SYNOPSIS

Petitioners are citizens of India, who have been in a long-term, same-sex relationship since 2008. They wish to marry under Indian law, as it operates through the Special Marriage Act of 1954 ('SMA') and the Foreign Marriage Act of 1969 ('FMA'). Petitioners have therefore approached this Hon'ble Court for certain declaratory and interpretive reliefs in relation to the SMA and the FMA. This Hon'ble Court has issued notice vide order dated 25.11.2022 in a similar petition (W.P. (Civil) No. 1011/2022) where the recognition of same-sex marriages under the Special Marriage Act 1954 has been sought.

Petitioners first impugn the constitutionality of Sections 2(b) and 4(c) of the Special Marriage Act, 1954 ["SMA"], insofar as these sections have been construed as using the terms "man" and "woman", and "male" and "female", to restrict the operation of the SMA to cis-gendered heterosexual relationships. In this regard, the Petitioners pray that this Hon'ble Court declare in accordance with established principles of statutory construction and the rights guaranteed under the Constitution - that where the SMA uses the term "man" and "male", it ought to be read to include "women" and "females" (including trans-women). In other words, Petitioners urge this Hon'ble Court to declare that the provisions of the SMA apply to all relationships, regardless of the respective partners' gender, sexual orientation, and sexual identity.

Petitioners further impugn the constitutional validity of Sections 5, 6, 7, 8, and 9 of the SMA, insofar as these provisions require (a) that a notice period of thirty days be provided to the Marriage Officer of the District in which one of the parties has

resided, (b) that such notice of intended marriage be affixed to a "conspicuous place", (c) that the details of the parties giving such notice be entered in a Marriage Notice Book that is available for inspection to any person, and finally, (d) that "any person" is vested with the authority during such notice period to object to solemnisation of the marriage.

Petitioners submit that these provisions infringe Articles 14, 19, and 21 of the Constitution. In particular, they (a) constitute a disproportionate invasion of citizens' right to privacy; (b) impose undue and disproportionate burdens upon the exercise of parties' decisional autonomy and right to intimate decision-making (in particular, the right to marry); (c) are irrational and arbitrary, as similar requirements are absent for marriages solemnised under personal laws that are unregistered or sought to be registered under the SMA; and (d) violate the constitutional guarantees of equality and non-discrimination by imposing greater burdens on individuals whose relationships are rendered particularly vulnerable due to the operation of protected markers, such as sexual and gender minorities, individuals entering into inter-faith or inter-caste marriages, and individuals from socially and economically marginalised backgrounds.

Petitioners respectfully submit that any rights accrued by the Petitioners from the declaration that sections 2(b) and 4(c) of the SMA apply to same-sex partners who desire to marry, will be negated by the continued operation of sections 5, 6, 7, 8, and 9 of the SMA. It is a well-recorded fact that despite the judgement of this Hon'ble Court in ***Navtej Johar v. Union of India***, **(2018) 10 SCC 1,** same-sex partners continue to face social and familial

stigma, opprobrium and violence. This is especially true for same-sex partners who are economically and socially vulnerable and dependent upon their families. There will, therefore, exist a number of situations in which same-sex partners will be unable to disclose their relationships to their families, or to the world at large. The public-notice-and-objection provisions of the SMA places these individuals in the impossible situation of *either* being forced to publicise their relationship (and thus risk ostracism, persecution, and violence) *or* to not marry at all. Petitioners respectfully submit that such provisions, in creating an impermissible deterrent effect on the exercise of a right, represent an unconstitutional state of affairs.

This Hon'ble Court has always held that, in considering questions of constitutionality, the *effect* of a law must be scrutinised with great care. Petitioners respectfully submit that the effect of sections 5 - 9 of the SMA is such that even if the law was to be interpreted so as to *formally* cover same-sex relationships, the right to marry would remain illusory for a large number of individuals, on grounds *only* of their sexual orientation. Even at present, though the right to marry under SMA exists for inter-faith couples, the notice-and-objection requirements have made access to that right illusory.

Finally, Petitioners impugn sections 4(c), and the scheme under sections 5 to 10 of the Foreign Marriage Act of 1969, for the same reasons as above. Section 4(c) uses the terms "bride" and "bridegroom", and consequently limits its application to heterosexual marriages. Sections 5 - 10 set out a "notice and objections" regime that is identical to the SMA. Petitioners

respectfully submit that, in order for there to be full and effective relief, the remedies prayed for ought to be extended to the Foreign Marriage Act, in the like manner.

