives that are open for people to engage with; any such proposition would be an anathema to core rights under the Constitution.

The people of Jammu and Kashmir have the right to access information under Article 19(1)(a) which includes information and news from a wide range of news media available online, inquire about the status of their friends and family from video calls, etc.

65. The impugned orders have had a devastating impact on businesses in Jammu & Kashmir which had already been suffering financial distress due to the communication shutdown imposed on 5 August 2019. Businesses in the region have not been able to function normally for nearly 9 months and there are serious concerns about closures and retrenchment. While businesses in other parts of the country have successfully shifted to work from home models as per Respondent No.2's guidelines, businesses in Jammu & Kashmir are unable to do the same due to slow internet speed which makes video conferencing and file sharing very difficult. As highlighted by M R Farooq, the General Secretary of the Travel Association of Kashmir, tour operators in Kashmir are finding it difficult to communicate with customers because they cannot even send email attachments to promote their travel packages (**See statement by MR Farooq at @pg. 16, IA No. 48309/20**). Therefore, the impugned orders have effectively negated the right to carry on one's trade, profession or business guaranteed by Article 19(1)(g) by slowing down internet speed during a period when all offices have been shut down and 4G internet access is essential for business continuity.

VI. THE IMPUGNED ORDERS ARE ULTRA VIRES THE PROVISIONS OF THE TELECOM SUSPENSION RULES AND ARE CONTRARY TO THE JUDGMENT OF THIS HON'BLE COURT IN ANURADHA BHASIN (SUPRA)

66. Rule 2(2) of the Telecom Suspension Rules mandates that a telecom suspension order issued under the Rules is to be forwarded to the Review Committee the next day. Rule 2(5) requires the State government/Union Territory to constitute a Review Committee and specifies the composition of the Committee. Rule 2(6) is a mandatory provision that the

Review Committee “shall” meet within five working days and record its findings about whether the orders passed by the government are in accordance with Section 5(2) of the Indian Telegraph Act.

67. This Hon’ble Court in *Anuradha Bhasin (supra)* issued various directions relating to the functioning of the Review Committee (**para 163 @ pg. 134 of the Petition**):

- a. All orders relating to suspension of telecom services, including internet, have to be published so as to enable the affected persons to challenge it before the appropriate forum
- b. Review under the Telecom Suspension Rules has to be periodic in nature and the Review Committee must conduct such a review within seven working days of the previous review as per Rule 2(6). As part of this review, the Committee has to examine whether the restrictions are compliant with Section 5(2) of the Telegraph Act and whether they are proportionate.
- c. The competent authorities have to review all orders suspending internet services

68. Despite the averments made by the Petitioner in its writ petition, the Respondents have failed to make any averment regarding the constitution of a Review Committee, including its (i) composition, (ii) date of constitution, (iii) date of meetings, (iv) orders passed, and (v) compliance with Rules 2(2) and 2(5) in their counter affidavit. Notwithstanding the express direction in *Anuradha Bhasin (supra)*, no review orders have been published on Respondent No. 1’s website, nor do the impugned orders make any mention of the functioning of the Review Committee. It is the Petitioner’s submission that no such review orders exist. As such thus, since the four impugned orders do not comply with the requirements of the Telecom Suspension Rules, they have to be struck down.

VII. THE IMPUGNED ORDERS FAIL THE TEST OF PROPORTIONALITY

A. The scope of the Proportionality test

69. The Standard of Review to be employed even in respect of fundamental rights violations under Article 19 and 21 (including on grounds of national security), as in the present case, is the proportionality standard. Indeed, this Hon'ble Court in *Anuradha Bhasin (supra)* (paras 77-79, 163(E) and (L) @ page nos. 113 & 135 of the Petition) was pleased to affirm that the proportionality standard would apply in adjudicating the constitutional validity of restrictions upon access to the internet (and, by extension, restrictions upon fundamental rights whose exercise is contingent upon effective access to the Internet). It also recognised that all orders restricting access to telecommunication/internet services must be supported by sufficient material and that the degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what is actually necessary to combat an emergent situation.
70. It is further submitted that merely because a measure is taken in pursuance of national security does not imply that the matter is not amenable to judicial review. The argument of the Union of India taken in the case law note, that the Legislature and Executive must be the sole judge of determining the means necessary for maintaining national security and that security of the state will predominate and potentially override fundamental rights are antithetical to the Indian constitution. The Indian Constitution lists Security of the State as one of the grounds under Article 19(2) on the basis of which freedom of speech can be restricted. However, such restrictions must be reasonable i.e. must satisfy the test of proportionality to be held valid. The same test applies in respect of violations of the right under Article 21 on ground of national security. Further, it is the Judiciary's prerogative under Article 32 to determine if such restrictions are proportionate. To ignore the rigorous standard of review recognised under Article 19 and 21 whenever the State invokes "national security" would amount not only to denuding the fundamental rights chapter of any effective force, but would also drive a cart and horse through seven decades of settled jurisprudence on the point, culminating, most recently, in the nine-judge bench decision of this Hon'ble Court in *K.S. Puttaswamy v Union of India*, (2017) 10 SCC 1 where this

Hon'ble Court specifically overruled *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521 and held as follows:

“137. A constitutional democracy can survive when citizens have an undiluted assurance that the Rule of Law will protect their rights and liberties against any invasion by the State and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights. The view taken by Khanna, J. must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions.”

