SYNOPSIS

1. The present petition has been filed on behalf of the Petitioner Nos. 1 and 2, two adult women and citizens of India, who have been in a relationship since 2007, and solemnised their marriage in Denmark in August, 2022. The Petitioners were constrained to leave India in October, 2021 as the legal environment for them to live a life of dignity and freedom was absent, with no recognition of their relationship. They have managed to build a life together in Berlin, Germany, but they wish to come back to India without losing their joint life. The Petitioners now wish to register their marriage under Section 17 of the *Foreign Marriage Act*, 1969 ('**FMA**') so that it may be legally recognized in India, but are unable to do so, due to the exclusionary, discriminatory and unconstitutional requirements of Section 17(2) read with Section 4(c) of the FMA, which only registers marriage between a man and a woman that have been solemnised in a foreign territory. The Petitioners further dream of adopting a child and leading a regular family life in India

2. The Petitioners, both natives of West Bengal, met at the [redacted], West Bengal, where they were enrolled in the [redacted] (Computer Science & Engineering) program. They grew close during the course of their education and began living together as a couple in 2007. In January, 2009, the Petitioner No. 2 moved in with the Petitioner No. 1 at Kolkata, who had moved there for work a few months earlier. The Petitioners lived together, divided domestic responsibilities, and financially supported each other. They shared a desire to raise children together and lead a regular family life in

India. However, legal recognition of their relationship was an impossibility under Indian law and neither had come out about their sexual orientation to their families and friends, out of concern for their safety and well-being. Consequently, they relocated in Bangalore in September, 2015 and live together as a couple.

3. This Hon'ble Court's landmark decision in ***Navtej Johar & Anr. v. Union of India*** (2018) 10 SCC 1 in September, 2018, gave a new ray of hope for the Petitioners who realised that their dream of being together and raising a child was no longer an impossibility anymore. They slowly began the difficult process of coming out to their friends, colleagues and family, which was excruciating and felt deeply unfair. Soon they felt that despite decriminalisation, their relationship had no legal or social sanction in India, and they did not want to spend their best years in the closet pretending to be someone else. Consequently, they decided to move abroad, where they could build a joint life with dignity and freedom. However, these plans were put on hold, due to the lockdown imposed amid the COVID-19 pandemic in March, 2020.

4. In October, 2021, the Petitioners moved to Berlin, Germany on individual visas where they took up jobs as software developers at different companies in Berlin, and began living together as a couple. While the Petitioner No. 1 had disclosed her identity to her mother few months prior, which was met with lot of hostility and disapproval, the Petitioner No. 2 found the courage to inform her family few months after her shift to Berlin, and met with unfortunate disapproval, and allegations of bringing shame to the family. In August, 2022, the Petitioners finally tied the knot in Copenhagen, Denmark in an intimate ceremony, and were ecstatic

that their longstanding relationship was now legal and visible to all, instead of being cloaked in invisibility and secrecy.

5. Soon after, the Petitioners found out that despite being legally married in Denmark and living as a married couple in Berlin, the Petitioners' marriage would not be considered as valid in India, owing to an implicit bar on the registration of same-sex marriages under Section 17(2) read with Section 4(c), i.e., the only marriage considered valid in India was the one between a man and a woman.

6. The FMA was enacted in India in 1969, pursuant to the recommendations of the 23rd Report of the Law Commission of India to enact a new legislation i) to provide for solemnisation of marriages outside India where at least one of the parties thereto is an Indian citizen; ii) to enable them to seek matrimonial relief in Indian courts; and iii) to ensure the validity of such marriages, so far as India is concerned. The legislation intent was to validate marriages solemnised by Indian citizens in foreign countries as far as possible, and not to invalidate them. Denying the Petitioners registration of their marriage under Section 17, FMA solely on the ground of their sexual orientation is impermissible and unconstitutional. The Petitioners submit that Section 4(c) and all other provisions of the FMA, 1954, which do not recognize marriage between people of the same gender and LGBTQIA+ individuals are unconstitutional.

7. This Hon'ble Court in the successive landmark judgments of ***National Legal Services Authority v. Union of India*** [(2014) 5 SCC 538 '***NALSA***'], ***K.S. Puttaswamy v. Union of India*** [(2017) 10 SCC 1], and ***Navtej Johar*** have upheld the fundamental rights

of LGBTQIA+ persons to equality, non-discrimination, freedom of expression, privacy, dignity, autonomy and health guaranteed under Articles 14, 15, 19(1), and 21 of the Constitution. Their exclusion from the institution of marriage and its concomitant status, rights and entitlements that are available to heterosexual couples in India is incompatible with our Constitution.

8. To that end, the Petitioners approach this Hon'ble Court challenging *inter alia* the constitutional vires of Section 17(2) read with Section 4(c) of the FMA to the extent that they do not recognise marriages between LGBTQIA+ couples, and a consequent direction that the words "bride" and "bridegroom" be read as "party" in the context of marriages involving LGBTQIA+ persons. The Petitioners also seek a declaration that the requirements of mandatory notice, domicile requirement, publication of notice, and invitation of objections stipulated by Sections 5, 6, 7, 8 and 10 of the FMA are unconstitutional and be struck down. The Petitioners are further challenging the Regulations 5(2)(a) and (3) read with Schedules II, III, VI and VII of the Adoption Regulations, 2022 framed by the Respondent Nos. 3-4 that exclude same-sex couples from joint adoption under *Juvenile Justice (Care and Protection of Children) Act*, 2015 by requiring the applicant couples to be in a heterosexual marriage for two years. They seek a consequent direction that the reference to an applicant couple's marital status under Regulations 5(2)(a) and (3) of the Regulations be read to include same-sex couples who are validly married in a foreign jurisdiction as well as to include unmarried same-sex couples within the ambit of the term 'spouse' used in Section 57(2) of the JJ Act.

9. The Petitioners are entitled to the fundamental right to marry, which entrenched in the Constitution, and includes the choice of a marital partner. The Constitution protects the ability of each individual to pursue a way of life, including in matters of love and partnership, which are central to their identity and autonomy. Neither the State nor society can intrude into that domain, except for a compelling State interest. The crux of FMA, 1954 is to provide a civil form of marriage to all Indians either based in foreign countries or to register marriages solemnised under foreign laws, including that of the Petitioners. To restrict the fundamental element of decisional autonomy in matters relating to marriage and partnership to heterosexual couples, to the exclusion of LGBTQIA+ persons, would do injustice to the object of the law, i.e., to enable consenting adults to enter into marriage, irrespective of territory, as long as one of the parties is an Indian citizen.

10. Section 4(c) read with 17(2) of the FMA discriminates against LGBTQIA+ persons, including the Petitioners, by excluding them from the procedure of solemnization and registration of their marriage under the FMA. This exclusion turns solely on their sexual orientation, as they meet all other conditions for registration of their marriage. Underlying this exclusion is a sex stereotype that marriage is essentially a union between a *cis man* and a *cis woman*. Section 4(c) and Section 17(2) of the FMA, which do not recognize marriage between the Petitioners, are unconstitutional and discriminatory, in that they deprive the marriage of the LGBTQIA+ couples the validity and recognition under Indian law that is accorded to registered heterosexual marriages under Sections 15 and 17(6) of the FMA. This denial of marital status to the Petitioners, despite a duly solemnized marriage under Danish

law, affects every aspect of their public and private lives in the most material and symbolic way and the Petitioners are made to feel "*lesser beings*" in India, as if their love and relationship is not enough or equal to the heterosexual couples.

11. The Petitioners are further entitled to a fundamental right to found a family and to motherhood under Article 21 of the Constitution. To deny the Petitioners the right to apply for adoption under the Regulations solely on the basis of their sexuality is patently discriminatory, all the more since the Petitioners have already validly married under Danish law, which is not recognised in India. The impugned Regulations place same-sex prospective adoptive parents who have been married under foreign law at a disadvantage compared to heterosexual married couples in matters of joint adoption, solely on the basis of the former's sexual orientation. While heterosexual married couples face no challenge proving that they are a married couple under Indian law, this is virtually an impossibility for prospective adoptive parents like the Petitioners whose marriage is not legally recognized in India. If they adopt under the impugned provisions, one of the Petitioners must forsake a legal relationship with the child, which is antithetical to their right to a family life and motherhood that are facets of the right to life as well as to the directive principle of state policy of giving children opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and protecting childhood and youth, *inter alia,* from material abandonment.

12. Adoption under the JJ Act is intended to serve as a mechanism to rehabilitate and reintegrate a particular class of children, who have a fundamental right to be adopted, to have a name and a family

under Article 21 of the Constitution. To exclude an entire class of parents from the pool of adoptive parents, solely on the basis of their sexual orientation, without any regard to the best interest of the child, which should be the guiding principle behind the Regulations, is irrational, unreasonable and manifestly arbitrary, and thus violative of Article 14. Be that as it may, Section 57(2), JJ Act does not even mandate that marriage is essential for joint adoption, by using broad words like 'couple', and 'spouses', and not 'married couple' or 'husband' and 'wife'.

13. The Petitioners deeply desire to move back to India and settle down here, while retaining their marital status and joint life as well as to adopt a child as soon as possible. They have approached this Hon'ble Court with enormous hope that their marriage under Danish law would be as valid in India as it would be for a heterosexual couple, provided the other essential conditions under FMA are met, and they would not be treated as single unpartnered individuals who are strangers to each other under the Indian law. Similarly, their longstanding wish to adopt a child and provide a stable, loving and caring family to a child in need of a family cannot be denied, solely on the ground of their sexuality. They should not have to choose between their home country and their fundamental rights to marriage, family and motherhood.

LIST OF DATES

1753	The first prominent legislative exercise with respect to marriage was enacted in Britain, titled, '*An Act for the better Preventing of Clandestine Marriages,*' which intended to regulate clandestine marriages, wherein young men and women were running away to marry each other against parental wishes. The Act contained provisions mandating that notice of intended marriage be published three Sundays prior to the marriage.
27.06.1892	The *Foreign Marriage Act*, 1892 ('**1892 Act**') was enacted by the British Parliament to consolidate the laws relating to the marriage of British subjects outside the British Kingdom. Marriages solemnized in a foreign territory in accordance with the 1892 Act would be as valid as a marriage solemnised in the United Kingdom. The facets of notice, domicile proof, publication of notice and caveat of the 1753 law were incorporated into the 1892 Act that stipulated a 7-day domicile requirement, in order to give notice of the intended marriage, publication of such notice by the Marriage Officer for at least 14 days before the marriage could be solemnised.

12.03.1903	The 1892 Act was modified to the extent of the notice procedure, vide the *Foreign Marriage Order in Council*, *1903.*
1903	The 1892 Act was then introduced into India, vide the Act No. XIV of 1903 enacted to give effect to the Foreign Marriage Order in Council, 1903. The said Act stipulated a domicile requirement of three consecutive weeks and publication of notice of intended marriage four days before the marriage could be solemnised.
09.10.1954	The Special Marriage Act, 1954 was passed and made enforceable from 01.01.1955, with the intent of the law to override the rigours of religious marriage evident in Section 4, which states, "*Notwithstanding anything contained in any other law for the time being in force relating to the solemnisation of marriages…"*
August, 1962	The Law Commission published its 23rd Report proposing enactment of the Foreign Marriage Act i) to provide for solemnisation of marriages outside India where at least one of the parties thereto is an Indian citizen; ii) to enable them to seek matrimonial relief in Indian courts; and iii) to ensure the validity of such marriages, so far as India is concerned.