Hence the present writ petition.

LIST OF DATES AND EVENTS

Date	Event
1954	The Special Marriage Act, 1954, is enacted. It is intended to be a *secular* legislation, for individuals who cannot, or do not wish to, solemnise their marriage under personal laws.
1969	The Foreign Marriage Act, 1969 is enacted, for the purposes of solemnising marriages outside India under the Act.
2012	The 242nd Law Commission Report recommends the deletion of the notice-and-objection requirements of the SMA, noting that this would keep a check on "high-handed or unwarranted interference", such as social boycotts, harassment, etc.
24.8.2017	In **Justice K. S. Puttaswamy vs Union of India**, **(2019) 1 SCC 1** this Hon'ble Court declares that the right to privacy is a fundamental right under the Indian Constitution. The right to privacy is held to include the right to decisional autonomy, and intimate decision-making.

6.9.2018	In **Navtej Johar vs Union of India**, **(2018) 10 SCC 1** this Hon'ble Court reads down section 377 of the Indian Penal Code, so as to decriminalise same-sex relationships between consenting adults.
2020-2021	In the wake of the judgment of this Hon'ble Court in **Navtej Johar vs Union of India**, **(2018) 10 SCC 1** petitions are filed in the Hon'ble High Courts of Kerala and Dehi, seeking recognition of same-sex marriage under the SMA.
12.1.2021	In **Safiya Sultana vs State of UP**, **(2021) SCC OnLine All 19** a single-judge bench of the Hon'ble High Court of Allahabad notes that the notice-and-objections requirement of the SMA "invade in the fundamental rights of liberty and privacy, including within its sphere freedom to choose for marriage without interference from state and non-state actors, of the persons concerned."
25.11.2022	In **Supriyo @ Supriya Chakraborty vs Union of India**, **W.P. (Civil) No. 1011/2022** this Hon'ble Court issues notice on a plea for the recognition of same-sex marriages under the SMA.
15.12.2022	Hence, the present petition.

IN THE SUPREME COURT OF INDIA

CIVIL WRIT JURISDICTION

WRIT PETITION (CIVIL) NO. ______ OF 2022

(Under Article 32 of the Constitution of India)

IN THE MATTER OF:

1. Utkarsh Saxena

2. Ananya Kotia,

… rs

Versus

Union of India, Ministry of Law & Justice, through its Secretary, 4th Floor, A-Wing, Shastri Bhawan, New Delhi – 110001

… Respondent

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

To

Hon'ble The Chief Justice of India
And his Companion Justices of
The Hon'ble Supreme Court of India

The humble Petition of
The Petitioner above named

MOST RESPECTFULLY SHOWETH:

1. This Writ Petition is filed under Article 32 of the Indian Constitution by parties aggrieved by the impugned provisions of law and seeking declaration *inter alia* holding:

a. That the provisions of the Special Marriage Act, 1954 ('SMA') particularly Sections 2(b) and 4(c) extend to

solemnisation of marriages, regardless of the respective partners' gender, sexual orientation, and sexual identity;

b. That Sections 5, 6, 7, 8, 9, 10 of the SMA are unconstitutional and liable to be quashed;

c. That the provisions of the Foreign Marriage Act, 1969 ('FMA') particularly Section 4(c), extend to solemnisation of marriages, regardless of the respective partners' gender, sexual orientation, and sexual identity;

d. That Sections 5, 6, 7, 8, 9, 10 of the FMA are unconstitutional and liable to be quashed.

A true typed copy of the provisions of the Impugned Act (The Special Marriage Act, 1954, Sections 2, 4, 5 to 10 and The Foreign Marriage Act, 1969, Sections 4 to 10) have been annexed herewith as **ANNEXURE P-1** from page no. **24** to **33**.

2. It is pertinent to note that this Court has issued notice vide order dated 25.11.2022 in a similar petition (W.P. (Civil) No. 1011/2022) where the recognition of same-sex marriages under the Special Marriage Act 1954 has been sought.