71. This Hon'ble Court has since applied the proportionality standard in respect of matters of national security (Kindly see *KS Puttaswamy v. Union of India*, (2019) 1 SCC 1 (para 500 to 504). Most recently, this Hon'ble Court in *Anuradha Bhasin* (supra) has held that any internet shut down orders must meet the requirement of proportionality and are amenable to judicial review (para 77-9). It is submitted that the case law cited in the case law note by the Union of India has no application in the present case. (Kindly see pg 129-132 of the Rejoinder filed).
72. This position is accepted in international jurisdictions including in the United Kingdom, where the principle of parliamentary sovereignty originated. In *A & Ors. v. Secretary of State for the Home Department*, [2004] UKHL 56, the House of Lords declared section 23 of the Anti-Terrorism, Crime and Security Act 2001 to be incompatible with Articles 5 and 14 of European Convention of Human Rights. Under this provision, the Government could indefinitely detain suspected international terrorists who could not otherwise be removed from the territory of the United Kingdom under international law. In this case, the Attorney General's submission's that the matters of national security were the prerogative of the Executive was rejected:
42. It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is

also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.” (*Emphasis supplied*)

Applying the proportionality test, the Court, inter alia, found that less restrictive measures that were used in respect of UK national suspected of terrorism could have been used in respect of foreign nationals instead of indefinitely detaining them.

73. This Hon’ble Court has consistently held that the restriction on fundamental rights under Article 19 and 21 must pass the test of proportionality. Under this test, restrictions upon a fundamental right must be imposed by law and must be in service of a “legitimate aim” (B); they must be suitable to achieve that aim (i.e., bear a rational relationship with the aim) (C); they must be necessary (i.e., the least restrictive alternative available to achieve the said goal) (D); and they must not be disproportionate in their impact upon citizens (E) [*Modern Dental College and Research Centre & Ors v. State of Madhya Pradesh & Ors., (2016) 7 SCC 353; K S Puttaswamy (Retd.) & Anr. v. Union of India (Puttaswamy I) (2017) 10 SCC 1 and K S Puttaswamy (Retd.) & Anr. v. Union of India (Puttaswamy II) (2019) 1 SCC 1, paras 147, 148, 151, 152, 154, 157 and 158*].

74. Proportionality is a requirement that comes in not only at the stage of a constitutional challenge, but also, must be taken into account by the State *at the time* it decides to restrict access to the internet. Respondent No. 1’s decision to continue restricted access via 2G mobile internet, despite this radical change in the situation because of COVID-19, requires reasoned orders demonstrating how, despite the impact of COVID-19, the restrictions remain proportionate. The impugned Orders, however, show no application of mind in this regard. In fact the latest impugned order dated 27.04.2020 does not even mention the pandemic or the lockdown imposed as a result. It is submitted that what is proportionate prior to the outbreak of the epidemic cannot be deemed to be proportionate post the outbreak and the lockdown imposing severe restrictions on movement, need for social distancing etc.

75. It is further submitted that the State's evidentiary and legal burden cannot be discharged through bald assertions or blanket averments, especially when these averments have been made without responding to the Petitioner's case regarding the technical inadequacy of 2G internet services, the absence of any *causal link* between the impugned measure (2G restrictions) and the desired goal (national security) and existence of less-restrictive alternative measures such as targeted restrictions on internet speed. In this context, the Petitioner respectfully recalls the settled position of law, as laid down in the **Aadhaar Judgment (*KS Puttaswamy v Union of India (II)*, (2019) 1 SCC 1, paras 221, 495.3):**

“221. Thus, it is evident from various case law cited above, that data collection, usage and storage (including biometric data) in Europe requires adherence to the principles of consent, purpose and storage limitation, data differentiation, data exception, data minimisation, substantive and procedural fairness and safeguards, transparency, data protection and security. Only by such strict observance of the above principles can the State successfully discharge the burden of proportionality while affecting the privacy rights of its citizens.

495.3. There are alternative methods of KYC which the banks are already undertaking, the State has not discharged its burden as to why linking of Aadhaar is imperative. We may point out that RBI's own Master Direction (KYC Direction, 2016) No. DBR.AML.BC. No. 81/14.01.001/2015-16 allows using alternatives to Aadhaar to open bank accounts.” (*Emphasis supplied*)

While striking down the mandatory linking of bank accounts with Aadhaar, in concurrence with the majority, Chandrachud J. held that (**para 1453.6**):

“The Union Government has been unable to discharge the burden of establishing that this was the least intrusive means of achieving its aim to prevent money-laundering **or** that its object would have been defeated if it were not to impose the requirement of a compulsory linking of Aadhaar numbers with all account based relationships with the reporting entity.” (*Emphasis supplied*)

In other words, as noted by this Hon'ble Court, (a) the burden of demonstration lies upon the Union Territory, and (b) if less restrictive methods are brought up, then it is for the UT to show that they were considered, and to explain why they were found wanting. Neither of the two conditions has been satisfied in the present case.

76. It is respectfully submitted that Respondent No. 1 throughout its counter-affidavit reveals that primarily one reason has been provided for the continued restriction of mobile internet speeds to 2G: i.e., that 4G internet speeds facilitate the transmission and download of audio-visual and multimedia material (in a way that 2G does not), and that this material is being used by terrorists to propagate their ideology, indulge in rumour mongering, and incite violence. Apart from the submissions made by the Petitioner in its Rejoinder, it is submitted that:

- a. The Petitioner acknowledges the harm caused by terrorism, and the devastating impact that terrorism has upon the lives and liberties of individuals. The Petitioner respectfully submits, however, that there is no evidence to show that curtailing *everyone's* access to the internet will mitigate the problem. The reason for this is that the internet is an agnostic medium: while it can be used to spread fake news and rumours at great speed, equally, it can be used to *debunk* rumours and provide vital - truthful - information, especially in times of crises and public health emergencies. For this reason, experts have cast doubt upon the utility of internet restrictions, and have suggested that depriving citizens and authorities of a powerful tool to *combat* misinformation and rumour-mongering can actually have a negative effect, instead of a positive one. (See pg. 27-29 , I.A. No. 48328/2020).
- b. It is respectfully submitted, therefore, that there is no rational relation between the legitimate State goal (curbing terrorism) and the method used (restricting access to the internet). The Petitioner also submits that - as established in *Anuradha Bhasin (supra)* - access to information through the internet is protected under Article 19(1)(a) of the Constitution. For this reason, the burden lies upon the Respondent No. 1 to establish that its measures curtailing access to the internet do, indeed, bear a rational relationship with its goal. It is submitted that neither in *Anuradha Bhasin (supra)*, nor in the present case, has the Respondent done so.
- c. The Petitioner respectfully submits that the internet is a medium through which fundamental rights can be effectively exercised, especially in the time of a pandemic and a nationwide lockdown. In this respect, it is disproportionate for the

