IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

WRIT PETITION (CRIMINAL) NO. _____OF 2021

[PUBLIC INTEREST LITIGATION]

IN THE MATTER OF:

Journalist Union of Assam
Through its authorised representative,
[redacted]
...PETITIONER

VERSUS

Union of India
Through Secretary,
Ministry of Law and Justice,
4th Floor, A-Wing,
Shashtri Bhawan, New Delhi-110001 ...RESPONDENT

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA CHALLENGING THE CONSTITUTIONAL VALIDITY OF SECTION 124A OF THE INDIAN PENAL CODE, 1860

TO THE HON'BLE CHIEF JUSTICE & THE HON'BLE COMPANION JUDGES OF THE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE
PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. The present writ petition under Article 32 of the Constitution of India has been filed in public interest impugning the constitutional validity of Section 124A of the Indian Penal Code 1860 ("**Impugned Provision/Impugned Section**") which criminalises the offence of "Sedition". The Impugned Provision states, in relevant part, that -

> "*[W]hoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government estab-lished by law shall be published with.....*"

2. The Impugned Provision forms part of Chapter VI of the IPC dealing with "Of Offences Against the State" and is classified as a "cognizable" and a "non-bailable office." A person convicted under the Impugned Provision may be (**i**) punished with imprisonment for life, to which a fine may be added, *or* (**ii**) with imprisonment which may extend to three years, to which a fine may be added, *or* (**iii**) only with a fine. Petitioner submits that the Impugned Provision is *ex facie* unconstitutional as it is contrary to Articles 14, 19, and 21 of

the Constitution and falls beyond the permissible limits to these fundamental rights.

I. DESCRIPTION OF PARTIES

3. **Journalist Union of Assam**, the Petitioner herein, is a registered body of media personnel based in Assam. Established in 1992, the Petitioner-Union is affiliated with the Indian Journalist Union and the International Federation of Journalists. The address of the Petitioner is House No. 245, Khagen Mahanta Path, Hengrabari Guwahati - 781006.

4. The primary aim of the Petitioner-Union is to uphold freedom of media and freedom of speech guaranteed by the Constitution of India, ethical journalism, decent working conditions of the journalists and other media workers. To that end, the Petitioner regularly holds seminars, workshops and training programmes. The Petitioner has instituted the instant proceedings because it is concerned with the impact of the Impugned Provision on the fundamental rights of journalists across the country. The Petitioner has appointed Mr Geetartha Pathak as its authorised representative, whose details are as under:

   Email address – pathakgeetarth@gmail.com

   Phone No. – 9435048484

   Occupation – Journalist

   Annual Income – 4.5 Lakhs (Approx)

   PAN number – AJIPP9623P

   AADHAR number - 573752251092

5. The Petitioner has no personal interest or gain, private motive or oblique reason in filing the present writ petition. The present petition is filed for the benefit of journalists, including those who are members of the Petitioner- Union. There are innumerable journalists across the

country, and since many of them could not have approached this Hon'ble Court, the Petitioner has filed the present writ petition in the public interest.

6. The Petitioner states that no civil, criminal or revenue litigation involving the Petitioners, which has or could have a legal nexus with the issues involved in this PIL nor any other pending litigation.

7. The Petitioner states there is no concerned government authority that could be moved for the reliefs sought in the present petition, as the only available efficacious remedy is the present writ petition. Petitioner submits that there is no other equal or efficacious alternative remedy available to them.

8. **Union of India,** Respondent No.1 herein is the sole Respondent. Respondent No.1 is represented through the Secretary of the Department of Legal Affairs under the Ministry of Law & Justice in accordance with the Government of India (Allocation of Business) Rules, 1961. The Ministry of Law & Justice is responsible for defending cases relating to the constitutional validity of central legislations and rules before this Hon'ble Court.

9. To the best of the Petitioner's knowledge, this Hon'ble Court has issued notice to Respondent No.1 in three petitions challenging the validity of the Impugned Section. These are Writ Petition (Civil) No. 682/2021 (***S.G. Vombatkere vs Union of India***), Writ Petition (Criminal) No. 106/2021 (***Kishorechandra Wangkhemcha & Anr. v. Union of India***), and Writ Petition (Criminal) No. 217/2021 (***M/s Aamoda Broadcasting Company***

Private Limited & Anr vs The State of Andhra Pradesh & Ors). On 15.07.2021, a bench led by the Hon'ble Chief Justice of India while hearing Writ Petition (Civil) No. 682, directed the registry to list these three writ petitions together as they raise a similar question of law.

10. The validity of the Impugned Provision was upheld by a Constitution Bench of this Hon'ble Court in ***Kedar Nath Singh v State of Bihar*, 1962 Supp (2) SCR 769** which acknowledged that if read literally, the clause infringed Article 19(1)(a) and could not be saved under Article 19(2) (Paragraph 25). Consequently, this Hon'ble Court construed the Impugned Provision so as to save it from being rendered unconstitutional, and held that it only punished speech which is *"intended or has a tendency, to create disorder or disturbance of public peace by resort to violence"* (Paragraph 26).