3. Petitioner No. 1 is a lawyer and development economist, currently pursuing a PhD in public policy at the University of Oxford. He has a BA (Hons.) economics / LL.B. from the University of Delhi, an LL.M. from Harvard Law School, and an MPA in international development (MPA/ID) from the Harvard Kennedy School of Government. Petitioner No. 1 was a Law Clerk with this Hon'ble Court; practised law before this Hon'ble Court and other courts in Delhi after enrolment with the Bar Council of Delhi in 2012; and worked as a consultant with the Chief Economic Advisor's office at

the Ministry of Finance (Government of India), the World Bank, and the Boston Consulting Group.

4. Petitioner No. 2 is an economist, currently pursuing a PhD in economics at the London School of Economics. He holds a B.A. (Hons.) economics from Delhi University, an M.A. in economics from the University of Cambridge, and an M.Phil. in economics from the University of Oxford. Petitioner No. 2 has previously worked as a consultant with the Chief Economic Advisor's office at the Ministry of Finance (Government of India), the National Institute of Public Finance and Policy, and the World Bank.

BACKGROUND

I. Marriage: A Fundamental Right

5. The institution of marriage has held strong significance across times and across societies. It serves as (a) a publicly declared expression of commitment between two people; (b) a source of social acceptance and legitimacy for a relationship; (c) a gateway to important social goods such as self-respect and dignity; and (d) a prerequisite to access important sources of state and social support, in domains such as care and the bringing up of children.

6. Thus, the exclusion of a set of people from the social institution of marriage carries with it serious harms, both socio-cultural and material, ranging from a public declaration of unequal moral membership of the polity, to very material consequences regarding health, finances, child-rearing, and support.

7. For these reasons, the right to marry is an integral element of the rights to life, freedom of expression, and privacy, under the Indian Constitution; and, correspondingly, the exclusion

of a set of people from accessing this institution raises serious concerns about the infringement of the guarantees of equality and non-discrimination as well as that of decisional autonomy.

8. This proposition has been affirmed by this Hon'ble Court on multiple occasions. In **Lata Singh vs State of UP, (2006) 5 SCC 475**, this Hon'ble Court held that "this is a free and democratic country, and once a person becomes a major he or she I can marry whosoever he/she likes." In **In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014, (2014) 4 SCC 786,** this Hon'ble Court held that "the State is duty bound to protect the Fundamental Rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage." In **Asha Ranjan vs State of Bihar**, **(2017) 4 SCC 397**, this Hon'ble Court held that "choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19." In **Shakti Vahini vs Union of India, (2018) 7 SCC 192**, this Hon'ble Court held that in marriage, "consent has to piously be given primacy." In **Shafin Jahan vs Asokan KM, (2018) 6 SCC 368,** this Hon'ble Court held that "the choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable."

9. It is therefore established beyond cavil that the right to marry is a fundamental right under the Constitution, and any limitation placed upon it must meet the constitutional tests of

reasonableness and proportionality (as applicable), in order to pass muster.

II. The Special Marriage Act: Application to Same-Sex Relationships

10. The Special Marriage Act ["SMA"] was enacted in 1954. It was explicitly meant to serve as a *secular alternative* for individuals who cannot, or do not, wish to get married under personal laws, such as the Hindu Marriage Act. The Special Marriage Act lays down a set of procedures for the solemnisation of marriages under its aegis. Notably, none of the requirements are based on religious or scriptural prescriptions. The vision of marriage under the SMA, thus, is of a relationship born out of the free choices of two adult, consenting individuals.

11. Various provisions of the SMA, however, constrain the very freedom that it purports to offer to individuals. While section 4 of the SMA refers to a marriage between "any two <u>persons</u>", 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, section 2(b) appears to imply that a marriage under the SMA must necessarily be between heterosexual partners. This implication is strengthened by 4(c), which stipulates that "the male [must have] completed the age of twenty-one years <u>and</u> the female the age of eighteen years."

12. There is, therefore, at the very least, an ambiguity in whether the SMA does or does not apply to same-sex relationships.

This ambiguity has filtered down into practice, with Magistrates refusing to solemnise same-sex relationships under the SMA.

