IN THE SUPREME COURT OF INDIA

ORIGINAL WRIT JURISDICTION

WRIT PETITION (C) No. _____ of 2022

Under Article 32 of the Constitution of India

IN THE MATTER OF:

Jaya Thakur ... Petitioner

Versus

Union of India and Anr. ... Respondent

Written Submissions on Behalf of Mr. Kapil Sibal, Sr. Advocate for the Petitioner

Time sought: 4 Hours

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1. These written submissions are being filed in compliance with the order of this Hon'ble Court dated 10th October 2023, directing all parties to the present proceedings to file their written submissions by 27th October, 2023.
2. Petitioner challenges the Electoral Bonds Scheme of 2018 (as amended in 2022), issued by the Department of Economic Affairs, Ministry of Finance, by way of Notification No. S.O. (E) 29/2018 dated 02 January 2018, in purported exercise of power under the Finance Acts of 2016 and 2017.
3. These written submissions are structured as fellows. Petitioner begins with a brief overview of the Electoral Bonds Scheme ["EBS"], and its salient features (**A**). Petitioner goes on to outline the integral features of a "free and fair election," which has been held to be a basic feature of the Constitution (**B**). Not only is the EBS inconsistent with free and fair elections, but it specifically violates citizens' fundamental right to information and an informed vote (**C**). Furthermore, the justifications proffered by the government (elimination of black money and protection of donor privacy) fail the test of proportionality (**D**). Lastly, the EBS is inconsistent with political parties' *public* role and character (**E**). It is therefore unconstitutional and deserves to be struck down.

A. THE NATURE OF THE ELECTORAL BONDS SCHEME

4. The EBS is a statutory instrument for the facilitation of political party funding, purportedly issued under the newly amended sub-section 3 of **Section 31** of the **Reserve Bank of India Act, 1934,** which was brought about through the Finance Act (No. 7 of 2017), 2017.

5. The EBS defines an 'electoral bond' as *"a bond issued in the nature of* [a] *promissory note which shall be a bearer banking instrument and* ***shall not carry the name of the buyer or payee****."* The other provisions of the EBS deal with the banks authorised to issue and encash the Electoral Bonds; persons entitled to purchase such bonds, the procedure for making an application for purchase of bonds and encashment of the said bonds, and the time periods during which such bonds are available for purchase.

6. The EBS derives its authority from a series of amendments to four crucial pieces of legislation relating to regulation of funding of political parties. These amendments were passed in a single swoop by way a "money bill" in the form of the Finance Act, 2017, which altered the following legislative provisions that regulate the flow of funds to political parties:

i) **Section 31** of the **Reserve Bank of India Act**, through Part III, Section 135 of the Finance Act, 2017: Amended to authorise a

scheduled bank to issue a promissory note described as an 'electoral bond' under a scheme notified by the Central Government. Thus, RBI approval is not necessary for the scheme formulated by the Central Government which results in the Executive Government being able to set the most basic rules for election financing without any independent oversight from any regulatory institution (whether the RBI or the ECI), or any expert body.

ii) **Section 29C**, the **Representation of the People Act, 1951** through Part IV, Section 137 of the Finance Act 2017: Amended to remove contributions made via electoral bonds from the reporting regime set out in Section 29C which required political parties to submit annual reports specifying the details of all contributions received above Rs. 20,000/- and tying this reporting requirement to procuring income tax exemptions. This means that the sources of funds received by political parties is hidden from both the public as well as the ECI itself.

iii) **Section 182** of the **Companies Act, 2013** through Part XII, Section 154 of the Finance Act, 2017: Amended to remove the cap of 7.5% of average net profits on corporate contributions to political parties. This cap was important to ensure that companies are not

incorporated solely to funnel funds to political parties, which is especially dangerous when the corporate structure is used to convert black money to white money. With this amendment even loss-making companies can donate the entirety of their assets to a political party. This amendment is not limited to electoral bonds and will apply to direct contributions made to a party. The amendment also deletes the obligation on companies to disclose in their profit and loss account the details of the party to which it has contributed funds. Only the total amount contributed to political parties in the financial year need be disclosed.

iv) **Section 13A** of the **Income Tax Act, 1961** through Chapter III, Section 11 of the Finance Act, 2017: Amended to delete the reporting requirement in Section 13A for those making contributions to political parties through electoral bonds. Political parties do not have to keep records of details of contributions including name and address of the contributors when made via electoral bonds. The delinking of reporting and grant of tax benefits eliminates an important incentive for political parties to follow reporting requirements under the law.

7. A tabular comparison of the previous provisions with the amended provisions is set out below:

Section 31 of the Reserve Bank of India Act, 1931	
Section 31. Issue of demand bills and notes. (1) No person in India other than the Bank or, as expressly authorized by this Act, the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person: Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.	**Section 31. Issue of demand bills and notes.** (1) No person in India other than the Bank or, as expressly authorized by this Act, the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person: Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.

