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Chapter I: PERNYATAAN KEPENTINGAN SEBAGAI AMICI

1. Open Net is a Korean non-governmental organization founded in Seoul in 2013. It is unique among civil society groups in its emphasis on digital economy and internet freedom, as exemplified in its work on government-issued electronic certificates, identity verification, intermediary liability, and other matters which have threatened the growth of the internet ecosystem in Korea. Especially relevant to this case, South Korea had, in the past, a media registration requirement in place for over twenty years. So Open Net is well-versed in the impacts of the regulation at issue.

2. Open Net has been active in participating in international human rights cases through amicus briefs. In 2018 through 2019, Open Net participated in an international coalition that submitted amicus briefs in *Google v. CNIL* and *Google v. Equsstek* to prevent global delisting orders.[1]

3. Courts have recognized Open Net for its expert opinions on human rights issues. It has advocated for wider availability of judgment databases, which impact the growth of civic technologies that enable open democracy. In 2019, the Korean Supreme Court heeded Open Net's recommendations, and created a one-stop search engine for all 85 courts' formerly separate databases and enabled keyword searches for criminal judgments.

4. The Electronic Frontier Foundation is a non-profit legal and policy organization that safeguards freedom of expression and privacy in the digital world. EFF was established in 1990 and has over 35,000 members who contribute financially. EFF litigated numerous cases regarding the need for protections against liability for those that host and archive voluminous user speech. It also regularly files amicus curiae or intervenor briefs in consequential court cases regarding freedom of speech and intermediary liability. In European courts, EFF's intervention and written observations were accepted in the landmark case *Google v. CNIL* before the Court of Justice of the European Union and in the *Vladimir Kharitonov v. Russia* case on website blocking. EFF also recently joined a submission in *Hurbain v. Belgium*. Drawing on the expertise of its attorneys and staff technologists, EFF's briefs seek to educate courts about Internet technologies and the broader consequences of laws and decisions affecting those technologies.

5. Access Now is a non-governmental organization which seeks to defend and extend the digital rights of people and communities at risk around the world, including the rights to freedom of expression and to receive and impart information. It was founded following Iran's contested presidential elections in 2009 in response to the actions of the Iranian government to block internet access, censor content, and undermine the online security of its opponents. Since that time, Access Now has grown to become an organization with international reach, with staff members across more than 10 countries. Its activities include advocacy for digital rights, direct technical support, and maintaining a respected

[1] *See* Open Net, "Open Net Korea files an amicus brief on Google v. CNIL," https://www.opennetkorea.org/en/wp/2020 (2016).

database of "internet shutdowns."[2] It is non-partisan, not-for-profit, and not affiliated with any country, corporation, or religion.

6. Access Now routinely files amicus briefs with domestic jurisdictions, including the United States, Cameroon, and Colombia,[3] as well as regional courts, such as the European Court of Human Rights and the Economic Community of West African States Court of Justice (ECOWAS).[4] In 2020, Access Now filed an amicus brief in the case of *Aliansi Jurnalis Independen (AJI) and Pembela Kebebasan Berekspresi and Asia Tenggara (SAFEnet) vs. the Ministry of Communication and Information (Kominfo) and The President of the Republic of Indonesia* at the Jakarta Administrative Court on the issue of internet shutdowns in the Papua and West Papua provinces of Indonesia.[5] Access Now has sought leave to intervene in these proceedings, particularly dealing with state ordered internet shutdowns, because they raise questions of fundamental importance regarding state interference with the right to freedom of expression, the right to assembly, the right to receive and impart information, as well as the rights to work, health, education, scientific progress, and cultural rights in the internet age.

7. In light of the above, the amici submit here a written statement, in their position as Amici Curiae (Friends of the Court), to provide views according to its field of expertise and as a form of community support to the Panel of Judges of the Jakarta State Administrative Court who will examine and decide case number: 424/G/TF/2022.

8. The preparation of Amici Curiae is limited to the following issues:

    a. Is a prior restraint on speech a violation of human rights, under the Indonesian Constitution, Indonesian law, and international law?

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[2] The database, available at https://www.accessnow.org/keepiton/, was cited by David Kaye, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, in his report to the UN General Assembly (6 September 2016), UN Doc. A/71/373, para. 22, footnote 27, https://undocs.org/pdf?symbol=en/a/71/373.

[3] See Access Now, "Access Now Joins Legal Brief Supporting Privacy of Facebook Users," https://www.accessnow.org/access-now-joins-legal-brief-supporting-privacy-facebook-users/ (2017); Brief of Amici Curiae Brennan Center for Justice, Electronic Frontier Foundation, Access Now, and TechFreedom in re 381 Search Warrants Directed to Facebook, Inc., and Dated July 23, 2013, Facebook, Inc. v. New York County District Attorney's Office, New York State Court of Appeals, https://www.brennancenter.org/sites/default/files/FacebookvNYCoDA-amic-Brennan-amicbrf.pdf (2016); and Access Now, "Access Now & ISF File Legal Intervention against Cameroon Shutdown," https://www.accessnow.org/access-now-isf-file-legal-intervention-cameroon-shutdown/ (2018).