State to restrict access to the internet of *all*, for the misdeeds and crimes of a *few*. For example, consider a situation where there is a well that serves as the source of water for a village, and which is also being used by terrorists. It would not be permissible for the State to fill up the well, or block access to it, on the basis that doing so would prevent terrorists from accessing water. It is respectfully submitted that the case of the internet (especially in the time of a pandemic and a nationwide lockdown): access to what are essentially public utilities cannot be restricted on the basis that it is also possible to misuse those utilities for nefarious purposes.

- d. The Petitioner respectfully submits that restricting access to 2G internet to all persons in Jammu and Kashmir because *some* are using it for illegal purposes effectively amounts to an imposition of *collective responsibility*, a concept unknown to civilised jurisprudence and to the Indian Constitution. In effect, citizens of India in the Union Territory of Jammu and Kashmir are deprived of equal access to the internet - and thereby, subjected to a severe deprivation of their rights, especially in a pandemic and a nationwide lockdown - as compared with citizens from the rest of the country, *for no fault of their own, and not upon the commission of any crime*. In fact, there is a further distinction that has been drawn amongst the residents of Jammu & Kashmir, with a minority section having access to full functioning internet through fixed line connectivity, while the majority has been restricted to 2G mobile internet access.

77. It is submitted that the impugned orders fail all these prongs of the proportionality test

B. Legality and Legitimate Aim

78. While the impugned orders have been passed under Rule 2(1) of the Telecom Suspension Rules read with Section 5(2) of the Telegraph Act, as argued above, they are *ultra vires* the Telecom Suspension Rules for violating Rules 2(2), 2(5), and 2(6). Respondent No. 1 has failed to publish (or even produce on affidavit) any orders regarding the constitution of the

Review Committee, the duration of its functioning, and the orders published by it reviewing the impugned orders. In light of this, the impugned orders do not have the sanction of law.

79. It is submitted that all three impugned orders cite sovereignty and integrity of India, security of the State, and public order as the legitimate aims justifying the passage of the impugned orders. However, a comparison of the orders dated 04.03.2020 (**@pg 174-176 of the Petition**), 17.03.2020 (**@pg. 177-178 of the Petition**), and the first impugned order dated 26.03.2020 (**@pg. 59-61 of the Petition**) reveal a complete non-application of mind inasmuch as the reasons given for restricting mobile internet speeds to 2G are almost identical; fail to elaborate on the type of supporting material; and make no mention of the evolving crisis caused by the COVID-19 pandemic, and the consequent lockdown in the Union Territory and the country.

Order Number	Rationale	Order
Order No. 17(TSTS) of 2020 dated 04.03.2020	Upon regular assessment of impact of the directions for regulation of the telecom services on the <u>overall security situation and maintenance of public order and taking note of the position brought out in the reports of the law enforcement agencies, while keeping in view the aspects of reasonability of restrictions with regard to the principle of proportionality and consideration of available alternatives</u> Restrictions necessary in <u>the interest of sovereignty and integrity of India, security of the State and public order.</u>	2G mobile internet for postpaid customers and verified prepaid customers for access to all websites. Fixed line connectivity with mac binding to access all websites
Order No. 20(TSTS) of 2020 dated 17.03.2020	On consideration of <u>overall security scenario and the reports of law enforcement agencies inter alia</u> bringing out the necessity of <u>speed related restrictions</u> on mobile data services to prevent misuse of social media applications, as also taking note of recent terror activities,	Restrictions in Order dated 04.03.2020 will continue to apply.

	<p>and upon <u>assessment of the available alternatives</u></p> <p>Restrictions absolutely <u>necessary in the interest of sovereignty and integrity of India, security of the State and public order.</u></p>	
<p>Order No. 21(TSTS) of 2020 dated 26.03.2020</p>	<p>Taking note of the <u>overall security situation in the UT of J&K and the latest reports of the law enforcement agencies</u>, particularly with regard to <u>speed related restrictions on mobile data services</u> , and <u>upon assessment of available alternatives...</u>”</p> <p>Restrictions absolutely <u>necessary in the interest of sovereignty and integrity of India, security of the State, and public order.</u></p>	<p>2G mobile internet for postpaid customers & verified prepaid customers for access to all websites. Fixed line connectivity with mac binding to access all websites</p>

It is submitted that the first impugned order, much like the preceding order dated 04.03.2020 and 17.03.2020 does not elaborate in any manner on the “overall security situation” or the latest “reports of law enforcement agencies” which justifies the continued restriction on internet speeds since August 2019. The term “overall security situation” is vague (as per the law laid down in *Shreya Singhal v Union of India, (2015) 5 SCC 1, paras 59 and 85*) since it conceals and prevents the Court as well as the people from knowing which areas of Jammu & Kashmir are at risk of incitement to violence to evaluate whether the restrictions have been tailored to those areas and have not been blanketly imposed. Similarly, ‘reports of law enforcement agencies’ does not make clear what the nature of the threat is – whether it is fake news or recruitment being tracked by cyber authorities. It is pertinent to note that the submission that the mentioning of incidents will defeat the purpose or further elaboration defeats the very object of restrictions was made before this Hon’ble Court in *Anuradha Bhasin*. This Hon’ble Court in its judgement dated 10.01.2020 was pleased to hold that all orders must be well reasoned to ensure judicial review of the proportionality of an order (**para no 77 and 102 @ pages 111, 118 of Petition**) and that orders must be made freely

available and parts of orders that are sensitive can be redacted if the claim of privilege is claimed as per law (**para 20 @ pg 100**). The Hon'ble Court in *Anuradha Bhasin* made great strides in constitutional jurisprudence by explaining how judicial review and concerns of national security can co-exist but the Respondent No. 1 has ignored the spirit of the judgment by continuing to use vague terms such as “overall security scenario” and “reports of law enforcement agencies” “anti-national activities”.