31.08.1969	The Foreign Marriage Act, 1969 ('**FMA**') was enacted by the Parliament to remove uncertainty relating to foreign marriages where at least one party was an Indian citizen.
20.11.1989	The UN General Assembly adopted the United Nations Convention on the Rights of Children, 1989 ('**CRC**') a human rights treaty on the rights of children. Article 3 read with Article 21 stipulate the best interests of the child as the paramount consideration for State Parties in all actions concerning children including adoption.
30.12.2000	The *Juvenile Justice (Care and Protection of Children) Act*, 2000 was enacted, *inter alia*, in discharge of India's obligations under the CRC ratified by India on 11th December, 1992. The said Act ushered in landmark changes to the law relating to adoption by setting in place a secular system of adoption. Adoption under the said Act was to serve as a mechanism to rehabilitate and reintegrate a particular class of children.
2004-2007	The Petitioners, both natives of West Bengal, met at the [redacted], West Bengal, where they were enrolled in the [redacted] (Computer Science & Engineering) program. They grew close

during the course of their education and began living together as a couple in 2007.

2009-2015 In January, 2009, the Petitioner No. 2 moved in with the Petitioner No. 1 at Kolkata, who had moved there for work a few months earlier. The Petitioners lived together, divided domestic responsibilities, and financially supported each other. They shared a desire to raise children together and lead a regular family life in India. By all accounts, their joint life was like a married couple's. The longer the Petitioners stayed together, the keener they became for legal and social recognition of their relationship through marriage, and to raise a child, through adoption. However, they abandoned the hope of having a family at the time, as legal recognition of their relationship was an impossibility under Indian law and neither had come out about their sexual orientation to their families and friends, out of concern for their safety and well-being.

Physically and mentally exhausted with this constant push and pull from their family members, the Petitioners decided to relocate to another city. Shortly before doing so, the Petitioner No. 1 first came out to her close friends and colleague.

15.04.2014	This Hon'ble Court in ***National Legal Services Authority v. Union of India*** [(2014) 5 SCC 538 ('***NALSA***')], passed a landmark judgment holding that Articles 14, 15, 16, 19(1)(a) and 21 required the State to recognise transgender persons in their self-identified gender, as a male, female or transgender person, without the insistence of sex reassignment surgery. In light of the historical exclusion of transgender persons from the law and participation in the political, economic, social and cultural landscape of the country, this Hon'ble Court saw fit to pass a series of specific directions, which included that transgender persons had the right to be recognised in their self-identified gender; the implementation of reservations in educational institutions and public employment; and ensuring the provision of appropriate medical care and the implementation of government programs aimed at the reduction of stigma and prejudice against transgender persons.
September 2015	When the Petitioner No. 2 relocated to Bangalore to join a prominent technology company as a Senior Software Development, the Petitioner No. 1 joined her in Bangalore soon after.

31.12.2015	The *Juvenile Justice (Care and Protection of Children) Act*, 2015 (‘**JJ Act**’) was enacted to replace the Juvenile Justice (Care and Protection of Children) Act, 2000 to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in various international instruments, including the CRC and the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, ratified on 6th June, 2003. The JJ Act is a secular legislation to facilitate adoption of children in need of care and protection and children in conflict with law by eligible persons, irrespective of their religion.
06.09.2018	This Hon’ble Court read down Section 377, Indian Penal Code, 1860 in ***Navtej Johar & Anr. v. Union of India*** [2018 10 SCC 1 (‘***Navtej Johar***’)], and upheld the fundamental rights of the LGBTQIA+ persons, including the Petitioners.
September, 2018-March, 2020	Feeling emboldened by the news of ***Navtej Johar,*** the Petitioner No. 1 came out to her colleagues in Bangalore as well and gradually to acquaintances and extended family. However, the Petitioners were

	acutely aware that without legal sanction, their relationship would remain vulnerable to all kinds of risks. Out of pure necessity, the Petitioners began looking for a LGBTQIA+ friendly country to move to and get married. But these plans were put on hold due to the COVID 19 pandemic.
October, 2020	When the Petitioners travelled to West Bengal for the last rites of the Petitioner No. 1's father, the Petitioner No. 1 was crestfallen to find her relatives treating Petitioner No. 2 'just a friend' and not life partner. She also felt immense grief at not having been able to disclose a fundamental part of her identity to her father during his lifetime.
June, 2021	The Petitioner No. 1 came out to her mother and then to her aunty. Her mother was disapproving. She stated that she would never accept the Petitioners' relationship and that '*Section 377 should have stayed*' to prevent such a relationship. She even suggested a 'lavender marriage' to Petitioner No. 1 to keep up the pretense of being married to a man in public, while continuing her relationship with Petitioner No. 2 in private.

	The experience served to confirm that the Petitioners had no chance of leading a peaceful family life that they had long dreamt of by remaining in India.
October, 2021-February, 2022	As a step towards obtaining legal recognition of their relationship, the Petitioners moved to Berlin, Germany, where they took up jobs as software developers.
	The Petitioner No. 2 came out to her immediate family about her sexual orientation and her decade long relationship with Petitioner No. 1, whom she intended to marry. Her mother too had a hostile reaction and essentially asked her daughter to hide her identity and an integral part of her life from their family. Tired of being discreet about their relationship, the Petitioners made a broader public announcement about their relationship on Facebook in February, 2022.
July, 2022	The Petitioners sent out wedding cards to their family, relatives, and friends which went unacknowledged for the most part.
16.08.2022	The Petitioners finally tied the knot in Copenhagen, Denmark in an intimate ceremony. They were ecstatic that their

	relationship was finally legal and visible to all, instead of being cloaked in invisibility and talked about in hushed tones and snide remarks.
23.09.2022	The Ministry of Women and Child Development notified the Adoption Regulations, 2022 framed by Respondent No. 3 ('**Regulations**'). Regulations 5(2)(a) and 5(3) read with Schedules II, III, VI and VII of the Regulations exclude same-sex couples from joint adoption under JJ Act by requiring applicant couples to be in a heterosexual marriage for two years.
January, 2023	Though they feel immense gratitude that their life in the European Union has afforded them the facility to finally marry, they miss their homes and want to return to India to lead a regular family life and adopt a child, like any other married couple, amongst their own. However, they are prevented from doing so by the legal impediments under FMA and the Regulations.
	HENCE THIS PETITION.

IN THE HON'BLE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. _____ OF 2023

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

(O. XXXVIII, R. 7, Supreme Court Rules, 2013)

IN THE MATTER OF:

1. AMBURI ROY
[redacted]
…PETITIONER NO. 1

2. APARNA SAHA
[redacted]
…PETITIONER NO. 2

VERSUS

1. UNION OF INDIA
Through the Secretary,
Ministry of Law and Justice,
A-Wing, Shastri Bhawan,
New Delhi-110001 …RESPONDENT NO. 1

2. UNION OF INDIA
Through the Foreign Secretary,
Ministry of External Affairs,
South Block, Raisina Hill,
New Delhi – 110011 …RESPONDENT NO. 2

3. UNION OF INDIA
Through the Secretary,
Ministry of Women and Child Development
Shastri Bhawan, A - Wing,
Dr. Rajendra Prasad Road,
New Delhi-110001 …RESPONDENT NO. 3

4. CENTRAL ADOPTION RESOURCE AUTHORITY
Through the Member Secretary and CEO
Ministry of Women & Child Development
West Block 8, Wing 2
1st Floor, R.K. Puram,
New Delhi – 110066 …RESPONDENT NO. 4

IN THE MATTER OF:
WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA FOR THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF THE PETITIONERS UNDER ARTICLES 14, 15, 19(1)(a), 21, AND 25 OF THE CONSTITUTION

AND IN THE MATTER OF:
THE CONSTITUTIONAL VIRES OF SECTIONS 4(c), 5, 6, 7, 8, 10 AND 17(2) OF THE FOREIGN MARRIAGE ACT, 1969

AND IN THE MATTER OF:
THE CONSTITUTIONAL VIRES OF THE REGULATIONS 5(2)(a), 5(3) AND SCHEDULES II, III, VI AND VII OF THE ADOPTION REGULATIONS, 2022

TO,
THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUSTICES OF THE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONERS ABOVE-NAMED

MOST RESPECTFULLY SHOWETH:

1. The present petition has been filed on behalf of the Petitioner Nos. 1 and 2, two adult women and citizens of India, who have been in a relationship since 2007, and solemnised their marriage in Denmark in August, 2022. The

Petitioners were constrained to leave India in October, 2021 as the legal environment for them to live a life of dignity and freedom was absent, with no recognition of their relationship. They have managed to build a life together in Berlin, Germany, but they wish to come back to India without losing their joint life. The Petitioners now wish to register their marriage under Section 17 of the *Foreign Marriage Act*, 1969 ('**FMA**') so that it may be legally recognized in India, but are unable to do so, due to the exclusionary, discriminatory and unconstitutional requirements of Section 17(2) read with Section 4 (c) of the FMA, which only registers marriage between a man and a woman that has been solemnised in a foreign territory. The Petitioners further dream of adopting a child and leading a regular family life in India. To that end, the Petitioners approach this Hon'ble Court challenging *inter alia* the constitutional vires of Section 17(2) read with Section 4(c) of the FMA to the extent that they do not recognise marriages of LGBTQIA+ couples, and a consequent direction that the words "bride" and "bridegroom" be read as "party" in the context of marriages involving LGBTQIA+ persons. The Petitioners also seek a declaration that the requirements of mandatory notice, domicile proof, publication of notice, and invitation of objections stipulated by Sections 5, 6, 7, 8 and 10 of the FMA are unconstitutional and be struck down. The Petitioners are further challenging the Regulations 5(2)(a) and (3) read with Schedules II, III, VI, and VII of the Adoption Regulations, 2022 ('**Regulations**') framed by the Respondent Nos. 3-4 that

exclude same-sex couples from joint adoption under the *Juvenile Justice (Care and Protection of Children) Act*, 2015 ('**JJ Act**') by requiring the applicant couples to be in a heterosexual marriage for two years. They seek a consequent direction that the reference to an applicant couple's marital status under Regulations 5(2)(a) and (3) of the Regulations be read to include same-sex couples who are validly married in a foreign jurisdiction as well as to include unmarried same-sex couples within the ambit of the term 'spouse' used in Section 57(2) of the JJ Act.