(2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881, no person in India other than the Bank or, as expressly authorised by this Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument.	(2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881, no person in India other than the Bank or, as expressly authorised by this Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument. **(3) Notwithstanding anything contained in this section, the Central Government may authorise any scheduled bank to issue electoral bond.** **Explanation.- For the purposes of this sub-section, 'electoral bond' means a bond issued by any scheduled bank under the scheme as may be notified by the Central Government.**
Section 29C of the RPA, 1951	

Section 29C. Declaration of donation received by the political parties.- (1) The treasurer of a political party or any other person authorized by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely; (a) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year; (b) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year. (2) The report under sub-section (1) shall be in such form as may be prescribed. (3) The report for a financial year under sub- section(1) shall be submitted	**Section 29C. Declaration of donation received by the political parties.-** (1) The treasurer of a political party or any other person authorized by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely; (a) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year; (b) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year. **Provided that nothing contained in this sub-section shall apply to the contributions received by way of an electoral bond.**

by the treasurer of a political party or any other person authorized by the political party in this behalf before the due date for furnishing a return of income of that financial year under section 139 of the Income -tax Act, 1961 (43 of 1961), to the Election Commission. (4) Where the treasurer of any political party or any other person authorized by the political party in this behalf fails to submit a report under sub-section (3) then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act.	**Explanation – For the purposes of this sub-section, "electoral bond" means a bond referred to in the Explanation to sub-section (3) of section 31 of the Reserve Bank of India Act, 1934.** (2) The report under sub-section (1) shall be in such form as may be prescribed. (3) The report for a financial year under sub- section(1) shall be submitted by the treasurer of a political party or any other person authorized by the political party in this behalf before the due date for furnishing a return of income of that financial year under section 139 of the Income-tax Act, 1961 (43 of 1961), to the Election Commission. (4) Where the treasurer of any political party or any other person

	authorized by the political party in this behalf fails to submit a report under sub-section (3) then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act.
Section 182 of the Companies Act, 2013	
Section 182. Prohibitions and restrictions regarding political contributions- (1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:	**Section 182. Prohibitions and restrictions regarding political contributions-** (1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party: **[First proviso omitted]**

Provided that the amount referred to in sub- section (1) or, as the case may be, the aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years: Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.	Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.
Section 182 (3)- Every company shall disclose in its profit and loss account **any**	Section 182 (3)- Every company shall disclose in its profit and loss account the

amount or amounts contributed by it to any political party during the financial year to which that account relates, **giving particulars of the total amount contributed and the name of the party to which such amount has been contributed.**	total amount contributed by it under this section during the financial year to which the account relates. **(3A) Notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account: Provided that a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.**
Section 13A Income Tax Act, 1961	

13A. Special provision relating to incomes of political parties- Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party: Provided that- (a) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom; (b) in respect of each such voluntary contribution in excess of ten thousand rupees, such political party keeps and maintains a record of such contribution	13A. Special provision relating to incomes of political parties- Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party: Provided that- (a) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom; **(b)** in respect of each such voluntary contribution **other than contribution by way of electoral bond in excess of ten thousand rupees**, such political

and the name and address of the person who has made such contribution; and	party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution;
(c) the accounts of such political party are audited by an accountant as defined in the Explanation below sub- section (2) of section 288.	(c) the accounts of such political party are audited by an accountant as defined in the Explanation below sub- section (2) of section 288; and
Explanation.- For the purposes of this section, "political party" means an association or body of individual citizens of India registered with the Election Commission of India as a political party under paragraph 3 of the Election Symbols (Reservation and Allotment) Order, 1968, and includes a political party deemed to be registered with that Commission under the proviso to sub-paragraph (2) of that paragraph.	**(d) no donation exceeding two thousand rupees is received by such political party otherwise than by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account or through electoral bond.** **Explanation.- For the purposes of this proviso, "electoral bond" means a bond referred to in the Explanation**

	to sub- section (3) of section 31 of the Reserve Bank of India Act, 1934; **Provided also that such political party furnishes a return of income for the previous year in accordance with the provisions of sub section (4B) of section 139 on or before the due date under that section.**

8. In sum, therefore, the EBS made the following alterations to the legal regime for party political funding:

   a. *Eliminated* transparency requirements for electoral funding, making it impossible for the Election Commission and the citizen to know the source of the flow of funds to political parties.

   b. *Eliminated* caps on corporate donations, thus authorising unlimited corporate funding of political parties.

   c. *Eliminated* internal corporate disclosures requirements for political donations making shareholder and regulatory oversight impossible.

   d. *Eliminated* the requirement that corporate funding must not exceed 7.5% of net corporate profit (going back three years),

thus facilitating the creation of shell corporations set up solely for the purposes of political funding and the siphoning of black money into political parties through layering.

e. *Delinked* grant of tax exemptions to political parties and funding disclosure requirements, removing an important incentive to disclose the receipt and source of political funds.

f. Set up an *asymmetrical information regime*, where the only entity (other than the donor and the party) with knowledge of the funding is the State Bank of India, and - through the SBI - the central government.

