

SYNOPSIS

That the present writ petition has been filed by two sets of Petitioners – Petitioner No.s 1 to 4 who are queer feminist activists, who have not only experienced discrimination, hate and conflict in view of their self determined gender identity and sexual orientation, but have worked actively for almost three decades to secure and protect the rights of lesbian, bisexual, trans and intersex (hereinafter referred to as “LBTI”) persons; and Petitioner No.s 5 to 10, who are young couples that have faced extremely violent rejection from their natal families in view of their self determined gender identity and their choice to establish queer relationships, as well as their desire to marry the person of their choice. The lack of legal protection for such queer marriages, as well as the complete apathy and contempt of the police and other institutions and agencies towards queer relationships, has resulted in Petitioner No.s 5 to 10 being subjected to physical violence and emotional abuse by their natal families, and criminal prosecutions have also been initiated in some cases in utter abuse of the legal process only to punish the Petitioners for having queer relationships.

The present writ petition under Article 32 of the Constitution of India has been filed to protect the fundamental rights of the Petitioners herein in the following terms:

- i. That lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, find themselves often facing conflict from natal families and the law. They suffer neglect, rejection, violence-physical and mental, abuse of law, surveillance, detention, and interference with respect to personal, professional, economic, medical and other vital decisions of their lives on account of their self-determined gender identity and sexual orientation, whether or not they are in intimate relationships.

- ii. That the directions of this Hon'ble Court in *Navtej Singh Johar v. Union of India, (2018) 10 SCC 1* on sensitizing and training the law enforcement in order to respect, protect and fulfill the basic rights of LGBTI individuals have not translated into offering a modicum of safety, security and dignity as illustrative incidents documented in this petition demonstrate that the police often act as an instrumentality of the natal family in furthering their illegal diktats, including separating chosen partners and seeking 'custody' of adults who decide to leave abusive homes.

- iii. That the decisions of this Hon'ble Court on matters relating to the fundamental right to privacy (*Justice K.S. Puttaswamy vs Union of India (I)*, (2017) 10 SCC 1), the fundamental right of choice of partner in marriage (*Shafin Jahan v. Asokan KM*, 2018 SCC Online SC 343) and anti-discrimination on basis of sex, gender identity and sexual orientation (*National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1) have imminent and substantial bearing on the denial of solemnization and registration of marriages involving LGBTI individuals under the *Special Marriage Act, 1954* (hereinafter 'SMA'). Sections 2(b), 4 and Parts I-II of First Schedule of SMA are thereby *ex facie* discriminatory on the basis of gender identity and sexual orientation and thus violative of Articles 14, 15, 19 and 21 of the Constitution.
- iv. That the "notice, domicile and objection" framework under Sections 5-9 of SMA acts as a deterrent for LGBTI persons to solemnize and register marriages, and thereby violates the fundamental right to marry for groups of individuals who have historically suffered stigma, discrimination and violence from

state and non-state actors, including natal families, on basis of their identities of caste, religion, gender identity and sexual orientation and thus violative of Articles 14, 15, 19 and 21 of the Constitution.

- v. That the 'Family' as a unit has traditionally been believed to be a source and site of love, care, protection and rearing, but experience demonstrates that it can also be a site of breach of basic human rights, and a source of discrimination, hate and violence, This is also recognized by law, like the Protection of Women from Domestic Violence Act, 2005, which is mandated to protect women from all forms of domestic violence from family members. That jurisprudential developments through decisions of this Hon'ble Court that advance propositions with respect to transcending the institution of natal family and marriage as a source of rights (*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321*) and purposively applying the constitution and law in order to protect rights of 'atypical families' or 'chosen families' (*Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088*) have imminent and substantial bearing on the protection of fundamental rights of LGBTI individuals

irrespective of marital status, against a lived experience and history where natal families are in conflict with LGBTI individuals. The law's conception of a family as members related only by 'marriage, birth or adoption' is not representative of the lived experiences of unmarried LGBTI individuals and the manner in which chosen families are organized, especially as the 'family' is the site of hetero-normative expectations, opposition and violence for many, like some of the Petitioners herein. The law's failure to recognize kinship bonds beyond the aforesaid category of 'family' leads to systemic exclusion and vulnerability in matters relating to healthcare, estate planning, housing, inheritance, and other social and economic rights which otherwise accrue as a direct incidence of a lawful marriage or blood related family ties, and is thus violative of Articles 14, 15, 19 and 21 of the Constitution of India.

That the experience of constant rejection and violence inflicted by the natal family on LGBTI persons leaves such persons vulnerable to further abuse and neglect in situations where the law recognized the right of the next of kin to take certain decisions on one's behalf, especially when the said individual may be medically incapacitated.

The present legal regime's insistence on according primacy to kinship and family on the basis of blood related ties results in LGBTI persons having to depend on their abusive families for their welfare and best interest, although otherwise the said LGBTI persons may have had to escape the abusive home and family for their survival. This necessitates that the law recognize that LGBTI persons often form intimacies not through blood related ties, but bonds forged through mutual care, love, understanding and respect – all aspects of life integral to a life with dignity. Such atypical families or chosen families, be it through queer romantic relationships or intimate friendships, provide real and greater support, comfort and care to a majority of LGBTI persons than their natal families, and the right to form such chosen families flows from the mandate of the right to a life with dignity and privacy under Article 21 of the Constitution of India.

That in view of the above, the present petition seeks the following prayers:

- i. Issue an appropriate writ, order or direction to declare that the non-recognition of marriage between persons on the basis of sexual orientation and/or gender identity under SMA is illegal and unconstitutional;

- ii. Issue an appropriate writ, order or direction to declare the usage of gender neutral terms like 'spouse' in the context of solemnization and registration of marriages between LGBTI persons, and all other corresponding provisions under SMA;
- iii. Issue an appropriate writ, order or direction to declare that the provisions of law with respect to the "notice, domicile and objection" framework in Sections 5, 6, 7, 8, and 9 of SMA are illegal and unconstitutional;
- iv. Issue an appropriate writ, order or direction to declare that the validity of marriages already solemnized or registered under the SMA would not de facto be jeopardized if one spouse transitions to their self-determined gender identity;
- v. Issue an appropriate writ, order or direction to declare and recognise the constitutional right of members of the LGBTI community to have a "chosen family" in lieu of next of kin under all laws, as an intrinsic part of their right to a dignified life under Article 21;
- vi. Issue an appropriate writ, order or direction to declare that an unmarried person can nominate 'any person(s)' to act as their nominee or next of kin, irrespective of whether such person is a 'guardian, close relative or family

member', with respect to healthcare decisions in case of incapacity such as execution of Advance Directives and assigning any legal right, interest, title, claim or benefit accrued to the person;

- vii. Issue an appropriate writ, order or direction to declare that State Governments must apply all preventive, remedial, protective and punitive measures, including establishment of safe houses similar to the *Garima Greh* welfare scheme, in order to guarantee safety and security of all individuals irrespective of gender identity and sexual orientation.

Hence this writ petition under Article 32 of the Constitution of India.

LIST OF DATES

DATE	EVENT
1954	The Special Marriage Act was enacted in India with a view to provide for a legal mechanism for conducting civil marriages between any two persons irrespective of

	<p>their faith or religion. The Schedule to the said Act however clarifies that the said two persons in a civil marriage solemnized or registered under this Act were envisaged to be a cis-male and a cis-female.</p>
06.09.2018	<p>A Constitution Bench judgment of this Hon'ble Court in <i>Navtej Singh Johar and Ors. Vs Union of India and Ors.</i> (2018) 10 SCC 1, decriminalized consensual sexual acts between two adult persons irrespective of their gender identity or sexual orientation by reading down Sec. 377 of the Indian Penal Code. This Hon'ble Court recognized that LGBTI persons have a right to equality before law and equal protection of the laws, and also held that there was a positive obligation on the State to facilitate the recognition of rights to bring fulfillment to same sex relationships. Further, this Hon'ble Court directed that there was immediate need for sensitizing and training the law enforcement in order to respect, protect and fulfill the basic rights of LGBTI individuals.</p>
Submission:	<p>That despite the judgment of this Hon'ble Court in</p>

Navtej, the Petitioner No.s 5 to 10 have faced immense violence from their natal families in view of their self determined gender identity and sexual orientation, and the natal families used law enforcement as a weapon against their queer relationships. For the sake of brevity, the ordeal faced by the Petitioner No.s 5 to 10 is described in detail in Paras 25 to 48 below, and not reproduced in the list of dates.

The Petitioner No. 1 to 4 are regularly approached by queer or trans persons, or persons in queer or trans relationships, seeking refuge from abusive families and homes, as well as from law enforcement agencies. Despite efforts of the Petitioner No.s 1 to 4 to help such queer and trans relationships, there are many instances where help could not be forthcoming in time and lesbian couples have chosen to end their lives to bring an end to the daily abuse, neglect, discrimination, hate and indignity that they suffered at the hands of their natal families and also society at large.

Judicial pronouncement has now recognized the right

	<p>to have 'atypical families' or 'chosen families' in some contexts, and there is a need for such recognition to be extended to the realm of marriage and familial rights, in order to respect the right of LGBTI persons to live a life with dignity and to protect their rights and freedoms to make choices and decisions vital to their life and personhood.</p>
	<p>Hence this writ petition.</p>

IN THE SUPREME COURT OF INDIA
CIVIL WRIT JURISDICTION
WRIT PETITION (CIVIL) NO. _____ OF 2023
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

1. **Rituparna Borah,**
[REDACTED] ...PETITIONER NO. 1
2. **Chayanika Shah,**
[REDACTED] ...PETITIONER NO. 2
3. **Minakshi Sanyal,**
[REDACTED] ...PETITIONER NO. 3
4. **Maya Sharma,**
[REDACTED] ...PETITIONER NO. 4
5. **A**

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER NO.

5

6. B

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER NO. 6

7. C

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITION

ER NO. 7

8. D

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER NO. 8

9. E

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER

NO.9

10. F

(Identity anonymised due to imminent threat to life, limb and liberty)

...PETITIONER

NO. 10

VERSUS

1. UNION OF INDIA

Through The Secretary,
The Ministry of Law and Justice,
3rd Floor, 'C' Wing, Lok Nayak Bhawan,
Khan Market New Delhi-
01.

...RESPONDENT

**WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF
INDIA**

TO,

THE HONOURABLE CHIEF JUSTICE OF INDIA,

AND HIS OTHER COMPANION JUDGES,

OF THE HON'BLE SUPREME COURT OF INDIA.