[4] See Access Now, "Website Blocking in Russia Goes to the European Court of Human Rights. Access Now Intervenes," https://www.accessnow.org/website-blocking-russia-goes-european-court-human-rights-access-now-intervenes/ (2017); Magyar Jeti Zrt v. Hungary, European Court of Human Rights, Application no. 11257/16, https://www.statewatch.org/news/2018/dec/echr-hu-magyar-jeti-zrt-v-hungary-hyperlinks-defamation-judgement-4-12-18.pdf (2018); Access Now Intervention, Big Brother Watch and Others v. the United Kingdom, European Court of Human Rights, Application No. 58170/13, https://www.accessnow.org/cms/assets/uploads/2016/02/ECtHRIntervention.pdf (2016); and Access Now, "Judges Raise the Gavel to #KeepItOn Around the World," https://www.accessnow.org/judges-raise-the-gavel-to-keepiton-around-the-world/ (2019).

[5] Access Now, "Indonesians seek justice after internet shutdown" (2020), https://www.accessnow.org/indonesians-seek-justice-after-internet-shutdown/.

b. Is blocking access to a website, as a penalty for failing to meet administrative registration requirements, a violation of human rights, under the Indonesian Constitution, Indonesian law, and international law?
c. Can simple administrative grounds, based on vague and open-ended wording, provide a justification for violating the law and human rights?

9. In compiling this brief, amici refers to legal instruments and statutory regulations including but not limited to international conventions that have been ratified as national law or are universally accepted. The references are as follows:

a. The 1945 Constitution of the Republic of Indonesia ("Constitution");
b. International Covenant on Civil and Political Rights, as ratified by Law No. 12 of 2005 concerning Ratification of the Covenant on Civil and Political Rights ("ICCPR");
c. International Covenant on Economic, Social and Cultural Rights, as ratified by Law No. 11 of 2005 concerning Ratification of the Covenant on Economic, Social and Cultural Rights ("ICESCR");
d. Law No. 11 of 2008 Concerning Electronic Information and Transactions ("ITE Law");
e. Law No. 19 of 2016 concerning Amendments to Law No. 11 years old 2008 concerning Information and Electronic Transactions ("UU ITE");
f. Law No. 40 of 1999 on the Press ("Press Law");
g. Law Number 39 of 2008 concerning State Ministries ("UU 39/2008");
h. Law No. 12 of 2011 on Establishment of Laws and Regulations ("UU 12/2011");
i. Universal Declaration of Human Rights, 1948 ("UDHR");
j. UN Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, 2011 ("General Comment No. 34");
k. UN Human Rights Committee, General Comment No. 37 on the right of peaceful assembly, 2020 ("General Comment No. 37");
l. UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984 ("Siracusa Principles");
m. UN Special Rapporteur on Freedom of Opinion and Expression, Joint Declaration on Freedom of Expression and the Internet, 2011 ("Joint Declaration");
n. Regulation of the Minister of Communication and Informatics Number 5 of 2020 on Private Electronic System Operators ("MR5")

Chapter II: RINGKASAN FAKTA HUKUM

10. In 2020, the government of Indonesia, through the Ministry of Communication and Information Technology ("Kominfo"), promulgated Regulation of the Minister of Communication and Informatics Number 5 of 2020 on Private Electronic System Operators ("MR5"). MR5 imposes many burdensome obligations on both technology platforms and basic websites. At issue in the instant case are two provisions in particular. First, MR5 requires that every Private Sector Electronic System Operator ("ESO")

registers and obtains an ID certificate.[6] Second, the administrative punishment for failing to register is a blocking of the offending website.[7]

11. According to MR5, essentially every website accessible in Indonesia is bound by the regulation.[8] One of the registration steps requires each ESO to "guarantee" that it will grant law enforcement access to its "systems" and "data."[9] The penalty for failing to register is blocking.[10] Article 8 provides a blank slate to Kominfo to initiate an administrative blocking based on its "request," unrelated to any enumerated infringement.

12. MR5 also requires ESOs to institute takedown and filtering measures. ESOs must not "facilitate distribution" of information that disturbs the "public order."[11] If they do so, their website will be blocked. The only way for an ESO to avoid blocking is to both take down the content and provide Kominfo with the offending user's subscriber information.[12] MR5 further authorizes the judiciary and the public at large to submit takedown requests.[13] ESOs have 24 hours to comply with a takedown request.[14] "Urgent" content – that is, "any content that causes public unrest and disturbance of public order" – must be removed within 4 hours.[15]

13. MR5 fixed the obligation to register at six months following the date the regulation came into force.[16] Kominfo promulgated MR5 on November 24, 2020. While registration was initially required by May 24th, 2021, the General Director APTIKA postponed the requirement.[17] Registration was set instead for July 2022.[18] On July 30, 2022, Kominfo blocked access to at least eight websites on the grounds that they failed to register in accordance with MR5, including PayPal, Yahoo, Epic Games, Steam, Dota, Counter Strike, Xandr.com, and EA Origin.[19]

14. On November 30, 2022, two individuals and two NGOs, the Alliance of Independent Journalists ("AJI") Indonesia and the Union of Media and Creative Industries Workers for Democracy ("SINDIKASI"), filed the current suit against the Minister of Kominfo.