9. It is respectfully submitted that the EBS is unconstitutional, for the reasons set out below.

B. THE ELEMENTS OF A FREE AND FAIR ELECTION UNDER THE INDIAN CONSTITUTION

10. It is respectfully submitted that free and fair elections are a basic feature of the Constitution and play a crucial, foundational role in our constitutional democracy. In ***Kihoto Hollohan v. Zachillhu & Ors. [1992 Supp (2) SCC 651],*** this Hon'ble Court has held,

"179. Democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy. One of the postulates of free and fair elections is provision for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority."

11. Article 324 of the Constitution of India foists a duty upon the Election Commission for the *"superintendence, direction and control"* over the conduct of all elections to Parliament as well as the State Legislatures. Further, Article 327 of the Constitution read with Entry 72 of List 1 of the VII Schedule of the Constitution gives power to Parliament to enact laws relating to elections to Parliament and State Legislatures.

12. Necessarily, the power exercised by Parliament must be in line with the basic feature of having free and fair elections.

13. By exercising powers under Entry 72 of List 1 of the VIIth Schedule, Parliament implemented the Representation of the People Act, 1951 which primarily regulates the conduct and rules to be followed in the electoral process. The Conduct of Elections Rules,

1961, promulgated under the said Act; these are also geared towards ensuring a free and fair election.

14. In this context, the scheme of the Act and the rules itself suggest that electoral expenses should be controlled and transparent. The Act and rules impose a penalty and disqualification. The act regulates not only candidates but political parties as well. ***(Section 77 r/w Rule 86 and Rule 90)*** Furthermore, it places limitations upon electoral *expenditures*, thus making it clear that its scheme is designed to cap the amount of money that can flow into the election process.

15. As will be developed below, any nature of funding that is opaque and that seeks to hide the source of the funding is contrary to the very spirit of free and fair elections which is a part of Basic Structure. Free and fair elections necessarily include transparency and the right of the public to know who funded the electoral process and to what extent. This requires disclosure of all details related to electoral funding: entities, amounts, time, and source. This transparency is fundamental to a free and fair election. Therefore, the EBS is per se unconstitutional.

a. Elections as the Vehicle of Representative Democracy

16. The Constitution of India brought into effect a system of **representative democracy**, transforming the political system in India from a system of *colonial rule by authority* to a culture of

participatory democracy, where sovereignty lies in the hands of the people themselves, who must consent to be governed. (***Govt of NCT of Delhi vs Union of India, (2018) 8 SCC 501; Reliance Petrochemical Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd (1988) 4 SCC 592; Village Panchayat, Calangute v. Additional Director of Panchayat II, (2012) 7 SCC 550****)*.

17. The Constitutional mandate of free and fair elections under the principle of universal adult franchise is a central pillar of our democratic culture. Under our political system, elected representatives do not have any political legitimacy independent of the will of the people, and must discharge their duties in public trust.

18. The institution of free and fair elections both ensures that the *will of the people* is manifest in the choice of political representation, and that when such *will* be disregarded, *consent to be governed* can be withdrawn and reassigned to others who abide by the limits of their office.

19. Thus, in this conception, elections are not merely procedures for selection of legislators, but rather constitute the core of the social and political practice of representative democracy. The regulatory regime for the conduct of elections must therefore have as its goal the fortification and reinforcement of deliberative democracy through

"free and fair" electoral practices. The mandate of the ECI under Article 324 for *"superintendence, direction and control of … the conduct of elections"* necessarily brings within its ambit ensuring that the elements of "free and fair" are safeguarded in the realm of electoral politics.

b. "Freedom" and "Fairness"

20. The concept of "freedom" under the Indian Constitution has both a negative and a positive dimension. In the context of "free" elections, in its negative dimension, "freedom" refers to the freedom of the voter to cast their vote in safety, without interference or intimidation, and without fear of adverse consequences for their electoral choice. This is secured by the secret ballot, and by the infrastructure of security around elections.

21. "Freedom" in its positive dimension means freedom *to* cast one's vote on the basis of complete and relevant information, and uninfluenced or undistorted by extraneous influences. In a functional democracy, elections ought to turn on a candidate's capacity to continuingly discern his/her constituents' wants, needs, and interests, and evolve policies to address these in a comprehensive and systematic manner, in a manner that is uninfluenced by money power,

and the modalities of the way in which money power is used in the context of elections.