THE HUMBLE PETITION OF

THE PETITIONERS ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. That the present writ petition under Article 32 of the Constitution of India is filed to protect the fundamental rights of the Petitioners herein in the following terms:

I. That lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, find themselves often facing conflict from natal families and the law. They suffer neglect, rejection, violence-physical and mental, abuse of law, surveillance, detention, and

interference with respect to personal, professional, economic, medical and other vital decisions of their lives on account of their self-determined gender identity and sexual orientation, whether or not they are in intimate relationships;

II. That the directions of this Hon'ble Court in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 on sensitizing and training the law enforcement in order to respect, protect and fulfill the basic rights of LGBTI individuals have not translated into offering a modicum of safety, security and dignity as countless incidents documented in this petition demonstrate that the police often act as an instrumentality of the natal family in furthering their illegal diktats, including separating chosen partners and seeking 'custody' of adults who decide to leave abusive homes;

III. That the decisions of this Hon'ble Court on matters relating to the fundamental right to privacy (*Justice K.S. Puttaswamy vs Union of India (I)*, (2017) 10 SCC 1), the fundamental right of choice of partner in marriage (*Shafin Jahan v. Asokan KM*, 2018 SCC Online SC 343) and anti-discrimination on basis of sex, gender identity and sexual orientation (*National Legal*

Services Authority (NALSA) v. Union of India, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1) have imminent and substantial bearing on the denial of solemnization and registration of marriages involving LGBTI individuals under the *Special Marriage Act, 1954* (hereinafter 'SMA'). Sections 2(b), 4 and Parts I-II of First Schedule of SMA are thereby *ex facie* discriminatory on the basis of gender identity and sexual orientation and thus violative of Articles 14, 15, 19 and 21 of the Constitution;

IV. That the “notice, domicile and objection” framework under Sections 5-9 of SMA acts as a deterrent for LGBTI persons to solemnize and register marriages, and thereby violates the fundamental right to marry for groups of individuals who have historically suffered stigma, discrimination and violence from state and non-state actors, including natal families, on basis of their identities of caste, religion, gender identity and sexual orientation and thus violative of Articles 14, 15, 19 and 21 of the Constitution;

V. That the 'Family' as a unit has traditionally been believed to be a source and site of love, care, protection and rearing, but experience demonstrates that it can also be a site of breach of basic human rights, and a source of discrimination, hate and violence, This is also recognised by law, like the Protection of Women from Domestic Violence Act, 2005, which is mandated to protect women from all forms of domestic violence from family members.

VI. That jurisprudential developments through decisions of this Hon'ble Court that advance propositions with respect to transcending the institution of natal family and marriage as a source of rights (*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321*) and purposively applying the constitution and law in order to protect rights of 'atypical families' or 'chosen families' (*Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088*) have imminent and substantial bearing on the protection of fundamental rights of LGBTI individuals irrespective of marital status, against a lived experience and history where natal families are in conflict with LGBTI

individuals. The law's conception of a family as members related only by 'marriage, birth or adoption' is not representative of the lived experiences of unmarried LGBTI individuals and the manner in which chosen families are organized, especially as the 'family' is the site of hetero-normative expectations, opposition and violence for many, like some of the Petitioners herein. The law's failure to recognize kinship bonds beyond the aforesaid category of 'family' leads to systemic exclusion and vulnerability in matters relating to healthcare, estate planning, housing, inheritance, and other social and economic rights which otherwise accrue as a direct incidence of a lawful marriage or blood related family ties, and is thus violative of Articles 14, 15, 19 and 21 of the Constitution of India.

1A. That the present petition is not a Public Interest Litigation.

ABOUT THE PETITIONERS

1. That Petitioner No. 1, Rituparna Borah, is a queer feminist activist with over 15 years of experience of working on issues of gender and sexuality. She is currently a board member at Nazariya, which is a Queer feminist resource group that focuses, inter alia, on awareness and accessibility of the rights of LBT persons by

conducting training sessions, engaging in advocacy and running a dedicated help line.

2. That the Petitioner no. 1 has handled various cases of natal family and marital family violence against LBT persons. She played a crucial role in providing support to a transgender man in escaping his violent natal family in Agra, Uttar Pradesh. It was in this case that the Hon'ble Delhi High Court in its judgment titled, *Shivani 'Shivy' Bhat v. State of NCT of Delhi, (2015) 223 DLT 391*, held that one's sexual orientation and gender identity were central to their fundamental right to self determination. Further, the Petitioner has also supported LBT couples who have faced "corrective rape" and conversion therapy at the hands of their natal families.
3. That the Petitioner no. 1, belongs to an indigenous community (Koch community) in Assam and identifies as a lesbian woman. The Petitioner no. 1 has lost both her parents, her father only very recently. While her father was an ally and was supportive and understanding of her sexual orientation and lifestyle choices, her surviving familial relatives are not. Rituparna suffers from Fibromyalgia and Chronic Fatigue, which has been recognised in the UK as a potentially disabling condition. Her diagnosis requires

those close to her to provide regular care and support and also to take medical decisions on her behalf and in her best interest. Such crucial medical decisions that determine her quality of life cannot be left to her surviving natal family members who do not support, respect or understand her and her lifestyle decisions. Currently, with no existing allies in her natal family, the Petitioner no.1 also doesn't wish to nominate any surviving members of her natal family as beneficiaries to her estate or her belongings, or desire that any legal rights or claims in her name accrue to them. Rather, she wants to assign such benefits, rights and claims to the people who might not be her de jure family but are her de facto support system and will take decisions in her best interest. She presently resides with her live-in partner in New Delhi.

4. That During Covid-19, Petitioner No. 1 and Nazariya provided relief in the form of food and ration supplies to LGBTI individuals who faced difficulties due to the restrictions on movement due to lockdowns and those who suffered loss of employment and housing.
5. That the Petitioner no. 1 was also a member of Voices Against 377, a coalition of persons who participated in the challenge against

Section 377, of the Indian Penal Code, 1860 which led to this Hon'ble Court's declaration to read-down the provision to exclude sex between consenting adults in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1. The Petitioner no. 1 is also a trained peer counselor and has successfully run the helpline of Nazariya.

6. That Petitioner No. 2 Chayanika Shah is a queer woman – a teacher, researcher and activist based in Mumbai. She has a doctorate degree and was a Physics lecturer in a Mumbai based college, from which she took voluntary retirement in 2008. Since her retirement she has been actively teaching and conducting seminars on themes such as Gender Studies, Queer Studies and Science Education.
7. That in the last 14 years, Petitioner No.2 has collaborated on three studies related to queer and transgender lives. The first was a research study titled, *“Breaking the Binary: Understanding concerns and realities of queer persons assigned gender female at birth across a spectrum of lived gender identities”*, which was based on qualitative interviews with 50 such individuals across the country. This study was conducted from 2009 to 2013 and later published as a book titled *“No Outlaws in the Gender Galaxy”* co-

authored by her and published by Zubaan Press in 2015. The second was a short study in 2013 with TISS, Mumbai titled, *“Making sense: Familial journeys towards acceptance of gay and lesbian family members”*. More recently from 2017 to 2019 she has been part of a multi-city study housed in TISS, Mumbai titled *“An exploratory study of discrimination based on marginalized genders and sexualities”*.

8. That as a member of voluntary collectives like Forum Against Oppression of Women (FAOW) for the last 4 decades and more recently of the People’s Union for Civil Liberties (PUCL), Petitioner No. 2 has been actively working on issues related to human rights from a queer feminist lens. She has been part of a voluntary group based in Mumbai, LABIA - A Queer Feminist LBT Collective from 1995 to 2021. As part of LABIA, she has worked towards creating space and support for many LBT people from Mumbai. They have worked with other feminist LBT groups and women’s groups to provide safe shelter and security to many people from across the country as well. Over the years, as more and more people reached out, LABIA along with the other organizations and individuals

worked within a loose network of LBT groups and individuals across the country, of which she remains an active member.

- 9.** That Petitioner No. 3, Minakshi Sanyal is a queer feminist activist and Indian citizen based in Kolkata. She has been engaged in the LGBTQIA+ rights movements and feminist movements in India for more than two decades. She is co-founder of Sappho (formed in 1999) and Sappho for Equality (formed in 2003), Kolkata, which is the first LBT rights collective and organization in eastern India. She served as the Managing Trustee for Sappho for Equality during 2003 - 2020 and continues to play an active role in mobilizing LBT communities in West Bengal.
- 10.** That Petitioner No. 3's life's journey depended on nothing but self-reliance, which is why she took voluntary retirement at the age of 53 from a public sector company and devoted herself completely to the feminist movement and the movement for the rights of marginalized sexualities. For the last 7 years, she has been actively engaged in conducting sessions on gender and sexuality at various higher educational institutions.

11. That in 2014-1015 the Petitioner No. 3 was engaged in a research study, titled, '*Politics of Living: In search of a roadmap for LBT(F to M)Q activism*'. Her jointly edited book titled '*Monologue: Dui Banglar Lesbian Kathan / Lesbian Narratives of Bangladesh and West Bengal*' was published in 2021 in both Bengali and English languages.
12. That Petitioner No. 4, Maya Sharma, who identifies as a lesbian woman, is a queer activist and writer, and is a part of the National Network of LBT persons. She is an Indian citizen and is based in Vadodara.
13. That in the late 1980s, the Petitioner No. 4 worked on the issues of single women in Delhi resettlement colonies. While working there she realized that the diversity amongst the single women concealed 'women who loved women'. These patterns also emerged in her work with trade unions. By the 1990s, she had to leave the union because of her queer activism.
14. That Petitioner No. 4 has a prolific writing career which began with her co-authoring a book on single women in Hindi, '*Kinaro Pey Ugti Pechan*,' She has also written a book titled, '*Loving Women: Being Lesbian in Unprivileged India*', published in 2006 by

Zubaan Books, which is based on her experience of living in Gujarat in the late 1990's when the queer voices of the marginalized community were barely audible. Her most recent publication, '*Footprints of a Queer History: Life Stories from Gujarat*', published in 2022 by Yoda Press, is the result of her years of involvement with queer issues: supporting queer couples in crisis, interacting with families of queer children and of bringing home the fragile entitlements available to trans persons under the *Transgender Persons (Protection of Rights) Act, 2019*. The stories narrated in Petitioner No. 4's books tell a tale of her personal struggle, in overcoming natal family violence, socio-legal struggles and finding friendships and love. Her life's work has meticulously cataloged the pain, stigma and silence which is woven into the everyday existence of the queer community.