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[6] Regulation of the Republic of Indonesia Number 5 of 2020 on Electronic Systems Operator for Private Scope, Johnny Gerard Plate, State Gazette of the Republic of Indonesia Year 2020 Number 1376 (November 16, 2021), Art. 2.
[7] *Id.* at Art. 7(2).
[8] *Id*. at Art. 4(1).
[9] *Id*. at Art. 3(4)(i).
[10] *Id*. at Art. 7(2).
[11] *Id*. at Art. 9(3-4).
[12] *Id*. at Arts. 11, 13.
[13] *Id*. at Art. 14(1).
[14] *Id*. at Art. 15(6).
[15] *Id*. at Art. 14 (3), 15(8).
[16] *Id.* at Art. 47.
[17] "Joint Statement: Global Coalition Urge Indonesia Minister of ICT To Repeal MR5," hrw.org/news/2021/06/01/joint-statement-global-coalition-urge-indonesia-minister-ict-repeal-mr5 (Jun. 1, 2021).
[18] Freedom House, "FREEDOM ON THE NET 2022 Indonesia," https://freedomhouse.org/country/indonesia/freedom-net/2022.
[19] *Pratto v. Minister of Communication and Information Technology of the Republic of Indonesia* 424/G/TF/2022, Complaint at 13.

The suit alleges that Kominfo's blockings violate plaintiffs' Article 27, 28, 28C—G, and 28I constitutional rights, as well as international law.[20]

Chapter III: PENDAPAT SEBAGAI AMICI

I. The MR5 registration requirement is a violation of human rights, according to the Indonesian Constitution, Indonesian Law, and International Human Rights Law

a. Threshold Analysis: Kominfo Lacked the Authority to Promulgate MR5

15. Before detailing the many ways in which the registration provision in MR5 is illegitimate, it is worth conducting a threshold analysis on whether MR5 was a legitimate exercise of state power. It was not. Under MR5 Article 2, "every Private Sector ESO is required to apply for registration," which encompasses any "site" that transmits "digital content."[21] This includes any person or website that offers goods or services; operates financial transactions; transmits paid material or digital content; operates communications services including messages, voice calls, video, email, network services, and social media; all search engines; and sites that provide information in the form of text, voice, image, animation, music, video, film, or games.[22] Registration requires a "statement that the Private Sector ESO [will] guarantee and comply with the obligation of granting access to Electronic Systems and Electronic Data for the purpose of ensuring the effectiveness of supervision."[23]

16. Kominfo lacks the authority to require every website, foreign and domestic, to register or face blocking. Under Law 12/2011, Ministers are limited to "administering government affairs" within their "scope of duty."[24] Law 39/2008 clarifies that, for Kominfo, these duties extend only to state technology interests.[25] The MR5 registration provision, as well as most other MR5 provisions, enact sweeping and invasive procedures across the international private sector. It strains credulity to conclude that requiring foreign websites to promise Kominfo access to their systems is a simple administration of state government affairs. Therefore, the MR5 registration provision is a gross overreach by Kominfo, impermissible under Indonesian law.

b. The Registration Provision of MR5 is Unconstitutional

17. The registration requirement in MR5 unduly burdens free speech and expression, as guaranteed in the constitution. Requiring companies and individuals to register before expressing oneself, communicating or sharing information online is an unconstitutional prior restraint under Indonesia's Constitution, especially Article 28F. Article 28F

[20] *Id.* at 12.
[21] MR5, *supra* note 6.
[22] *Id*. at Art. 2(2).
[23] *Id*. at Art. 3(4)(i).
[24] Law No. 12 of 2011 on Establishment of Laws and Regulations, Art. 26(1), 27.
[25] Law No. 39 of 2008 concerning State Ministries, Art. 5(3).

establishes that "[e]very person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels."[26] In the hierarchy of laws, the Constitution is supreme, followed by assembly decisions, then laws, and only then government regulations.[27]

18. Article 1(3) of the Constitution requires that "the State of Indonesia shall be a state based on the rule of law."[28] Article 28 mandates that the "freedom to associate and to assemble, to express written and oral opinions, etc., shall be regulated by law."[29]

19. Following president Suharto's resignation in 1998, the 1945 Constitution was amended in a series of reforms.[30] Of particular relevance here, Articles 28A through 28J were added, a "most radical change to the original philosophy of the Constitution" with "clauses lifted directly from the Universal Declaration of Human Rights."[31] These articles revolve around the freedoms of speech, assembly, and access to information.

20. MR5 is a regulation that violates supreme constitutional rights. Its registration prerequisite is a screening barrier, prior to speech. It burdens the fundamental right to communicate guaranteed in Article 28F. Defendants may argue that, in Indonesia, Article 28F rights are derogable. The following sections address this argument, demonstrating how, according to Indonesian law and the Constitutional Court, there are no sufficient countervailing rights in this case that compete with the freedoms guaranteed in 28F.

21. The analysis begins with the 1999 Press Law, which guarantees press freedom as a human right for all citizens, including the right to search for, obtain, and disseminate ideas and information.[32] "No censorship, prohibition, or restriction" is permissible against the press.[33] Article 18(1) imposes criminal penalties on any person who intentionally obstructs press freedom.[34] The MR5 registration requirement is a restriction on the press. It requires the press including, for example, websites facilitating the sharing of news articles or information which come under the remit of MR5, to follow arduous procedures prior to engaging in speech. This is exactly the kind of restriction that violates the Press Law.