13. It is important to note that various religious faiths have certain conceptions about marriage, and who can enter into a marriage. Certain religions might hold the view that, by definition, a marriage can only subsist between a biological male and a biological female. It is evident, however, that those conceptions have no role to play in the SMA, because - as set out above - the SMA was enacted as an *alternative* to religious marriages under personal laws, and is therefore *a-religious by design*.

III. The Special Marriage Act: Notice and Objections

14. The question of application is not the only manner in which the SMA constrains the choices of individuals in entering a marital relationship. Sections 5 to 9 of the SMA set out a detailed procedural regime that must be complied with for a marriage to be solemnised. This can be summarised as a "notice and objections regime."

15. Put simply, the "notice and objections" regime proceeds through the following stages:

a. The individuals intending to marry must notify a Marriage Officer in the district in which one of the parties ordinarily resides, <u>one month</u> 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 authorised to object to the proposed marriage, on the basis that the requirements of section 4 have been 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.

16. The "notice and objections" regime, 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.

17. The intention of the "notice and objections" regime appears to be to address potential situations where individuals hide 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: instead of, for instance, deterring breaches by having a regime of *penalties*, it seeks to deter breaches by erasing the privacy of the individuals involved. It is also important to note that the "notice and objections" regime is absent from personal laws governing marriage. Consequently - and evidently - it is not the only way to address the problem of a breach of the prerequisites of marriage.

18. The notice-and-objections regime casts an undue and stringent burden upon many individuals who wish to marry, especially when such marriages are in the teeth of familial or social opposition. It is no surprise that the judgments referred

to in **paragraph 7** of this petition almost exclusively arose out of situations where consenting individuals were harassed, persecuted, boycotted, and even subjected to violence by their kin, and by their immediate society.

19. 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, and exists as a legal *fait accompli*, familial objection might be blunted. However, familial and social objections are likely to be *particularly* strong in the period of time between a publicly-declared intention to marry, and the solemnisation of the marriage itself, as families will (rightly) perceive that with the right amount of pressure and coercion, the situation is still reversible.

A true copy of reportage titled 'Kerala interfaith couples harassed by right wing vigilantes using marriage notices' published in the News Minute on 20.07.2020, is annexed herewith as **ANNEXURE P-2** from page no. **34** to **43**.

A true copy of reportage titled 'The law requires couples wanting to have a 'secular' marriage to file an advance notice, which is then publicly displayed with all their personal information' published by the News Laundry on 26.07.2021, is annexed herewith as **ANNEXURE P-3** from page no. **44** to **50**.

A true copy of reportage titled 'Ghaziabad Mob Assaults Muslim Man for Registering Marriage with Hindu Woman' published by the Wire on 24.07.2018, is annexed herewith as **Annexure P-4** from page no. **51** to **53**.

20. For these reasons, it is no surprise that both the Law Commission, in its 242nd Report, and the High Court of

Allahabad, in a *habeas corpus* petition, raised exactly these constitutional concerns about the notice-and-objection regime. A true copy of the relevant portions of the 242nd Report of the Law Commission of India is annexed herewith as **Annexure P-5** from page no. **54** to **58**.

21. Furthermore, this state of affairs raises intersectional concerns. Individuals 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.

22. For these reasons, the "notice and objections" regime raises several issues of constitutional concern. It infringes the right to privacy, the right to intimate decision-making, and the right to marry, and enables precisely what this Hon'ble Court has warned against in the judgments cited in **paragraph 7** of this petition: a societal *veto* over individual choice to enter into a marriage.

23. Finally, the **Foreign Marriage Act of 1969** replicates the provisions of the SMA - both substantive and procedural - and therefore suffers from the same constitutional infirmities.

24. This writ petition, therefore, raises the following - among other - grounds:

GROUNDS

A. BECAUSE the right to marry is a fundamental right under the Constitution of India. It is an integral element of the right to privacy, the right to decisional autonomy, and the right to choice, and the freedom of expression and is protected by

Articles 19 and 21 of the Constitution. (**Lata Singh vs State of UP, (2006) 5 SCC 475; Asha Ranjan vs State of Bihar**, **(2017) 4 SCC 397; Shakti Vahini vs Union of India, (2018) 7 SCC 192; Shafin Jahan vs Asokan KM, (2018) 6 SCC 368**)

B. BECAUSE the denial or exclusion of the right to marry causes both dignitarian as well as material harms. On the one hand, it sends a signal to the excluded individuals that they are unequal moral members of the society, as they may not access, and participate in, a social institution of enduring and vital significance. On the other, it causes material injury by denying individuals vital resources in the domains of care and child-rearing. For these reasons, exclusion from the marital institution must be scrutinised with particular rigour under the Constitution. The State must discharge a heavy burden to justify any such exclusion.