22. This is recognised under the Representation of the People Act, 1951. In service of guaranteeing the *freedom* of elections, the RP Act enacts a statutory prohibition of "corrupt practices," which are defined under s. 123 of the Act to include "all forms of bribery and undue influence" upon voters. In addition, "free" elections are secured by the imposition of model codes of conduct, which limit *what* political parties can say or do in the scope of an election campaign, and when they can say or do it.

23. The concept of "fairness" is closely linked to the concept of "freedom." In ***Raghbir Singh Gill vs Gurcharan Singh Tohra*, 1980 SCR (3) 1302**, this Hon'ble Court held that "fairness" implies "fairness to all parties and candidates." Integral to the concept of fairness, thus, is the idea of a *level playing field*.

24. Economic power presents a grave risk to any level playing field between individual citizens and groups and can give some voices a disproportionate say in deciding the agenda of political parties and hence of laws and policies that will govern the entire country. In pluralistic democracies like India, practices must emerge that

preserve the equal voice of all citizens and that ensure that the special needs of all groups are heard.

25. Furthermore, this assumes particular importance in the context of elections, as - in a democratic polity - elections are the foundation of all democratic legitimacy. A skewed or uneven electoral process, thus, damages and undermines democratic legitimacy.

26. To address this concern, various regulatory regimes have been mooted across countries to equalise the capacity of each candidate to campaign, including caps on electoral fundings, uniformly state sponsored campaign funding, televised public debates that allow all contesting candidates to participate, and so on. *Until* the amendments to the Finance Act and the issuance of the EBS, the Indian regulatory regime also addressed this concern, through funding caps and disclosure requirements. The Foreign Contributions (Regulation) Act, 2010 also prohibits the receipt of any funding from foreign sources (whether individuals or companies) by candidates for elections, political parties or organisations of a political nature, which is based on the recognition that money power wields influence over political parties and is ultimately reflected in governance policies.

27. This Hon'ble Court has, on multiple occasions, recognised this concern as a constitutional issue. As observed by Hon'ble Justice P.N.

Bhagwati (as he then was) in ***Kanwar Lal Gupta v. Amar Nath Chawla*, (1975) 3 SCC 646**, *"the small man's chance is the essence of Indian democracy and that would be stultified if large contributions from rich and affluent individuals or groups are not divorced from the electoral process."*

28. A final element of free and fair elections lies in the fact that - as submitted above - elections are the vehicle through which *representative* democracy is secured. Representative democracy necessarily implies that the will of the electorate be reflected *through* and *by* representatives (in Parliament), who are chosen through the mode of free and fair elections. An electoral process that is severed from representative democracy, thus, is neither free nor fair.

29. It is respectfully submitted that the EBS is inconsistent with the elements of a free and fair election. It is submitted, at the outset, that corporate funding *per se* falls foul of the Constitution: corporations are not citizens (and therefore, are not entitled to Article 19(1)(a) rights), their purpose is not to intervene into the political process, and their presence in corporate funding severely undermines parity, and therefore, the fairness of elections.

30. Even otherwise, the EBS is unconstitutional for the following reasons:

31. *First,* the EBS severs the link between elections and representative democracy, through a combination of the removal of funding limits *and* the removal of transparency. The impact of political funding upon policy formation has been well-documented, and takes the following forms:

    a. A *direct* quid pro quo: a political candidate or party takes money from a donor and makes an explicit promise to enact policy in favour of that donor, should they come to power.

    b. Quid pro quo, however, does not need to be direct. In the electoral context, it has been widely observed that influence of large political donations is *indirect and subtle*, and is exercised through heightened access to policy-makers, the proverbial "seat at the table," and an underlying belief among policy-makers that they need to keep their donors "onside" in order to keep receiving funding.

32. Whether direct or indirect, the impact of large-scale private or corporate political funding, thus, severs the link between the *voter* and the *representative*, as the representative's actions are substantively oriented towards the will and interests of the donor rather than that of the voter.

33. While some democracies address this problem through a wholly public funded electoral process, others acknowledge the legality of private and corporate political funding, but seek to mitigate its influence through a strict regime of *transparency*. A regime of transparency enables voters to assess *for themselves* possible links between political donations and policy formation, and to judge for themselves whether - and to what extent - there is a *quid pro quo* between a large donor and a political party or candidate.

34. It is for this reason that The United Nations Convention Against Corruption has strongly advocated in favour of transparency in political funding and the same is supported by Law Commission reports of 2015. (***United Nations Convention Against Corruption, 2004, Article 7(3) and [Para 2.31(b)6] Para 2.31(b)8] of Law Commission report***).

35. Removing the caps on funding *and* removing transparency, thus, drives the relationship between the donor and the party/candidate underground, and obscures the *quid pro quo* between funding and policy from public scrutiny. Thus, it severely undermines the basic elements of free and fair elections.