C. Suitability: The impugned orders do not bear a rational relationship with achieving the aim of security of state and public order

80. The restriction of mobile internet speeds to 2G does not bear a rational relationship to protecting security, as it is possible for persons who are responsible for such activities to communicate with one and another using 2G speeds, whereas videos can be uploaded or downloaded on the internet (Respondent No. 1's concern as per **para 20 of the Counter Affidavit**) even using fixed line internet. Respondent No. 1 is providing full internet speed on fixed line internet using Mac binding is a means of ensuring traceability, and there is no reason why a similar solution cannot be employed while providing internet access at 4G speeds on mobile phones. In fact, the discrimination between the users of mobile phones and fixed line internet in terms of the speed and the extent to which they can access the internet is violative of Article 14 of the Constitution.

81. Furthermore, research suggests that internet shutdowns may in fact be counter-productive, since they promote those forms of violent collective action which require less planning and coordination than peaceful protests; and they further create uncertainty in the minds of the public in an already volatile environment. (**@pg 27-29, IA No. 48328/20**). Research carried out by the Royal United Services Institute for Defence and Security Studies and the Observer Research Foundation has also found that internet shutdowns have been ineffective in counter-terrorism operations. (**@pg. 30-33, IA No. 48328/20**). These reports and studies refer to the work done by Jan Rydzak, a former research scholar and associate director for program, Global Digital Policy Incubator (GDPi), Stanford University wherein he details how internet shutdowns have the effect of rendering non-violent protests violent

as they cannot rely on usual modes of communication. He found that violent protests generally increase on each consecutive day for the first five days after the imposition of an internet shutdown, and they eclipse the number of riots that would occur if communication services remained available (See *Jan Rydzak, “Of Blackouts and Bandhs: The Strategy and Structure of Disconnected Protest in India”* (February 2019), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330413>. Finally, officials on the ground have reported that lack of internet and communication channels also hinders local intelligence inputs from reaching them in Kashmir (@pg 34-35, IA No. 48328/20).

82. In its counter affidavit dated 29.04.2020, Respondent No. 1 has argued that the context of “militancy” has to be kept in mind while deciding the quality of internet services to be provided in Kashmir and that 2G restrictions are justified to prevent recruitment and infiltration by terrorists and rumour mongering which could incite the public . It has not, however, discharged its burden of proof by demonstrating the causal link between downgrading internet speeds from 4G to 2G and the reduction in militancy and prevention of violence. Notably, it has also failed to respond or even deny the evidence put forth by the Petitioner in its interim application showing expert reports that internet shutdowns may be ineffective and counterproductive since they promote those forms of violent collective action which require less planning and coordination than peaceful protests; and they further create uncertainty in the minds of the public in an already volatile environment (see **pages 27-29, 30-33, 34-35 of IA No. 48328/2020**). It is submitted that on the mere “apprehension” that increase in internet speeds will lead to “swift uploading and posting of provocative videos and other heavy data files” (para 15 of the counter affidavit), Respondent No. 1 has restricted the freedom of speech and impacted the right to life of millions of innocent civilians even though there is no proximate connection between the activities of the ordinary civilians (who are bearing the brunt of the impugned orders) and the activities of the so-called “anti national elements”.

83. In its counter affidavit dated 29.04.2020, Respondent No. 1 has also relied on statistics to demonstrate the human cost of terrorism in terms of lives lost (@para 10, 16 of Counter-

affidavit). The Petitioner joins the Union Territory in unambiguously deploring terrorism, and emphasizing that even one life lost to terrorism is a life too many; and support the relevant measures that Respondent No. 1 may take to address terrorism within the limits of the law. However, in the present case relating to reduction in mobile internet speeds from 4G to 2G, the Petitioner would like to rely upon the data placed on record by Respondent No. 1 in its “Limited Affidavit” dated 30.09.2019 before this Hon’ble Court in *Anuradha Bhasin (supra)* (@pg 122-123 of the Rejoinder), which suggests that that incidents of terrorism have significantly reduced post the introduction of the digital era through mobile phones and internet. Further, even when incidents of terrorism in the post 3G/4G era were higher than the figures mentioned in the para under reply, Respondent No. 1 did not restrict internet services to 2G for such an extended and unprecedented duration of time. This can be demonstrated from the table below, which reproduces the table filed by Respondent No. 1 in *Anuradha Bhasin*, while adding the figures mentioned in **para 16 of the counter affidavit** the para under reply (Kindly See **pg 30 of the Rejoinder**).

Year	Incidents of Terrorist Violence	Civilians Killed	Security Forces Killed	Terrorists Killed
1990	4158	461	155	550
1991	3765	382	173	844
1992	4817	634	189	819
1993	5247	747	198	1310
1994	5829	820	200	1596
1995	5938	1031	237	1332
1996	5014	1341	184	1209
1997	3420	971	193	1075
1998	2932	889	236	999

1999	3071	873	355	1082
2000	3074	847	397	1520
2001	4522	996	536	2020
2002	4038	1008	453	1707
2003	3401	795	314	1494
2004	2565	707	281	976
2005	1990	557	189	917
2006	1667	389	151	591
2007	1092	158	110	472
2008	708	91	75	339
2009	499	71	79	239
2010	488	47	69	232
2011	340	31	33	100
2012	220	15	15	72
2013	170	15	53	67

2014	222	28	47	110
2015	208	17	39	108
2016	322	15	82	150
2017	342	40	80	213
2018	614	39	91	257
2019 (8 th September)	365	23	78	136
5 August 2019 to 25 April 2020	108 99 in Kashmir & 9 in Jammu)	30 dead 114 injured	20 dead 54 injured	76 killed 132 arrested

84. Respondent No. 1's data does not suggest any strong causal link between terror incidents and mobile/internet use. It is respectfully submitted that the suitability prong of the proportionality standard requires at least prima facie evidence of a rational connection between the measure undertaken and the legitimate State goal. It is respectfully submitted that even under a deferential approach, and without any intention of substituting judicial wisdom for that of the Union Territory of Jammu & Kashmir, this rational connection has not been made out on the record.