11. The Petitioner respectfully submits that the decision in ***Kedar Nath Singh*** requires reconsidered and Section 124A needs to be struck down *inter alia,* for the following reasons:

a. ***Kedar Nath Singh*,** while purporting to rely upon the decision of the Hon'ble Federal Court in ***Niharendu Dutt Majumdar v King-Emperor*, 1942 FCR 38**, misconstrued and misunderstood that judgment, and with significant consequences. In ***Niharendu Dutt Majumdar***, Sir Maurice Gwyer C.J. held that in case of public order offences, *"the acts or words complained of must, either incite to disorder or must*

be such as to satisfy reasonable men that that, is their intention or tendency." (Page 50, emphasis supplied) According to the test, the gravamen of the offence is *incitement* to disorder, and the acts or words must either accomplish that or have that intention or tendency. However, in ***Kedar Nath Singh***, this Hon'ble Court held instead that "*if we accept the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder or reasonable apprehension thereof...*" (Paragraph 50, emphasis supplied) Therefore, this Hon'ble Court removed the requirement of *incitement*, and - thereby - the requirement of *proximity* between the acts/words and public disorder, that had been established by the Federal Court.

b. ***Kedar Nath Singh*** failed to correctly consider the judgment of a Constitution Bench of this Hon'ble Court in ***Superintendent, Central Prison, Fatehgarh v Ram Manohar Lohia*, 1960 SCR (2) 821**, where it had held that for public order legislation to pass the test of constitutionality, the relationship between speech and consequence must be "proximate." By making, instead, "*tendency*" the gravamen of the test, ***Kedar Nath Singh*** abandoned the crucial proximity requirement that had been part of established law, both in ***Niharendu Dutt Majumdar*** and in ***Ram Manohar Lohia***. The "tendency" test,

introduced in ***Kedar Nath Singh***, carries the law outside the bounds of reasonable restrictions under Article 19(2) of the Constitution due to its vagueness and elasticity.

c. In a series of judgments after ***Kedar Nath Singh***, this Hon'ble Court has repeatedly followed the tests laid down in ***Niharendu Dutt Majumdar*** and ***Ram Manohar Lohia.*** In ***S. Rangarajan v P. Jagjivan Ram*, 1989 SCR (2) 204**, this Hon'ble Court held that the relationship between speech and disorder must be akin to a "spark in a powder keg"; in ***Arup Bhuyan v State of Assam*, (2011) 3 SCC 377**, this Hon'ble Court held that the correct test under Article 19(2) is that of incitement to public disorder; this was reiterated by this Hon'ble Court in ***Shreya Singhal vs Union of India*, (2015) 5 SCC 1**. It is therefore respectfully submitted that the "tendency" test in ***Kedar Nath Singh*** is inconsistent both with precedent before 1962 and also with fifty years of consistent jurisprudence *after* 1962.

d. It is therefore submitted that ***Kedar Nath Singh's*** interpretation of the Impugned Provision violates Article 19(1)(a) of the Constitution and cannot be saved by Article 19(2). In ***Kedar Nath Singh,*** the Court held that its interpretation could save the Impugned Section because it was *"in the interest of public order"*. However, it did not consider whether its interpretation was a *"reasonable restriction"* on

freedom of speech and expression. As held by this Hon'ble Court in ***State of Madras v V.G. Row*, 1952 SCR 597,** the reasonableness requirement under Article 19(2) requires proportionality assessment. The requirement of *proximity* - or that of *incitement* - as held by a consistent line of cases respects the reasonableness requirement and its inherent proportionality assessment by limiting punishment of speech only to those cases where the situation is like that of a "spark in a powder keg", and there is no scope or time for "counter-speech". This analysis, however, is entirely missing from ***Kedar Nath Singh*.**

e. ***Kedar Nath Singh*** also ignored the judgment of the Constitution Bench of this Hon'ble Court in ***Chintaman Rao v State of MP*, 1950 SCR 759,** which articulated the doctrine of *overbreadth*, noting that if a section was so broadly worded that it captured *both* constitutionally permissible activity and impermissible activity within its scope, it would have to be struck down as unconstitutional. This is especially true in the case of speech-based offences, as over-breadth is closely linked to the concept of *'chilling effect'*, where a broadly-worded penal provision is likely to lead to self-censorship, as people will wish to stay well clear of the "forbidden zone" attracting sanctions. The judgment in ***Chintaman Rao*** and the doctrine of overbreadth, however, were not considered by

Kedar Nath Singh. That the Impugned Provision today is no longer a non-cognizable offence, as it was in 1962, but a cognizable offence for which persons may be arrested without warrant further deepens the chilling effect cast by its vague and overbroad language.

f. Even on its own terms, it is respectfully submitted that the Court in ***Kedar Nath Singh*** constructed the Impugned Provision in a manner that goes beyond the legally permissible limits placed upon the Court while interpreting the text of a statute. The Impugned Provision punishes speech that excites or attempts to excite *disaffection* towards the Government established by law and was designed to cover *illocutionary* speech acts. The provision does not require such speech to have a tendency to '*create disorder disturbance of public peace by resort to violence*' thereby attaching criminal liability only to *perlocutionary speech* acts. It is respectfully submitted that by adding a public disorder requirement to Section 124A, and changing the nature of the offence to exclude punishment of illocutionary speech altogether, the Court impermissibly *rewrote* the section in order to save it from constitutional invalidity.

g. It is submitted that ***Kedar Nath Singh*** proceeded on a fundamentally incorrect assumption, in extending a presumption of constitutionality to Section 124A which was

introduced *via* Section 5 of Act No. 27 of 1870, and that it ought to be presumed that the Legislature could not have intended to traverse the limits of Article 19. On the basis of this assumption, the judgment provided a purposive interpretation of the provision, which according to the bench brought it within the permissible limits laid down in clause (2) of Article 19. It is a settled position of law that a presumption of constitutionality cannot be extended to laws that ante-date the Constitution itself, as the colonial government was not limited by considerations of Part III of the Constitution of India, 1950 [***Joseph Shine v Union of India*, (2019) 3 SCC 39** (Paragraph 270)].