36. Hence, the anonymity provided to donors - the heart of the issue in the present case - infringes upon the voters' right to know

(addressed below), and has the effect of making political parties *even* more unaccountable. Contributions by way of Electoral Bonds facilitate - rather than check - black money in politics and this undisclosed funding of political parties impinges upon the principles of democracy at its very core.

37. *Secondly*, EBS - in its present form - is inconsistent with the concept of "*fairness to … parties*." It introduces a *structural distortion* of the electoral playing field *beyond* simply private parties articulating their political preferences through money. This is because its non-transparency is *asymmetric*: while the *voter* does not know who donated to whom, and by how much, the *central government* does know - through the State Bank of India.

38. The EBS, thus, has a built-in *incumbent bias* into its very design. In a fused parliamentary model - where the executive is drawn from the ruling party - asymmetric information about political donations will ensure that a significantly larger portion of the donor pie will go the ruling party (whichever party that may be), as function of political risk-management; this is especially true of corporate donations, given the symbiotic relationship between corporations and the policy-making branch of the State in the modern, privatised economy.

39. The record bears this out. Since the introduction of the EBS, it has been extensively documented that the ruling party at the centre has received *vastly* greater funding through electoral bonds than all other parties *put together*. For example, Election Commission data demonstrates that between 2018 and 2022, the Bharatiya Janata Party ["BJP"] received Rs. 5,270 crores out of a total of Rs 9,208 crores donated via electoral bonds, i.e., 57% of the total donations (the second-highest was 10%). (***News Report by NDTV)***

40. It is respectfully submitted that the skew in numbers demonstrates beyond cavil that "unfairness … to political parties" is thus baked into the design of the EBS.

41. *Finally*, it is respectfully submitted that unlimited, anonymous corporate donations to political parties completely drown out the voice and will of the individual citizen-voter. While an ordinary individual has a single vote - and every vote is equal ("one person, one vote"), to paraphrase Dr. B.R. Ambedkar, not every citizen has the same "value" under the EBS. The EBS accords significantly greater value to corporate donors, by giving them significantly greater opportunity to influence political parties and electoral outcomes, than the ordinary, individual voter.

42. It is respectfully submitted that before the amendment to the Finance Act and the introduction of the EBS, the Indian regulatory regime for the electoral process was cognisant of all these issues. The EBS is a radical departure from a carefully calibrated regulatory regime - both constitutional and statutory - that has treated corporate funnelled financing of political parties with grave suspicion. This regulation has been along three axes:

1) Whether corporate donations to political parties should be allowed at all, and if yes, which kinds of companies should be allowed to make such donations?;
2) If corporate donations are allowed, what cap of the net profits should be set on such donations?, and
3) Who is the appropriate body within the corporation to authorise such donations?

43. A company or a corporate body is primarily established with the purpose of making a profit. It is the fiduciary duty of the Board of Directors towards the shareholders of the Company to carry out the business of the Company in its best interest. Carrying on the business of the company would include overseeing the expenditures of the company which would necessarily be in furtherance of the objects and business of the Company. Section 4 of the Companies Act, 2013 relates

to the Memorandum of Association of the Company. Sub-section (c) of sub-section (1) of Section 4 states that the Memorandum of the Company shall consist of:

> *"(c) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof"*

44. It is submitted that funding a political party can never be in furtherance of the objects of the Company. There is no doubt that a citizen of India can, if that citizen agrees with the ideologies of a particular political party, give funds to the said party. However, the same cannot apply to a corporate entity. Unlike citizens, a corporate entity, being a juristic person, is not given the same rights under the Constitution as those given to a citizen. This Hon'ble Court has held that a company does not have rights under Article 19 of the Constitution (***State Trading Corporation of India Ltd. v. Commercial Tax officer & Ors. reported at AIR 1963 SC 1811***). However, by way of the EBS, a corporate entity is permitted to (i) be equated with a citizen of India; (ii) interfere and influence with the electoral process; (iii) give unlimited funding, irrespective of its profitability, thereby permitting the Board of Directors to forego their fiduciary duty

towards its shareholders and (iv) hide from the shareholders as to which political party the Company has given funding to. It is therefore submitted that the EBS is violative of, not only the companies act, but also the Constitution of India by permitting a juristic entity to enter into and influencing the foray of the electoral process.

45. Historically, corporate donations to political parties were completely banned by the introduction of Section 293A into the Companies Act, 1956 by way of the Companies (Amendment) Act, 1969 (Act No. 17 of 1969). This amendment also made corporate donations to political parties a punishable offence. The primary reason behind this amendment was the report of the Santhanam Committee on Prevention of Corruption (1964) which had highlighted the problem of black money being channelled back to political parties and candidates to garner favourable policy decisions and recommended a "total ban on all donations by incorporated bodies to political parties" because of "public belief in the prevalence of corruption at high political levels."