2. This petition raises several substantial questions of law of constitutional and public importance as they concern the protection of fundamental rights of LGBTQIA+ persons to equality, human dignity, privacy and personhood, and the right to found a family, as set out hereunder:
   a. Whether LGBTQIA+ persons have a fundamental right to marry and found a family under the Constitution, on equal terms as available to the heterosexual citizens of India?
   b. Whether the blanket exclusion of LGBTQIA+ persons from registration of marriage under Section 17 of the FMA, violates their fundamental rights to equality, non-discrimination, freedom of expression, privacy, dignity, autonomy and freedom of conscience guaranteed under Articles 14, 15, 19(1)(a), 21 and 25 of the Constitution?
   c. Whether the non-recognition of a same-sex marriage under the FMA duly solemnized under foreign law between two Indian citizens violates their fundamental rights to equality, non-discrimination, freedom of expression, dignity, and

family guaranteed under Articles 14, 15, 19(1), 21 and 25 of the Constitution?

d. Whether the provisions of domicile proof, notice of intended marriage, publication of notice, inviting objections and inquiry by the Marriage Officer under Sections 5, 6, 7, 8, and 10 of the FMA are violative of the fundamental rights of equality, freedom, privacy and security of the individuals wanting to marry?

e. Whether the references to marital status of applicant couples in the Regulations 5(2)(a) and (3) read with Schedules II, III, VI and VII of the Regulations are *ultra vires* the JJ Act inasmuch as they exclude married LGBTQIA+ couples from joint in-country adoption?

f. Whether the exclusion of LGBTQIA+ couples from joint adoption is violative of the fundamental rights of equality, dignity and family guaranteed under Articles 14, 15, and 21 of the Constitution?

g. Whether Regulation 5 is irrational, arbitrary and discriminatory inasmuch as it accords primacy to the sexual orientation of prospective adoptive parents for the purpose of joint adoption, but not for single parent adoption?

h. Whether the exclusion of LGBTQIA+ couples from joint adoption violates the best interest of the child principle and the object of the JJ Act?

i. Whether the Constitution allows an entire class of LGBTQIA+ persons to be left out of the legal regime of status, rights and benefits available to heterosexual married couples?

PARTIES

3. The Petitioners are citizens of India from West Bengal who began living as a couple in 2007. They moved to the European Union in October, 2021 for the dual purposes of employment in the tech industry and of getting legal recognition of their longstanding relationship. The Petitioners got married in Denmark on 16.08.2022, and have been living in Berlin as a married couple since then. They have a deep desire to move back to their country in India, adopt a child, and lead a happy family life, but are prevented from doing so on account of discriminatory and exclusionary laws that prevent their marriage from being recognized as valid in India and render them ineligible to adopt a child as a couple solely due to their sexual orientation.

4. The Respondent No. 1 is the Union of India through the Secretary, Ministry of Law and Justice, the nodal ministry responsible for deciding the questions of marriage, while the Respondent No. 2 is the Foreign Secretary, Ministry of External Affairs, Government of India, the ministry responsible for implementing the FMA. The Respondent No. 3 is the Ministry of Women and Child Development, Government of India, the nodal ministry for the implementation of the JJ Act, while the Respondent No. 4 is Central Adoption Resource Authority ('**CARA**'), through its Member Secretary and CEO, which is a statutory authority and the nodal body to facilitate and oversee adoption of children under the JJ Act.

FACTS LEADING UP TO THE PETITION

5. The Petitioners have deep roots in West Bengal where they spent their formative years, including schooling and college years. The Petitioner No. 1 was born in [redacted], West Bengal in

November, 1985 and the Petitioner No. 2 was born in [redacted], West Bengal in December, 1986. Both completed their primary education in their respective hometowns.

6. The Petitioners met each other during their higher education in the [redacted] (Computer Science & Engineering) program at the [redacted], West Bengal in 2004. They grew close during the course of their education and began living together as a couple from 2007 onwards. They have led a joint life ever since, moving together as a couple to different cities for work in the last 15 years. In January, 2009, the Petitioner No. 2 moved in with the Petitioner No. 1 at Kolkata who had moved to the city to work as a PHP Programmer a few months earlier. In fact, when the Petitioners stayed in Kolkata from 2009 to 2015, they would frequently visit the Petitioner No. 1's house, wherein the Petitioner No. 1's mother and other relatives knew the Petitioner No. 2 very well as a 'close friend' of the Petitioner No. 1, though it was clear that their relationship was much more than 'friendship'. They were even manipulated for years by their families, terming their sexual orientation as their weakness. The Petitioners were physically and mentally exhausted with this constant push and pull from their family members, and decided to relocate to another city. In September, 2015, when the Petitioner No. 2 relocated to Bangalore to join a prominent technology company as a Senior Software Development, the Petitioner No. 1 joined her in Bangalore soon after.

7. The longer the Petitioners stayed together, the keener they became for legal and social recognition of their relationship. Marriage seemed like the next inevitable step as both the Petitioners shared

a desire to have kids even before the two moved to Bangalore in 2015. However, they felt forced to abandon the hope of having a family at the time, as neither had come out about their sexual orientation to their families and friends, out of concern for their safety and well-being. They feared losing their jobs as well as physical harm upon making their relationship public. To minimize the risks of being public with their same-sex relationship, the Petitioners considered the idea of adopting children to whom they would be 'mothers in private', but 'aunties in public'. They quickly abandoned this notion of leading a double life, not only because it was stressful, but also because the Petitioners were not eligible to adopt as a couple under the laws of India.

8. It was only 8 years into their relationship that the Petitioners began the gradual and arduous process of coming out to their community. The Petitioner No. 1 first came out to her close friends and colleagues in Kolkata in 2015, shortly before moving to Bangalore. In September, 2018, feeling emboldened by the news that this Hon'ble Court had read down Section 377, Indian Penal Code, 1860 in ***Navtej Johar & Anr. v. Union of India*** [(2018) 10 SCC 1 ('***Navtej Johar***')], the Petitioner No. 1 came out to her colleagues in Bangalore as well. She found it difficult to disclose and explain the most integral part of her life, after having hidden it for so long. The ordeal of coming out only to be dismissed or received with incredulity by friends and colleagues also felt deeply unfair, being one that a heterosexual couple would rarely have to endure.

9. But the Petitioners were determined to be open about their commitment to each other. The Petitioner No. 1 slowly took to referring to the Petitioner No. 2 as her 'girlfriend' in conversations

with acquaintances and came out to a cousin in 2019. However, soon they realised that these piecemeal measures were not enough, as despite decriminalisation in *Navtej Johar*, their relationship did not enjoy any legal or social sanction in India, thereby making them vulnerable to all kinds of risks, including family interventions. The Petitioners thus began looking for a LGBTQIA+ friendly country to move to and get married, in order to live a life of togetherness with dignity and freedom. They were not keen to leave India, which was their home in all sense of the word, but they felt compelled to look for a place to settle down, where they did not have to hide themselves and their basic safety was not in jeopardy all the time. However, these plans were put on hold, due to the lockdown imposed amid the COVID-19 pandemic in March, 2020.

10. In October, 2020, the Petitioners travelled to West Bengal for the last rites of the Petitioner No. 1's father. The Petitioner No. 1 was grief stricken, since she wanted to inform her father about her sexual identity, but did not get a chance to do so. The Petitioner No. 1's grief over the loss of her father was exacerbated by the fact that her relatives were treating the Petitioner No. 2 as 'just a friend' and not her life partner. The Petitioners felt distraught that a relationship of this long duration and nature was invisible before their family, which was unbearable for them to accept.

11. The Petitioners began to actively explore options under the laws of India to adopt a child, but were dismayed that they continued to be ineligible to adopt as a couple. The only option available was for one person to legally adopt a child and for the other to be a *de facto* parent without any legal relationship with the adopted child. The Petitioners were unwilling to have a such an arrangement,

which was at odds with the family life that they envisioned for their future. They thus realised that even if they would be able to live together in India, albeit without legal recognition, they would still be unable to adopt a child as a couple, thereby denuding them their deep desire to raise a child together and be a family.

12. In June, 2021, the Petitioner No. 1 came out to her mother, who reacted in a hostile and disapproving manner stating that she would never accept their relationship or the Petitioner No. 2 as the partner of the Petitioner No. 1. She even suggested 'lavender marriage', i.e., marrying a gay man so that both can pretend to be a married couple before the world, while continuing their same-sex relationships in private, which infuriated the Petitioner No. 1. The Petitioner No. 1's mother even went to the extent of saying that "*Section 377 should have stayed*", so that these relationships would not continue, and asked the Petitioner No. 1 to marry any man, but not the Petitioner No. 2. The Petitioner No. 1 was heartbroken with this reaction, and realised that they were on their own, with no family or social support, and again began to look for places to settle outside India.

13. In October, 2021, as a step towards obtaining legal recognition of their relationship, the couple moved to Berlin, Germany on individual visa where they took up jobs as software developers at different companies and continued to live together as a couple.

14. At a safe distance from India, the Petitioner No. 2 finally came out to her immediate family about her sexual orientation, and disclosed to them about her decade long relationship with the Petitioner No. 1 and their intention to marry and live as a couple in Berlin. Unfortunately, the Petitioner No. 2's mother too had a

hostile reaction, and stated that 'she wished she did not know', and was more concerned about the family's reputation and the reaction of the relatives than her own daughter's well-being. She categorically told the Petitioner No. 2 that she could do what she wanted in Berlin but their relatives in Kolkata should not find out, thereby essentially asking the Petitioner No. 2 to hide her identity and an integral part of her life from their family in West Bengal that was untenable for the Petitioner No. 2. She was proud of her identity and relationship with the Petitioner No. 1, and would no longer hide herself and her relationship.

15. Accordingly, having hitherto disclosed their relationship on an individual one-on-one basis, the Petitioners made a broader public announcement about their relationship on Facebook in February, 2022. Overall, friends and colleagues on Facebook were quite accepting and sent them warm wishes, but the same warmth did not ensue from their respective families, and they were met with a deliberate silence from most family members.

16. In July, 2022, the Petitioners sent out wedding cards to their family, relatives, and friends, hoping against hope that their relationship would be finally accepted by their family and friends, and they would be treated as any other married couple. However, their families continued to ignore their relationship and their proposed marriage, and treated them as single persons, and not as a partnered one. In fact, one uncle of the Petitioner No. 1 left the family WhatsApp group when she posted her wedding card on the group, while the other relatives would intentionally like only those photos on social media where the Petitioner No. 1 was with other persons and not with the Petitioner No. 2. This intentional invisibilisation rankled the Petitioners a lot, as they realised that

no matter what, their family would not accept them or their relationship, till the laws in India change. The Petitioner No. 2's family even reacted aggressively stating that the Petitioners were bringing shame to their families, and if the word got out, it would ruin their societal reputation. They even advised the Petitioner No. 2 not to send the wedding card by post, as it might get in the hands of other persons and their relationship would be disclosed, but the Petitioner No. 2 went ahead and posted the cards.

17. On 16.08.2022, the Petitioners finally tied the knot in Copenhagen, Denmark in an intimate ceremony, but unfortunately, none of their family members were present. Though a bit disappointed, the Petitioners were ecstatic that they could finally solemnise their marriage in a country where their relationship was legal and visible to all, instead of being cloaked in invisibility and talked about in hushed tones and snide remarks. A true copy of the wedding invitation is annexed as **Annexure P-1 (pages __ to __)**. A true copy of photos of the wedding are annexed as **Annexure P-2 (pages __ to __)**. An apostilled marriage certificate was issued to the Petitioners by the Registrar, Copenhagen Municipality, a true copy of which is annexed as **Annexure P-3 (pages __ to __)**.