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[26] Indonesia's Constitution of 1945, Reinstated in 1959, with Amendments through 2002, https://www.constituteproject.org/constitution/Indonesia_2002.pdf?lang=en.
[27] UU 12/2011, *supra* note 24, Art. 7.
[28] Constitution, *supra* note 26.
[29] *Id.*
[30] Aslı Bâli and Hanna Lerner, *Constitutional Design Without Constitutional Moments*, 49 CORNELL INT'L L.J. 227, 263.
[31] Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 6 SING. J. INT'L & COMP. L. 244, 254 (2002).
[32] SIMON BUTT AND TIM LINDSEY, THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS (2012), 428.
[33] Law No. 40 of 1999 on the Press.
[34] Butt, *supra* note 32 at 428.

22. In practice, Indonesia has a pair of Constitutional Court cases in which the Court held that the 28F right for the press to communicate freely is limited by other constitutional rights.[35] Article 28J(2) outlines such permissible limitations: that, "in exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others."[36] In both the *Piliang* and *Wijaya and Lubis* cases, plaintiffs alleged that the press had printed defamatory statements.[37] The Court concluded that critical statements in the press infringed the plaintiffs' constitutional right to "protection of his/herself, family, honour, dignity" guaranteed in Article 28G.[38] Thus, the Court reasoned that 28J(2) requires a balancing test as between two constitutional rights: one party's right to protect his honour and the other party's right to speak freely. The Court concluded that the 28G right to protect honour superseded the press's 28F right to speech.[39]

23. This case is fundamentally different. There is no balancing of competing constitutional rights. The websites that failed to register under MR5 did not defame Kominfo. Kominfo here has no constitutional justifications to restrict plaintiffs' 28F right to speech. While the Constitutional Court has held that this right is derogable, there are no countervailing interests to balance in this case.

c. The Registration Provision of MR5 Infringes on Human Rights under Indonesian and International Law

24. The MR5 registration requirement fails to meet international human rights standards. Prior restraints on speech occur when a speaker must first gain approval from any branch of the government prior to engaging in speech. Cases from the highest courts of other countries, as well as international human rights cases, amply demonstrate that requiring registration with the government is either grossly unlawful or subject to the highest scrutiny.

25. It is worth first discussing the weight that arguments from international law should carry in Indonesia. Indonesia has directly ratified some particularly relevant human rights conventions, such as the International Covenant on Civil and Political Rights (Law No. 12 of 2005) and the International Covenant on Economic, Social and Cultural Rights (Law No. 11 of 2005), as domestic law. However, other provisions of international human rights law are also relevant to an analysis of these issues.

26. Doctrine (doktrin) is very influential on the work of lawyers and judges in civil law countries including Indonesia, with commentary from highly-respected legal scholars

[35] No 14/PUU-VI/2008 and No 50/PUU-VI/2008.
[36] Constitution, *supra* note 26.
[37] *See* JIMMY CHIA-SHIN HSU, HUMAN DIGNITY IN ASIA: DIALOGUE BETWEEN LAW AND CULTURE (2022), 152-3.
[38] Constitution, *supra* note 26.
[39] *See* Hsu, *supra* note 37.

considered as a source of law.[40] Professor Mochtar Kusumaatmadja wrote that, "We should consider ourselves bound by treaties and conventions approved (disahkan) by Indonesia."[41] Professor Saudargo Gautama argued even further, that the Supreme Court of Indonesia ought to have applied the New York Convention in its Decision No. 294K/Pdt/1983, even though Indonesia had not yet implemented that convention.[42] Lastly, the Supreme Court issued a directive in 2006, applying the 1961 Vienna Convention on Diplomatic Relations which Indonesia had formally ratified (Law No. 1 of 1982), but had not yet transformed into national law.[43] Thus, the following legal arguments that the registration requirement is unlawful, based on international law, carry great force in the case at hand.

27. The main argument flows from Article 19 of the ICCPR, which states that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers… through any other media."[44] Under the ICCPR, some limited restrictions on expression are permissible. The UN has articulated a three-part test for restrictions: they must be (i) prescribed by law; (ii) for an enumerated nonarbitrary grounds; and (iii) must conform to the strict tests of necessity and proportionality.[45] The Siracusa Principles, General Comment No. 34, and other exegetic sources provide authoritative guidelines for interpreting this three-part test. The ICCPR imposes duties on all State Parties to ensure enabling environments for freedom of expression and to protect its exercise.[46]

28. The registration requirement in MR5 fails all three parts of the test for limitations permissible under Article 19. First, the prescribed by law requirement means that "a law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."[47] In MR5 Article 8(1), Kominfo purports to grant to itself wide website blocking powers, based on "regulations in the field where [the] Ministry of Institution has authority."[48] This is the definition of unfettered discretion. There is no judicial safeguard, no auditing process – no oversight, executive, administrative, legal or otherwise, vis-à-vis Kominfo's ability to wield administrative sanctions during registration procedures.

29. Second, any restriction on expression must be based strictly and narrowly on the legitimate aim of protecting the rights or reputations of others, the protection of national security or of public order (ordre public), or of public health or morals.[49] A registration

[40] Simon Butt, *Recent Development: The Position of International Law within the Indonesian Legal System*, 28 EMORY INT'L L. REV. 1, 4.
[41] Mochtar Kusumaatmadja & Etty R Agoes, Pengantar Hukum internasional (2003), 92.
[42] Butt, *supra* note 40, at 12.
[43] *Id*. at 7.
[44] International Covenant on Civil and Political Rights (Dec. 19, 1966), 999 U.N.T.S. 171, Art. 19.
[45] Gen. Comment No. 34 on Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (Sep. 12, 2011), 6.
[46] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018).
[47] Gen. Comment No. 34, *supra* note 45, at 6.
[48] MR5, *supra* note 6, at Art. 8.
[49] Gen. Comment No. 34, *supra* note 45, at 8.

requirement, as a prior restraint on speech, is not based on any of these grounds. It restricts speech before any speech has actually occurred.