C. BECAUSE the SMA imposes two kinds of constraints upon consenting, adult individuals who wish to marry. The first is that sections 2(b) and 4(c) suggest that the application of the SMA is restricted to heterosexual marriages. In other words, same-sex partners are seemingly excluded from its ambit. The second is that sections 5 - 9 impose a "notice and objections" regime as a procedural prerequisite to the solemnisation of marriages under the SMA. It is respectfully submitted that *both* sets of constraints are unconstitutional, and that in order for the petitioners - and for all others - to be able to exercise their right to marry, *both* sets of constraints must go.

The Substantive Constraints on Same-Sex Marriages

D. BECAUSE the exclusion of same-sex partners from the ambit of the SMA discriminates against them on grounds *solely* of their sexual orientation. *Prima facie,* this infringes Articles 14, 15, 19, and 21 of the Constitution (**Navtej Johar vs Union of India, (2018) 10 SCC 1).** This infringement is heightened by the fact that the discrimination is with respect to the *right to marry*, itself a fundamental right under the Constitution.

E. BECAUSE, consequently, this discrimination is unconstitutional unless justified by the State with reference to the standards laid down by this Hon'ble Court under Articles 14 (reasonableness and non-arbitrariness), 15, 19, and 21 (proportionality). It is submitted that no such justification exists.

F. BECAUSE any putative justification cannot invoke social mores or public morality as a basis for denial or exclusion. In **Shafin Jahan vs Asokan KM, (2018) 16 SCC 368,** this Hon'ble Court made it explicitly clear that "society has no role to play in determining our choice of partners" (whether in or out of marriage). Indeed, our long, tragic, and continuing history of violence and social boycotts around inter-caste and inter-faith marriages warns us of the perils of allowing a *societal veto* over an individual's choice to marry.

G. BECAUSE a conception of marriage that is exclusively heterosexual in nature, insofar as it is rooted in norms of particular religious denominations, cannot be endorsed by a secular state that recognises for its citizens both freedom of religion and freedom from religion under Article 25. (***Indian Young Lawyers Association v. State of Kerala,*** **(2019) 11 SCC 1).**

H. BECAUSE, more specifically in the context of the SMA, the Special Marriage Act was enacted as an alternative to marriage under religious personal laws. The SMA is a sanctuary for those individuals who cannot, or do not wish to, marry under personal laws. As such, the SMA is a key part of the legal architecture of marriage in a secular state, and cannot *reproduce* religious bases or criteria for defining marriage (such as a union between a biological male and a biological female).

I. BECAUSE, consequently, the exclusion implicit under sections 2(b) and 4(c) of the SMA is unconstitutional.

J. BECAUSE, under the General Clauses Act, unless the context signifies otherwise, reference to "man" can be read to include "woman." It is respectfully submitted, therefore, that this Hon'ble Court need neither strike down sections 2(b) and 4(c), nor rewrite them, to remove the vice of unconstitutionality. The simple device of *declaring* that the gender-specific words in sections 2(b) and 4(c) are to be interpreted as *gender neutral* will suffice.

K. BECAUSE such an act of interpretation is well within the jurisdiction and competence of this Hon'ble Court. Indeed, **Navtej Johar vs Union of India, supra**, is an example of how this Hon'ble Court decriminalised same-sex relations through *interpreting* Section 377 of the IPC to exclude from its ambit consensual, same-sex relationships.

L. BECAUSE the Foreign Marriage Act of 1969 suffers from the same infirmities insofar as Section 4(c) uses the terms "bride" and "bridegroom", and therefore the same interpretive relief is prayed for.

The Notice and Objections Regime

M. BECAUSE Sections 5 to 9 of the SMA (the "notice and objections regime") violate the right to privacy, render the right to marry illusory, impose an undue burden upon the freedom of choice, are disproportionate, and are manifestly arbitrary.