h. ***Kedar Nath Singh*** also did not consider the constitutionality of the punishment scheme provided in the Impugned Section. Not only is the substantive content of the offence impermissibly broad, but the punishment regime is also broad and promotes arbitrariness. At present, a conviction under Section 124-A may result in an accused to be sentenced with **(1)** imprisonment for life, to which fine may be added **or (2)** with imprisonment which may extend to three years, to which fine may be added **or (3)** with fine alone. Unlike other offences prescribing vastly different punishments for crime, such as Section 304 IPC, there is no guidance offered to courts enabling them to exercise their discretion in a manner

consistent with Article 14 of the Constitution. That penal statutes must satisfy the tests of Article 14 is a well settled position since the decision of this Hon'ble Court in ***Bachan Singh v State of Punjab,*** **(1980) 2 SCC 684** and ***Mithu v State of Punjab,*** **(1983) 2 SCC 277.** The *ex facie* arbitrariness of the punishment regime under Section 124-A IPC does not only affect post-trial sentencing phase of the process but also casts a shadow upon the pre-trial process, as the arbitrary scheme denies to accused persons the benefit of this Hon'ble Court's directions in ***Arnesh Kumar*** **v.** ***State of Bihar*** **[(2014) 8 SCC 273]** whereby it recommended police ought not to exercise powers of arrest in cognizable offences punishable *up to* three years imprisonment.

i. ***Kedar Nath Singh*** did not examine the impact of the Impugned Section on journalists or other similarly placed professionals, who are routinely threatened with prosecution under Section 124A. The Impugned Section casts a chilling effect on their speech which in turn prevents them from exercising their duties as the fourth estate. This Hon'ble Court in its order dated 31.05.2021 in ***M/S Aamoda Broadcasting Company Private Limited & Anr Vs The State Of Andhra Pradesh & Ors.*** **W.P. (Crl) 217/2021** has also observed that "*the ambit and parameters of the provisions of Sections 124A, 153A and 505 of the Indian Penal Code 1860 would require*

interpretation, particularly in the context of the right of the electronic and print media to communicate news, information and the rights, even those that may be critical of the prevailing regime in any part of the nation."

II. LEGAL HISTORY OF SECTION 124A

12. The Impugned Section 124-A was inserted into the IPC *vide* Section 5 of Act No. 27 of 1870, as it was considered "*remarkable that the Penal Code contained no provision at all as to seditious offences not involving an absolute breach of the peace. It says nothing of seditious words, seditious libels, seditious conspiracies or secret societies.*" The original Section 124A, read as follows:

> "*Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.*
>
> *Explanation—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation is not an offence within this clause.*"

13. Act No. 4 of 1898 amended the provision, adding the words "hatred" and "contempt" along with "disaffection", and replacing the sole explanation with three separate explanations, which in their present form (after minor changes on account of adaptation orders) read as follows:

> "...
> *Explanation 1.—The expression "disaffection" includes disloyalty and all feelings of enmity.*
>
> *Explanation 2.—Comments expressing disapprobation of the meas-ures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.*
>
> *Explanation 3.—Comments expressing disapprobation of the admin-istrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."*

14. It is apparent that the Impugned Provision was inserted to rectify what was identified as a lacuna in the Penal Code at the time. This lacuna was not the absence of a public-order offence, but the absence of an offence that stemmed from speech that *did not* impinge upon public order by causing a breach of the peace. To put it in the language of speech theory — Section 124A punished speech for its *illocutionary* effect by deeming content of certain speech acts harmful *per se*, and did not create a requirement that speech can only be proscribed for a harmful *perlocutionary* effect of the speech. The

three explanations inserted in 1898 sought to buttress this logic and not depart from it. The debates over Act No. 4 of 1898 confirm that it was specifically intended by the Governor-General in Council to *not* include a requirement that the offending speech should either incite or even have the tendency to excite disorder. Even though the law in England might have required speech to bear a connection with public disorder, it was necessary for the offence of sedition in British India to ensure "self-preservation" for a foreign government.

15. Courts in British India, till the passing of the Government of India Act 1935, consistently maintained that the offence of sedition was complete so long as the accused engage in speech/actions intending to excite or attempting to excite the feelings proscribed under Section 124-A; it was immaterial whether or not the speech acts *in fact* had caused public disorder or incited public disorder [***Queen-Empress v. Jogendra Chunder Bose*** **(1892) ILR 19 Cal 35;** ***Queen Empress v. Bal Gangadhar Tilak*** **ILR (1898) 22 Bom 112;**]. It was only when the Federal Court was apprised of the issue in 1942 that a different note was struck. In ***Niharendu Dutt Majumdar***, the Federal Court interpreted Rule 34(6)(e) of the Defence of India Rules under the Defence of India Act (35 of 1939) which it considered to be *pari materia* to the Impugned Section. The Federal Court read in a requirement that the offending speech must be such as to "*either incite to disorder [or] satisfy reasonable men that that is their intention or tendency.*" Shortly thereafter, however, the Privy

Council disapproved of this view in ***King-Emperor v. Sadashiv Narayan Bhalerao,*** **74 IA 89** and it reaffirmed the position that the phrase "excite disaffection" in the Impugned Provision could not be equated with "excite disorder" for this would impermissibly re-write the provision itself.

16. The pre-independence legal position pertaining to the Impugned Section was clear and shows that: (**i**) Indian law on sedition was decidedly different from English law, both before and after the 1898 amendments; and (**ii**) it was passed by a foreign government, ruling by fiat and not elections, to secure its self-preservation over subjects who did not enjoy any guaranteed civil liberties. Independence, and the creation of the democratic constitutional Republic of India which recognised fundamental freedom of speech and expression under Article 19, as limited by Article 19(2) as it then stood, *ex facie* contradicted the basis for the prevailing law of sedition. However, the Impugned Provision was not repealed or amended besides minor changes made due to adaptation orders.