46. It was only in 1985 that Section 293A of the Companies Act, 1956 was amended to permit corporate donations, subject to a 5% cap (of average net profits) and other restrictions. The Law Commission in

its 170th Report on Reform of the Electoral Laws (1999) decried this move observing that: *"Under the present provision, a company is permitted to contribute amounts to a political party or for a political purpose to any person provided that the amount does not exceed five per cent of its average net profits. In the case of an Indian company of a multinational stature or in the case of any big business group, five per cent would mean a mind-boggling figure." (**Chapter I, The proposal to delete Explanation I to section 77, clause 4.1.6.1. ,170th Law Commission Report)***

47. The Companies Act, 2013 increased the cap to 7.5% of the average net profits of the three preceding years by way of sub-section 1 of Section 182. The Law Commission of India, under the Chairmanship of Retd. Hon'ble Justice Shri A. P. Shah submitted its Report No. 255 on "Electoral Reforms" suggesting comprehensive measures for changes in the law relating to electoral finance, including on regulation of corporate financing of political parties. The Report recommended that Section 182(1) of the Companies Act, 2013 should be amended to require the passing of the resolution authorising the contribution from the company's funds to a political party at the company's Annual General Meeting (AGM) instead of its Board of

Directors. (***Chapter II Election Finance Reforms Para 2.31(a)2] ,255th Law Commission Report)***

48. The EBS eliminates these safeguards at all three levels without any constitutionally valid justification or any legitimate state purpose. There is no conceivable justification or state purpose that is served, for example, by: allowing loss making companies to funnel money to political parties or for companies to be created solely for such purposes, allowing companies to pump money into political parties without any caps, allowing company boards to make decisions about political donations in secrecy without any transparency and shareholder oversight. In permitting these practices, the EBS brings into place a regime where seeking corporate patronage is the single most important goal for political parties that want to win elections and stay in power, which is a grave inversion of free and fair elections. Such carte blanche to corporate India to carry out unchecked and unrestricted corporate financing of political parties is per se unconstitutional.

49. This free hand to corporate India is made even more egregious by the fact that funds contributed through the EBS can be utilised by political parties in whatever manner that they wish, without having any link to electoral campaigns (including periods between election

campaigns). The EBS thus is a colourable exercise of power by the executive branch to enable untrammelled funnelling of money through masked corporate structures, such that any *quid pro quo* between political parties and the economically powerful doyens of the corporate sector is undetectable under the EBS' veil of secrecy.

C. THE VOTER'S RIGHT TO INFORMATION

50. It is respectfully submitted that the voter's right to relevant information about the political process, which enables her to cast an informed vote, is guaranteed by Article 19(1)(a) of the Constitution.

51. Article 19(1)(a) guarantees the freedom of speech and expression. The act of casting a vote - which is a central element of the democratic process - has been held to be an expressive act protected under Article 19(1)(a) [***People's Union for Civil Liberties vs Union of India, (2003) 4 SCC 399**.]*

52. As this Hon'ble Court has held on multiple occasions, the protection of a specific, enumerated fundamental right under the Constitution entails the protection of ancillary rights, without which the original right would be meaningless, or redundant.

53. Following this logic, in ***Union of India vs Association for Democratic Reforms, (2002) 5 SCC 294***, this Hon'ble Court held that "there is no reason to hold that freedom of speech and expression

would not cover a right to get material information with regard to a candidate who is contesting elections for a post which is of utmost importance in the country." Specifically, this Hon'ble Court went on to hold that "casting of a vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect democracy seriously."

54. On this basis, in **Association for Democratic Reforms, supra,** this Hon'ble Court held that in order for voters to exercise an informed decision, electoral candidates must disclose their assets, educational qualifications, and involvement in criminal cases.

55. It is respectfully submitted that this proposition has been an established part of Indian constitutional jurisprudence right from the origins of the Constitution. In ***Romesh Thapar vs State of Madras, 1950 SCR 594,*** the first Article 19(1)(a) case to be decided by this Hon'ble Court, it was clearly articulated that "the public interest in freedom of discussion stems from the requirement that members of democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves." Likewise, in ***PUCL vs Union of India, supra***, this Hon'ble Court held that "there can be little doubt that exposure to the public gaze and

scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures."

56. It is respectfully submitted that the legal proposition (i.e., that voters have a fundamental right to *receive* relevant information about electoral candidates), along with the *principle* that underlies it (that an informed vote is essential to the functioning of democracy), establishes beyond cavil that information pertaining to the *source of political party and candidate funding* falls squarely within the ambit of Article 19(1)(a), as interpreted by this Hon'ble Court.