N. BECAUSE it is a well-established aspect of the jurisprudence of this Hon'ble Court that when testing a law for constitutional compliance, what matters is not its object and form, but its effects (**Navtej Johar vs Union of India, <u>supra</u>**). Laws that are innocuous on their face - not to mention, neutral - can be rights-infringing and discriminatory in their effect. Sections 5 - 9 of the SMA are rights-infringing and discriminatory in effect.

O. BECAUSE the notice-and-objection regime under the SMA is applicable only to marriages solemnised under the SMA, and has specifically not been imposed on marriages solemnised under personal law and only sought to be registered under the SMA. This is *on the face of it* an unreasonable and arbitrary classification, as well as discriminatory insofar as distinct regimes with unequal burdens are created for those choosing to marry under religious personal laws and those choosing (or constrained to) marry under the secular SMA.

P. BECAUSE the notice-and-objection regime takes marriage out of the domain of a private, individual choice between two consenting adults, and makes the *publicisation* of this choice mandatory.

Q. BECAUSE as this Hon'ble Court has held on multiple occasions, marriage is a choice between two freely

consenting adults, in which *society* has no role to play. The notice-and-objections regime violates this basic precept.

R. BECAUSE the notice-and-objection regime violates the privacy of the individuals who wish to marry under the SMA. Individuals may have a variety of legitimate and well-founded reasons to *not* publicise their marriage until it is solemnised. The notice-and-consent regime denies them that choice.

S. BECAUSE decisional autonomy has been recognised to be a vital facet of the right to privacy guaranteed under Article 21. Such autonomy from state interference can only be meaningful when it means more than a mere absence of prohibition of one's intimacy. Rather, a legal regime that imposes differing and unequal burdens on different forms of intimacies inherently denudes citizens' decisional autonomy by filtering their choices through a system of preferences and disincentives institutionalised by the state.

T. BECAUSE there exist a huge number of cases where the notice-and-objection regime not only violates the right to privacy and choice, but essentially makes the right to marry illusory. These cases are cases of individuals who wish to get married in the teeth of objections from their families or the broader society. By compelling these individuals to make *public* their intention to marry *one month* before the solemnisation of the marriage, the notice-and-objection regime exposes these individuals to pressure, threats, coercion, and even violence (this is not an academic concern, but is well-documented).

U. BECAUSE the notice-and-objection regime disproportionately impacts vulnerable and marginalised

individuals, who *already* live at the intersection of multiple axes of discrimination: economically dependent individuals, individuals wishing to enter into inter-caste or inter-faith marriages, and individuals belonging to gender and sexual minorities. As held by this Hon'ble Court in **Navtej Johar vs Union of India, supra,** intersectional discrimination is a form of discrimination that requires close constitutional scrutiny.

V. BECAUSE it is these individuals who have the most well-founded reasons *not* to publicise their intention to marry, and it is these individuals whose rights stand to be infringed to the maximum degree by the law denying them that choice.

W. BECAUSE by placing these individuals in a situation where they are obligated to exercise their right to marry *by giving up* their right to privacy and in effect also their right to personal safety under Article 21, the notice-and-objection regime imposes an *unconstitutional condition*. An unconstitutional condition is defined as a condition where an individual must give up one constitutional right in order to exercise another (**Ahmedabad St Xavier's College vs State of Gujarat, 1975 SCR (1) 173.)**

X. BECAUSE, in addition, the notice-and-objection regime is arbitrary, and lacks any determining principle. It is conspicuous by its absence in personal laws, and therefore undermines the claim that it is required in order to prevent the breach of section 4 conditions.

Y. BECAUSE even if it is accepted that the State has a legitimate goal in securing compliance with section 4 of the SMA, the notice-and-objection regime is disproportionate, for the following reasons:

a. The pre-emptive mandatory requirement of disclosure is based on the premise that every person wishing to enter into a SMA marriage is a potential law-breaker. This casts a "shadow of criminality" over SMA marriages; furthermore, in **Justice K.S. Puttaswamy vs Union of India (II) (2019) 1 SCC 1**, this Hon'ble Court held - while striking down mandatory Aadhaar linkage for SIM cards - that any law based on a "presumption of criminality" was *ipso facto* unconstitutional.

b. The notice-and-objections regime, particularly the requirement of maintaining a publicly inspectable Marriage Notice Book, also inherently lends itself to a machinery of state-surveillance and tracking of individuals that have historically been vulnerable to state-sanctioned abuse and criminalisation on account of their identity and choice of intimacies.

c. Compliance with section 4 can be achieved through a range of less restrictive means, including - for example - the usual legislative device of penalties for breach. The State bears the burden of showing that the notice-and-objection regime - which infringes upon the rights to privacy and equality, and erases the right to marry in many cases - is the "least restrictive alternative" to secure compliance with section 4. In the absence of any such justification, the regime is evidently unconstitutional.