18. After their wedding in August, 2022, the Petitioners decided to get their marriage registered under the FMA, since being Indian citizens, the Petitioners wanted their marriage to be considered valid in India too. However, they found out that they could not register their marriage under the FMA, owing to an implicit bar on the registration of same-sex marriages under Section 17(2) read with Section 4(c), i.e., the only marriage considered valid in India was the one between a man and a woman. The Petitioners were devastated that despite being legally married in Denmark and

living as a married couple in Berlin, the Petitioners' marriage would not be considered as valid in India. Consequently, they are barred from jointly adopting a child due to Regulations 5(2) and 5(3) read with Schedules II, III, VI and VII of the Regulations framed under the JJ Act that exclude married same-sex couples from joint in-country adoption. A true copy of relevant extracts of the Regulations is annexed herewith as **Annexure P- 4 (pages __ to __)**.

19. The Petitioners have had very limited interaction with their families after their marriage in August, 2022, since their families want to be distant from them and their choices, as they are pre-occupied with protecting their so-called family reputation.

20. From the very beginning, the Petitioners have supported each other financially, even opening a joint bank account in the State Bank of India. However, their other bank accounts, investments and properties remain in their individual names, since they were told that only persons related by blood or marriage were allowed to be joint holders. They have also divided up their domestic responsibilities, wherein the Petitioner No. 2's job is to cook for the two, and the Petitioner No. 1's to keep their house clean. By all accounts, the Petitioners are in a long term committed relationship characterised by mutual commitment, support, responsibility, devotion and care, and based on a deep emotional attachment.

    The Petitioners are highly qualified law abiding citizens who identify closely with their culture and community in West Bengal. They miss their home food, culture and people and are eager to return to India, but at the same time, they do not want to be treated

as an unmarried couple in India, owing to the aforementioned legal impediments under the FMA and the Regulations.

VALIDITY OF FOREIGN MARRIAGES UNDER THE FMA

21. The legislative history of the FMA enacted in 1969 can be traced back to the English law, the *Foreign Marriage Act*, 1892 ('**1892 Act**') that was enacted by the British Parliament to consolidate the laws relating to the marriage of British subjects outside the United Kingdom. It provided that all marriages between parties, one of whom at least was a British subject solemnised in the manner provided in the 1892 Act in any foreign territory would be valid as if it was solemnised in the United Kingdom. The procedure for solemnisation included a notice of intended marriage to the Marriage Officer in the district where the parties had resided for at least 7 days, publication of such notice by the Marriage Officer for at least 14 days before the marriage could be solemnised, and caveat against marriages. These requirements of notice, domicile proof, publication of notice, and inviting objections were in fact traced to the English law of 1753 intended to prevent 'clandestine marriages', and had then consequently been incorporated in the Special Marriage Act, 1872 in India. These provisions have continued till today under the FMA. A true copy of the 1892 Act is annexed as **Annexure P-5** (**pages __ to ___**). The 1892 Act was modified to the extent of the notice procedure, vide the *Foreign Marriage Order in Council*, 1903, a true copy of which is annexed as **Annexure P-6** (**pages __ to ___**).

22. Consequently, the 1892 Act was then introduced into India, vide the Act No. XIV of 1903, wherein the 1892 Act was made applicable to all British subjects in the territory of British India. It

also provided for a notice of intended marriage in a district where one of the parties had resided for a minimum period of three consecutive weeks, and then the notice had to be published four days before the marriage could be solemnised. A true copy of Act No. XIV of 1903 is annexed as **Annexure P-7** (**pages __ to ___**).

23. In post-independence India, the political establishment was keen on reforming not just the religious personal laws, especially the Hindu personal law, but also on strengthening the secular framework of marriage under *Special Marriage Act*, 1954 ('**SMA**'), which was open for all Indians, irrespective of their religious affiliation. At the time of its enactment in 1954, Section 4(e), SMA provided that "*where the marriage is solemnised outside the territories to which the Act extends, both parties should be citizens of India domiciled in the said territories*." When the SMA was being deliberated, a suggestion was made that SMA should cover even those marriages, where one of the parties is an Indian citizen, i.e., marriages either in foreign territories or with foreign nationals involving Indian citizens. At that time, Mr. C.C. Biswas, the then Law Minister had assured that the Parliament would bring a separate legislation on the issue of foreign marriages, and referred the matter to the Law Commission of India for consideration and recommendations.

24. In August, 1962, the 23rd Report of the Law Commission ('**Law Commission Report**') proposed the Foreign Marriage Act i) to provide for solemnisation of marriages outside India where at least one of the parties was an Indian citizen; ii) to enable them to seek matrimonial relief in Indian courts; and iii) to ensure the validity of such marriages, so far as India was concerned. A true copy of

the Law Commission Report is annexed herewith as **Annexure P-8 (pages __ to __)**.

25. In August,1969, FMA was enacted by the Parliament in India to remove uncertainty relating to foreign marriages where one party was an Indian citizen. FMA was intended to operate closely with the SMA, which was enacted to provide a secular institution of marriage. The Law Commission Report recommended enacting a separate legislation that would not be self-contained, but would incorporate Chapters IV, V, VI, and VII of the SMA by reference, concluding that the '*usual objection to referential legislation – that it often leads to ambiguity – will not apply in this case. For the purposes of matrimonial relief, there is hardly any difference between a foreign marriage solemnized under the proposed law and a marriage solemnized in India under the Special Marriage Act, 1954*' The Statement of Objects and Reasons as well states that FMA provides for an enabling form of marriage more or less on the same lines as the SMA.

26. The FMA deliberately retains the conditions of capacity and essential validity set out in the SMA, though it applies to marriages with a foreign element. In order for a marriage to be solemnized under the FMA, it must satisfy the conditions of capacity and essential validity in Section 4. These conditions are that the parties must be unmarried, of sound mind, beyond the degrees of prohibited relationship and of the minimum age required to marry. Clause (c) prescribes the minimum age of a 'bride' and 'bridegroom' in keeping with the typical notion of marriage occurring between a man and a woman. In order to ensure a high degree of international validity and consistency with the law of place of celebration of the marriage, the Marriage Officers are

authorized to refuse solemnization of a marriage if it is inconsistent with international law or the comity of nations or prohibited by any law in force in the foreign country where the marriage is to be solemnized, under Sections 11(1) and (2) of the FMA.

27. Sections 5-10, FMA lay down the procedure for notice of intended marriage, publication of notice, and objections to be received to the said marriage, in the following manner:

> *"5.Notice of intended marriage.—When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the First Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given, and the notice shall state that the party has so resided.*
>
> *6. Marriage Notice Book.—The Marriage Officer shall keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the "Marriage Notice Book", and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.*
>
> *7. Publication of notice.—Where a notice under section 5 is given to the Marriage Officer, he shall cause it to be published—*
> *(a) in his own office, by affixing a copy thereof to a conspicuous place, and*
> *(b) in India and in the country or countries in which the parties are ordinarily resident, in the prescribed manner.*
>
> *8. Objection to marriage.—*
> *(1) Any person may, before the expiration of thirty days from the date of publication of the notice under section 7, object to the marriage on the ground that it would contravene one or more of the conditions specified in section 4. Explanation.—Where the publication of the notice by affixation under clause (a) of section 7 and in the prescribed manner under clause (b) of that section is on different dates, the period of thirty days shall, for the purposes of this sub-section, be computed from the later date.*
> *(2) Every such objection shall be in writing signed by the person making it or by any person duly authorised to sign on his behalf, and*

shall state the ground of objections; and the Marriage Officer shall record the nature of the objection in his Marriage Notice Book.

10. Procedure on receipt of objection.—
(1) If an objection is made under section 8 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection in such manner as he thinks fit and is satisfied that it ought not to prevent the solemnization of the Marriage or the objection is withdrawn by the person making it.

(2) Where a Marriage Officer after making any such inquiry entertains a doubt in respect of any objection, he shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government; and the Central Government, after making such further inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Officer, who shall act in conformity with the decision of the Central Government."

28. In effect, Sections 5 to 7 set out the procedure for publishing a notice of the intended marriage. Notice of the marriage has to be given to the Marriage Officer in the district where at least one of the parties has resided for the preceding 30 days. The Marriage Officer is required to publish the notice of the intended marriage in a conspicuous place in his own office as well as in India and in the country where the parties ordinarily reside. Section 8 grants a window of 30 days from the publication of the notice for objections to the marriage. Section 9 permits a marriage to be solemnized after the expiration of the objection period, in case no objection is received. Section 10 sets out the powers of the Marriage Officer in case an objection is received.

29. Sections 12 and 13 further set out the form and place of solemnization along with mandatory declarations. Importantly, under the FMA, the form of solemnization of the marriage is left to the parties to decide under Section 13(2), so long as they make the binding statement prescribed under the proviso. In doing so,

the law permits the parties to marry in accordance with their own wishes, without making any religious or cultural ritual a precondition to the marriage. Upon solemnization, a certificate of the marriage is to be entered into the Marriage Certificate Book under Section 14, serving as conclusive evidence of the solemnization of the marriage under the FMA. Section 15 affirms that the marriages so solemnized would be recognized as valid by the courts in India.

30. Chapter III provides for the registration of marriages solemnized under any other foreign law so that they may be recognized as valid by courts in India. Section 17(6) provides that marriages registered under Section 17 shall be deemed to have been solemnized under the FMA. Read with Section 15 of the FMA, registered marriages are regarded as good and valid in law in India. Section 17(2) prohibits registration of a marriage that does not satisfy the conditions set out in Section 4, one of which is Section 4(c), i.e., the minimum age requirement of the 'bridegroom' and the 'bride', thereby evincing that though the marriage of a same-sex couple might have been duly solemnized under foreign law, it would be ineligible for registration under the FMA and denied validity in India.

31. Chapter IV provides for matrimonial relief in respect of foreign marriages solemnized under the FMA or under any foreign law. The reliefs under Chapters IV (Consequences of Marriage under SMA), V (Restitution of Conjugal Rights and Judicial Separation), VI (Nullity of Marriage and Divorce) and VII (Jurisdiction and Procedure) of the SMA are available to marriages solemnized under the FMA or under other foreign law, subject to other provisions of Section 18. Section 18(1) unambiguously entitles

couples whose marriages have been solemnized or are deemed to be solemnized under the FMA to avail of the relief under Chapters IV, V, VI and VII of the SMA. However, under Section 18(4), the SMA cannot be the law of first resort for all other marriages if the relief in respect of these marriages is available under their personal laws. Consequently, a marriage that is not registered under the FMA is automatically governed by personal laws of the parties, which is a clear departure from the secular nature of the FMA.

32. The Law Commission Report makes a reference to the rules of private international law so as to ensure as far as possible that the validity of the marriage can be recognised in other countries, besides India. It is in aid of this tightrope act that Section 18(1) Explanation (ii) exempts foreign marriages not solemnized under the FMA and those deemed to be solemnised under Section 17 from being considered void under Section 24, SMA. The explanatory note in respect of this provision states that care had been take to ensure that the validity of marriages solemnized under other laws was not affected by the FMA, but if such marriage was registered in contravention of Section 17(2), i.e., the essential conditions of marriage, then such registration would have no effect. The anxiety to avoid invalidating foreign marriages not solemnized under the FMA is reaffirmed in Section 27, which states that the FMA does not in any way affect the validity of a marriage solemnized in a foreign country otherwise than under the Act. This was added by way of abundant caution to allow citizens the freedom to solemnize their marriage in a foreign country in a mode of their choosing, without it being invalidated by the FMA.