57. The rationale for this was articulated by the Supreme Court of the United States in the landmark campaign funding case of ***Buckley vs Valeo, 424 U.S. 1 (1976*)**, in terms that are squarely applicable to the present situation: disclosure requirements "provide the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office." The link between political funding and necessary *information required to evaluate electoral candidates*, thus, is clearly established. In plain language, the knowledge that an candidate for elected office might be likely to represent, or predominantly represent, the interests of his or her donors is relevant and necessary information for voters to decide

whether, and to what extent, the said candidate might represent *their* interests (especially when such interests are in conflict) (see also ***Nixon vs Shrink Missouri Government PAC, 528 U.S. 377 (2000)***.

58. It is respectfully submitted that empirical research bears this out. It has been seen that voters who are informed about a candidate's source of political funding are able to exercise their vote on par with voters who have *actively researched* the policy positions of a particular candidate (***Elizabeth Garrett, "The Future of Campaign Finance Reform Laws in the Courts and in Congress", University of Chicago Public Law & Legal Theory Working Paper No. 19, 2001).***

59. Put simply, information about a candidate's source of political funding is an invaluable aid for a voter to discern their likely stance on issues of policy (especially if the voter lacks the time - or the resources - to engage in a detailed study of the said candidate). On the flip side, *denying* this information to voters makes it impossible for the latter to understand when their elected representatives might be acting in favour of large campaign donors.

60. It is therefore submitted that the EBS, in its shielding of the source of political funding from the voter, violates Article 19(1)(a) of the Constitution.

D. PROPORTIONALITY

61. The Respondents have proffered two justifications for the EBS: *first*, that by formalising the process of political donations, black money will be eliminated from politics; and *secondly*, that the EBS protects the donor's right to privacy. It is respectfully submitted that both justifications fail the test of proportionality.

62. It is well-established that State action that infringes Article 19 must - in order to constitute a "reasonable restriction" upon the right - pass the four-pronged test of proportionality: a legitimate State aim, a rational nexus with the aim, the requirement of necessity, and proportionality *stricto sensu* (i.e., a balance between the intensity of the goal and the restriction of the right).

a. Black Money

63. With respect to black money, it is respectfully submitted that the fact that under the EBS financial contributions are now routed through the State Bank of India ["SBI"], and therefore have to pass a Know-Your-Customer ["KYC"] check, is of no assistance. This process cannot address a donor's ability to funnel "black" money *through* a legitimate company or individual, a risk that is enhanced by the fact that under the EBS, there is no requirement of keeping a record of large donations

or donors. In other words, the EBS does not tackle the problem of the legitimacy of the *origin* of political donations, and arguably, makes scrutiny even more difficult. Even if the State's goal is taken at face value, the means to achieve it fail the second prong of the proportionality test (rational nexus). (***SBI Donor Guidelines)***

64. However, even if it is held that the second prong has been satisfied, it is respectfully submitted that the justification cannot pass muster under the necessity prong, i.e., the requirement of the "least restrictive measure." This is because it is evident that the rooting out of black money from the electoral process does not require *donor anonymity*. In other words, a strong regulatory system of campaign financing can co-exist with a regime of transparency, where voters are provided the relevant information with respect to the funding of political candidates. Therefore, depriving voters of this information is not the "least restrictive alternative," insofar as the goal of the EBS is the rooting out of black money.

b. Donor Privacy

65. With respect to donor privacy, it is respectfully submitted that this justification fails at the first prong itself. *Other* than the secret ballot, democracy - and the process of elections - are *quintessentially public acts*, which take place in the public sphere. While there is no

compulsion upon any citizen - or corporation - to participate in the political or electoral process (including through the means of financial donations), *should* an individual or corporation choose to do so, they cannot claim that right on conditions of blanket anonymity. The argument of unregulated donor privacy, thus, has no place in the context of participation in the political and electoral process, and is not a "legitimate State aim

66. However, even if it is held that in certain cases, donor privacy might be a legitimate State aim, it is evident that the EBS fails on the second limb of proportionality. This is because the privacy it purportedly provides is *asymmetric*: information about donations is known to the State Bank of India, which is owned by the Union Government and is bound by directions issued by the union from time to time under section 18 of the SBI Act, 1955. There is no section or mechanism that restricts sharing of this information with the government. Unlike the Census Act, 1948, for example, which restricts the sharing of information for any purpose other than for the census, there is no imposition of any restriction on the sharing of this data with the government or on the use of it for any other purpose. That being the case, donor privacy is always subject to Central Government's broad powers to obtain the identity of the donors. In other words, the

"donor privacy" guaranteed by the EBS is "privacy *except* from the central government."

67. It is respectfully submitted that insofar as the principle underlying donor privacy in the electoral context is to safeguard donors from political persecution or reprisals, the availability of such information to the central government - which has exclusive control over the instruments of State coercion - is entirely irrational, and defeats the stated purpose entirely. This is also manifestly unfair and violative of Article 14 of the Constitution inasmuch as it privileges one party i.e. the party ruling at the centre with crucial electoral information that other parties are not privy to, thereby undermining the level playing field that the electoral process must guarantee.