85. In its counter-affidavit, Respondent No.1 has claimed that there has been a surge in terrorist activity since the pandemic (**@para 25 of Counter-affidavit**). If Respondent No.1's assertion is taken at face value, it implies that terrorists are able to communicate successfully without the use of 3G/4G technology, thus putting into question the *suitability* of Respondent No. 1's measures. This implies that there exists a problem – solution mismatch as terrorists are resorting to alternative modes of communication to carry out operations. On the other hand the restrictions are only harming civilians who are unable to use the internet for the purposes of working, education, and accessing health care facilities.

86. Respondent No. 1 has also cited a few instances of fake news, that were spread through the means of online videos to suggest that fake news and fake videos are a unique threat to public order in Kashmir, as opposed to anywhere else (**@para 18 of Counter-affidavit**). It is respectfully submitted that:

- a. Respondent No. 1 has drawn no causal link between the spread of these videos *via* 4G networks, and the disruption to public order (indeed, the Respondent does not explain how this happened, given that mobile internet speeds were - and are - at 2G levels), nor has it seemingly given any consideration to the advocacy versus incitement distinction that was drawn by this Hon'ble Court in *Shreya Singhal (supra) (para 13)*. The lockdown coupled with the heavy military presence in the region implies that people cannot come out of their homes. Under Article 19(1)(a) incitement must be such that it must lead to imminent violence and the same is not possible given the prevailing situation;
- b. Respondent No. 1 appears to suggest that advisories against misuse of the internet prevalent in other parts of the country “may not suffice” in the case of J&K (**para 18, Counter Affidavit**); this assertion, however, seems to imply that the circulation of fake videos leading to violence is a unique problem to Jammu & Kashmir. It is obvious that this is false, as only the recent weeks have shown how fake news and fake videos have severe consequences *across* the country. It is equally clear, however, that blocking access to the internet is not the solution. The spread of

greater internet literacy, combined with strict law enforcement on the ground, is the solution. The Petitioner has

- c. It is reiterated that a few instances of fake news or misuse of mobile data services cannot justify restricting internet access for the *entire population* of Jammu & Kashmir, *especially during COVID 19*. Nor does it explain the discrimination being perpetuated by Respondent No. 1 between those citizens within Jammu & Kashmir who have access to a proper functioning internet on their broadband and those citizens of Jammu & Kashmir who can only partially access the internet through restricted speeds on their mobile phones.

87. It is further stated that terrorist attacks have taken place in Jammu & Kashmir before 4G technology was in place and if Respondent No. 1's argument is accepted at face value, the misuse of the internet by a few (many of whom are outside India or may be using fixed line internet) will never justify the restoration of 4G internet access. The militancy figures in the table above were also cited by Respondent No. 1 in *Anuradha Bhasin*, and despite that this Hon'ble Court still held (**para 109 @ pg 120 of the Petition**) that the restriction on internet services cannot be *permanent* Respondent No. 1 has to discharge its burden of proof by *demonstrating* the causal link between downgrading mobile internet speeds from 4G to 2G in Jammu and Kashmir and the reduction in militancy and prevention of violence. Interestingly, while Respondent No. 1 has relied on an academic article by Prof. Gregory S. McNeal from Pepperdine University, who states that internet is a powerful and effective tool for spreading propaganda (**para 22 of the Counter Affidavit**), the article **does not in any way advocate for internet shutdowns as a solution to address terrorism related content**. Much to the contrary, the article advocates for blocking of specific terrorism related websites and suggests that it will be a multi-step process requiring cooperation with watchdog groups and foreign diplomacy.

88. It is submitted that Respondent No. 1's argument that the presence of militancy and terrorism in and of itself merits a reduction of internet speed (since the UT of J&K is on a

“continuous” war, with “chronic” anti-national cross-border activities @paras 15 and 25 of Counter), taken to its logical conclusion, implies that high speed internet could never have, and can never exist in Kashmir and would continue indefinitely, which is unacceptable in a democratic society. Therefore, it is, and was incumbent on the Administration to have considered less restrictive alternatives than resorting to a blockade of high speed internet on the population of an entire region, which has not been done in the present case under the necessity stage.

D. Necessary: The restriction of mobile internet to 2G speeds for the entire population is not the least restrictive alternative to achieve the government’s aim

89. It is submitted Respondent No. 1 has failed to consider and apply less restrictive alternatives (rather than the blanket measure of restricting the mobile internet speed of the *entire population* of Jammu & Kashmir to 2G) to achieve its stated aims. The Petitioner respectfully reiterates that under the proportionality standard, the burden lies upon the State to show that less restrictive measures were considered, and to explain why they were found insufficient. Indeed, there exists a panoply of legal measures open to the Respondent, which can be used singly or in combination. These include:

- a. Identification of suspected persons, the interception of their conversations, and/or the blocking of their numbers under applicable law, based on intelligence inputs.
- b. The blocking of specific websites (“blacklisting”) that are known to spread terrorism or are used to recruit terrorists.
- c. *Post-facto* take down orders can also be issued under Section 69 of the IT Act.
- d. Restrictions upon internet access in a specific region for a specific period of time, based upon a specific intelligence input about a threat. In fact, Respondent No. 1 has passed such time and region-restricted orders in Jammu & Kashmir after the COVID-19 crisis, which have not been challenged by the Petitioner. For instance, vide Order No. Home-24 (TSTS) of 2020 dated 06.04.2020 (@ pg. 53-54, IA No. 48328/20), 2G services were suspended in Kulgam district on 05.04.2020 from

10:00 am to 5:00 pm, subsequent to the neutralisation of four terrorists and based on intelligence input.