33. Chapter VI contains a third mode for recognition of foreign marriages in India. Section 23 provides that the Central

Government may notify such marriages solemnized under the law of a foreign country, whose provisions that are similar to those in the FMA, to be recognised by courts in India as valid. Thus, there exists a clear legislative intention not to invalidate marriages duly solemnised under foreign law by the Indian citizens.

IMPUGNED PROVISIONS OF THE FMA – SECTION 17(2) READ WITH SECTION 4(C)

34. Chapter II of the FMA sets out the procedure for solemnization of foreign marriage. Section 4 stipulates the essential conditions of marriage. While Section 4 further mentions marriage between any "two parties", the expectation of one party being male and the other female, is evident in Section 4(c), which states:

> *"the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of marriage."*

35. This is reinforced by the use of gendered terms in the First and Second Schedule, including 'widow', 'widower', 'bride' and 'bridegroom', as well as the text of the declarations to be made by the parties under the proviso to Section 13(2). As set out more elaborately hereinafter, the Petitioners submit that Section 4(c) and all other provisions of the FMA, which do not recognize marriage between people of the same gender and LGBTQIA+ individuals are unconstitutional.

36. Further, Section 17, FMA provides for registration of foreign marriages, and reads as:

"17. Registration of foreign marriages.—

(1) Where—
(a) a Marriage Officer is satisfied that a marriage has been duly solemnized in a foreign country in accordance with the law of that

country between parties of whom one at least was a citizen of India; and
(b) a party to the marriage informs the Marriage Officer in writing that he or she desires the marriage to be registered under the section, the Marriage Officer may, upon payment of the prescribed fee, register the marriage.
(2) No marriage shall be registered under this section unless at the time of registration it satisfies the conditions mentioned in section 4.
(3) The Marriage Officer may, for reasons to be recorded in writing, refuse to register a marriage under this section on the ground that in his opinion the marriage is inconsistent with international law or the comity of nations.
(4) Where a Marriage Officer refuses to register a marriage under this section the party applying for registration may appeal to the Central Government in the prescribed manner within a period of thirty days from the date of such refusal; and the Marriage Officer shall act in conformity with the decision of the Central Government on such appeal.
(5) Registration of a marriage under this section shall be effected by the Marriage Officer by entering a certificate of the marriage in the prescribed form and in the prescribed manner in the Marriage Certificate Book, and such certificate shall be signed by the parties to the marriage and by three witnesses.
(6) A marriage registered under this section shall, as from the date of registration, be deemed to have been solemnized under this Act."

37. The Petitioners are thus ineligible for registering their marriage under the FMA, due to Section 17(2) that prohibits registration of any marriage that does not satisfy the conditions in Section 4.

38. It is important to note that there were no discussions on the possibility of marriage amongst LGBTQIA+ persons, either during the debates on the SMA, 1954 or during the legislative deliberations on the FMA, as the essential conditions of marriage under Section 4, FMA are similar to the ones under Section 4, SMA. Neither the legislators nor religious and/or civil society groups sought explicit prohibition on same-sex marriage or marriage involving LGBTQIA+ persons.

39. Section 4(c) read with 17(2) of the FMA discriminates against LGBTQIA+ persons, including the Petitioners, by excluding them

from the procedure of solemnization and registration of their marriage under the FMA. This exclusion turns solely on their sexual orientation, as they meet all the capacity and essential validity conditions for registration of their marriage. Underlying this exclusion is a sex stereotype that marriage is essentially a union between a *cis man* and a *cis woman*. Section 4(c) and Section 17(2) of the FMA, which do not recognize marriage between the Petitioners, are unconstitutional and discriminatory, in that they deprive the marriage of the LGBTQIA+ couples the validity and recognition under Indian law that is accorded to registered heterosexual marriages under Sections 15 and 17(6) of the FMA. This denial of marital status to the Petitioners, despite a duly solemnized marriage under Danish law, affects every aspect of their public and private lives in the most material and symbolic way and the Petitioners are made to feel "*lesser beings*" in India, as if their love and relationship is not enough or equal to the heterosexual couples.

40. Their ineligibility to register under Section 17, FMA burdens the Petitioners with tremendous uncertainty about their rights, entitlements, and obligations once they relocate to India. Without registration under the FMA, their marriage will not be valid and will inevitably inhabit a proverbial no-man's land, not being unambiguously void by reason of Sections 18(1), Explanation (ii)(a) and 27, yet being a dead letter for any purpose in India, including in accessing matrimonial reliefs under a secular law. This uncertainty would not typically befall a similarly situated heterosexual married couple because their right to marry and to matrimonial reliefs is taken for granted solely due to their sexual orientation.

41. Further, the imposition of a notice period of 30 days prior to the marriage under Section 5, FMA is entirely discriminatory and, having been derived from a specific religious personal law, i.e., from the Christian law, is entirely inappropriate in a law that is modeled on the secular SMA. As noted before, the 1892 Act from England too contained a notice period of 7 days in the district of residence, and another period of 14 days for publication of notice before the marriage could be solemnised, which was intended to prevent 'undesirable' marriages. The notice period under the FMA is analogous to Section 5 of the SMA, which the Law Commission in its 242nd Report and its Consultation Paper published in 2018, deemed as a major impediment to the freedom of autonomy exercised by couples and an enabler of violence. The requirement of the notice prior to the marriage is particularly perilous to LGBTQIA+ individuals who very often face violence and disapproval from their family members. The notice period also interferes with the fundamental right to personal liberty and privacy that extends to one's choice to partner without interference from the State, family or society.

42. Similarly, the procedure for publication of notice for 30 days under Section 7, inviting objections under Section 8 and procedure on receipt of objection under Section 10 provide ample opportunity to third parties, including hostile family members, to interfere with the decisions of the LGBTQIA+ couples to marry a person of their choice. It is the common experience for LGBTQIA+ individuals, especially lesbian, bisexual and transgender persons that they have to leave their homes suddenly to avoid being coerced into a marriage by their families. Where a couple runs away together to a foreign country and wishes to get married, under the FMA, they

would have to reside in the new city for 30 days and then provide notice of intended marriage for another 30 days in India, leaving them vulnerable to being separated and harassed in the meantime. If the Petitioners had not married under the Danish law, but sought to solemnise their marriage under the FMA, then besides Section 4(c), the Petitioners could not have followed the procedure laid down in Sections 5-10, FMA, owing to fear of family interference.

JOINT ADOPTION BY SAME-SEX COUPLES UNDER THE JJ ACT AND THE REGULATIONS

43. The JJ Act replaced the *Juvenile Justice (Care and Protection of Children) Act*, 2000, which was enacted to fulfill the directive principles of State policy under Articles 39(e) and (f), 45, and 47 of the Constitution of India to ensure that all needs of children are met and their basic human rights are protected and in discharge of India's obligations under international instruments, specifically the United Nations Convention on the Rights of Children, 1989 ('**CRC**').

44. The *Juvenile Justice (Care and Protection of Children) Act*, 2000 ('**JJ Act, 2000**') ushered in landmark changes to the law relating to adoption, as before 2000, Hindus could only adopt under the *Hindu Adoptions and Maintenance Act*, 1956 ('**HAMA**'), whereas Christians and Muslims could only be appointed as 'guardians' by the Court under the *Guardians and Wards Act*, 1890. It set in place a secular system of adoption that is distinct from customary adoption regulated by HAMA. Under the JJ Act, 2000, as well as the JJ Act, adoption is contemplated as a mechanism to rehabilitate and reintegrate a particular class of children, and not as a means of securing spiritual benefits to the adopter and his ancestors. Even before 2000, the Hon'ble Bombay High Court in ***In The Matter***

Of Manuel Theodore vs. Unknown [2000 (2) Bom CR 244] upheld the right of a child to be adopted, to have a name and a family as a fundamental right under Article 21 of the Constitution.

45. The JJ Act has expanded the scope of adoption and laid down conditions of adoption that are specifically tailored to the object of the legislation, lacking some of the strictures of the HAMA. For example, the JJ Act does not prohibit a prospective adoptive parent with a living Hindu daughter to adopt another daughter, which is a clear departure from the conditions of a valid adoption under Section 11 of the HAMA.

46. There exists no explicit provision in the JJ Act prohibiting adoption by LGBTQIA+ couples, as evident from the following:

    (a) The JJ Act is secular and permits adoption irrespective of religion. Its overarching concern is with the welfare of surrendered, abandoned, or orphaned children. Section 3 sets out the principles to be followed in the administration of the JJ Act. Relevant among them are the principle of the best interest of the child meaning that all decisions about the child ought to be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential [Section 3(iv)]; of family responsibility that the primary responsibility of care, nurture and protection of the child shall be with the adoptive parents [Section 3(v)]; of positive measures to mobilize all resources including those of family and community, for promoting the well-being, facilitating the development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the

need for intervention under the Act [Section 3(vii)]. The "best interest of child" is defined as the basis of any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development [Section 2(9)].

(b) Chapter VIII of the JJ Act governs the procedure for adoption. Section 56(1) makes a specific reference to adoption as a means of ensuring the right to family of an orphan, abandoned and surrendered children. Section 57 sets out the eligibility of prospective adoptive parents. There is no specific bar on LGBTQIA+ persons to adopt, as single persons too are eligible to apply for adoption. Section 57(2) deals with the specific circumstance of adoption by a 'couple' stipulating that *'in case of a couple, the consent of both spouses for the adoption shall be required.'* The Petitioners submit that as a matter of practicality and to further the object of the JJ Act, the terms 'couple' and 'spouses' as opposed to 'married couple' and 'husband and wife', are intended to encompass same-sex couples whose marriage has been duly solemnized under foreign law. In fact, the JJ Act is entirely silent on the sexual orientation of the adoptive parents, be they single or a couple. It does not use gendered terms like 'husband' or 'wife', 'father' or 'mother' to describe the prospective adoptive parents nor does it make any reference to the sexual orientation of the prospective adoptive parent or parents under Section 57 or under Section 58. Section 59, in fact, provides that if an orphan, abandoned or surrendered child could not be placed with an Indian or Non-Resident Indian ('**NRI**') prospective

adoptive parents, he would be free for inter-country adoption by interested NRIs, overseas citizen of India, person of Indian origin or a foreigner. Due to the foreign element of the JJ Act, it necessarily accommodates different manifestations of familial or spousal relationships that are legally recognized in other jurisdictions, if not necessarily in India. Consequently, the JJ Act precludes any possibility of adjudicating upon the validity of a foreign marriage under Indian law for the process of adoption.

(c) Sections 58 and 59 set out the procedure of in-country and inter-country adoption that*, inter alia*, involves vetting of the prospective adoptive parents based on a home study to identify highly motivated candidates for adoption. Prospective adoptive parents who are found eligible based on the home study are referred a child along with the child's study report and medical report. Upon acceptance of the child by the prospective adoptive parent, the Specialised Adoption Agency has to take steps to obtain an adoption order from the District Magistrate.