30. Lastly, there is neither necessity nor proportionality in the registration requirement. Every website, every online actor is subject to it. It is a blanket imposition, with absolutely no exceptions. Any such blanket regulation lacks nuance and inherently fails a necessity and proportionality test. A legitimate grounds for restriction must articulate in "specific and individualized fashion the precise nature of the threat" in order to pass the third prong's requirements.[50]

31. MR5 fails every single prong of the test required by Article 19 of the ICCPR. Even so, it is beneficial to consider how other high courts and other legal systems approach the question of prior restraints on speech. Given some common contextual elements, it is worth first considering the position of South Africa, a new democracy with a mixed legal system that retains elements of Dutch civil law. Justice Albert Sachs, one of the main architects of the South African constitution and, subsequently, a constitutional court justice, laid out South Africa's position on prior restraints. He differentiates South Africa from the U.S. (known for its strong stance, i.e. that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"[51]), stating that, in South Africa, other rights such as equality might be more important than speech.[52]

32. Nevertheless, Justice Sachs goes on to state that "resounding notes struck in two cases by the US Supreme Court generations ago continue to reverberate in our country [South Africa]. It's not simply a question of text or doctrine or whether freedom of speech comes first or eighth in the list of protected rights. It's about what it means to live in an open and democratic society…. The first was the Pentagon Papers case [quoted in the parentheses in ¶29, about state secrets during the Vietnam war]…. The second was the *Sullivan* matter [about the intent requirement in criticizing public officials], which was at the time a pervasive practice in countries like Singapore, Kenya, and Malaysia. For those of us about to become judges in our new democracy, these decisions shone like lanterns to illuminate the role that judges should play in keeping society open."[53] That is, the leading figure in South Africa's legal system expressly borrowed the legal notion that one of the critical functions of the judiciary is to prevent prior restraints on speech.

33. The European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and People's Rights all may be more permissive of prior restraints than the United States but, nevertheless, they all subject any such restraints to the highest scrutiny. MR5 would fail these strict scrutiny tests across the board.

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[50] Gen. Comment No. 34, *supra* note 45, at 8.
[51] *Nebraska Press Association v. Stuart* (The Pentagon Papers case), 427 U.S. 539 (1976).
[52] Albie Sachs, *Reflections on the Firstness of the First Amendment in the United States* in: THE FREE SPEECH CENTURY (2018), 180.
[53] *Id*. at 182.

34. The European Court of Human Rights recently described how this "Court has frequently examined preventive restrictions and prior restraints, reiterating that the dangers inherent in prior restraints are such that they call for the most careful scrutiny on its part."[54] As a result, the Court's case law demonstrates that "only where the criteria for prior restraints are clearly indicated in the law and procedural safeguards are embedded in domestic systems to prevent any arbitrary encroachments" are prior restraints permissible.[55] The Court has repeatedly struck down such restraints. Most recently, on the basis that there was not sufficiently "tight control over the scope of bans and effective judicial review to prevent any abuse of power."[56] As detailed above, MR5 does not provide for any oversight or accountability mechanism against Kominfo. MR5 would fail to meet the strict scrutiny of even the flexible European approach.

35. The American Convention on Human Rights, to which the majority of Central and South American countries are parties, similarly provides for a more flexible approach to speech. Nevertheless, Article 13 requires that exercise of the right to speech "shall not be subject to prior censorship but shall be subject to subsequent imposition of liability."[57] The Inter-American Court of Human Rights, interpreting this provision, held that there must "be no individuals or groups that are excluded from access to such media."[58] Any registration or licensing scheme that manifestly excludes parties who fail to register from participating in speech and expression would require a very high showing of necessity and proportionality. MR5 thus would also fail an IACHR analysis.

36. The African Commission on Human and Peoples' Rights has invalidated a licensing scheme based on the ministry's lack of political independence. In evaluating Cameroon's broadcasting licensing scheme, the Comission held that "the Minister of Communication cannot be deemed 'an independent regulatory body'… nor is the Minister 'adequately protected against interference'" since he reports to the President.[59] The same is true in Indonesia, where Kominfo is part of the executive branch and not sufficiently politically independent to administer a registration scheme. Thus, human rights courts across the world would strike down MR5's registration requirement.