17. That despite decisions by this Hon'ble Court in ***Romesh Thapar vs State of Madras*** **AIR 1950 SC 124** and ***Brij Bhushan v State of Delhi,*** **1950 SCR 605**, as well as the Hon'ble High Court of Punjab in ***Tara Gopi Chand vs State*** **AIR 1951 Punj 27**, the Provisional Parliament at the time refused to recognise "sedition" as a separate ground for restricting the fundamental freedom of speech. Rather,

the Constitution (First Amendment) Act, 1951 enhanced the scope for judicial review of the deprivation of fundamental rights to secure enforcement of the freedom of speech and expression, as elaborated below:

Article 19(2) before the First Amendment	**Article 19(2) after the First Amendment**
Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the state from making any law **relating to**, libel, slander, defamation, contempt of court or any matter which offence against decency or morality or which undermines the security of, or tends to overthrow, the state. [Emphasis supplied]	Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law **imposes reasonable restrictions** on the exercise of the right conferred by the said subclause **in the interest of** the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. [Emphasis supplied]

18. After the passing of the First Amendment, three High Courts adjudicated constitutional challenges to the Impugned Section [***Debi Soren & Ors v State of Bihar*** **1954 CriLJ 758** (Patna High Court); ***Sagolsem Indramani Singh & Ors v State of Manipur*** **1955 CrLJ 184** (Manipur High Court); ***Ram Nandan v. State,*** **AIR 1959 All 101** (Allahabad High Court)]. One of these decisions (*Ram Nandan*)

was part of the batch of appeals ultimately decided by this Hon'ble Court in ***Kedar Nath Singh*** in 1962. This Hon'ble Court disagreed with the view taken by the Hon'ble Allahabad High Court and declared the Impugned Provision was constitutional. However, as is stated above, it is respectfully submitted that this Hon'ble Court gravely erred in arriving at this conclusion, and the same merits reconsideration.

19. In the judgment of ***Kedar Nath Singh*** it is stated that, at the time, the Law Commission of India was considering amendments to the Impugned Provision (Paragraph 5). While details of that consultation exercise have not been made publicly available, it is within the public domain that at Paragraphs 6.16 - 6.17 in its 42nd Report on the Indian Penal Code (June, 1971), the Law Commission termed the Impugned Provision "defective" for its failure to clearly define the proximate link between the speech act and the danger to national security or public order, and further described the punishment regime as "very odd" giving an insufficient indication to courts about the gravity of the offence. More recently, in a consultation paper dated 30.08.2018, the Law Commission specifically questioned the continued justification of retaining the Impugned Provision on the statute book.

The relevant extract from the 42nd Law Commission Report is annexed herewith as **ANNEXURE P-1 (Page No.** 43 - 59)

The consultation paper dated 30.08.2018 issued by the Law Commission of India is annexed herewith as **ANNEXURE P-2** **(Page No.** 60-94)

IMPUGNED PROVISION IN PRACTICE

20. After the decision in ***Kedar Nath Singh,*** the Parliament enacted the Code of Criminal Procedure, 1973 (No. 2 of 1974). CrPC, 1973 repealed the Code of Criminal Procedure, 1898 (No. 5 of 1898) and, significantly, made the Impugned Section a cognizable offence allowing police to register a case and arrest individuals based on their subjective understanding of whether a speech had a tendency to affect public order.

21. The transformation of sedition from a non-cognizable offence which entailed prior judicial scrutiny before a case could be registered by police and coercive measures could be adopted against an individual for engaging in allegedly seditious speech acts, to a cognizable offence which removed this crucial element of scrutiny, has rendered the safety valves attempted to be engrafted on to the provision in ***Kedar Nath Singh*** illusory in practice. In the words of Dr. Anushka Singh, "*When law traverses the ground at the level of FIRs, charge sheets, bail and so on, it leads to several iterated notions of what*

constitutes the act of sedition owing to its varied interpretations. ... Therefore, professedly, within the Indian liberal democracy, the offence of sedition is constituted only in acts of incitement to violence or disorder. In the quotidian life of the law, however, sedition is constituted in a whole range of mundane political acts falling short of having any impulse to incite violence." [Dr. Anushka Singh, *Sedition in Liberal Democracies* p. 311, 360 (2018)]. These observations are borne out from the small subset of sedition prosecutions extracted below:

a. A journalist who criticised the government's efforts to respond to the COVID-19 pandemic (***Vinod Dua v. Union of India & Ors,* W.P. (Crl.) No. 254/2020**)

b. Three journalists who were critical of the Citizenship Amendment Bill (***Dr Hirain Goahn & Ors vs. State of Assam,* AB 120/2019, Guwahati High Court**)

c. A doctor who merely met an alleged Maoist (***Binayak Sen v. State of Chattisgarh,* SLP (Crl) 2053/2011**)

d. A sitting Minister of Finance who criticized this Hon'ble Court's decision in ***Supreme Court Advocate on Record Association vs Union of India* (2016) 5 SCC 1** (NJAC Judgment). (***Arun Jaitley v. State of Uttar Pradesh,* Application No. 32702 of 2015, Uttar Pradesh High Court**)

e. 8956 individuals from Idinthakari and Kudankulam villages who protested against the commissioning of the Kudankulam Nuclear Power Plant in the wake of the accident at Fukushima Daiichi Nuclear Power Plant, Japan which led to over a 1000 deaths (***G. Sundarajan vs. Union of India & Ors.,*** **C.A No. 4440 of 2013**)

f. A cartoonist raising the issue of corruption in the country (***Sanskar Marathe vs State of Maharashtra,*** **2015 CriLJ 3561, Bombay High Court)**

22. These observations have been buttressed by ongoing empirical studies. Article14 — a web-based publication which provides intensive research and reportage, data and perspectives on issues necessary to safeguard the rule of law — has developed a database which analyses sedition cases since 2010. Their current research confirms not only that the total number of sedition cases registered has steadily risen, but that in several cases individuals have been accused of sedition for merely holding posters to social media posts, to raging slogans and private communications. The rise in cases registered is not matched with a rise in convictions: 326 cases were registered under the Impugned Section between 2014 and 2019, but only nine individuals were convicted of the offence. It is respectfully submitted that this is a direct result of the breadth and vagueness of the words used in Section 124A, such as "disaffection" leading to

Section 124A being used to suppress "*mundane political acts falling short of having any impulse to incite violence*".