The National Network for LBI Women and Trans Persons

15. That Petitioner Nos. 1-4 are part of an informal network called "*National Network of LBI Women and Trans persons*". This network's members include queer, intersex and trans individuals from Mumbai, Kolkata, Vadodara, Thrissur, Delhi, Chennai, Hyderabad and other cities. The members of the Network have

been active in other collectives and organizations working with and for LBI women and trans persons over several decades, whereby they have created spaces for these communities to reach out for connection and in case of any urgent crisis in their lives;

16. That this network was created during a conference held in Bangalore in June 2008, when Petitioner Nos. 1-4 came together with others as an informal network of individuals and organizations. The network has evolved as new groups were formed and new people joined from different cities. They stayed in touch through joint campaigns and conferences from time to time but most importantly as a network collaborating with each other as they responded to pleas for help from LBI women and trans persons from across the country;

17. That over the years Petitioner Nos. 1-4 and other members of the network have been contacted directly by a large number of queer and trans individuals, including Petitioner Nos. 5-10 herein. The presence of this network in different states has made a significant difference because distress migration from home towns and states has been a feature of the lives of LBI women and trans persons, due to violent opposition, hostility and discrimination from

natal families and local communities. They are forced to leave their homes and take refuge and shelter in anonymity in other states as far away as possible from their natal families because they fear being apprehended and separated. The Petitioners No. 1-4 often work in coordination since many a times the person(s) may need help in multiple locations.

18. That runaway LBI women and trans persons, often wish to marry each other and are seeking to secure some legal and social legitimacy for their relationship, particularly given the hostility, threat and violence that is inflicted on them not only by society at large but specifically from family members, opposed to their choice and decision. They have tried different ways of solemnising their relationship, through ceremony in temples or approaching state authorities to help them get married. They often approach LGBT activists, including Petitioner Nos. 1-4 when they desire to live as a married couple, so that their relationship is recognised with respect and dignity, and the ire of family and discrimination by society is blunted on account of the social and cultural privileges attached to 'marriage' and the recognition of their 'spouse' by family and the world at large. Petitioner Nos. 1-4 have assisted a significant

number of such couples hailing from all parts of the country, from the remotest of villages to the biggest of metropolis; from all religions, castes and also from adivasi communities. The common thread running through the lives of all LBT couples is the myriad forms of violence that they suffer from their natal families and local communities. More often than not the natal family is hostile to the relationship and opposed to the choice of partner, and far from being a source and space of love and protection, becomes a source and site of conflict from which such persons need protection, including seeking legal and constitutional protection through marriage.

- 19.** That while intervening in such situations across the country, Petitioner Nos. 1-4 have used all available statutory and constitutional mechanisms, including the provisions for addressing violence against women, habeas corpus petitions and appeals to higher officials in the police hierarchy, in order to safeguard the right to life and personal liberty of LBI women and trans persons. In some cases, they have been able to help the people get the required support and security to lead their chosen lives. In some, they have not been able to help because families employed

physical violence and force to separate the partners. In some others, it was too late to intervene, where one or both of them ended their lives, as they could no longer endure the relentless coercion, violence and pressure from their families to end the relationship. Petitioner No.1-4 have also witnessed situations where natal families have reconciled and accepted the choices made by their children, however, the proportion of instances where the family remains in conflict with queer-trans persons far outnumber these happy endings.

20. That the Petitioner Nos. 1-4 also find in the course of their work and their own lives that family violence is also continuously directed towards queer women and trans persons who may not be in relationships because their families disapprove of their self determination of their gender and/or sexuality. This violence includes attempts at conversion therapy, depriving them access to education, forced marriages, disallowing them to be mobile and communicate with others like them, and even threats or actual disinheritance.

21. That the Petitioner Nos. 1-4 have seen and continue to see many queer women and trans masculine persons struggle with the

violence that they face from their natal families, including providing adequate social and legal support to Petitioner Nos. 5-10 herein. Petitioner Nos. 1-4 are therefore before this Hon'ble Court to secure legal and constitutional protections which can enable and assist persons such as the Petitioners herein live their lives of choice, with dignity, autonomy and independence. Their queer feminist activism of 4 decades informs them that these difficult individual battles, which are often fought alone without social support or official assistance, can be aided by assembling an appropriate legal scaffolding, and the dynamism of the forever transformative Constitution of India provides the legal tools to build the same.

PETITIONERS 5-10

- 22.** That the Petitioner Nos. 5 -10 are before this Hon'ble Court for the legal recognition of their right to solemnize a marriage with a partner of their choice, irrespective of sexual orientation or gender identity. The Petitioners No. 5-10 have all suffered physical, verbal and psychological abuse from their natal families and subjected to bias, discrimination and prejudice from the State machinery because of their self determined gender identity, sexual

orientation and choice in life partner. The current legal regime's non-recognition of the right of same sex couples or trans and intersex persons to solemnize a marriage has exacerbated the prejudice and abuse faced by them leaving them vulnerable and veritable strangers in law.

23. That Petitioner No. 5 aged about 23 years old, identifies as a trans-masculine person and Petitioner No. 6 about 22 years old is a cis-gender woman and they are in a romantic relationship. Petitioner No. 5 has completed his education up to Class XI and Petitioner No. 6 has completed her education up to Class VI. They are both Indian citizens and hail from socially and economically marginalized communities in Howrah, West Bengal.

24. That when Petitioners 5-6 shared the news of their relationship with their families in 2019, Petitioner No. 5's family brutally assaulted him which almost left him for dead. His father threatened him that he must forget Petitioner No. 6 and get married. Petitioner No. 6 also suffered violence at the hands of her brother.

25. That Petitioner Nos.5 and 6 have made several attempts to elope due to the grave resistance from the former's natal family, but were unsuccessful as his family members traced their location,

separated them and dragged him home against his wishes. In early 2020, when they both escaped to Barasat, Petitioner No. 5's family eventually found them after 3 months and manipulated them into returning home on the false assurance that they had accepted the relationship. However, on arriving home, Petitioner No. 6 was immediately sent to her residence and Petitioner No. 5's family again physically abused him. He was so distraught after repeatedly suffering physical violence and verbal abuse at the hands of his own family, he began contemplating self-harm as a way to escape his abusive circumstances.

- 26.** That during her stay at her natal family home, Petitioner No. 6 reached out to Sappho for Equality (SFE) - a Kolkata-based organization which works for the rights of LBI women and trans persons, for assistance as she was facing pressure from her brother to get married. The familial rejection of her relationship with Petitioner No. 5 and the constant threat of a forced marriage also pushed the Petitioner no. 6 to contemplate self-harm as a means to escape her abusive circumstances. As both the Petitioners were confined to their homes against their will due to Covid lockdown

measures, they experienced constant and heightened insecurity to their physical and mental health within their homes.

27. That on their final attempt at elopement on 05.02.2021, Petitioner Nos. 5 and 6 visited the Dunlop Police Station, Kolkata, for help. Subsequently, they called SFE's helpline and sought assistance as Petitioner No. 5 was apprehensive of his family's intervention to forcefully separate them again. SFE sought the intervention of the West Bengal State Women's Commission, who instructed the Dunlop Police Station to keep Petitioner Nos. 5 and 6 safely in protective custody for the night. That the Petitioner Nos. 5 and 6 spent the night at the police station as they feared violence from their natal families. However, instead of assuring the Petitioners of their safety and security, the police subjected them to verbal abuse, issued threats of violence and shamed them for leaving their natal families in order to pursue their relationship. The police even contacted Petitioner No. 6's father and told him to "discipline" her through physical violence.

28. That the police's hostile treatment of the Petitioner Nos. 5 & 6 is illustrative of the general attitude of law enforcement towards LGBTI couples who runaway from natal families due to the real

threat of violence, wherein the legacy of criminalization and the vagueness of the legal status of such relationships translates into a climate of social disapproval by families and the police alike.

29. That due to their inability to complete their education, both Petitioner Nos. 5 and 6 have faced significant challenges in securing formal employment. At present, Petitioner No. 5 works at a cafe and Petitioner No. 6 works in a boutique and they both struggle for sustenance on a daily basis. After leaving SFE's temporary safe residence, both Petitioners continue to face challenges in securing rental housing due to intersectional vulnerabilities on account of their gender identity, sexual orientation, religion and class, apart from their inability to cohabit as a married couple in the eyes of law.

30. That Petitioner No. 7, 23 years old, identifies as a trans-masculine person and Petitioner No. 8 (21 years) is a cis-gender woman and they are in a romantic relationship. They are both Indian citizens.

31. That Petitioner No. 7 used to regularly visit Petitioner No. 8 at her residence, in Baranagar, North 24 Parganas, West Bengal, as they both lived there with their natal families. However, when

Petitioner No. 8's parents learnt about their intimacy, they started harassing and physically abusing her to discourage her from continuing the relationship with Petitioner No. 7. Unable to face the violent abuse at home, Petitioner No. 8 decided to leave her natal home of her own volition.

- 32.** That since June 2020, Petitioner Nos. 7 and 8 have been living together in a rented house in Kolkata. That after Petitioner No. 8's father learnt of her relationship with Petitioner No. 7, he canceled her enrollment at the Techno India College, where she was pursuing a Bachelor in Business Administration, and started pressuring her to get married. In order to separate them against their wishes, Petitioner no. 8's mother even lodged a criminal complaint against Petitioner No. 7 in September 2022, falsely alleging that he had abducted her daughter and stolen valuable items from their residence. Her family went to the extent of displaying "missing persons" posters in public spaces and employed local goons to trace their location. These acts by Petitioner No. 8's natal family heightened the risk to their safety and security.

33. That due to the false FIR lodged by the natal family of Petitioner no. 8, Petitioner No. 7 was arrested and he was only released on bail after unjustly suffering 3 months of detention due to an egregious abuse of the process of law. Petitioner No. 8's family was present at the court for the hearings and they attempted to forcefully bring her home. However, the family members ceased their attempts as soon as they realized they could not risk drawing attention to the dispute in the court premises. The copy of the FIR and the bail order is not being filed along with the petition in order to protect the identity of the Petitioners who remain vulnerable to threats and coercion. The Petitioners undertake to produce the said documents in court if so directed.