68. Finally, *even* if it is held that, as far as the goal of donor privacy is concerned, the EBS passes both the legitimate State aim and rational nexus prongs of the proportionality standard, it fails the necessity test. To the extent that the concern around reprisals and political persecution is valid, this can be addressed on a case-by-case basis, and not through an omnibus guarantee of donor privacy. For example, in ***Brown vs Socialist Workers Comm., 459 U.S. 87 (1982)***, the US Supreme Court noted that disclosure requirements could be waived where there existed "specific evidence of hostility, threats, harassment

and reprisals." This determination - made on a case-by-case basis - is a more proportionate way of addressing the concern. In its existing form, therefore, EBS evidently fails the proportionality test.

69. Even assuming that *donor privacy* is a valid justification for the measure, it is manifestly arbitrary and overbroad inasmuch as it includes corporate entities within its protective opacity fold. Individuals have privacy rights flowing from Article 19 read with Article 21. Corporate persons - as non-citzens - do not have privacy rights.

E. POLITICAL PARTIES PERFORM A PUBLIC FUNCTION

70. A political party is an entity registered under a statute i.e. the Representation of Peoples' Act, 1951 and the privileges accorded, including a uniform symbol, under the Symbols Order 1968. They have played an outsized role in legislation and policy making since independence. Following the enactment of the Xth Schedule to the constitution, their *de facto* role became consecrated *de jure* so much so that now, political parties determine and influence legislative outcomes more than any other organ or entity in our polity. Being so, they indisputably perform a key public function and there is

substantial public interest in the sources of their funding being known to the public at large.

71. This privilege to determine legislative outcomes to political parties, despite election to each seat being a separate event under the constitution; and the privilege accorded to recognised political political parties in terms of uniform symbol across a state or the country; and the top slots in the ballot or the EVM for recognised national parties cumulatively constitute state largesse and unless these parties are willing to forego that largesse, there is no reason why they ought to be allowed to have secretive funding sources.

F. CONCLUSION

72. Regulation of spending in elections is a delicate process that necessarily must take into account the following factors:

a. Elections need funding.

b. Individuals ought to have the freedom to contribute to political candidates or issues of their choice.

73. However, excessive funding corrupts the political process in at least two ways.

a. It gives rise to a “pay for play” political culture where wealthy corporations or persons pay high amounts in order to influence

the political process in a way so as to ensure that they obtain the "gratitude" of the powerful which is often expressed in the form of policies and laws that favour these donors over others. A political system where the rich have unhindered access to power leads to cynicism among the other persons and a corresponding lack of faith in the fairness of the democratic process. Public faith in democracy is what is ultimately the final line of defence for a democratic system. The perception of a "quid pro quo" often spells the death knell for public faith in the system.

b. Public policy is dictated by the desires of a few over the needs of the many. This leads to laws that serve private or public interests, and which favour the priorities of a few over everyone else.

74. Keeping in mind these dangers, India, before the EBS scheme, carefully regulated political donations in the following manner:

a. An elaborate system of disclosure was prescribed. First, Political parties were to give the data of the donations received to both the EC and the Income Tax authorities. Second, Companies that made political donations were required to disclose political contributions in their profit and loss statements. Thus the public

had the opportunity to find out how candidates were raising funds and could exercise their vote keeping this in mind.

b. In order to ensure that shell companies are not set up to fund political parties, companies could donate only up to 7.5% of their profits.

c. Political parties were forbidden from obtaining foreign funds under the FCRA.

75. It is the wanton destruction of this carefully calibrated structure by the EBS scheme that is under challenge in the present petitions.

76. Removal of restrictions on corporate funding- i.e. the 7.5% of profit cap that was imposed under the Companies Act, violates Article 19(1)(a) insofar as it permits deep pocketed companies to flood out the voice of citizens who do not have access to such funds. It also violates the "equal treatment" clause as it permits some people more political access than others based on money power.

77. Removal of the transparency and disclosure requirements violates the rights of citizens to know the candidates, their antecedents and their big money associations which are valuable to those seeking to exercise their ballots. This is in violation of rights under Article 19(1)(a), and 19(1)(c). Further, it utterly destroys the ability of shareholders to influence the political activities of companies. Boards

decide on donations and the profit and loss statement only records political donations and not to whom they were made. As such, shareholders have been denied complete agencies on how companies owned by them act politically. This is in violation of Article 300A of the Constitution.

78. The justifications preferred by the State do not pass the threshold of non-arbitrariness and proportionality.

79. For these reasons, it is respectfully submitted that the EBS is unconstitutional and deserves to be struck down.

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