A copy of Article14's report titled '*Our new database reveals rise in sedition cases in the Modi era'* is annexed herewith as **ANNEXURE P-3 (Page No.** 95-106)

A State/Union Territory-wise data from 2014 to 2019 collected by National Crime Records Bureau on cases registered, cases charge-sheeted, cases convicted, cases in which trials were completed and conviction rate under the Impugned Section is annexed herewith as **ANNEXURE P-4 (Page No.** 107-109)

23. Therefore, in light of the above-mentioned facts and circumstances, the Petitioner submits that the Impugned Provision ought to be struck down as unconstitutional on the basis of the following, amidst other, grounds.

GROUNDS

I. THE JUDGMENT IN *KEDAR NATH SINGH* REQUIRES RECONSIDERATION

A. ***BECAUSE*** the judgment in ***Kedar Nath Singh*** ought to be reconsidered because: *first*, ***Kedar Nath Singh*** impermissibly rewrote the language of Section 124A, by engrafting into it the requirement of "tendency to incite violence" or "tendency to create

public disorder"; and *secondly*, even if ***Kedar Nath Singh's*** interpretation of Section 124A is tenable as a matter of statutory interpretation, the "tendency" test violated precedent, has been discarded by subsequent judgments, and does not meet the threshold of reasonableness under Article 19(2) of the Constitution.

Kedar Nath impermissibly rewrote the language of Section 124A IPC

B. ***BECAUSE Kedar Nath Singh*** itself recognised that a literal interpretation of the Impugned Section prohibits speech which excites disaffection, contempt or hatred against the Government established by law but does not impact public order (Paragraph 26). It noted that if the Impugned Provision is not read down and is interpreted literally, it "*is not only within but also very much beyond the limits*" of Article 19(2) of the Constitution (Paragraph 25). Accordingly, it upheld the validity of the clause by reading it down to limit its application to speech act which is "*intended or has a tendency, to create disorder or disturbance of public peace by resort to violence.*"

C. ***BECAUSE Kedar Nath Singh*** read down the Impugned Section even though settled law does not permit reading down of a provision when it unambiguously violates the Constitution. In such a circumstance, the Court's only duty is to strike the provision down

as unconstitutional. [***Nalinakhya Bysack v Shyam Sunder Haldar,*** **AIR 1953 SC 148** (Paragraph 329); and ***Delhi Transport Corporation v D.T.C. Mazdoor Congress & Ors,*** **1991 Supp (1) SCC 600** (Paragraph 255)].

D. ***BECAUSE Kedar Nath Singh*** read down the Impugned Section by incorrectly relying upon the decision in ***R.M.D Chamarbaugwalla v Union of India,*** **(1957) SCR 930.** In that case, the Hon'ble Court held that the intention of the legislature is the determining factor in deciding whether valid parts of a statute are separable from the invalid parts (Paragraph 22). However, the colonial legislature did not limit nor did it intend to limit the scope of the Impugned Section to only those speeches which have a tendency to incite violence. In fact, the reason given by J. Fitz James Stephen, who presented the bill before the Council of Governor-General, for introducing the offence of Sedition to the IPC in 1870 was:

"*The law relating to riots and unlawful assemblies is very full and elaborate,* ***but it is remarkable that the Penal Code contained no provision at all as to seditious offences not involving an absolute breach of the peace.*** *It says nothing of seditious words, seditious libels, seditious conspiracies or secret societies. The additions made in 1870 provide to a certain extent for the punishment of such offences.*"

E. ***BECAUSE,*** reliance by the court on ***R.M.D. Chamarbaugwala v. Union of India,*** **(1957) SCR 930** to apply the doctrine of severability is also misplaced because the Court in the guise of

'reading down' the Impugned Provision has 'read into' the provision, words which are incompatible with the unambiguous intent of the legislature, i.e. the phrase "*tendency to create disorder or disturbance of public peace by resort to violence*". Limiting the operation of the Impugned Section to only speeches that have a tendency to incite public disorder, amounts to 'judicial legislation'. This Hon'ble Court in ***Shreya Singhal v. Union of India, (2015) 5 SCC 1*** recently reiterated that the Court cannot read into a provision or add something when the legislature never intended to do so.

Kedar Nath Singh's interpretation violated precedent, has been discarded by subsequent judgments, and does not meet the threshold of reasonableness under Article 19(2) of the Constitution.

F. ***BECAUSE*** in ***Chintaman Rao***, this Hon'ble Court articulated the doctrine of *overbreadth*, noting that if a section was so broadly worded that it captured *both* constitutionally permissible activity as well as impermissible activity within its scope, it would have to be struck down as unconstitutional (Paragraph 7). This is especially true when it comes to speech-based offences, as over-breadth is closely linked to the concept of *a chilling effect*, where a broadly-worded penal provision is likely to lead to self-censorship, as people will wish to stay well clear of the "forbidden zone" attracting sanctions. The judgment in ***Chintaman Rao*** and the doctrine of overbreadth, however, were not considered by ***Kedar Nath Singh***.

G. ***BECAUSE*** the Hon'ble Court in ***Kedar Nath Singh*** did not sufficiently examine whether the Impugned Section as interpreted by it, can be saved by Article 19(2) of the Constitution. The Court simply held that "*any law enacted in the interest of public order may be saved from the vice of unconstitutionality*", without examining whether the Impugned Section on its terms constituted a 'reasonable restriction' on the freedom of speech and expression (Paragraph 26). A provision may be "*in the interest of public order*", and yet may not be a reasonable restriction. The word 'reasonable' was introduced into Article 19(2) *via* the First Amendment and interpreted authoritatively by this Hon'ble Court in ***State of Madras v. V.G. Row,*** **(Supra)** and therefore, ***Kedar Nath Singh*** should not have ignored it.