34. That Petitioner No. 8's parents persisted in their attempts to bring her back to the natal home by any means whatsoever. Her mother made pleas of her father being missing or her being subjected to domestic violence, in order to compel her to come home. Petitioner No.7 and 8 decided to return to their natal home temporarily until such circumstances settled down. When they returned home, they were forcibly trapped and they learnt that the Petitioner No. 8's mother had employed false pretexts in order to

bring her home and restrict her liberty. They both were not allowed to go outdoors and were under strict surveillance within the home. Both their phones were confiscated to cut them off from any support from the outside world. Her family manipulated her by imputing false and malicious allegations of “human trafficking” on Petitioner No. 7. They involved their relatives and neighbors in the matter to “counsel” Petitioner No. 8 to break the relationship and when the “counseling” wouldn’t suffice, everyone verbally abused and issued threats of physical violence against Petitioner No. 7 and 8 to forcibly separate them. The Petitioner No. 8’s father even threatened to sexually assault Petitioner No.7.

- 35.** That when Petitioner No. 7 and 8 discretely attempted to contact the local police for help, they were of no assistance whatsoever as they only spoke to Petitioner No. 8’s natal family to verify their safety and well-being, who falsely assured the police of the same and silenced the matter. That at this stage, in September 2022, Petitioner No. 7 contacted SFE and desperately requested for urgent help to protect Petitioner No. 8. When the SFE team reached Petitioner No. 8’s residence, they were intimidated by 3 men who were business associates and family friends of Petitioner

No. 8's father. The men threatened the SFE team and said that they considered homosexuality to be a "perversion" and claimed that Petitioner No. 7 is a "bad influence" on Petitioner No. 8. In front of Petitioner no. 8's natal family, SFE members asked her whether she wants to stay with her parents or live with Petitioner No. 7. When Petitioner No. 8 asserted that she wants to live with Petitioner No. 7, the SFE team helped her pack her belongings and requested her parents to handover her certificates and essential official documents.

36. That Petitioner No. 8's parents initially resisted but eventually handed over the documents. That the SFE team also contacted the Belgachia Police Station for help, who instructed all parties to appear before them to resolve the matter. At the police station, the police officers initially supported the family and insisted that Petitioner No. 8 should return to her natal home. However, with SFE's intervention and explanation of the rights of all consenting adults to choose a partner and live together irrespective of gender identity and sexual orientation, the police changed their attitude. The Police officers counseled Petitioner No. 8's mother that the family cannot interfere in her private decisions. Even when

Petitioner Nos. 7 and 8 were leaving the police station along with the SFE team, they were chased by Petitioner No. 8's mother who was verbally abusing them.

37. That at present, Petitioner Nos. 7 and 8 are living together in a rented house in Kolkata. However, the criminal proceedings falsely initiated by the family of Petitioner No. 8 against Petitioner No. 7 are currently pending and have detrimentally affected his employment opportunities. Petitioner No. 8 is currently the sole earning member and supports the family. Petitioner No. 8's family continues to keep a watch on her whereabouts and contact her from time to time in order to manipulate her into breaking the relationship and returning to her natal home.

38. That Petitioner No. 9 is a 21 year old, cis-gender woman and Petitioner No. 10 is a 22 year old transgender man and they are both in a romantic relationship. They met when they were studying in Class VI in a government school in Darbhanga, Bihar. They fell in love during their formative schooling years. They are both Indian citizens.

- 39.** That in November 2019, when they were in Class XI, Petitioner No. 10's parents started pressuring him to marry. On 26.11.2020, when he refused to get married, his family sent him to his elder sister's house in Muzaffarpur and started looking for a man to marry him in the meantime. At his sister's home, he confided in her about his gender identity and his relationship with Petitioner No. 9. His sister understood and accepted his identity and decided to not let him go back to the natal home because their parents threatened to kill him if he did not marry.
- 40.** That in January 2020, Petitioner No. 10's parents started issuing death threats to his elder sister and her husband for supporting his decisions. His sister sent him to their maternal grandmother's home in Samastipur, where he lived up to October 2020. During this time, Petitioner No. 10's maternal uncle requested his family to allow him to finish his education up to Class XII.
- 41.** That in December 2021, Petitioner No. 10's family arranged his marriage with a man in Patna. Petitioner No. 10 informed the man about his relationship with Petitioner No. 9 and requested him to refuse the marriage proposal before their respective families,

however, the man expressed his wish to solemnize the marriage notwithstanding Petitioner No. 10's explicit wishes. On 13.12.2021, the marriage ceremony was performed.

- 42.** That in March 2022, Petitioner No. 10 convinced his 'spouse' to send him to study in Darbhanga to prepare for an ITI diploma course. Petitioner No. 9 also came to Darbhanga to prepare for the CTET exam. Here, Petitioner Nos. 9 and 10 started living together in a rented house. On 27.03.2022, Petitioner No.10's 'spouse' came to meet him for Holi celebrations where he demanded Petitioner No. 9 to have sex with him and threatened to tell their families about their relationship if she refused. That when Petitioner No. 9 refused, Petitioner No. 10's 'spouse' physically assaulted them both and informed their families of their relationship. Apprehensive about their safety and security, Petitioner Nos. 9 and 10 decided to run away. They went to the nearest railway station and arrived at the Sitamarhi railway station. On 28.03.2022 at 3:00 AM, their families found them both at the Sitamarhi railway station and took them both by force to Petitioner No. 10's paternal aunt's home in Baheri, where they committed physical assault on both of them in separate rooms. Petitioner No. 10's father demanded

Rs.15000/- from the mother of Petitioner no.9 as a pre-condition for her release.

43. That Petitioner No. 10's family coerced him to write a 'suicide letter' where he was ordered to assign the reason for his 'death' to Petitioner no. 9. He wrote the letter under fear for his safety, but when he didn't mention Petitioner No. 9's name in it, his father cut his wrist. His father again demanded that he write the letter and mention that he is not 'mentally stable'. After Petitioner No. 10 wrote the letter under fear for his safety, his father submitted copies of the 'suicide letter' to the nearest police station and the local sarpanch.

44. That in April 2022, Petitioner No. 9 contacted Nazariya - a Delhi-based queer feminist resource group - for help, who connected them with Women Special Cell in Darbhanga. Petitioner Nos. 9 and 10 decided to flee from their natal family homes on 29.04.2022 and meet at the Baheri police station. However, on 28.04.2022, Petitioner No. 10's family confiscated his phone and his 'spouse' physically assaulted him. On 29.04.2022, Petitioner No 9 and 10 met at the Baheri Police Station, after leaving home under false pretexts to evade surveillance from the families. At the

Baheri Police Station, they were redirected to the Laheriya Saray Police Station which is designated as the Mahila Police station, where the officers noted the couple's written statements. The police officers assisted Petitioner No.10 and his 'spouse' in preparing their petition for divorce, which was signed by both parties. On the night of 29.04.2022, Petitioner Nos. 9 and 10 arrived at Patna to stay in *Garima Greh* shelter homes for transgender persons, which operates under the aegis of the Ministry of Social Justice and Empowerment (MOSJE).

- 45.** That since June 2022, Petitioner Nos. 9 and 10 have been living at a rented house in Delhi since they couldn't live together at the *Garima Greh* in Patna for a long duration, as cis-gender women are not permitted to stay at these shelter homes.
- 46.** The sole Respondent is the Union of India, through the Ministry of Law and Justice.

BRIEF FACTS AND BACKGROUND

Denial of Choice by Natal Families

47. That the collective experiences of Petitioner Nos. 1, 5 -10 are illustrative of the range of interference and multiple violations by natal families that LGBTI individuals continue to suffer every day across the country, which is further aggravated due to the non-recognition of their relationships under marriage laws. LGBTI individuals are often compelled to sever ties with their natal families for survival and self-preservation. Yet, they continue to live under precarious circumstances maintaining constant vigil against real and imminent dangers of surveillance and violence at the instance of natal families and the police, as Petitioner Nos. 1, 5-10 continue to do even today. The force of prejudice and extra-judicial attempts at separating the couples can be substantially mitigated if LGBTI individuals can exercise the fundamental right to marry, which can add layers of social, economic and legal protection to their safety, security and well-being against interference from natal families and the police. While natal families may continue to meddle with respect to a lawfully married couple, however, a

declaration by this Hon'ble Court recognizing the fundamental right to marry for LGBTI individuals, will slowly but surely have a cascading effect on society, including natal families and the police, in recognizing LGBTI individuals as equal citizens in a constitutional democracy.

48. That the lack of legal recognition to lesbian, gay, bisexual, transgender and intersex (LGBTI) persons' relationships is historically a contributing factor emboldening natal families to force them to enter into 'heterosexual' marriages against their will. Attached herewith is a copy of extracts from '*Less Than Gay, A Citizens Report on the Status of Homosexuality in India*', *AIDS Bhedbhav Virodhi Andolan (1991)*, pgs. 8-9, marked as **Annexure-P1 at Pages 83-85**.
49. That forced marriages have compelled many LBT people to run away in attempts to 'marry' a partner of their choice or die by suicide. Attached herewith are copies of extracts from '*Lesbian Suicides and the Kerala Women's Movement*', *Paper presented at Hyderabad Young South Indian Feminists Conference, Deepa Vasudevan, Sahayatrika, (2001)*, pgs. 1-6, marked as **Annexure-P2 at Page 86-98A** and '*Law like Love: Queer perspective on*

Law, Yoda Press (2011), pgs. 325-337, marked as **Annexure-P3** at Page 99-105B.