37. Lastly, the amici would like to share pragmatic concerns based on South Korea's historical experience. The UN Human Rights Council has acknowledged that the contemporary "appeal of regulation is understandable" in light of "legitimate State

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[54] *Case of Unifaun Theatre Productions Limited and Others v. Malta* (Application no. 37326/13) (2018).
[55] Council of Europe, *'Prior Restraints' and Freedom of Expression: The Necessity of Embedding Procedural Safeguards in Domestic Systems* (2018).
[56] Dirk Voorhoof, "Kablis v. Russia: prior restraint of online campaigning for a peaceful, but unauthorised demonstration violated Article 10 ECHR," COLUMBIA GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/updates/2019/05/kablis-v-russia-prior-restraint-of-online-campaigning-for-a-peaceful-but-unauthorised-demonstration-violated-article-10-echr/ (2019).
[57] American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica (Nov. 22, 1969).
[58] *Inter-American Court of Human Rights Advisory Opinion Oc-5/85*, Requested by the Government of Costa Rica (Nov. 13, 1985), 9.
[59] *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v. the Republic of Cameroon*, Communication No. 290/2004 (2019).

concerns such as privacy and national security."[60] But it is exactly at this juncture that States must be most careful about violating free expression rights. Under a series of authoritarian leaders, South Korea had a media licensing regime for over twenty years.[61] Even after the Sixth Republic's new constitution explicitly prohibited licensing, Justice Pyon Chong-su on the Constitutional Court pointed out "similarities between a new registration system and the constitutionally prohibited licensing," due to the Minister having "excessive discretion in accepting, rejecting, or delaying registration."[62] Under that Korean registration system, many platforms had to subjugate themselves to the influence of the government, even when there was no specific government request. Registration systems incentivize sites to prioritize the wishes of government officials at the expense of users' rights. Under Korea's past system, the Minister even used its broad registration powers to regularly deport foreign correspondents.[63]

38. Kominfo used the registration requirement in Article 2 of MR5 as grounds to block access to eight websites. The above analysis in this section demonstrated how this registration requirement is unconstitutional because it violates Article 28F; is illegal because it violates the press law; fails all three parts of the ICCPR Article 19 test; and also fails any heightened scrutiny, as applied in courts with more flexible approaches to prior restraints.

II. The MR5 provision enabling website blocking is a violation of human rights, according to the Indonesian Constitution, Indonesian Law, and International Human Rights Law

a. The Website Blocking Provision of MR5 Violates Economic Rights Guaranteed in the Indonesian Constitution and in International Law

39. Article 7(2) of MR5 enables Kominfo to block ESOs that do not register. When Kominfo blocked access to sites like Counter Strike, Dota, and Paypal, it prevented individuals who rely on those sites from getting paid for their work or accessing payment already made for their work.

40. This termination of access is an unlawful restriction on people's rights to work, enshrined in the Article 27(2) of Indonesia's Constitution, which states that "every citizen shall have the right to work and to a living, befitting for human beings."[64] Indonesia affirms the right to work by agreeing to Article 27(2) of the ASEAN Human Rights Declaration which states that "every person has the right to work [and] to the free choice of employment."[65] The UN has described the right to work as "fundamental to the enjoyment of certain subsistence and livelihood rights such as food, clothing, housing,

[60] A/HRC/38/35, *supra* note 46.
[61] Kyu Ho Youm, *Press Freedom under Constraints: The Case of South Korea*, 8 ASIAN SURVEY 26 (1986).
[62] Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J INT'L L. 1 (1994), 21-22.
[63] Youm, *supra* note 61, at 873.
[64] Constitution, *supra* note 26.
[65] ASEAN Human Rights Declaration (2012), Art. 27(1).

etc" and as including "the right not to be unjustly deprived of work."[66] Because Kominfo used MR5 to punish websites with blocking, it prevented many Indonesian citizens from obtaining their normal source of income through legitimate work. It deprived these citizens of access to work without any due process or appeals channels.

41. By blocking plaintiffs' revenue sources, Indonesia also breached its obligation under two treaties that it has ratified through UU 11/2005 and UU 12/2005: the ICESCR and the ICCPR. Both documents mandate that "all peoples may, for their own ends, freely dispose of their natural wealth and resources… [i]n no case may a people be deprived of its own means of subsistence."[67] Kominfo blocked Paypal pursuant to MR5. By blocking the entire Paypal platform, it prevented independent contractors of all kinds, including Indonesians who work with entities abroad, from accessing and disposing of their most basic financial resources. This is a direct violation of UU 11/2005 and UU 12/2005. The MR5 website blocking provision unconstitutionally and illegally interferes with citizens' basic rights to work and to use their income.

b. The Website Blocking Provision of MR5 Violates Cultural Rights Guaranteed in the Indonesian Constitution and in International Law

42. Article 28C(1) of the Constitution provides that "[e]very person shall have the right to develop him/herself through the fulfillment of his/her basic needs, the right to get education and to benefit from science and technology, arts and culture[.]"[68] The ICESCR similarly states that each person has the right to "take part in cultural life."[69] The UN has described this "taking part" to have, as a "main component," the right of "access" to mediums of cultural exchange.[70] For example, websites like Yahoo allow individuals to share, access, and exchange opinions and information about art and culture, while Paypal allows them to sell and purchase art and cultural artifacts, tickets to theater, music, and museums. Video games are also regarded as a part of cultural and artistic expression, both in terms of their content and in allowing the developers to convey their cultural background through the artistic style of the games they develop.[71] In this case, Kominfo blocked access entirely to the most significant mediums of cultural exchange, in violation of the Constitution and of UU 11/2005. Website blocking is an impermissible violation of cultural rights.

c. The Website Blocking Provision of MR5 Violates the Right to Freedom of Expression Guaranteed in the Indonesian Constitution and Indonesian Law

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[66] High Commissioner for Human Rights, *Fact Sheet No. 16 (Rev. 1): The Committee on Economic, Social and Cultural Rights*.
[67] International Covenant on Economic, Social and Cultural Rights, as ratified by Law No. 11 of 2005 concerning Ratification of the Covenant on Economic, Social and Cultural Rights, Art. 1(2).
[68] Constitution, *supra* note 26.
[69] UU 11/2005, *supra* note 67, Art. 15(3).
[70] Gen. comment No. 21 Right of everyone to take part in cultural life, U.N. Doc. E/C.12/GC/21, (Dec. 21, 2009).
[71] *See, e.g.,* European Commission, *Games as cultural and artistic expression*, https://digital-strategy.ec.europa.eu/en/library/games-cultural-and-artistic-expression (2022).