H. ***BECAUSE*** speech may only be restricted '*in the interest of public order*' if it is '*intrinsically dangerous*' and its impact on public order is not remote, conjectural or far-fetched [***S. Rangarajan v P. Jagjivan Ram,*** **(Supra)** (Paragraph 45)]. This Hon'ble Court has interpreted public order as the even tempo of life of the community [***Arun Ghosh v State of West Bengal,*** **[1970] 3 S.C.R. 288** (Paragraph 3)]. ***Kedar Nath Singh's*** interpretation criminalises speech that *merely* has a tendency to disturb public order even if it may not in fact disturb the life of a community. The interpretation prohibits speech based on a probabilistic danger that may be remote, conjectural or far-fetched. Thus, the interpretation is not '*in the*

interest of public order' and does not satisfy the requirements of Article 19(2).

II. THE IMPUGNED SECTION VIOLATES ARTICLE 19(1)(A) AND IS NOT SAVED BY ARTICLE 19(2)

I. ***BECAUSE*** this Hon'ble Court has held that a law may be struck down as unconstitutional if it is vague, overbroad and penalises speech which does not offend the Constitution [***Shreya Singhal v Union of India*** **(Supra),** ***State of Madhya Pradesh v Baldeo Prasad,*** **(1961) 1 SCR 970,** ***K.A. Abbas v The Union of India & Another,*** **(1971) 2 SCR 446,** ***Harakchand Ratanchand Banthia & Ors. v Union of India & Ors.,*** **(1969) 2 SCC 166,** ***A.K. Roy & Ors. v Union of India & Ors.,*** **(1982) 2 SCR 272** and ***Kartar Singh v State of Punjab,*** **(1994) 3 SCC 569**]

J. ***BECAUSE*** the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India is a cornerstone of democracy. The right not only makes it possible to highlight the popular opinion of a society but also provides a platform to perspectives that otherwise legal, may be suppressed by a polity that does not view them favourably. The right enables society to evolve by compelling it to engage with a range of opinions. Journalists such as those represented by the Petitioner-Union play an important role in placing these opinions before society and thus, need the protection provided by this right. In several cases, this Hon'ble Court has recognised the importance of Article 19(1)(a) for our democracy, the

citizenry and the press. [***Romesh Thappar v State of Madras (Supra)***; ***Sakal Papers (P) Ltd. & Ors. v Union of India,*** **[1962] 3 S.C.R. 842**; ***Bennett Coleman & Co. & Ors. v Union of India & Ors.,*** **[1973] 2 S.C.R. 757**; ***Indian Express News Papers (Bombay) v Union of India*** **(1985) 1 SCC 641** and ***Arnab Goswami v Union of India*** **(2020) SCC Online SC 462.**]

K. ***BECAUSE*** the Impugned Section violates Article 19(1)(a) by criminalising speech purely for its illocutionary effect of instilling or attempting to instil hatred, contempt or disaffection towards Government established by law. The Impugned Section does not recognise that criticism of the Government is not akin to spreading disaffection against the State or the entity, that is Union of India. While 'State' is the system of governance, '*Government established by law*' is a vague term, left undefined even by this Hon'ble Court in ***Kedar Nath Singh*** which merely equated it with "*visible symbols of the state*". In contrast to Section 124A IPC, Section 10(2)(b) of the Citizenship Act, 1955 prohibits disaffection towards the "Constitution of India". As a result of the overbreadth of the Impugned Section, any criticism of the Government may form the basis of arrests and prosecutions even though it may not impact the sovereignty or integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or contempt of court, defamation or incitement to an offence.

L. ***BECAUSE*** the Impugned Provision also violates Article 19(1)(a) by creating a chilling effect against any reporting critical of the Government. The chilling effect, that is, self-censorship is caused by the threat of proceedings under the Impugned Section, prevents journalists from not only publishing opinions but also from reporting on facts. Moreover, in the digital age where individuals speak to millions of people using social media, the Impugned Section acts as a sword handing over the head of all citizens, and especially journalists because of the heightened threat of initiation of proceedings. This Hon'ble Court in ***Shreya Singhal vs Union of India*** **(Supra)**, struck down Section 66A of the Information Technology Act, 2000 on the ground that it had a chilling effect on freedom of speech and expression.

M. ***BECAUSE*** to bring a provision within the subject matters contained under Article 19(2), it must be established that the impugned legal provision has a proximate nexus with the subject matter which is intimate, real and rational [***Kameshwar Prasad v State of Bihar,*** **AIR 1962 SC 1166** (Paragraph 14)*;* and ***Ram Manohar Lohia v Union of India,*** **(Supra)** (Paragraph 13)]. However, the Impugned Section cannot be brought within the exceptions contained under Article 19(2) because it does not have a connection with the eight subjects set out in Article 19(2). In fact, the Impugned Section does not even make a reference to any of those eight subjects.

N. ***BECAUSE***, even if it was to be assumed that Section 124A is traceable to one of the sub-clauses of Article 19(2) - such as "public order" - it nonetheless falls on the ground of reasonableness. It is the consistent jurisprudence of this Hon'ble Court that a speech-restrictive law that is justified on grounds of public order must be framed narrowly, and be limited to a *proximate* relationship between speech/act and public disorder, which is akin to "a spark in a powder keg" or "incitement to violence." For example, a law may prohibit a person from shouting *"fire"* in a crowded theatre; it may not, however, prohibit - in the words of Mahatma Gandhi, writing in *Young India* in the wake of his sedition trial - "discussion of even revolutionary projects."