- e. *Offline* measures, such as the considered and localised application of Section 144, on the basis of credible and specific intelligence, which can enforce restrictions on movement (once the COVID lockdown is over) .
- f. Further, there exists a lockdown in the region as a result of which no one can gather and cause any violence. Therefore, there is no need to continue suspension of 4G internet on top of the lockdown.
- g. The Respondent have already prohibited internet on unverified pre-paid SIM cards. Since verified pre-paid SIM cards and post-paid connections can be more easily traced, they are unlikely to be used for any illegal activity but will be used by ordinary civilians, 4G internet could have been provided on such SIM cards.

90. The restriction on all forms of videos amounts to both a prior restraint as well an overbroad restriction, both of which are unconstitutional under the Indian Constitution. (Kindly see *S. Rangarajan v. P. Jagjivan*, (1989) 2 SCC 574; *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632, para 22 See also *Brij Bhushan and Ors. v. The State of Delhi*, 1950 Supp SCR 245, para 4). In the same vein, it is submitted that the dicta of this Hon'ble Court does not support the blocking of content merely on account of "propagation" (a ground taken in the second impugned order dated 03.04.2020) but on imminent incitement. In this regard, the opinion of **Brandeis J. in *Whitney v. California* [71 L Ed 1095 : 274 US 357 (1927)]** quoted with approval in *Shreya Singhal v. Union of India* (2015) 5 SCC 1 is an important guide - "*Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.*" (Kindly also see *Kameshwar Prasad v State of Bihar*, 1962 SCR Supl. (3) 369, para 16)

91. International courts have also recognized this distinction between advocacy and incitement and held that speech cannot be suppressed merely because it is propaganda even in terrorism affected regions. For instance, in *Surek v. Turkey (No.4) (Application No. 24762/1994)*, the European Court of Human Rights held that the Applicant's conviction for disseminating separatist propaganda was unjustified despite a history of terrorism in the region. The Court explained that hard hitting criticism of the government was “*more a reflection of the hardened attitude of one side to the conflict, rather than a call to violence*” and found that “*the domestic authorities in the instant case failed to have sufficient regard to the public’s right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.*”
92. Jammu & Kashmir is already in a state of a lockdown and movement is severely restricted due to the COVID outbreak, making it extremely difficult, if not impossible, for individuals to leave their houses to congregate, and cause any form of unrest – thus reducing the possibility of any actions that can endanger public order. To the contrary, the absence of avenues of continuous updates about the situation as it unfolds and details of relief centres of the Government are more likely to endanger public order. The mere fact that the lockdown may have been violated on one occasion or in a particular region, as stated in the third impugned order dated 15.04.2020 (@pg 24-26, IA No. 48328/20) does not justify the imposition of such severe restrictions on the entire Union Territory.¹ Instead, restrictions must be imposed in specific areas for specific time periods where there are verified intelligence inputs of unrest, as has been done by Respondent No. 1, for instance vide Order No. Home-24 (TSTS) of 2020 dated 06.04.2020 (@ pg. 53-54, IA No. 48328/20), where 2G services were suspended in Kulgam district on 05.04.2020 from 10:00 am to 5:00 pm, subsequent to the neutralisation of four terrorists and based on intelligence input.

¹ By that logic, the internet should have recently been shut down in all of Maharashtra or Mumbai when some persons reached Bandra in the hope of going home to their home state owing to rumours on social media. It is submitted that any restrictions have to be calibrated and localised and cannot be imposed in a blanket manner on an entire population.

93. It is further submitted that to restrict mobile internet speeds for an entire Union Territory on the basis of one incident (violation of lockdown) in one specific area amounts to treating all persons in the Kashmir region amounts to treating all persons with suspicion. Such “jurisdiction of suspicion” was accepted by the Hon’ble Court in *ADM Jabalpur v. Shivkant Shukla*, which was overturned by a nine judge bench of this Hon’ble Court in *KS Puttaswamy v Union of India, (2017) 10 SCC 1*. It is therefore respectfully submitted that the “presumption of criminality” and the “jurisdiction of suspicion” are no longer constitutionally valid; rights of citizens cannot be restricted without probable cause or suspicion. In fact, in *KS Puttaswamy v. Union of India II (Aadhaar), (2019) 1 SCC 1, paras 489-496, 500-504*, the Constitution Bench, while holding the amendment to Rule 9 of the PMLA Rules by the PMLA (Seventh Amendment) Rules, 2017 requiring Aadhaar linking of bank account unconstitutional stated:

“492. Nobody would keep black money in the bank account. We accept the possibility of opening an account in an assumed name and keeping black money therein which can be laundered as well. However, the persons doing such an act, if at all, would be very few. More importantly, those having bank accounts with modest balance and routine transactions can be safely ruled out. Therefore, the provision in the present form does not meet the test of proportionality. Therefore, for checking this possible malice, there cannot be a mandatory provision for linking of every bank account.

493. In *Lal Babu Hussein v. Electoral Registration Officer, (1995) 3 SCC 100*, this Court had struck down the order of the Electoral Officer asking the residents of a particular en masse to prove their identity as unconstitutional. The Court held that the Electoral Officer asking residents of a particular area *en masse* to prove their identity was unconstitutional. In the case, the EO went on the assumption that all inhabitants of a particular area were foreigners, notwithstanding their name appearing in earlier electoral rolls. The Court held the following:

.....

493.3. Large-scale presumption of illegality impermissible.

.....

495. The Rules are disproportionate for the following reasons:

495.1. A mere ritualistic incantation of “money-laundering”, “black money” does not satisfy the first test;

495.2. No explanations have been given as to how mandatory linking of every bank account will eradicate/reduce the problems of “money-laundering” and “black money”;

.....