43. ¶ 14 – 17, above, lay out Indonesia's constitutional protections of speech and expression. Article 28F establishes that "[e]very person shall have the right to communicate and to obtain information… by employing all available types of channels."[72] Blocking a website prevents every individual in Indonesia from conveying or obtaining information on that website. The blocking directly contravenes the speech rights guaranteed in Article 28. Further, the dangers that MR5 presents to this right are not imaginary or hypothetical. A 2022 Indikator Politik survey in Indonesia "reported that 62.9 percent of respondents thought that today's society is increasingly afraid to express opinions."[73]

44. Not only is website blocking an unconstitutional infringement on speech, but Kominfo also lacks legal authorization to block content as a penalty for an administrative requirement to register. The website blockings here, and any website blocking based on bureaucratic logistics, violates Indonesian law. UU ITE (2016) provides the guidelines for when the government may implement a website blocking. Blocking is strictly limited to cases with prohibited content. Under Article 40 paragraphs 2(a) and 2(b), termination of access is only acceptable in situations where the "Electronic Information and/or Electronic Documents either misuses information in a way that disturbs public order or carries prohibited content."[74] Neither of these conditions existed when Kominfo blocked the websites at issue here. Kominfo did not make a showing that the unregistered websites had prohibited content or content that disturbed the public order. Further, after promulgating MR5, Kominfo articulated new guidelines to enumerate instances of prohibited content under the ITE Law – none of the grounds under these new guidelines were used to block the eight websites in question.[75] Kominfo did not execute these blockings on the basis of any proof either that content on these sites disturbed public order or that the sites transmit prohibited content. It terminated access only on the grounds that the sites failed to register. Kominfo has violated the ITE Law, and is enlarging its own power in a manner not permitted by the People's Consultative Assembly.

45. Indonesian courts agree that Kominfo does not have the power to terminate website access in this way. With respect to internet throttling in West Papua, the State Administrative Court of Jakarta issued judgment No. 230/G/TF/2019/PTUN-JKT.[76] That decision adopted a framework rooted in international human rights law to hold that the internet throttling in West Papua was illegal. The Constitutional Court overturned that decision in 81/PUU-XVIII/2020. However, the Constitutional Court made its

[72] Constitution, *supra* note 26.
[73] Freedom House, *supra* note 18.
[74] Law No. 19 of 2016 concerning Amendments to Law No. 11 years old 2008 concerning Information and Electronic Transactions.
[75] *See* Kominfo, "SKB Guidelines for Implementing the ITE Law Signed," https://kominfo.go.id/content/detail/35229/skb-pedoman-implementasi-uu-ite-ditandatangani-menko-polhukam-berharap-beri-perlindungan-pada-masyarakat/0/berita.
[76] Decision of the Jakarta Administrative Court in the case of throttling akses / bandwidth hdibeber apawilayah Provinsi Papua aratdan Papua Province on 19 August 2019. That decision noted that "the Government is authorized to terminate the access to electronic information and/or electronic documents limited only to specific unlawful content." *See* Lembaga Kajian dan Advokasi untuk Independensi Peradilan, "The Implementation of Human Rights Principles in Jakarta Administrative Court Judgment on Internet Access in Papua and West Papua."

determination on the basis that the government required speed to terminate content disruptive to the public order.[77] The Court still explicitly required that "of course… the action [blocking] is only carried out if there is an element of content that violates the law."[78] In the West Papua case, at issue were inflammatory racial comments. As there is no evidence, or claims, that any of the blocked websites at issue in this case contain prohibited content, Kominfo's action of blocking these sites, runs counter to the requirements clearly established by the Constitutional Court in the West Papua internet throttling case.

46. Further, the Constitutional Court approved the internet throttling in West Papua because ITE Law Article 40(2)(b), which permits cutting off access, "can be submitted for a legal settlement mechanism through the judiciary (due process of law)."[79] However, Kominfo's actions in this case are not permitted under 40(2)(b). Correspondingly, these MR5 blockings fall outside the scope of redressability. Since the blockings occurred on impermissible grounds, the law does not contemplate any means of judicial review. Further, MR5 itself provides no due process. It is worth acknowledging that two Justices of the Constitutional Court, in their dissenting opinion, highlighted the need for more transparent checks on internet blocking. But, even according to the majority's view, Kominfo's actions in this case lack any legitimacy because they are not authorized by the ITE Law.

d. The Website Blocking Provision of MR5 Violates the Right to Freedom of Expression Guaranteed in International Law

47. ¶ 24, above, describes the important role of doktrin and international law in the Indonesian legal system, while ¶ 25 describes the centrality of the ICCPR Article 19 test for legitimate restrictions on the right to freedom of expression. Under Article 19, "everyone shall have the right to freedom of expression"[80] and any restriction must be (i) prescribed by law; (ii) for an enumerated nonarbitrary grounds; and (iii) must conform to the strict tests of necessity and proportionality.[81] Blocking websites that individuals use to express themselves and to seek, receive and impart information of all kinds, such as the Yahoo search engine, Paypal payment service, and gaming and advertising websites, fails all three parts of this test.