O. ***BECAUSE*** this jurisprudence of our Courts is founded in good reason: respect for the dignity and autonomy of individuals requires the State not to control peoples' thoughts, or the form that they take through expression, no matter how distasteful the State might find the thought or the expression. The answer to distasteful speech is *counter-speech.* The one exception to this rule is when - either for reasons of a lack of time, or otherwise - counter-speech becomes impossible. For this reason, when it comes to public order, the Courts have clarified that the standard of prohibition requires a high degree of proximity, expressed through the image of the "spark in the powder keg" or the legal test of "incitement". It is only in situations where there can be no counter-speech - such as the

example of a fire in a crowded theatre, or goading on an enraged mob to imminent violence - may the law step in. It is respectfully submitted that whether one considers the words used in Section 124A - "disaffection", "contempt" and "hatred", or the gloss put on them in ***Kedar Nath Singh*** ("tendency to public disorder), *neither* can stand the constitutional test outlined above.

III. THE IMPUGNED SECTION VIOLATES ARTICLE 19(1)(G) AND IS NOT SAVED BY ARTICLE 19(6)

P. ***BECAUSE*** the freedom of the press is an integral part of Article 19(1)(a) of the Constitution, given that the press whose interests the Petitioner represents, provide the principal vehicle of expression of information and views to citizens and this has been recognised by this Hon'ble Court in ***Express Newspapers (P) Ltd v Union of India,*** **(1986) 1 SCC 133** and ***Bennett Coleman & Co v Union of India,*** **(1978) 1 SCC 248.** Further, the right to know and receive information, recognised as part of Article 19(1)(a) also includes the right to receive, propagate, and circulate one's views in different media, including online media.

Q. ***BECAUSE*** the Impugned Section restricts the fundamental right of the journalists to implement the freedom of the press by carrying out their journalism, which is a right guaranteed under Article 19(1)(g) by prohibiting and criminalising any statements which instil or attempt to instil hatred, contempt or disaffection towards the

Government established by law. As a result of the overbreadth of each of these expressions, any criticism of the Government may fall foul of the Impugned Section, and the criminalisation of such criticism is not a reasonable restriction on the Petitioners' right to carry on its journalistic profession.

R. ***BECAUSE*** the Impugned Section violates the journalists' right to carry on any trade guaranteed by Article 19(1)(g) of the Constitution because it exposes reporters and journalists to unconstitutional threats to their personal liberty and compel journalists to censor themselves and their reporting, to avoid even the risk of prosecution under such a draconian law.

IV. THE IMPUGNED SECTION VIOLATES THE FOUR SUBCOMPONENTS OF PROPORTIONALITY

S. ***BECAUSE*** this Hon'ble Court in ***Modern Dental College & Research Centre v State of M.P.***, **(2016) 7 SCC 353** [affirmed in ***K.S. Puttaswamy v Union of India,*** **(2017) 10 SCC 1**, ***Anuradha Bhasin v Union of India,*** **(2020) 3 SCC 637** and ***Gujarat Mazdoor Sabha v The State of Gujarat*** **2020 SCC OnLine SC 798**] has laid down four components of proportionality which are used to determine the permissible infringements on fundamental rights. These are:

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

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

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

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

T. ***BECAUSE*** the Impugned Section does not have a legitimate aim. A democratic nation has absolutely no occasion to restrict speech which excites disaffection or hatred against the government established by law. The only purpose for continuing with the provision is to use it as a tool for vindictive action against human rights defenders, journalists, right to information activists, protestors and other voices of dissent.It may be noted that the legitimacy of State's restrictions has to be judged more strictly when a core right such as liberty or autonomy is being infringed, and especially when non-compliance with the restrictions is penalised with imprisonment.

U. ***BECAUSE*** assuming that the intended purpose of the Impugned Section is to prevent public disorder, the provision is neither suitable nor the least restrictive means to achieve that end. The provision uses broad expressions such as "disaffection", "hatred" and "contempt", and thereby prohibits speech that may not have any impact on public

order. Even the interpretation provided to the Impugned Section in ***Kedar Nath Singh***, does not provide a least restrictive alternative to prevent public disorder. By making "*tendency*" the gravamen of the test, ***Kedar Nath Singh*** abandoned the crucial proximity requirement that had been part of established law, both in ***Niharendu Dutt Majumdar*** and in ***Ram Manohar Lohia***. The "tendency" test permits law enforcement agencies to prohibit speech which is remote, conjectural and far-fetched to any public disorder.

V. ***BECAUSE*** the Impugned Section has a disproportionate impact on the rights holder not only because it enables the police officers to arrest citizens based on their subjective understanding of whether an activity had a tendency to incite violence, but also because it prescribes a punishment which is the most unusual. The Impugned Section does not provide judges with any guidance on whether to punish an accused with **(1)** imprisonment for life, to which fine may be added **or (2)** with imprisonment which may extend to three years, to which fine may be added **or (3)** with fine. As a result, similarly placed persons are likely to suffer varying punishments.

W. ***BECAUSE*** the Impugned Section has a disproportionate impact on the rights holder also because of the manner in which it is being enforced. Ongoing research by Article14 demonstrates that there has been an increase in registration of sedition cases over the past six years. While there has been a rise in the number of cases, and

naturally arrests, for sedition, convictions continue to remain abysmally low. According to data released by the Ministry of Home Affairs, 326 cases were registered under the Impugned Section between 2014 and 2019. In this time period, only nine individuals were convicted of the offence. Article14's database notes that in several of these cases individuals have been accused of sedition for merely holding posters to social media posts, to raging slogans and private communications. Therefore, it is evident that the Impugned Provision is only being used to suppress mundane political opinions bearing not even a tendency, let alone proximity, to incite public disorder.