(d) Its secular nature notwithstanding, the JJ Act seeks to facilitate the placement of children in a culturally familiar environment as seen from the priority given to in-country adoption over inter-country adoption under Section 59(1) and to NRIs, OCIs and persons of Indian origin over foreigners in the case of inter-country adoption under Section 59(2). The focus of the welfare of the child above all else is further reaffirmed by the mandate under Section 58(5) to follow the progress and well-being of the child in his adoptive family and under Section 61 for the District

Magistrate to, *inter alia,* satisfy herself that the adoption is for the welfare of the child before issuing an adoption order.

(e) A duly completed adoption creates the legal relationship of a natural parent and natural child for all purposes, including intestacy, as per Section 63. In the case of the heterosexual couple whose marriage is valid under Indian law, adoption would create a legal relationship of the adopted child with both parents under the law.

(f) Thus, the State policy visible from the JJ Act is to encourage adoption, that is, to ensure as far as possible that children do not grow up in institutions, but as part of safe and loving families. In that light, restricting adoption to a subset of persons who form stable families is inconsistent with the intention of the JJ Act itself

IMPUGNED PROVISIONS – REGULATION 5(2)(a), 5(3) READ WITH SCHEDULES, II, III, VI AND VII OF THE REGULATIONS

47. The Regulations have been framed by the Respondent Nos. 3-4 under Section 68(c) read with Section 2(3) of the JJ Act to regulate adoption procedures in India. As mentioned before, Section 57 sets out the eligibility of prospective adoptive parents, with no mention of the sexual orientation of the adoptive parents. However, the Regulations framed by the Respondent Nos. 3-4 exclude same-sex couples from joint adoption, which are in teeth of the JJ Act.

48. The Regulation 5(2)(a) provides that "*the consent of both the spouses for the adoption shall be required, in case of a married couple*". The Regulation 5(3) further mandates that the adoptive couples must have at least two years of stable marital relationship, except in cases of relative or step-parent adoption. This is in stark

contrast to Section 57(2) of the JJ Act, which merely states that "*in case of a couple the consent of both the spouses for the adoption shall be required",* with no specific requirement of either marriage or a marital relationship of a minimum period of two years.

49. Further, the schedules under the Regulations refer to the prospective adoptive parents in gendered terms. Prospective adoptive parents are required to furnish a marriage certificate, pursuant to Schedule VI of the Regulations titled as 'Online Registration Form and List of Documents to be Uploaded' of the Regulations. The said form can be filled only by one male applicant and one female applicant. The form for 'Home Study Report of Resident Indian Parent' under Schedule VII of the Regulations further requires the details of a male applicant and female applicant to be filled in the case of an applicant couple. Similarly, the signature box of the Child Study Report in Schedule II and Medical Examination Report in Schedule III, which the prospective adoptive parents are supposed to sign to signify their acceptance of a child referred to them, calls for the signatures of a male applicant and a female applicant.

50. This assumption of heterosexuality of the applicant couples in the Regulations is inconsistent with the express provisions of the parent JJ Act. Married same-sex couples cannot be excluded from joint adoption under the Regulations when the sexual orientation of an applicant couple is not mentioned in the eligibility criteria under the JJ Act. The exclusion also breaches the mandatory principle of the best interest of the child contained in the JJ Act and reiterated in Regulation 3(a) inasmuch as it would deprive the adoptive child of a same-sex couple of having a legal relationship with the *de facto* parent under Section 63 of the JJ Act solely

because the parents' same-sex marriage is not valid under Indian law.

51. The impugned provisions are discriminatory and unconstitutional on several levels. First, they place same-sex prospective adoptive parents who have been married under foreign law at a disadvantage compared to heterosexual married couples in matters of joint adoption, solely on the basis of the former's sexual orientation. While heterosexual married couples face no challenge proving that they are a married couple under Indian law, this is virtually an impossibility for prospective adoptive parents like the Petitioners whose marriage is not legally recognized in India. If they adopt under the impugned provisions, one of the Petitioners must forsake a legal relationship with the child. In fact, in case of a heterosexual couple having solemnised their marriage abroad, the Respondent Nos. 3-4 would not even bother to check if their marriage is valid in India or if they are registered under the FMA, but in case of the Petitioners, despite being validly married under the Danish law, they are not even eligible to apply as adoptive parents under the Regulations, owing to the discriminatory prohibition on adoption by same-sex couples. Be that as it may, Section 57(2) does not even mandate that marriage is essential for joint adoption, by using broad words like 'couple', and 'spouses', and not 'married couple' or 'husband' and 'wife'. Second, the impugned provisions lack coherence, are arbitrary, and scuttle the expression of one's sexual identity inasmuch as they disregard sexual orientation for the purpose of single parent adoption, but not for the purpose of joint adoption. Third, they would force couples like the Petitioners in the absurd and tenuous position of picking a legal parent amongst themselves, which is antithetical to

the right to a family life and motherhood that are facets of the right to life as well as to the directive principle of State policy of giving children opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and protecting childhood and youth, *inter alia,* from material abandonment.

52. In ***Navtej Johar***, a bench of five judges of this Hon'ble Court applied ***National Legal Services Authority v. Union of India*** [(2014) 5 SCC 538] *('**NALSA**'),* while holding Section 377, Indian Penal Code, 1860 unconstitutional to the extent that it criminalized consensual sexual acts between same-sex couples. This Court *inter alia* held that LGBTQIA+ individuals have been constrained to live under a coercive environment of conformity, grounded in cultural morality, stereotypes and prejudice. It held that constitutional morality required the Court to ensure the respect of the dignity of LGBTIA+ persons, so as to fulfil the promises of the Constitution.

53. Encouraged by the landmark decisions of this Hon'ble Court, a large number of LGBTQIA+ individuals have sought to assert their rights to be in relationships contrary to the wishes of their parents, including the Petitioners. It was only after ***Navtej Johar*** that the Petitioners decided that they would not hide their identity or relationship anymore from the world at large, or their family and friends in particular. However, the lack of recognition in terms of marriage indicates a State disapproval of the relationship itself, which in turn is used against them.

54. Thus, the exclusion of the Petitioners' marriage from the FMA, in terms of not being able to register the marriage under Section 17, FMA, and thus not being valid in India, has the effect of

communicating to the world that their relationship does not merit the same social and legal sanction as that of a heterosexual relationship, relegating it to a lower tier. This has the effect of affirming the homophobic and transphobic notion that relationships, and marriages can only be entered into by a man and a woman. For the Petitioners, from the time they declared to their families that they were in a relationship, they were met with the response that it was not legally or socially permissible for two women to be in a relationship or get married. The non-recognition of their relationship in law reinforced the social stigma that they faced. Further, their inability to pursue joint adoption under the Regulations that have gone beyond the purview of the parent JJ Act, despite being duly married under the Danish law, owing to the discriminatory stipulations that restrict joint adoption only to heterosexual married couples with at least two years of marriage, further serves to reaffirm the compulsory heterosexuality that animates the legal regime of marriage and adoption in India.

EVOLUTION IN FOREIGN LAW ON SAME-SEX MARRIAGE AND ADOPTION

55. Article 51(c) of the Constitution requires the State to foster respect for international law and treaty obligations in the dealings of organized peoples and one another. Accordingly, the *Protection of Human Rights Act*, 1993 recognises and incorporates international conventions and treaties as part of the Indian human rights law.

56. This Hon'ble Court has for long incorporated the principles enshrined in the important covenants and treaties in the domestic law, including those contained in the Universal Declaration of Human Rights, 1948 ('**UDHR**'); International Covenant on Civil

and Political Rights, 1966 ('**ICCPR**'), International Covenant on Economic, Social and Cultural Rights, 1966 ('**ICESCR**'), Convention on the Elimination of All Forms of Racial Discrimination, 1965 ('**CERD**'); Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ('**CEDAW**'); the CRC and the Convention on the Rights of Persons with Disabilities, 2006 ('**CRPD**').

57. Similarly, this Hon'ble Court has extensively referred to the provisions of the European Convention on Human Rights, 1950 ('**ECHR**'), along with the decisions of the European Court of Human Rights ('**ECtHR**') as well as the American Convention on Human Rights, 1969 ('**ACHR**'), along with the decisions of the Inter-American Court of Human Rights ('**IACtHR**'), in order to expand the content and scope of the fundamental rights in India.

58. In the last three decades, the international human rights law has developed an established jurisprudence on the protection of the rights to equality, privacy and autonomy of LGBTQIA+ persons and freedom from discrimination on the grounds of sexual orientation and gender identity. In their general comments, concluding observations and communications, the human rights treaty bodies have affirmed that the States are obligated to protect individuals from discrimination on the basis of sexual orientation and gender identity, as these factors do not limit an individual's entitlement to enjoy the full range of human rights, as evident from the report of the UN Human Rights Council, "*Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*" (2011).

59. In November, 2006, a group of distinguished human rights experts from all over the world drafted and developed at Yogyakarta, Indonesia, what came to be known as Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity ('**Yogyakarta Principles'**). Principle 24 explicitly refers to the right to found a family, irrespective of sexual orientation or gender identity, and calls upon the States to "*take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity*", "*to take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners*"; and "*to take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners*". This Hon'ble Court in ***NALSA*** and ***Navtej Johar*** have reaffirmed the Yogyakarta Principles by incorporating the same for recognizing the human rights of sexual and gender minorities.

60. A meaningful interpretation of the right to marry provisions of the treaties mentioned above requires the States to affirm the freedom to marry of same-sex couples. Indeed, foreign jurisprudence has gradually evolved to accord legal recognition of same-sex unions.

[***Minister of Home Affairs v. Fourie*** (2006) 1 SA 524 (CC); ***Young v. Australia*** CCPR/C/78/D/941/2000, date of decision: 18.09.2003; ***X v. Colombia*** CCPR/C/89/D/1361/2005, date of decision: 18.05.2007; ***C v. Australia*** CCPR/C/119/D/2216/2012, date of decision: 01.11.2017; ***Concluding Observations on the Sixth Periodic Report of Australia*** CCPR/C/AUS/CO/6, date: 01.12.2017; ***Concluding Observations on the Fifth Periodic Report of Mauritius*** CCPR/C/MUS/CO/5, date: 11.12.2017; ***Concluding Observations on the Sixth Periodic Report of Hungary*** CCPR/C/HUN/CO/6, date: 09.05.2018; and ***Concluding Observations on the Fourth Periodic Report of Bulgaria*** CCPR/C/BGR/CO/4, date: 15.11.2018; ***Schalk and Kopf v. Austria*** (Application No. 30141/2004, date: 22.11.2010); ***Vallianatos and Others v. Greece*** (Application No. 29381/2009, date: 07.11.2013); ***Oliari & Others v. Italy*** (Application No. 18766/2011, date: 21.07.2015), ***Orlandi & Others v. Italy*** (Application No. 26431/2012, date: 14.12.2017); ***Fedotova & Others v. Russia*** (Application No. 40792/2010, date: 13.07.2021); IACtHR Advisory Opinion (OC-24/17, date: 24.11.2017); ***Halpern v. Canada*** (AG) (65 O.R. (3d) 161 (2003), Court of Appeal for Ontario); the Constitutional Court of South Africa in the ***Minister of Home Affairs v. Fourie*** (2006) 1 SA 524 (CC); ***Obergefell v. Hodges*** 576 US 644 (2015); ***Suman Panta v. Ministry of Home Affairs et. al.*** (Case No. 073-WO-1054, date of decision: 23.10.2017); Decision of the Constitutional Court of Taiwan on J.Y. Interpretation No. 748].