496. There may be legitimate State aim for such a move as it aims at prevention of money-laundering and black money. However, there has not been a serious thinking while making such a provision applicable for every bank account. Maintaining bank account in today's world has almost become a necessity. The Government itself has propagated the advantages thereof and is encouraging people to open the bank account making it possible to have one even with zero balance under the Pradhan Mantri Jan Dhan Yojana. The Government has taken various measures to give a boost to digital economy. Under these schemes, millions of persons, who are otherwise poor, are opening their bank accounts. They are also becoming habitual to the good practice of entering into transactions through their banks and even by using digital modes for operation of the bank accounts. Making the requirement of Aadhaar compulsory for all such and other persons in the name of checking money-laundering or black money is grossly disproportionate. There should have been a proper study about the methods adopted by persons who indulge in money-laundering, kinds of bank accounts which such persons maintain and target those bank accounts for the purpose of Aadhaar. It has not been done.” (Emphasis supplied)

94. The Court further went on to hold that the circular issued by the Government of India mandating the linking of Aadhaar number to the mobile phone was unconstitutional on the ground that the entire population could not be subject to intrusion of their private lives merely on account of misuse by some:

“503. We are of the opinion that not only such a circular lacks backing of a law, it fails to meet the requirement of proportionality as well. It does not meet “necessity stage” and “balancing stage” tests to check the primary menace which is in the mind of the respondent authorities. There can be other appropriate laws and less intrusive alternatives. **For the misuse of such SIM cards by a handful of persons, the entire population cannot be subjected to intrusion into their private lives.** It also impinges upon the voluntary nature of the Aadhaar Scheme. *We find it to be disproportionate and unreasonable State compulsion.* It is to be borne in mind that every

individual/resident subscribing to a SIM card does not enjoy the subsidy benefit or services mentioned in Section 7 of the Act.

504. We, therefore, have no hesitation in declaring the Circular dated 23-3-2017 as unconstitutional.” (*Emphasis supplied*)

95. It is submitted that given alternate, less-restrictive methods are available with Respondent No. 1 to ensure the security of Jammu & Kashmir, the impugned orders restricting the mobile internet speeds to 2G *for the entire population* of Jammu & Kashmir fails the necessity test. As will be demonstrated in the next section, it also fails the balancing test.

E. Balancing: The impugned orders fail the proportionality or balancing stage i.e. they are inherently disproportionate in terms of the harm caused

96. The Petitioner’s primary case, and the reason it has approached this Hon’ble Court *only after the extent of the COVID-19 pandemic and the lockdown became evident*, is that the existence of the COVID-19 pandemic and the lockdown has meant that considerations of national security must be re-balanced against the impact of 2G restrictions on the rights of the citizens of Jammu & Kashmir to access healthcare, education, and other facilities.

97. In view of the unprecedented and extraordinary situation caused by the spread of the COVID-19 pandemic, it is evident that the impugned Orders fail the final prong of the constitutional standard, which requires that there must be a proportionate balance between the interests of the State, and the extent of the restrictions upon fundamental rights. It is respectfully submitted that in addition to the necessity of speedy and effective internet towards guaranteeing rights under Article 19(1)(a), it has been demonstrated above that without access to such internet, the right to health (and hence, the right to life) - in times of a pandemic - is effectively rendered illusory. It is respectfully submitted that in the struggle against COVID-19, for reasons advanced above, access to speedy and effective internet is now a question of health, survival and livelihood. In this context, a measure by the Government - reportedly for the security of persons - which threatens their survival,

and also their security due to the need for information during the pandemic is indeed disproportionate. It is submitted that the internet is indispensable during the pandemic and lockdown for the following reasons:

- a. Due to the lockdown, the internet is required for carrying out almost all economic activities. Respondent No. 2 has, vide order No. 40-3/2020-DM-I(A) dated 24.03.2020 (**@ pgs 201 to 207 of the Petition**) itself advised that, save for certain exceptions, all establishments are to work from home. This requires individuals to be part of virtual meetings, video conferences, sending emails with attachments and reports, which is almost impossible with mobile internet 2G speed.

Response of the Government: A perusal of the counter affidavit filed by the Respondent reveals that the Government has not at all addressed the impact of the restriction on the internet speed on the ability of the people of Jammu and Kashmir to work from home.

- b. While the rest of India has shifted, or is in the process of/attempting to shift schooling and college systems online, students in Jammu & Kashmir have been unable to access such systems. This was brought out in the affidavit by Ms. Revati Laul, annexed with the additional documents filed by the Petitioner on 15.04.2020 (**@ pgs 9-20, IA No. 48309/2020**), as well as in media reports **@pg 248-249 of the Petition** as well as the separate writ petition that has been filed before this Hon'ble Court by the Private Schools Association, Jammu & Kashmir. The response of the Government has been inadequate and their submissions that are teleconferences, YouTube videos, E-books can easily be accessed on 2G speed is not supported by evidence. (Kindly see paras 26-32 above).

- c. The internet is an important source of information for doctors and medical staff. Since the situation of the pandemic is evolving, its treatments are also evolving. Doctors and medical staff in the State of Jammu and Kashmir have a right to access such research to be able to provide the best possible care for patients. Medical staff

also need to access guidelines being issued by the Government especially the Ministry of Health and Welfare (Kindly See the affidavit by Ms. Revati Laul, (@ pgs 9-20, IA No. 48309/2020 as well as news reports @pg 235-238 and 239-242 of the Petition). The Respondent authorities have not explained with evidence how these guidelines are accessible on a 2G network, or how many hospitals in fact have fixed line connections and, or address the importance of the internet for doctors and research to collaborate and receive information from colleagues around the world. (Kindly see paras 23-25 above).