50. That lesbian couples have frequently sought to formalize their relationships under the device of *maitri karar* (friendship agreements), however, the legal ambiguity of such arrangements has increased their vulnerability to interference by natal families and non-recognition in law. Such intimate relationships may not always be sexual or romantic, but are borne out of mutual care and respect, and allow gender non conforming individuals to exercise their right to choice of family. Attached herewith is a copy of extracts from '*Rights in Intimate Relationships: Towards an Inclusive and Just Framework of Women's Rights and the Family*', *Partners for Law in Development* (2010), pgs. 66-72, marked as **Annexure-P4 at Page 106-113** ;

51. That several rural and urban LBI women and trans persons have historically undergone religious ceremonies to 'marry' in witness of their supporting families, local communities and officiated by priests, or died by suicide together, in cases where families and communities have violently opposed such relationships, often abetted by the local police force. Ironically, the

earliest reported instance from 1987 concerned 2 police-women, Leela Namdeo and Urmila Shrivastav, who married each other at a temple in Bhopal. The formal law may not recognize such 'marriages', however, local customs keep evolving and sometimes gain social recognition after long duration of practice (*Love's Rite: Same Sex Marriages in Modern India and the West*, Ruth Vanita, Palgrave Macmillan (2005))

52. That LBI women and trans masculine persons who faced violent resistance to their relationships from natal families or third parties approached High Courts for relief even before *Naz Foundation v. Govt. of NCT of Delhi, 2009 (111) DRJ 1 (DB)*. However, since at the time the law *de facto* criminalized LGBTI relationships, the vast majority of legal records relating to protection cases of LGBTI persons between the period 1947 to 2009 do not authentically represent the gender identity or sexual orientation of parties before the courts, since openly identifying as LGBTI could invite social hardships and legal penalties. Attached herewith is a copy of extracts from '*Queer Women and Habeas Corpus in India: The Love that Blinds the Court*', Ponni Arasu and

Priya Thangarajah, 19(3) Indian Journal of Gender Studies 413, (2012), pgs. 4-6, 8-17, marked as Annexure-P5 at Page 114-137.

53. That despite landmark declarations of this Hon'ble Court with respect to self-determination of gender identity and decriminalization of sex between consenting adults, LBI women and trans masculine persons are routinely compelled to resort to High Courts for seeking remedies against arbitrary interference and violations by natal families and third parties (*Mansur Rahman v Superintendent of Police, 2018 SCC Online Mad 3250; Sadhana Sinsinwar and Another v State & Ors., WP (Crl) No. 3005 of 2018 disposed of by final order dated 01.10.2018; SSG v State of West Bengal, Writ Petition No. 23120(W) of 2018, disposed of by final order dated 29.01.2019; Bhawna and Others v State and Others, WP (Crl) No. 1075 of 2019, order dt. 12.04.2019; Monu Rajput v State, 2019 SCC Online Del 9154; Madhu Bala v State of Uttarakhand and Others, 2020 SCC Online Utt 276; Paramjit Kaur and Another v State of Punjab and Others, CRWP no. 5042/2020 disposed of by final order dated 20.07.2020; Sultana Mirza and Another v State of Uttar Pradesh, Writ Petition (C) 17394/2020, disposed of by order dated 02.11.2020; Raunak Roy v State of*

Karnataka, WP (C) 85 of 2020, disposed of by final order dated 14.12.2020; Poonam Rani and Another v State of UP and 5 others, Writ Petition (C) No. 1213 of 2021 disposed of by final order dated 20.01.2021; S. Sushma & Anr. v Commissioner of Police, order dated 07.06.2021 in WP No. 7284/2021).

- 54.** That analysis of the aforesaid cases reveals that this process is fraught with real and imminent challenges for LBI women and trans people, as they are compelled to negotiate exercising their right to choose a partner against threats to personal safety and economic security by natal families. The recourse of approaching High Courts on an ad-hoc basis often provides limited relief in terms of prevention of imminent threat to life. In this context, solemnization and registration of marriages irrespective of gender identity and sexual orientation of parties can mitigate the impact of arbitrary interference and violence by natal families and third parties. Attached herewith is a copy of extracts from *'The L World: Legal Discourses on Queer Women'*, Surabhi Shukla, 13 NUJS L. Rev. 3 (2020), pgs. 14-22, marked as **Annexure-P6 at Page 138-162** .

55. That a vast majority of Indian laws define ‘family’ to be persons related by *marriage*, birth or adoption, therefore, LGBTI individuals present a compelling case for legal recognition of their relationships in order to formalize access to social and economic rights which arise as a direct incidence of a lawfully solemnized marriage. Attached herewith is a copy of extracts from ‘*Happy Together: Law and Policy Concerns of LGBTQI Persons and Relationships in India*’, Centre for Health Equity, Law and Policy, (2021), pgs. 47-52, 62-68, marked as **Annexure-P7 at Page 163-239** .

56. The Petitioners also seek to draw attention and emphasize that while some LGBTI persons wish to make the choice to get married, there are also many others who do not share such aspirations, and the law cannot ignore or have a blind spot towards the rights of such LGBTI persons. In this context, apart from ensuring that the bouquet of rights ensuing from marriage is made accessible to LGBTI persons, there is an imminent need for recognition of the right of LGBTI persons to a chosen family and for legal recognition of such atypical families. The recognition in law of the right to choose a family “*disrupts assumptions around the*

primacy of marriage as the principal marker of adult commitment,” as explained by Deborah A. Widiss in “*Chosen Family, Care, and the Workplace*”, 05.11.2021, published in The Yale Law Journal. This idea is dealt with in greater detail below.

Revisiting the Paradigm of Care in Context of Conflict inflicted by Natal Families:

57. That a critical mass of the LGBTI community may not choose marriage as an institution to define the meaning of their intimate relationships and lives; whereas on the contrary, they seek and choose to assign rights and obligations with respect to the most intimate aspects of their private lives in relation to housing, custody of minor children, end of life care decisions, among others, to individuals like friends, live-in partners and any other persons of vital importance in their lives. These lived experiences with chosen families occur against a backdrop of restrictions and interference by natal families who deny dignity and autonomy in life and death. It is pertinent to note that while the notion of a chosen family may be borne out of the conflict inflicted by the natal family, it is not an idea that challenges natal family bonds, but merely allows for a

more inclusive understanding of adult intimacies and commitments, leading to conceptualizing of families that are more capacious, inclusive and available to LGBTI persons, especially when in need of care. Attached herewith is a copy of extracts from '*Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*', Edited and Compiled by Bina Fernandez, India Centre for Human Rights and Law (1999), pgs. 83-88, marked as **Annexure-P8 at Page 240-245A** and '*Submissions by LBT Women's Groups to the Law Commission of India (2018)*', marked as **Annexure-P9 at Page 246-251A**.

58. That LGBTI individuals face invidious interference and opposition from natal families on account of any choice (whether personal, professional, economic and others) that affirms the centrality of their gender identity and sexual orientation to their lives, irrespective of whether or not they are in relationships and/or cohabit with a partner. Hence, the recognition of an individuals' ability to nominate 'any person', not conventionally related, yet being most intimate, available and reliable, to secure their best interests in circumstances of vulnerability, incapacity or when the individual is unable to make a decision for any other reasons,

assumes greater significance for unmarried LGBTI individuals who, out of abundant caution, need to clearly define and limit the role of their natal families in their private lives to every possible extent, including exclusion in the most dire events. The primary objective being to ensure one's best interests, a large number of LGBTI persons, informed by their lived experiences of natal family rejection, hostility and violence, need the legal right to substitute natal family relatives with their chosen family or 'nominee' for medico-legal as well as social purposes. In the absence of such legal recognition, the law perpetuates natal family violence on LGBTI persons even decades after they may have succeeded in escaping violent and abusive families. Perpetuation of such violence, even though seemingly as per law, is impermissible under the constitutional scheme which does not permit the perpetuation of historic injustices, biases and prejudices through promulgation or continuance of laws.

THE SPECIAL MARRIAGE ACT, 1954

- 59.** That SMA was enacted in 1954 to serve as a secular alternative for individuals who cannot, or do not, wish to get

married under personal laws. The SMA prescribes procedure for the solemnisation of marriages, wherein notably, none of the requirements are based on religious or scriptural prescriptions. The conceptualisation of marriage under the SMA, thus, is of a relationship born out of the free choice of two adult, consenting individuals.

60. That Section 4 of the SMA refers to a marriage between “any two persons”. However, Section 4(c) stipulates “*the male has completed the age of twenty-one years and the female the age of eighteen years*” as a condition for a valid marriage. Further, Section 2(b), which defines the degrees of prohibited relationships, does so by referring to a “man and any of the persons mentioned in Part I of the First Schedule, and a woman and any of the persons mentioned in Part II of the said Schedule.” As Part I exclusively contains female family members and Part II exclusively contains male family members, a joint reading of the provisions implicitly codifies the rule that a marriage under the SMA shall be between heterosexual partners. This is the traditional, literal interpretation of the statute.

- 61.** That it is important to note that personal laws on marriage also codify the rule by implication that a marriage can only subsist between heterosexual partners. However, these conceptions must have no role to play under SMA as the law was enacted as an alternative to religious marriages under personal laws, and must therefore be guided by adequate determining principles in accordance with the Constitution.
- 62.** That Sections 5 to 9 of the SMA set out the procedural framework to be complied with for a marriage to be solemnised. The “notice, domicile and objection” framework proceeds through the following stages: a. The individuals intending to marry must notify a Marriage Officer in the district in which at least one of the parties to the marriage has resided for a period of not less than 30 days, before the date of solemnisation. b. The Marriage Officer must enter the details of the individuals into a Marriage Notice Book. This Book is to be made open to public inspection. c. The Marriage Officer must also affix the details of the parties in a “conspicuous place.” d. Once the thirty-day notice period commences, “any person” is authorized to object to the proposed marriage, on the basis that the requirements of Section 4 are

contravened. e. On receiving an objection, the Marriage Officer is obligated to decide it within thirty days, and has the powers of a civil court in doing so. f. It is only after these steps have been completed, that the marriage may be solemnised.

- 63.** That the “notice, domicile and objection” framework, thus, ensures that whether or not they want to, individuals’ decision to marry will be publicised to the world at large, and - specifically - to their families and to the immediate societies in which they live.
- 64.** That the intention of the “notice, domicile and objection” framework appears to be to address potential situations where individuals suppress or conceal a breach of a Section 4 condition from the Marriage Officer. However, the manner in which the SMA seeks to address this issue is grossly disproportionate. It is also important to note that the “notice, domicile and objection” regime is conspicuously absent from personal laws governing marriage.
- 65.** That the “notice, domicile and objection” regime casts an undue burden upon many individuals who wish to marry, especially when such marriages are in the teeth of familial or social opposition. There are, therefore, countless cases where individuals have no choice but to keep their relationship a secret from their

families. This extends to marriage: once a marriage has been solemnised, familial objection might be blunted. However, familial and social objections are likely to be particularly strong in the interregnum period between a publicly-declared intention to marry, and the solemnisation of the marriage itself, as natal families will perceive that through coercion and pressure, the situation is still reversible.