61. Many of these decisions from foreign jurisdictions were affirmatively cited by this Hon'ble Court in ***Navtej Johar,*** wherein it was noted that comparative jurisprudence not only required the

State not to discriminate but also called for the State to recognise rights and entitlements that bring true fulfillment to same-sex relationships. This Hon'ble Court thus noted that "*the overwhelming weight of international opinion and dramatic increase in the pace of recognition of fundamental rights of same sex couples reflects a growing consensus towards sexual orientation equality*" (para 563).

62. The right of same-sex couples to adopt has also been recognised under foreign law both as corollary of the legal recognition of same-sex relationships and as an independent self-contained right.

63. In 2017, the IACtHR issued a landmark advisory opinion (OC-24/17, date: 24.11.2017)**,** requested by the Republic of Costa Rica on gender identity, and equality and non-discrimination of same-sex couples, whereby the IACtHR found that the freedom to marry without discrimination on the ground of sexual orientation is protected under the right to privacy and family life (Article 11(2) read with Article 17) as well as under the right to equality and non-discrimination (Articles 1 and 24). The Court further found the concept of family in ACHR to encompass the familial bonds formed by same-sex couples, including marriage itself. It held by a majority that States were obligated to protect such rights by ensuring full access to all mechanisms under domestic law that are available to families formed from heterosexual couples

64. In ***X & Ors. v. Austria*** (Application No. 19010/2007, Judgment dated 19.02.2013), the ECtHR held that the exclusion of same-sex couples from the right of second parent adoption, i.e. adoption of one's partner's biological child by the other partner of the same-sex couple, under Article 182(2) of the Civil Code of Austria, was

not proportionate and violated the prohibition on discrimination in enjoyment of rights and freedoms on the basis of sex, race, etc. under Article 14 in conjunction with right to respect for private and family life under Article 8. The existence of *de facto* family life between the parents and the child, the importance of extending legal recognition to such a unit, the best interest of the child, and acknowledgment of the Austrian Government that same-sex couples may be as suited for second parent adoption as heterosexual couple weighed in favour of removing an absolute prohibition on second parent adoption by the same-sex couples.

65. The Constitutional Court of South Africa recognised joint adoption and parenthood rights of same-sex parents as early as in 2001 and 2003**.** Proceeding on the basis that the Constitution contemplates more than one notion of family life, the Court held in ***Du Toit & Anr. v. The Minister For Welfare & Population Development & Ors.*** (CCT 40/01) that the impugned provisions of the Child Care Act, 1983 and the Guardianship Act, 1993 that exclude unmarried couples, including committed same-sex couples, from joint adoption, violated the child's best interest principle and equality clause of the Constitution. It further held that the failure of the law to recognize the value and worth of one member of the couple as a parent limited their right to dignity. The absence of statutory regulation to protect the children of same-sex adoptive couples in the event of a breakdown in the relationship was not found to be sufficient to justify limiting the constitutional rights relevant to the case. **In *J & Anr. v. Director General, Department of Home Affairs & Ors***. (CCT46/02) [2003] ZACC 3), the Court recognized both partners in a permanent same-sex couple as parents to a child conceived by one of the partners

through artificial insemination. Confirming the High Court's order, the Constitutional Court held that Section 5 of the Children's Status Act, 1987 unfairly discriminated between married persons and permanent same-sex life partners in a manner that was inconsistent with the constitutional prohibition on discrimination on the basis of sexual orientation.

66. Similarly, key decisions from the Americas and Europe have recognised the right of adoption by same-sex couples.

67. In ***K. and B.(Re)*** (1995 CanLII 7396 (ON SC)), the Ontario Supreme Court, while interpreting the definition of 'spouse' in the Child and Family Service Act, held that the term 'spouse' included 'same-sex couples living in a conjugal relationship outside marriage'. The Court held that a restrictive definition of 'spouse' under the said Act was discriminatory as it would amount to a denial of a benefit of the law based on personal characteristics in contravention of Section 15(1) of the Canadian Charter of Rights and Freedoms.

68. In a challenge to the denial of second parent adoption of a child conceived by artificial insemination to an unmarried same-sex couple ***(In re Adoptions of B.L.V.B. & E.L.V.B., 628 A. 2d 1271 (1993 Vt)*)**, the Vermont Supreme Court observed that the purpose of the relevant provision was to clarify and protect the legal rights of the adopted person and not to proscribe adoptions by certain combinations of individuals. It held that to deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent served no legitimate state interest and was inconsistent with the child's best interests and therefore the public policy of the state. The US Supreme Court's

decision in ***Obergefell v. Hodges,*** 576 US 644 (2015) (‘***Obergefell’)***, has drastically reduced the scope for State interference in the marital and familial rights and responsibilities that would accrue to a married same-sex couple. In ***Campaign for Southern Equality v. Mississippi Department of Human Services, 175 F. Supp, 3d 691 (2016)*** a US District Court judge granted a preliminary injunction against Mississippi’s ban on adoption by married same-sex couples by holding that the majority opinion in *Obergefell,* foreclosed litigation over laws interfering with the right to marry and rights and responsibilities intertwined with marriage, including the right to adopt.

69. In ***Accion de inconstitucionalidad 2/2010*** (Mexico) the Mexico Supreme Court upheld the reformed civil code that allowed same-sex marriage, consequently achieving parity in adoption between same-sex couples and married couples. The Court held that the legal protection of family in the Mexican Constitution requires the law to protect the family as a social reality and not as an ideal model, which requires the recognition of same-sex marriage. As for adoption, the Court held that the best interests of the child had to be determined on a case-by-case basis and not through an *a priori* ban on adoption by same-sex couples.

70. The Austrian Constitutional Court in ***G 119-120/2014-12*** (decided on 11th December, 2014), struck down provisions of the Civil Code and the Federal Act on Registered Partnership that prevented registered same-sex partners from joint adoption and successive adoption (second adoption of the adopted child of one spouse) as violating Articles 8 and 14 of the ECHR and the principle of equality. The child’s best interest did not justify the unequal treatment of heterosexual couples and same-sex couples

in matters of joint adoption given that step child adoption was already available to same-sex parents.

71. Similarly, the Committee on the Rights of the Child has recently recommended the State Parties to "*integrate and consistently interpret and apply the right of children, including children born to same sex partners, to have their best interests taken as a primary consideration in all legislative, administrative and judicial proceedings*" [See: ***Concluding Observations on the combined Fifth and Sixth Periodic Reports of Poland*** (CCPR/C/POL/CO/5-6, date: 06.12.2021)].

72. The Petitioners have no other alternate, effective and efficacious remedy other than to approach this Hon'ble Court through the present Writ Petition under Article 32 of the Constitution of India on, *inter alia*, the following grounds, which are urged without prejudice to one another:

GROUNDS

A. BECAUSE the Petitioners are entitled to the fundamental right to marry, as it is intimately connected to the fundamental values of human dignity, equality and freedom as entrenched in the Constitution, which, as this Hon'ble Court has held, include the choice of a marital partner. It is well-settled that the choice of a partner, whether within or outside marriage, lies within the exclusive domain of the individual's privacy and autonomy, which is inviolable.

B. BECAUSE this Hon'ble Court has recognised the right to marry a person of one's own choice as integral to Article 21 of the Constitution, which cannot be taken away, except by a law that is substantively and procedurally fair, just and reasonable. The

Constitution protects the ability of each individual to pursue a way of life, including in matters of dress, food, ideas, love and partnership, which are central to their identity and autonomy. Neither the State nor society can intrude into that domain, except for a compelling State interest.

C. BECAUSE the Petitioners are validly married under Danish law, and their marital status is an integral part of their relationship that cannot be shed or altered based on their location in the world. If a marriage is good by the law of the country where it is solemnised, it is good all over the world. It is an expression of their sexual orientation, which is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. They should not suffer the indignity of having their marital status invalidated and being treated as unmarried, devoid of the concomitant rights and privileges in law, thereby being rendered second class citizens in their own country. Exclusion of the Petitioners from registration under the FMA denies them the plethora of rights, and entitlements that the State provides to the heterosexual married couples who would be eligible for registration under the FMA on account of their sexual orientation, which is impermissible. The Petitioners ought to be allowed to have their marriage recognized in India so that their separation or divorce or devolution of property or rights to maintenance or custody of children if their relationship does not last can be dealt with as per law under SMA.

D. BECAUSE there exists no explicit prohibition on marriages involving LGBTQIA+ persons under FMA. Section 4(c), while referring to the minimum age of the parties as a condition for valid marriage, uses the terms “bridegroom” and “bride”. The FMA was

enacted on the lines of SMA, which too limits the institution of civil marriage to 'man' and 'woman'. A bare perusal of the parliamentary debates reveals that there was no discussion on same-sex marriage or to limit the institution of civil marriage only to the heterosexual couples.

E. BECAUSE the exclusion of the Petitioners from having their marriage recognized by registration under Section 17 FMA is a gross violation of their fundamental right to equality and equal protection of laws under Article 14 of the Constitution. The Petitioners are entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any similarly situated heterosexual couple. It is well-settled that the law must operate equally on all persons under '*like circumstances'*. To deny the Petitioners access to registration under Section 17(2) FMA solely on the ground of their sexual orientation amounts to discrimination, which is prohibited under Article 14.

F. BECAUSE the exclusion of the Petitioners from registration under Section 17 of the FMA, and thus being deemed invalid on the ground of sexual orientation is manifestly arbitrary, and irrational, and thus violates Article 14. It is well-settled that if a law is disproportionate, excessive or unreasonable or lacks an adequately determining principle, then this Hon'ble Court can strike it down as manifestly arbitrary under Article 14. There exists no rational nexus with the classification between heterosexual couples and homosexual couples with respect to access to registration under the FMA and the object of such classification. If the object of classification is either procreation or religious reasons, those

objects are impermissible, and cannot be allowed to discriminate against a class of Indian citizens in relation to access to one of the most important institutions of the State and society.

G. BECAUSE the exclusion of the Petitioners from registration under the FMA, constitutes a grave violation of their fundamental right to speech and expression guaranteed under Article 19(1)(a), which includes the right to express one's self-identified sexuality and to choose a partner.

H. BECAUSE the content of the fundamental right to liberty and life under Article 21 is not just negative in nature, but also includes the positive obligations on the part of the State to undertake all necessary legal and administrative measures needed for the protection of the fundamental rights of the individuals. The State cannot look the other way when LGBTQIA+ couples like the Petitioners are having to take drastic steps like emigrating in order to be able to marry.

I. BECAUSE it is well-settled that the term 'sex' in Articles 15(1) and 15(2) have been interpreted to include 'sexual orientation' and 'gender identity'. Accordingly, the State cannot discriminate against the Petitioners or any other LGBTQIA+ person on the ground of sexual orientation in relation to rights available to heterosexual married couples including the recognition of a marriage duly solemnized under foreign law as valid and eligible for registration under the FMA as well as for applying for adoption as a couple under the Act.