Z. BECAUSE authorising "any person" to object to an SMA notice is a gross overreach, and enables continuing harassment and persecution. It, once again, impermissibly makes the larger public an interested party in what is the

exercise of intimate choice and decision-making between two individuals.

AA. BECAUSE the scenarios outlined above are not merely examples of "abuse" of the SMA provisions, which can be remedied by appropriate administrative action. Rather, the infringement of privacy, free choice, and the right to marry is *baked into* the notice-and-objection regime, in the manner outlined above.

BB. BECAUSE this Hon'ble Court has, on multiple occasions, taken judicial notice of facts or states of affairs that are the subject of common knowledge. The difficulties faced by inter-caste, inter-faith, economically vulnerable, and gender-diverse couples are all subjects of common knowledge, and the fact that on many occasions coercion and persecution is at the hands of family and the immediate society is also a subject of common knowledge (as recognised by this Hon'ble Court in many cases dealing with inter-caste marriages and *habeas corpus* petitions, some of which have been extracted in **paragraph 7** of this petition). It is respectfully submitted that the notice-and-objections regime cannot be analysed in isolation from the prevailing state of affairs; indeed, it is the effects test that joins the text of sections 5 - 9 of the SMA and this state of affairs, and it is on an application of the effects test that the unconstitutionality of the notice-and-objections regime is writ large.

CC. BECAUSE, for the reasons advanced above, the challenges to sections 2(b) and 4(c), and to the notice-and-objections regime, are inextricably bound up with each other: any attempt to address the unconstitutional exclusion of same-sex couples from the SMA will be partially successful, at best,

unless it also addresses the unconstitutional notice-and-objections regime.

DD. BECAUSE sections 5 - 10 of the Foreign Marriage Act sets out the same notice and objections regime, and therefore suffers from the same constitutional infirmities.

25. The Petitioner has not filed any such similar petition challenging the Impugned Act in this Hon'ble Court or in any other court.

26. The annexures appended to the petition are the true copies of their respective originals.

PRAYERS

In the premises, this Hon'ble Court may be pleased to issue appropriate declarations, writs, orders and directions as set out below:

(a) Issue a writ in the nature of *mandamus*, or any other appropriate writ, order, or direction declaring that the provisions of solemnisation and registration under the Special Marriage Act, 1954 extend to marriages regardless of the respective partners' gender, sexual orientation, and sexual identity;

(b) Issue a writ in the nature of *mandamus*, or any other appropriate writ, order, or direction declaring that the provisions of solemnisation and registration under the Foreign Marriage Act, 1969 extend to marriages regardless of the respective partners' gender, sexual orientation, and sexual identity;

(c) Issue a writ of *mandamus* or any other appropriate writ, order, or direction, declaring Sections 5, 6, 7, 8, 9, and 10 of the Special Marriage Act, 1954 as unconstitutional, illegal, and void;

(d) Issue a writ of *mandamus* or any other appropriate writ, order, or direction, declaring Sections 5, 6, 7, 8, 9, and 10 of the Foreign Marriage Act, 1969 as unconstitutional, illegal, and void;

(e) 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 PETITIONER, AS DUTY BOUND, SHALL EVER PRAY TO THEIR LORDSHIPS.

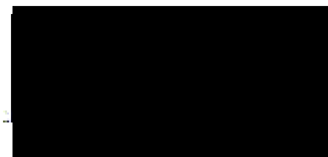
Drafted By: **Filed By**:

Mr. Gautam Bhatia, Adv.

Mr. Utkarsh Saxena, Adv.

Mr. Abhinav Sekhri, Adv.

Ms. Hrishika Jain, Adv.



Place: New Delhi

Date: 13.12.2022

Mr. Shadan Farasat

Advocate for the Petitioners