66. That most vulnerable to familial and social pressure will be individuals who already exist at several axes of marginalisation and disempowerment, those who are economically dependent on their families, those who are already subjected to caste discrimination, inter-faith couples, and for the purposes of this petition, in particular - gender and sexual minorities. It is thus relevant to note the intersectionality within which such laws operate and the heightened vulnerability of LGBTI persons in such circumstances. Attached herewith is a copy of the news report 'How the Special Marriage Act is Killing Love', *Article 14*, dated 19.10.2020 marked as **Annexure-P10 at Page 252-265**.

67. That the "notice, domicile and objection" framework under SMA is facially neutral, however, the adverse impact in

implementation falls disproportionately on inter-caste and inter-religious couples. Petitioner Nos. 1-4 and other LBT persons have authored and published a large volume of research studies, literature and books which document the nature and extent of the epidemic of abuse and violations committed by natal families, police and third parties against LGBTI individuals. These provide evidence of the very real and imminent risk to life and liberty of individuals in relationships irrespective of gender identity and sexual orientation, who are very likely to face similar or worse consequences under the “notice, domicile and objection” framework of SMA. The authorisation of ‘any person’ to object and cause interference in solemnization and registration of marriages on the basis of gender identity and sexual orientation, directly infringes upon personal autonomy in organizing the most intimate aspects of one’s lives. A declaration by this Hon’ble Court to affirm the fundamental right to marry, without dismantling the “notice, domicile and objection” framework under SMA, will perpetuate the cycle of queer and trans persons facing conflict from the law and natal families, and compel them to ‘abscond’ from one state to another in search of safe havens. Attached herewith are copies of

extracts from *'The nature of violence faced by lesbian women in India, A Study by Bina Fernandes and Gomathy N.B.'*, Tata Institute of Social Sciences (2003), pgs. 40-46, 111-112, marked as **Annexure-P11 at Page 266-275** *'Documenting and Mapping Violence and Rights Violations Taking Place in Lives of Sexually Marginalized Women to Chart Out Effective Advocacy Strategies'*, Sappho for Equality (2011), pgs. 30-42, marked as **Annexure-P12 at Page 276-289** *'Breaking the Binary: Understanding Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Identities, A Study by LABIA' – A Queer Feminist LBT Collective (April 2013)*, pgs. 33-38, marked as **Annexure-P13 at Page 290-296**; *'Beyond the Roof: An action-research study on women survivors of violence and shelter homes in Delhi'*, Action India, Jagori and Nazariya (2019), pgs. 16-19, marked as **Annexure-P14 at Page 297-301**; *'Progressive Realization of Rights: A Co-Traveller's Reflections on Crisis Intervention'*, Suchithra K K, Deeptha Rao V N & Sathyakala K K (2022), pgs. 5-15, marked as **Annexure-P15 at Page 302-313**.

68. That for these reasons, the unconstitutional legacy of “against the order the nature” is writ large on the “notice, domicile

and objections” framework, as SMA’s legal regime directly fosters a culture of intolerance, whereby third parties use the law and extra-judicial means to deter “*all forms of intimacy which the social order finds ‘disturbing’*”.

69. That the Petitioners approach this Hon’ble Court for the reliefs prayed for herein on the following, amongst other grounds, which are without prejudice to one another:-

GROUND

- I. **Non-recognition of marriage between two consenting adults on basis of gender identity or sexual orientation under the scheme of solemnization and registration of marriages in SMA violates Articles 14, 15, 19 and 21:**

70. BECAUSE LGBTI persons need the layers of social, economic and legal protections which accrue as a direct incidence of marriage, in order to shield themselves from the opposition, interference, violence and violations by natal families;

71. BECAUSE as conflict with natal families is a recurring phenomenon in many queer and trans persons’ lives, the right to marry can substantially mitigate these circumstances by offering

the immunity of state sanction to queer and trans marriages, and hence shield them against the misuse and abuse of law by natal families;

- 72.** BECAUSE as conflict inflicted by natal families results in loss of social and economic rights accrued as members of such families, the benefits accruing as the direct incidence of marriage will offer a source of support to queer and trans couples in order to live with dignity;
- 73.** BECAUSE the rule of law mandates that notions of public morality must give way to constitutional morality in a Constitutional Republic. As a result, laws that codify inequality on prohibited grounds of discrimination must be interpreted in a manner that protects this guarantee (*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1);
- 74.** BECAUSE LGBTI individuals' prayer for the right to marry under SMA must be adjudicated keeping in view the interpretive changes to the statute by the passage of time. This Hon'ble Court must take into consideration the progressive development of social and jurisprudential norms which have taken place since the

passage of SMA. Although constitutional in 1954, the SMA's validity must be interpreted as per LGBTI individuals' aspirations and recognized rights in 2023 (*John Vallamattom v. Union of India*, (2003) 6 SCC 611);

75. BECAUSE the mere fact that LGBTI marriages are considered “unconventional” by social norms does not justify depriving it of equal protection of law. The freedom of making a choice also encompasses the freedom to make an “unpopular” choice. (*Joseph Shine v. Union of India*, (2019) 3 SCC 39);

76. BECAUSE marriage is an expressive choice, therefore, it implicates the freedom of expression and association under Articles 19 and 21 of the Constitution (*Asha Ranjan vs State of Bihar*, (2017) 4 SCC 397; *Shakti Vahini vs Union of India*, (2018) 7 SCC 192);

77. BECAUSE the denial of recognition of marriages under SMA on basis of gender identity or sexual orientation are not based on any adequate determining principle, therefore, the impugned provisions are manifestly arbitrary. (*Shayara Bano v. Union of India*, (2017) 9 SCC 1);

78. BECAUSE the law can govern conditions of solemnizing a valid marriage and dissolution thereof, however, neither the State nor the law can dictate a choice of partners or limit the free ability of every person to decide on this aspect. Social approval for intimate personal decisions is not the basis for recognizing them. The Constitution guarantees the right of every individual to take decisions on matters central to the pursuit of happiness. (*Shafin Jahan v. Asokan KM*, 2018 SCC Online SC 343)
79. BECAUSE this Hon'ble Court noticed that non-recognition of self-determined gender identity leads to denial of social, economic, civil and political rights of transgender individuals, including unfair exclusion from marriage laws which are coded in the binary of "male/female" (*National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438);
80. BECAUSE the institution of marriage cannot be limited between biological men and women, as with the march of time, the law recognizes that self-determined gender identity is the appropriate basis for recognizing rights of individuals, (*National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438);

- 81.** BECAUSE provisions of the *Transgender Persons (Protection of Rights) Act, 2019* codify the rule of law on recognition of self-determination of gender identity and guarantee equality before law, and existing older laws must be revisited to ensure that the protections under the Transgender Persons (Protection of Rights) Act, 2019 see the light of day and are implemented on the ground;
- 82.** BECAUSE SMA's denial of recognition of marriages between two consenting adults, irrespective of gender identity or sexual orientation, embodies a stereotype which violates the guarantee of non-discrimination based on 'sex' under Article 15. The SMA is an instance of law where biological differences between sexes has devolved into oppressive cultural norms and therefore merits strict scrutiny in so far as the impugned law suffers from incurable fixations of stereotypical morality and conception of sexual roles (*Anuj Garg v Hotel Association of India, (2008) 3 SCC 1*);
- 83.** BECAUSE on the basis of this Hon'ble Court's recognition of self-determination of gender identity, there is judicial precedent under the HMA, MTP and IPC of expansive and inclusive

interpretation of gendered categories, to include transgender women and intersex persons identifying as women in laws regulating private aspects of family life and impacting violation of sexual autonomy. Laws governing marriage and other aspects of family life too must keep pace with this jurisprudential advancement, and specifically under the SMA, categories such as, 'woman/bride' and 'man/bridegroom' need to be interpreted as including transgender persons and intersex persons self identifying as woman or man, and not be limited to cis women and men. The submission herein seeks that legal terms be read and interpreted in an expansive and inclusive manner to ensure the right to marry and attendant and consequential rights are available and accessible to persons of all sexual orientation and gender identity. This is without prejudice to the Petitioner's prayer that the law be interpreted to recognize the right to marry any person of one's choice irrespective of sexual orientation or gender identity (*Arunkumar and Sreeja v. Inspector General of Registration*, AIR 2019 Mad 265; *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, 2022 SCC Online SC 1321;

Anamika v. Union of India W.P. (Crl) 2537/2018 before High Court of Delhi);

- 84.** BECAUSE the exclusion of LGBTI individuals from the institution of marriage under SMA perpetuates a history of discrimination, prejudice and social exclusion against the group. Any form of stigmatization which leads to social exclusion violates the anti-exclusion principle as codified in Article 17 (*Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1*);
- 85.** BECAUSE determining the constitutional validity of limiting the solemnization of marriages under SMA exclusively for heterosexual couples under the framework of analysis of the 'classification test' misses the true value of equality as a safeguard against arbitrariness. The exclusion of LGBTI individuals from the institution of marriage must be decided on the touchstone of the guarantee of substantive equality under Article 14, which in turn would inform and influence the classification test. (*Navtej Singh Johar v. Union of India, (2018) 10 SCC 1*);
- 86.** BECAUSE the codification of the complete spectrum of marriage related laws on basis of the male/female binary in matters relating to maintenance, child custody, divorce proceedings and

other aspects does not detain this Hon'ble Court from intervening on the limited aspect of solemnization of marriages by breaking the binary at this stage. SMA excludes LGBTI individuals from the institution of marriage for failing to conform to heterosexual expectations of society. In doing so, it perpetuates a symbiotic relationship between anti-LGBTI laws and traditional gender roles. One cannot separate the discrimination on the basis of sexual orientation and discrimination on the basis of sex because the former inherently proceeds on stereotypical notions of sex and gender roles. By attacking these gender roles, LGBTI individuals, in this move to build communities and relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchal sexual roles in order to function. (*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1);

- 87.** BECAUSE in order to remedy systemic discrimination, the responsibility of constitutional courts is not limited to the negative duty of striking down discriminatory policy, criteria or practice (PCP) such as anti-sodomy laws and compensating the aggrieved for the harm, but also a positive duty to affirm the right to choose a partner

for marriage that can facilitate social redistribution by providing for entitlements that aim to negate the scope of future harm (*Madhu & Anr. v. Northern Railways & Ors.*, 2018 SCC Online Del 6660; *Lt. Col. Nitisha v. Union of India*, 2021 SCC Online SC 261);

88. BECAUSE the recognition of the right to marry and found a family for LGBTI individuals under SMA would guarantee substantive equality for the community by breaking a cycle of disadvantage associated with status, promote dignity and thereby redress stigma, stereotyping, humiliation and violence because of membership of an identity group and facilitate full participation in society, both socially and politically (*Lt. Col. Nitisha v. Union of India*, 2021 SCC Online SC 261);