J. BECAUSE the Petitioners are entitled to the fundamental right to found a family, which is a facet of the right to life under Article 21. The right to meaningful family life includes those aspects of

life which go to make an individual's life meaningful, complete and worth living, and help in retaining the physical, psychological and emotional integrity of the persons. The Petitioners thus have a fundamental right to family, including being able to raise a child through joint adoption. A child has a right to love, shelter, care, a sense of identity and belonging, which can be provided by the Petitioners. Both the Petitioners and the child cannot be denied the right to raise a family together.

K. BECAUSE Article 25 of the Constitution guarantees the freedom of conscience to all persons. Conscience is not necessarily limited to religious beliefs, but refers to the moral compass of a person with respect to her core beliefs. The freedom of conscience guaranteed under Article 25 extends to the entire consciousness of a human, including beliefs of her sexual identity, which, in fact, go to the core of each individual's sense of self, as well as the intensely personal nature of her own sexual orientation. Thus, the exclusion of the Petitioners from registration under the FMA entitling them to matrimonial reliefs under the secular SMA grossly impairs their freedom of conscience that inheres in each individual, and the ability to take decisions on matters that are central to the pursuit of happiness.

L. BECAUSE the procedural requirements of the FMA, including the requirement of giving notice to the Marriage Officer in the district in which one of the parties has been residing for a minimum period of 30 days under Section 5, publication of the said notice by the Marriage Officer at a conspicuous place in their office under Section 7, objection to marriage by any person, on the ostensible basis of contravention of one of the valid conditions of marriage, within 30 days from the publication of such notice under Section

8, and the power of inquiry into the objections by Marriage Officer under Section 10, constitute an arbitrary and unwarranted interference by the State and the community in an individual's basic freedom to choose their partner and the fundamental rights to privacy and autonomy.

M. BECAUSE the Constitution protects diverse forms of families, based on the inherent claims of dignity and autonomy of individuals. Atypical manifestations of familial relationships, including queer partnerships, should not be placed at a disadvantage by relying on the black letter of the law. This Hon'ble Court in ***Deepika Singh v. Central Administrative Tribunal*** 2022 SCC OnLine SC 1088 ('***Deepika Singh'***) emphatically noted that family units may manifest in myriad ways, including domestic, unmarried partnerships or queer relationships, and there is a need to grant legal recognition to atypical and non-traditional forms of relationships. This has been reiterated in ***X v. Principal Secretary, Health and Family Welfare Department, Government of NCT and Anr.*** 2022 SCC OnLine SC 1321. However, the Petitioners cannot fully realize this right on account of the exclusion of LGBTQIA+ persons from registration under the Section 17 of the FMA and from joint adoption under the Regulations. Despite being married, the Petitioners are prevented from constituting a family, establishing, enjoying and benefiting from family life, and from maintaining a legally protected relationship, while having domicile and citizenship of India. In fact, in order to have any chance of adoption, the Petitioners must pick one amongst themselves to be the legal parent of the adopted child, which is an affront to the right to life under Article 21.

N. BECAUSE on account of their sexual orientation, the Petitioners have suffered dual discrimination that would deny them any meaningful opportunity of founding a family in India. Not only are they prevented from registering their marriage under Section 17 of the FMA, but even if their marriage was recognised, the Regulations would prevent them from jointly applying for adoption, inasmuch as they limit this right to married heterosexual couples, which violates Article 14.

73. BECAUSE it is well-settled that adoption is one of the best means of rehabilitating a child without a family and giving stability needed for its normal growth and development. A child has a right to be adopted, to have a name and a family as a fundamental right under Article 21 of the Constitution.

O. BECAUSE Regulation 5 cannot travel beyond the remit of the parent JJ Act, and is thus invalid. When the JJ Act does not mention any disqualification based on sexual orientation of prospective adoptive parents, whether as adoptive couples, or as a single parent, such a patently discriminatory condition cannot be introduced in the Regulations by the Respondent Nos. 3-4.

P. BECAUSE if a LGBTQIA+ person can adopt as a single parent, then there is no rational reason why a LGBTQIA+ couple, who is married under foreign law, but not recognised in India, cannot adopt under Regulation 5. The Petitioners are being denied opportunities, benefits and advantages that are not only available to the rest of the population, but are available to individual LGBTQIA+ persons, i.e., the right to apply for adoption and have their application considered in the best interest of the child, which is arbitrary and discriminatory *simpliciter*. In any case, Section

57(2), JJ Act does not make marriage as a necessary condition for joint adoption, and the Regulations cannot go beyond the remit of the parent JJ Act.

Q. BECAUSE the exclusion of married same-sex couples from joint adoption under the Regulations also breaches the mandatory principle of the best interest of the child contained in the JJ Act and reiterated in Regulation 3(a) inasmuch as it deprives the adopted child of a same-sex couple of a legal relationship with the *de facto* parent under Section 63 of the JJ Act solely because the parents' same-sex marriage is not valid under Indian law.

R. BECAUSE the right to life under Article 21 includes the right to motherhood, which both Petitioners are denied from realizing jointly due to the exclusion of same-sex couples from joint adoption under the Regulations. The Petitioners have had a deep desire to adopt a child and raise a family since last several years, and they would provide a safe, loving and caring family to an adopted child, if not for the discrimination based on their sexual identity.

S. BECAUSE there is no legitimate State interest, much less a compelling one, in limiting the right to found a family only to heterosexual couples, to the exclusion of LGBTQIA+ couples like the Petitioners. A parent's sexual orientation has no bearing on the development of the child and same-sex couples make as competent parents as any heterosexual couple. The only criterion is whether the adoptive parent is providing an adequate level of care for the child or not. As long as the parents are providing such care, the State should not intervene in the parent-child relationship that should remain inviolable.

T. BECAUSE while Section 57(2), JJ Act uses the word 'spouse' in the context of 'couple', which is considered broad enough to include relationships that are 'marriage like', Regulations 5(2)(a) and 5(3) restrict it only to heterosexual married couples, which is beyond the pale of the parent Act. A bare perusal of Chapter VIII of the JJ Act makes it clear that the Act recognises non-traditional families, including a single lesbian parent, and grants them the same rights and protections as granted to the traditional families of husband, wife and child. An unmarried individual is entitled to seek adoption without any impediment, except the best interest of the child. This is in consonance with this Hon'ble Court's observations in ***Deepika Singh,*** with reference to 'atypical families' including domestic unmarried partnerships or queer relationships. To make either marital status or heterosexuality contingent for joint adoption by an adoptive couple is inconsistent with the beneficial object of the JJ Act as well as violative of the fundamental rights of the LGBTQIA+ persons.

U. BECAUSE Regulation 5 of the Regulations is inconsistent with the principle of policy in respect of children bound to be followed under Article 39(f) of the Constitution and the principle of the best interest of the child under the JJ Act and the Regulations, inasmuch it deprives the adopted child of a married same-sex couple of a legal relationship with both parents.

V. BECAUSE the international human rights law and comparative jurisprudence from USA, South Africa, Canada, Latin America, and European Union, have called for the State to recognise rights and entitlements that bring true fulfillment to queer relationships. The Constitutional Courts of South Africa, USA, Taiwan and many Latin American countries have struck down discriminatory

marriage and/or adoption laws that excluded same-sex couples, and upheld the equal right of the LGBTQIA+ couples to found a family.

W. BECAUSE marriage represents one of the vital personal rights essential to the pursuit of happiness for individuals, especially for LGBTQIA+ persons. It provides a sense of security, fulfillment and an enduring bond between the individuals, who wish to marry. Though the Petitioners are no longer 'outlaws', and their intimate relationship is no longer illegitimate, following the momentous decision of this Hon'ble Court in ***Navtej Johar***, the Petitioners are still considered as 'outcasts' in State and public sphere, with no aspect of their relationship having legal recognition or acceptance. Once they are validly married under foreign law, they cannot be stripped of their marital status in India, owing to non-recognition of their marriage under the FMA. The Courts often lean towards validity of marriages, rather than invalidity. It is not enough to be able to live together or love each other without the fear of law or the knock of the police on their door. The Petitioners should have the right to celebrate their relationship, and their commitment to each other in public as recognised by the Indian law. They should not have to choose between their home country and their fundamental rights to marriage, family and motherhood.

74. That the Petitioners crave the liberty of this Hon'ble Court to add, alter, modify or amend the grounds during the pendency of this Writ Petition, if necessary.

75. That the Petitioners have not filed any similar Writ Petition before this Hon'ble Court or any other Court/s involving the subject matter of the present Petition or the reliefs prayed herein.

76. That the Petitioners do not presently have any effective remedies in respect of the subject-matter of the present petition. The Petitioners' grievances are subsisting.

77. That the Petitioners do not have any other alternative or efficacious remedy than to invoke their fundamental right under Article 32 of the Constitution of India seeking enforcement of Fundamental Rights under the Constitution of India.

78. That this Hon'ble Court has the jurisdiction to entertain and adjudicate the present Petition.

79. That the present Petition is *bona fide* and in the interest of justice.

PRAYER

It is, therefore, in the interest of justice and in the facts and circumstances of the case, most humbly and respectfully prayed that this Hon'ble Court may graciously be pleased to:

a. Issue an appropriate writ, order or direction declaring that Section 17(2) and Section 4(c) of the Foreign Marriage Act, 1969, to the extent they exclude the registration of marriages duly solemnized by LGBTQIA+ couples in the foreign countries, are unconstitutional;

b. Issue an appropriate writ, order or direction declaring that the words "bride" and "bridegroom" in the Foreign Marriage Act, 1969, would be substituted by the word "party", to the extent of its application to marriages that are solemnized where at least one of the parties to the marriage is an LGBTQIA+ person;

c. Issue an appropriate writ, order or direction declaring that Sections 5, 6, 7, 8 and 10 of the Foreign Marriage Act, 1969 are unconstitutional;

d. Issue an appropriate writ, order or direction declaring that all rights, entitlements and benefits associated with the solemnisation and registration of marriage under the Foreign Marriage Act, 1969 would be applicable to LGBTQIA+ persons;

e. Issue an appropriate writ, order or direction declaring that Regulations 5(2)(a) and 5(3) read with Schedules II, III, and VI, of the Adoption Regulations, 2022, to the extent they exclude LGBTQIA+ couples from joint adoption, are unconstitutional and *ultra vires* of the Juvenile Justice (Care and Protection of Children) Act, 2015;

f. Issue an appropriate writ, order or direction declaring that the words "married couple" and "marital relationship" used in Regulations 5(2)(a) and (3) in the Adoption Regulations, 2022 encompass LGBTQIA+ couples duly married under any foreign law;

g. Issue an appropriate writ, order or direction declaring that the words 'male applicant' and 'female applicant' would be substituted by the word 'Prospective Adoptive Parent 1' and 'Prospective Adoptive Parent 2 (in case of applicant couples)' in Schedules II, III, VI and VII of the Adoption Regulations, 2022; and

h. Pass such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

AND FOR THIS ACT OF KINDNESS THE PETITIONERS SHALL, AS IN DUTY BOUND, EVER HUMBLY PRAY

Drawn by:

Asawari Sodhi, Advocate
Amritananda Chakravorty, Advocate

Filed by:

[redacted]

Dr. Anindita Pujari
Advocate for the Petitioners

Drawn on: 12.01.2023

Filed on: 31.01.2023