- d. In the same vein, the internet is also necessary to enable tele-medicine since visiting hospitals has been discouraged during the pandemic. Applications such as WhatsApp Video call, Skype are necessary to allow doctors to examine patients. The counter affidavit of the Respondent does not address the impact of the restrictions on telemedicine.
- e. The internet is also an indispensable source of information for the people to access information related to the lockdown – this includes a list of containment zones, red zones and green zones, the grocery stores that are still operating, list of government volunteers and area of operations, list of relief centres. Such information is changing on a daily basis and is so localized and is therefore incapable of being accurately reported through TV and newspapers, similarly personal queries that the internet can be used for cannot be provided through helplines. (Kindly see para 25, 64 above).
- f. During a nationwide lockdown and a pandemic, the importance of being able to stay in touch with family and friends has been widely acknowledged. While citizens in the rest of the country have been able to maintain contact with their friends and family through video calls and other applications, citizens in Kashmir have been unable to do so. It is submitted that such deprivation has an adverse impact on the

mental health of people in Kashmir. The Response of the Government does not address the impact of the restrictions in this respect.

- g. Finally, the internet is necessary to secure access to justice, as can be evidenced by this Hon'ble Court's own circular dated 15.04.2020 noting that dedicated 4G internet (minimum 2MBPS) is required for an effective videoconference hearing (@pg 47, IA No. 48328/20). The Respondent has merely stated that computers can be provided to lawyers without internet. However, the problem is more multi-faceted. Clients, juniors and staff also need internet to be able to effectively adjudicate a case. Further, for lawyers not living in the city traveling to a place with a computer may be difficult in the midst of a lockdown.

98. It is respectfully submitted that the that the fourth limb of the proportionality standard requires an evaluation of the extent of harm caused to fundamental rights as a result of the measure vis-a-vis the public interest at stake. However, impugned orders have failed to assess the impact of the unavailability of 4G internet on persons unable to leave their homes owing to the lockdown and the COVID outbreak and merely makes an assertion that efforts relating to COVID have remained unhindered, which is not borne out by the testimonies of people from the region and facts brought on record.

99. Reference may be made to the decision of the **Israel High Court, Beit Sourik Village Council v. The Government of Israel (HCJ 2056/04)**, wherein the Court struck down a security fence put up by the military to prevent infiltration of terrorists as a disproportionate restriction on the rights of farmers, their right to movement and right to livelihood. Justice A Barak speaking for the Court held as follows:

48...The second question examines the proportionality of the route of the separation fence, as determined by the military commander. This question raises no problems in the military field; rather, it relates to the severity of the injury caused to the local inhabitants by the route decided upon by the military commander. In the framework of this question we are dealing not

with military considerations, but rather with humanitarian considerations....The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportional. That is our expertise.

... 60. Our answer is that there relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate. The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence – which separates the local inhabitants from their agricultural lands – injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law. Here are the facts: more than 13,000 farmers (falihin) are cut off from thousands of dunams of their land and from tens of thousands of trees which are their livelihood, and which are located on the other side of the separation fence. No attempt was made to seek out and provide them with substitute land, despite our oft repeated proposals on that matter. The separation is not hermetic: the military commander announced that two gates will be constructed, from each of the two villages, to its lands, with a system of licensing. This state of affairs injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), will be subject to restrictions inherent to a system of licensing. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this segment of the route). As a result, the life of the farmer will change completely in comparison to his previous life. The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe...

61.. Indeed, the real question in the “relative” examination of the third proportionality subtest is not the choice between constructing a separation fence which brings security but injures the local inhabitants, or not constructing a separation fence, and not injuring the local inhabitants. The real question is whether the security benefit reaped by the acceptance of the military commander’s position (that the separation fence should surround Jebel Muktam) is proportionate to the additional injury resulting from his position (with the fence separating local inhabitants from their lands). Our answer to this question is that the military commander’s choice of the route of the separation fence is disproportionate. The gap between the security provided by the military commander’s approach and the security provided by the alternate route is minute, as compared to the large difference between a fence that separates the local inhabitants from their lands, and a fence which does not separate the two (or which creates a separation which is smaller and possible to live with).” (*Emphasis supplied*)

100. It is submitted in the present case, the slowing down of internet in a lockdown completely deprives the people in Jammu & Kashmir from accessing any economic activities, educational activities which have moved online. Further, the slowing down of the internet also denies doctors and hospital staff crucial information about a disease that is still developing, denies people information about the extent and relaxation of the lockdown which changes on a daily basis, as well as prevents people from communicating with their loved ones. Thus, the absence of functioning internet can render the guarantee of the right to life and livelihood illusory. On the other hand, Respondent No. 1, having been unable to demonstrate a causal relationship between reducing speeds and preventing terrorist activities has failed to show any loss that will be caused to national security if the speed is restored. Moreover, Respondent No. 1 could have undertaken more proportionate measures that would have been equally if not more effective, such as surveillance and tracking of the communications of suspected militants, blacklisting websites that may be used for purposes of recruitment, and so on; it is also respectfully submitted that the onus of maintaining law and order lies upon the State; it cannot pass on that burden to *every* citizen by depriving them of their fundamental rights, in the middle of a pandemic and a nationwide lockdown.

Therefore, the restriction has a disproportionate impact on the right to life and livelihood of the people of Jammu & Kashmir.

101. It is further respectfully submitted that the lack of 4G Internet, in the middle of a pandemic and a nationwide lockdown, affects the rights of every citizen of India presently living in Kashmir. Only a minuscule proportion of the persons in Kashmir are militants. It is respectfully submitted, therefore, that a blanket ban on 4G internet is a form of “collective punishment”, that is outlawed by the Indian Constitution, as well as by all international legal instruments. In this regard, it is pertinent to note that in a Joint Declaration on Freedom of Expression and the Internet (2011), the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and African Commission Special Rapporteur on Freedom of Expression and Access to Information resolved that “*Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) **can never be justified, including on public order or national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet.***” (<https://www.osce.org/fom/78309?download=true>)

102. In light of the above, it is therefore humbly prayed that the prayers in the Writ Petition be allowed.

Filed by:

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