89. BECAUSE the denial of the right to marry for LGBTI individuals under SMA fails to meet the material threshold of restriction of fundamental rights under Article 21, i.e., there exists no legitimate state interest in restricting the institution of marriage exclusively for cis-gender and heterosexual couples. Any purported justification is outweighed by the detrimental effects of systemic discrimination and violence on the lives of LGBTI individuals due to

exclusion from the institution of marriage (*Justice K.S. Puttaswamy vs Union of India (I)*, (2017) 10 SCC 1);

- 90.** BECAUSE domestic law must be applied in a manner consistent with binding international human rights commitments, therefore, SMA must recognize LGBTI marriages pursuant to Principle 24 (The Right to Found a Family) of the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, in order to withstand scrutiny of Articles 14, 15, 19 and 21 of the Constitution (*Nisha Priya Bhatia v. Union of India*, 2020 SCC Online SC 394; *National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1);
- 91.** BECAUSE the substantial questions of law as to the interpretation of SMA and the Constitution are within the powers of adjudication of this Hon'ble Court and do not merit deference to the Parliament. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being

favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. In a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties (*Justice K.S. Puttaswamy vs Union of India (I)*, (2017) 10 SCC 1);

II. The “notice, domicile and objection” framework under Sections 5-9 of SMA violates Articles 14, 15, 19 and 21

92. BECAUSE the struggle of individuals who seek registration of their marriages under SMA irrespective of gender identity and sexual orientation is located within the larger history of struggles against various forms of social subordination in India. The impugned provisions under SMA perpetuate the unconstitutional legacy of “against the order of nature” formerly sanctioned under Section 377, Indian Penal Code, 1860, (IPC) which was conceptually not limited to non-procreative sex, but applied to all forms of intimacy which the social order finds ‘disturbing’. This

includes various forms of inter-caste and inter-religious relationships which are sought to be curbed by society, including natal families. The re-imagination of the 'order of nature' as being not only about prohibition of non-procreative sex but instead about limits imposed by structures such as gender, caste, class, religion and community necessitates the protection of the right to marry and removal of impugned barriers under SMA, not just for LGBTI individuals, but for all (*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1);

- 93.** BECAUSE although the “notice, domicile and objection” framework is facially neutral, the adverse impact in implementation falls disproportionately on inter-caste and inter-religious couples, and especially on further marginalized couples, where one or both partners do not conform to the gender binary or have non conventional sexual orientation(s). Individuals in relationships across gender identity and sexual orientation are very likely to face worse consequences, on account of the ignominious history of violence and opposition from natal families as illustrated herein above. The impugned provisions have the effect of perpetuating disadvantage in the shape of social, economic and political

exclusion, psychological and physical harm, when viewed in the backdrop of the systemic disadvantages as well as the conflict inflicted by natal families faced by minority communities on basis of the aforesaid prohibited grounds of discrimination. Therefore, the impugned provisions of SMA are unconstitutional as they amount to indirect discrimination under Article 15 (*Madhu & Anr. v. Northern Railways & Ors.*, 2018 SCC Online Del 6660; *Lt. Col. Nitisha v. Union of India*, 2021 SCC Online SC 261);

94. BECAUSE the doctrine of intersectionality presents a framework of analysis to interpret the implementation of the “notice, domicile and objection” framework under SMA, by focusing on the effects of natal family opposition to solemnization of marriages by the intersection of caste, religion, gender identity and sexual orientation which shape individual and collective experiences of inequality (*M. Sameeha Barvin v. Jt. Secy., Ministry of Youth and Sports Development*, (2022) 1 Mad LJ 466; *Patan Jamal Vali v. State of Andhra Pradesh*, AIR 2021 SC 2190);

95. BECAUSE it is necessary to consider the impact of SMA’s “notice, domicile and objection” framework on marginalized groups, whose social and economic conditions heighten their vulnerability

to discrimination, harassment and violence by natal families and third parties. The implementation of laws must not mirror the systemic discrimination prevalent in society but must be aimed at remedying this discrimination and ensuring substantive equality (*Devika Biswas v. Union of India And Ors.*, (2016) 10 SCC 726);

96. BECAUSE the “notice, domicile and objection” framework signals to natal families and local communities that third parties have a legitimate and vested right to cause interference and disruption in the most intimate and private aspects of lives of consenting adults, whether before or after marriage, resultantly depriving inter-caste, inter-faith and LGBTI couples the freedom from insecurity, interference and violence by state and non-state actors (*National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438);

97. BECAUSE Article 21 guarantees both procedural as well as substantive due process. Therefore, the scheme of SMA must be applied in a manner that is fair, just and reasonable in order to guarantee the fundamental right to marry. The procedure with respect to inspection of the marriage notice book and opportunity for filing objections with respect to a notice of intended marriage by

“any person” violates both the guarantees (*Mohd. Arif v. Registrar, Supreme Court of India, (2014) 9 SCC 737*);

98. BECAUSE the “notice, domicile and objection” framework is rendered unconstitutional on the ground of vagueness, as it lacks reasonable standards and clear guidance for citizens, authorities and courts, in so far as it allows “any person” to inspect records and cause interference between an intending couple. When a law uses vague expressions capable of misuse or abuse, it leaves affected parties in a boundless sea of uncertainty and has a chilling effect on the ability of individuals belonging to vulnerable groups to solemnize a marriage (*Shreya Singhal v. Union of India, (2015) 5 SCC 1*);

99. BECAUSE the Law Commission of India has recommended the procedure with respect to notice, domicile and filing objections under SMA to be completely deleted (*Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework. Report No.242 (2012)*);

100. BECAUSE while intra-community marriage laws (Hindu, Muslim, Christian, Parsi personal laws) do not provide for “notice,

domicile and objection” framework, the codification of the same under SMA is unconstitutional in so far as the impugned provisions are (a) disproportionate to the object of prevention of violations of the law and (b) there exists no legitimate state interest in regulating inter-religious marriages and inter-caste marriages when intra-community marriages are not subject to similar regulation (*Justice K.S. Puttaswamy v. Union of India (I)*, (2017) 10 SCC 1)

101. BECAUSE while intra-community marriage laws (Hindu, Muslim, Christian, Parsi personal laws) do not provide for the “notice, domicile and objection” framework, the codification of the same under SMA is unconstitutional in so far as it casts a presumption of criminality on any two consenting adults who choose to marry beyond constraints of caste, religion, heteronormativity, gender identity and sexual orientation (*Justice K.S. Puttaswamy vs Union of India (II)* (2019) 1 SCC 1);

102. BECAUSE the additional “notice and objection” framework under Sections 15-16 of SMA, meant for registration of marriages formerly solemnized as per personal laws, suffers from the same defects and violations as the “notice, domicile and objection” framework impugned herein, since it imposes an unconstitutional

barrier in circumstances where one party to a marriage has transitioned to affirm their self-determined gender identity and both parties have mutually decided to continue the marriage and save it's validity under Sections 15-16 of SMA;

103. BECAUSE the fundamental right to marry under Article 21 is rendered futile by the “notice, domicile and objection” framework, as such provisions have the direct and inevitable effect of emboldening natal families and local communities in negating this fundamental right (*RC Cooper v Union of India (1970)*, 1 SCC 248);

III. Non-recognition of ‘atypical families’ or ‘chosen families’ beyond constraints of marriage, blood or adoption violates Articles 14, 15, 19 and 21

104. BECAUSE for those who ‘come out’ as queer or trans to their families or are inadvertently found out to be queer or trans, the conflict from the family does not start and end with relationships. Irrespective of relationship status, queer or trans individuals are seen as “ill and abnormal”. Families resort to all desperate attempts to “reform” their children through coercive and violent means, which involve illegal and medically harmful methods

like “conversion therapies” or traditional methods through faith-healers or even forced heterosexual marriage, which is seen as a “cure” for all assertions of individual choice;

105. BECAUSE LGBTI individuals face opposition, denial of identity, restriction of liberty, surveillance, forced marriages and violence from “guardians, close relatives and family members” when they ‘come out’ and present their authentic selves before their families and society. The limitations of law’s recognition of only a typical family unit is grossly inadequate as it strips LGBTI individuals the autonomy to choose ‘any person’ in order to secure their best interests and ensure security of person, especially where the natal family is predisposed to reject and harm the LGBTI person. LGBTI people form different kinds of families for taking care and responsibility for and of each other, and pooling of financial and immovable assets, which are not protected by the law’s notion of a ‘family’.

106. BECAUSE the predominant understanding of the concept of a “family” both in the law and in society is that it consists of a single, unchanging unit with a mother, a father and their children. This assumption ignores both, the many circumstances which may lead

to a change in one's familial structure, and the fact that many families do not conform to this expectation to begin with. Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. A household may be a single parent household for any number of reasons, including the death of a spouse, separation, or divorce. Similarly, the guardians and caretakers of children may change with remarriage, adoption, or fostering. These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally, if not more deserving, not only of protection under law but also of the benefits available under social welfare legislation and policies. The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones. (*Deepika Singh v. Central Administrative Tribunal*, 2022 SCC OnLine SC 1088);

107. BECAUSE while much of law's benefits are rooted in the institution of marriage, the law in modern times is shedding the notion that marriage is a precondition to the rights of individuals (alone or in relation to one another). Changing social mores must be borne in mind when interpreting the provisions of an enactment

to further its object and purpose. Statutes are considered to be “always speaking”. Societal reality indicates the need to legally recognize non-traditional manifestations of familial relationships. Such legal recognition is necessary to enable individuals in non-traditional family structures to avail of the benefits under beneficial legislation. Both married and unmarried persons have equal decisional autonomy to make significant choices regarding their own welfare (*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321*);

108. BECAUSE adults with capacity to consent have the fundamental right to self-determination and autonomy to refuse medical treatment. In this regard, Advance Directives by a terminally-ill person or a person in vegetative state, for withdrawing medical treatment, is entitled to be followed by a treating physician under Article 21 of the Constitution. This Hon’ble Court has laid down guidelines to facilitate the process of implementing Advance Directives, and outlined the role of *guardians, close relatives or family members* of the executor in giving effect to the same (*Common Cause v Union of India, (2018) 5 SCC 1; 2023 SCC Online SC 99*);