V. THE IMPUGNED SECTION VIOLATES ARTICLE 14 OF THE CONSTITUTION

X. ***BECAUSE*** penal statutes must satisfy the tests of Article 14 is well settled since the decision of this Hon'ble Court in ***Bachan Singh vs State of Punjab,*** **(Supra)** and ***Mithu vs State of Punjab,*** **(Supra),** more recently confirmed through the decisions in ***Shreya Singhal*** **(Supra),** ***Joseph Shine v Union of India*** **(Supra)** and ***Navtej Singh Johar v Union of India,*** **(2018) 1 SCC 791.**

Section 124-A IPC violates the classification doctrine

Y. ***BECAUSE*** the Impugned Section prescribes a punishment regime unlike any other offence under the Indian Penal Code, 1860. Section 124A IPC in effect contains three different offences within itself and

permits judges to punish an accused with **(1)** imprisonment for life, to which fine may be added **or (2)** with imprisonment which may extend to three years, to which fine may be added **or (3)** with fine. Unlike other offences which permit drastically varying punishments, such as Section 304 IPC for instance, the Impugned Section does not provide any guidance to judges on how to rationally classify different cases and decide whether to punish an accused with imprisonment for life or with imprisonment up to three years or merely impose a fine.

Z. ***BECAUSE*** the *ex facie* arbitrariness of Section 124-A IPC does not only affect the post-trial sentencing phase of the criminal process, but also casts a shadow upon the pre-trial stage of the process where it places similarly placed persons differently. Where persons accused of offences punishable up to seven years imprisonment are covered by the scope of this Hon'ble Court's observations in ***Arnesh Kumar* v. *State of Bihar,* (Supra)** whereby it directed police to not exercise powers of arrest in such cases, persons who are accused under Section 124A IPC nevertheless face threat of arrest as even though sedition is punishable only with fine, or up to three years imprisonment, it is *at the same time* punishable with life imprisonment, without there being any basis to differentiate between the kinds of cases that may attract different treatment.

Section 124-A IPC is manifestly arbitrary

AA. ***BECAUSE*** this Hon'ble Court in ***Shayara Bano v Union of India, (2017) 9 SCC 1*** has held that even statutes, and not merely administrative action, may be struck down on the ground that it is manifestly arbitrary i.e., if it is drastically unreasonable, capricious or without any adequate determining principle. This Hon'ble Court has applied the manifest arbitrariness doctrine to strike down Section 497 IPC in ***Joseph Shine v Union of India*** **(Supra)** and read down Section 377 IPC in ***Navtej Singh Johar*** **(Supra).**

BB. ***BECAUSE*** the Impugned Provision is manifestly arbitrary on account of the disproportionate impact upon journalists or other persons engaged in the expression or coverage of views that may be contrary to the position of the "Government established by law". The position occupied by journalists places them under higher threats of prosecution under Section 124A IPC. The chilling effect cast by such threats of prosecution also leads to consequences that are different from those that may follow in the case of other individuals, as it ultimately impacts the ability of journalists to continue with their reporting and discharge their role as the fourth estate. Even if these complaints do not result in any action because they lack merit, considering the conviction rate is so low, it imposes a huge financial and resource burden on small organisations and freelance journalists. The threat of prosecution under the Impugned Section effectively

forces journalists to self-censor than publish any controversial or critical speech, regardless of its permissibility under law.

CC. ***BECAUSE*** the iterated usage of the Impugned Section confirms that it lacks any adequate determining principle. It punishes speech for its illocutionary effect which is antithetical to the fundamental freedom of speech and expression, and despite the attempt to re-engineer the provision in ***Kedar Nath Singh*** the provision continues to be applied in the manner as originally intended. This Hon'ble Court itself, on at least two separate occasions, in ***Common Cause*** **(Supra)** and ***Vinod Dua*** **(Supra)**, has implored authorities to initiate prosecution under the Impugned Section only when the conditions prescribed in ***Kedar Nath Singh*** are met.

DD. ***BECAUSE***, as Prof. Vincent Blasi has correctly noted, one of the purposes of a free speech guarantee is to protect against the abuse of power by public officials. It is respectfully submitted that when the words of a provision, and the interpretation provided by the Court, are significantly different, and when there is a wide gap between the two, that gap is ripe for exploitation by unscrupulous public officials - evidence of which has been provided previously in this Petition.

EE. ***BECAUSE*** a much milder version of the law has long since been repealed in the United Kingdom by the Coroners and Justice Act, 2010. The enactment abolished sedition and seditious libel with

effect from 12th January 2010. Significantly, the erstwhile Justice Minister, Claire Ward, mentioned that one of the main objectives behind promulgating the Coroners and Justice Act was to create a domino effect amongst other democracies across the world to reconsider laws that suppress free speech. An extract of the statement is as follows: *"Having an unnecessary and overbroad common law offence of sedition, when the same matters are dealt with under other legislation, is not only confusing and unnecessary, it may have a chilling effect on freedom of speech and sends the wrong signal to other countries which maintain and actually use sedition offences as a means of limiting political debate."*

FF. Any other grounds that may be urged during oral submissions with the leave of this Hon'ble Court.

24. The Petitioner has not filed any petition in any High Court or the Supreme Court of India on the subject matter of the instant Petition.

PRAYER

The Petitioner, therefore, pray that in the facts and circumstances of the present case, this Hon'ble Court may be pleased to issue a writ of mandamus/certiorari or a writ or direction of like nature:

a. To issue appropriate writ, order or direction in the nature of mandamus for a declaration that Section 124A of the Indian Penal Code 1860 is unconstitutional and therefore is *void ab initio*;
b. For such further and other orders as this Hon'ble Court may deem fit in the interest of justice and circumstances of the present case.

AND FOR THIS KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY

Drawn on: 31.08.2021

FILED ON: 02.09.2021