48. General Comment No. 34 cites website blocking as definitionally impermissible under the ICCPR: "[p]ermissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3."[82] Nevertheless, a thorough discussion of how the MR5 website blocking provision fails each part of the test follows.

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[77] THE SUMMARY OF THE DECISION OF CASE NUMBER 81/PUU-XVIII/2020 Concerning Government Authority in Terminating Access to Illegal Content.
[78] *Id.*
[79] *Id*.
[80] ICCPR, *supra* note 44.
[81] Gen. Comment No. 34, *supra* note 45, at 6.
[82] Gen. Comment No. 34, *supra* note 45, at 43.

49. Any restriction on the freedom of expression must be prescribed by law. Courts have described this prong as: "the law must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention, and indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise."[83] Not only does Article 7 of MR5 permit blocking for a failure to register, but Article 8 provides a blank slate to Kominfo to initiate an administrative blocking based on its "request," not tied to any enumerated infringement. There are no specified parameters as to what would constitute a valid administrative blocking. Kominfo can block websites for failure to register or whenever it wishes. This is limitless discretion. Additionally, MR5 does not outline any appeals channel, or any way for an ESO or citizen whose rights are violated by the blocking to contest Kominfo's decision. There is no due process in Articles 7 and 8 of MR5. As a result, they utterly fail the "prescribed by law" requirement.

50. Second, the blockings are not made based on any legitimate aim or pressing social need, such as the preservation of public order. The Special Rapporteurs have stated that "mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse."[84] This idea is mirrored in Indonesia's ITE Law: blocking is permissible against prohibited content. But MR5 permits blocking on routine administrative grounds. This is totally untethered from considerations of the public order, and so fails the second part of the Article 19 test.

51. The last prong is necessity and proportionality. Any legitimate grounds for restriction must articulate in "specific and individualized fashion the precise nature of the threat."[85] There is no clearly identified threat here, since the website blocking provisions fail the second part of the test. Registration is not tied to any threatening content, so of course blocking is not a proportionate response because there is no threat. It is worth highlighting here that Kominfo knows that its regulation is undermining international human rights law. In MR5 Article 23, related to accessing ESO systems, Kominfo invokes "proportionality" language as a boundary for its actions.[86] This is an explicit admission that Kominfo recognizes that it should be drafting regulations that contain certain limitations on its power. It is even more daring, then, that Kominfo admits that it is aware of the law and yet puts no meaningful mechanisms in place to actually comply with international law, Indonesian law, or the Constitution.

III. Conclusion

[83] European Court of Human Rights, *OOO Flavus and others v. Russia*, app. nos. 12468/15 (Jun. 23, 2020).
[84] UN Special Rapporteur on Freedom of Opinion and Expression, *Joint Declaration on Freedom of Expression and the Internet* (2011).
[85] Gen. Comment No. 34, *supra* note 45, at 8.
[86] MR5, *supra* note 6.

52. Blocking entire web platforms and online services is not only bad for citizens and plaintiffs, but even for governments. Shutdowns include any "interference with electronic systems primarily used for person-to-person communications, intended to render them inaccessible or effectively unusable, to exert control over the flow of information."[87] A study of internet shutdowns in Africa, which have increased in recent years, found that "blackouts have not only been dangerous but expensive; between 2015-2017 blackouts led to an estimated loss of $235 million in those countries."[88]

53. Lest anyone contend that these harms, with respect to MR5, are speculative, the data show that the regulation has had an explosive impact on the way people engage on the internet, in a manner that has so far gone unreported. A review of Google Transparency Report data shows that content removal requests from Indonesia have skyrocketed. Indonesia submitted 26 requests targeting 41 accounts in the first half of 2020 then, in the first half of 2021, made 362 requests with 253,690 targets.[89] Of these 253,690 targets, Google removed 305. A similar astronomical increase occurred at Facebook. Facebook does not report the overall number of requests, but does report the number of takedowns. It removed 760 items in 2020 and then, after MR5, over 4,000 items in 2021.[90] If this is the scale of Kominfo's takedown requests, as reported by large foreign companies, it is quite impossible to determine the extent of Kominfo's website blocking practices. There is no mechanism for the courts or civil society, or any authority, to review Kominfo's blocking practices. It is possible that Kominfo has blocked many small Indonesian websites, which then no longer have any voice to protest.

54. The amici have demonstrated that both the Article 2 registration requirement and the Article 7 website blocking provision are violations of economic, cultural, and free expression rights, under the Constitution, Indonesian law, and international human rights law. They must be struck from MR5.

[87] Access Now, *A taxonomy of internet shutdowns: the technologies behind network interference*, https://www.accessnow.org/wp-content/uploads/2022/06/A-taxonomy-of-internet-shutdowns-the-technologies-behind-network-interference.pdf (2022), 5.
[88] The Kofi Annan Commission on Elections and Democracy in the Digital Age, *Protecting Electoral Integrity in the Digital Age* (Jan. 2020), 48.
[89] Dataset available at https://transparencyreport.google.com/government-removals/government-requests/ID?hl=en.
[90] Dataset available at https://transparency.fb.com/data/content-restrictions/country/ID/.