- 109.** BECAUSE competent courts routinely declare and appoint one spouse as the legal guardian of the medically incapacitated spouse, for managing the estate as well as participating in healthcare decisions in the best interests of the family. (*Rajni Hariom Sharma v Union of India and Anr., 2020 SCC Online Bom 880*);
- 110.** BECAUSE the ability to nominate a caregiver in such emergency healthcare situations is severely restricted for LGBTI individuals who are facing conflict from their natal families. Often the ‘guardians, close relatives or family members’ are at best unaware of the wishes of the person, or worse, actively dishonour the wishes of the person, thereby, violating their rights and heaping indignity even in the midst of critical events;
- 111.** BECAUSE likewise LGBTI individuals are stripped of autonomy with respect to nominating ‘any person’ due to the non-recognition in law of ‘atypical or chosen families’ which are formed beyond the constraints of marriage, blood or adoption, in matters ranging from estate planning, housing, transfer of property, employment-based partner benefits, guardianship of children,

access to assisted reproductive technologies and many other private aspects of family life;

112. BECAUSE certain High Courts have expanded the scope of legal heirs for the hijra community by declaring that non-conjugal kinship bonds of the *guru-chela parampara* are not opposed to public policy and recognized members of a hijra gharana as lawful heirs with respect to devolution of property of a deceased member (*Illyas v. Badshah alias Kamla, AIR 1990 MP 334; Sweety v. General Public, AIR 2016 HP 148*);

113. BECAUSE Section 14 of the *Mental Healthcare Act, 2017* recognizes an individual's right to appoint 'any person' as the nominated representative, in addition to 'relatives', for purposes of giving effect to their advance directive on the course of mental healthcare treatment in the event of their incapacity. It is humbly submitted that the law's recognition of 'any person' as capable of serving the best interests of individuals in a state of vulnerability or incapacity ought to be reproduced in general contexts for LGBTI individuals to assign a right, title, interest, claim or benefit accrued as per law;

- 114.** BECAUSE the principle of substantive equality mandates that the State must not exact conformity as a price for equality. Instead, it should accommodate difference and aim to achieve structural change. LGBTI individuals, who do not choose marriage, deserve the recognition and protection of law when they seek to nominate ‘any person’ beyond the constraints of ‘guardians, close relatives or family members’ as they seek to lead autonomous lives independent of any restrictions imposed by natal families, by virtue of their inherent dignity. (*Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) 1 SCC 608; Lt. Col. Nitisha v. Union of India, 2021 SCC Online SC 261*);
- 115.** BECAUSE the inviolable nature of the human personality is manifested in the ability of an individual to make intimate choices. The recognition that the fundamental right to privacy is an intrinsic recognition of heterogeneity and the right of the individual to stand against the tide of conformity must lead towards the inescapable conclusion of recognition of the authority of the individual in nominating ‘any person’ in order to secure their best interests in matters relating to organizing chosen families and other vital

aspects of life (*Justice K.S. Puttaswamy v. Union of India (I)*, (2017) 10 SCC 1);

IV. Saving of validity of pre-existing marriages where one party has transitioned to affirm their self-determined gender identity in order to protect rights accrued under Articles 14, 15, 19 and 21 of the Constitution:

116. BECAUSE in cases of pre-existing marriages recognized under law, where one partner has transitioned to affirm their self-determined gender identity and parties mutually choose to continue the marriage, there exists uncertainty in terms of social, economic and legal consequences as to the status of the marriage thereafter. It is submitted that as long as parties to the marriage do not object to one partner transitioning to affirm their self-determined gender identity, the law must continue to recognize the validity of the marriage between the parties.

117. BECAUSE Sections 24-25 of SMA on void and voidable marriages respectively, in context of violation of a condition of a validly solemnized marriage under Section 4, provide for such declaration only at the instance of one party to the marriage, and

no third party objection to the status of the marriage ought to be permissible in law.

118. BECAUSE the bouquet of rights which flow from marital and familial ties between parties to a marriage cannot be arbitrarily snatched from a family where a party to a marriage transitions to affirm their self-determined gender identity. State institutions and service providers often deny services like banking, insurance, etc by raising dubious objections against the status of a marriage where either party to the marriage is a trans person or has transitioned into another gender identity. The law must recognize and protect such marriages from discrimination and moral policing which leads to a denial of fundamental rights.

119. BECAUSE instances of such marriages solemnized under personal laws can be saved by the device of registration under Sections 15-16 of SMA;

120. Because this Hon'ble Court has passed directions to occupy the field of law in absence of statutory guidance in order to do complete justice under Article 142 of the Constitution (*Vishaka v State of Rajasthan*(1997) 6 SCC 241;*Common Cause v Union of India*, (2018) 5 SCC 1);

V. Interference, opposition and violence from natal families, irrespective of marital status, violates the fundamental Right to Life and Personal Liberty under Article 21 of the Constitution:

- 121.** BECAUSE whether or not LBI women and trans persons are in intimate relationships, they are often faced with conflict from the natal family by virtue of the opposition to the self-determination of gender identity and sexual orientation;
- 122.** BECAUSE despite solemnization and registration of marriages, LGBTI couples will remain vulnerable to unabated cycles of opposition, interference and violence from natal families, undermining the fundamental right to marry and found a family, therefore, it is incumbent to protect the life and liberty under Article 21 irrespective of relationship/marital status;
- 123.** BECAUSE international human rights bodies recognize that the predominant social and cultural justification for natal family violence suffered by LGBTI individuals in Asia is embedded in notions of “family honour” - the same oppressive norm which fuels

opposition, interference and violence against inter-caste and inter-faith couples (*Report of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: Practices of so-called “conversion therapy”, A/HRC/44/53, 1 May 2020*);

124. BECAUSE LBI women and trans persons run away from natal families and homes often due to real and imminent threats of forced marriages, or when the family finds out about their identity. The families typically respond by detaining them against their will under ‘house arrest’ and without communication with any of their friends. Often their education is stopped and their jobs, if any, discontinued;

125. BECAUSE in case of LGBTI couples, natal families often file false missing person complaints when their adult ‘daughters’ voluntarily leave homes and use the police to track them across states. They often also file false charges of kidnapping and theft against the partners as well as their own adult children, as acts of retaliation and insidious means to seek their ‘custody’ and compel them into heterosexual expectations of society;

- 126.** BECAUSE district courts have directed that in cases of missing persons cases, once the police have obtained statements from the runaway LGBTI couples that they are adults and have left their natal homes of their free will and volition, the case must be closed forthwith and the police must ensure there is no further interference in the relationship (*S. Sushma & Anr. v. Commissioner of Police & Ors., WP No. 7284/2021, order dated 07.06.2021*);
- 127.** BECAUSE this Hon'ble Court has declared that any kind of torture or torment or ill-treatment in the name of "honour" that violates the right to choose a partner in a relationship or marriage by any group of persons is illegal and has issued directions to state governments for adopting preventive, remedial and punitive measures, including establishment of safe houses to respect, protect and fulfill the fundamental right to marry and found a family for inter-caste and inter-religious couples (*Shakti Vahini vs Union of India, (2018) 7 SCC 192*);
- 128.** BECAUSE this Hon'ble Court's aforesaid directions have been extended to runaway LGBTI couples by High Courts, who face similar vulnerability to "honour" based natal family violence

(Dhanak of Humanity & Ors. v. State of NCT & Anr. WP (CrI)1321/2021, final order dated 23.07.2021);

- 129.** BECAUSE High courts have directed the Ministry of Social Justice and Empowerment (MOSJE) in a series of orders to enlist non-governmental organizations (NGOs) in order to make shelter homes available for all members of the LGBTI community in a manner similar to the *Garima Greh* welfare scheme, which provides shelter homes run by members of the transgender community for at-risk members of their community (*S. Sushma & Anr. v. Commissioner of Police & Ors., WP No. 7284/2021, orders dated 23.12.2021, 08.04.2022, 08.07.2022, 22.08.2022, 09.12.2022*).
- 130.** BECAUSE the Petitioners crave leave to rely on additional grounds at the stage of arguments.
- 131.** That the Petitioners have no other alternative efficacious remedy but to approach this Hon'ble Court for the relief prayed for herein.
- 132.** That the Petitioners have paid the requisite Court fees on this Petition.

133. That the Petitioners have not filed any other petition in any Court, High Court or in the Supreme Court of India in respect of the subject matter of this Petition.

PRAYERS

It is therefore, most respectfully prayed that your Lordships may graciously be pleased to:

- i. Issue an appropriate writ, order or direction to declare that the non-recognition of marriage between persons on the basis of sexual orientation and/or gender identity under SMA is illegal and unconstitutional;
- ii. Issue an appropriate writ, order or direction to declare the usage of gender neutral terms like 'spouse' in the context of solemnization and registration of marriages between LGBTI persons, and all other corresponding provisions under SMA;
- iii. Issue an appropriate writ, order or direction to declare that the provisions of law with respect to the "notice, domicile and objection" framework in Sections 5, 6, 7, 8, and 9 of SMA are illegal and unconstitutional;

- iv. Issue an appropriate writ, order or direction to declare that the validity of marriages already solemnized or registered under the SMA would not de facto be jeopardized if one spouse transitions to their self-determined gender identity;
- v. Issue an appropriate writ, order or direction to declare and recognise the constitutional right of members of the LGBTI community to have a “chosen family” in lieu of next of kin under all laws, as an intrinsic part of their right to a dignified life under Article 21;
- vi. Issue an appropriate writ, order or direction to declare that an unmarried person can nominate ‘any person(s)’ to act as their nominee or next of kin, irrespective of whether such person is a ‘guardian, close relative or family member’, with respect to healthcare decisions in case of incapacity such as execution of Advance Directives and assigning any legal right, interest, title, claim or benefit accrued to the person;

- vii. Issue an appropriate writ, order or direction to declare that State Governments must apply all preventive, remedial, protective and punitive measures, including establishment of safe houses similar to the *Garima Greh* welfare scheme, in order to guarantee safety and security of all individuals irrespective of gender identity and sexual orientation;
- viii. Issue any other writ, order or direction as this Hon'ble Court may deem fit and proper to do complete justice in the circumstances of the case.

**AND FOR THIS ACT OF KINDNESS, THE PETITIONERS HEREIN
SHALL EVER PRAY**

Settled by: Vrinda Grover, Adv.

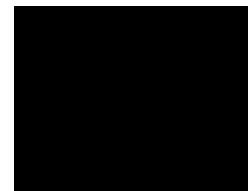
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