

**IN THE HON'BLE HIGH COURT OF DELHI AT NEW DELHI  
EXTRAORDINARY CIVIL WRIT JURISDICTION  
W.P. (C) NO. \_\_\_\_ OF 2021**

**IN THE MATTER OF:**

UDIT SOOD & ORS.

... PETITIONERS

VERSUS

UNION OF INDIA & AN .  
R.

... RESPONDENTS

**SYNOPSIS**

The Constitution of India guarantees each “*person*” the right to marry the individual of their choice. However, India’s only secular marriage statute, the Special Marriage Act, 1954 (“**Act**”), does not explicitly recognize LGBTQ+ individuals, which enables the authorities to deny us, the Petitioners, realization of this basic human right. In this Petition, we humbly submit that the Hon’ble Supreme Court of India has ruled that we are entitled to be treated in society as human beings. We pray that this Hon’ble Court recognize us, and other members of the LGBTQ+ community, as people, and uphold non-discriminatory access to the Act, which provides that “*a marriage between any two persons may be solemnized under [it].*”

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## I. THE TRUTH ABOUT GENDER AND SEXUALITY:

It is true that most people identify as “male” or “female.” However, it is equally true that some do not, and the Hon’ble Supreme Court has unambiguously confirmed that the Constitution of India protects non-binary individuals. *NALSA v. Union of India*, (2014) 5 SCC 438 at 487-92 (Para 61-82) (“*Article 14 does not restrict the word ‘person’ and its application only to male or female. . . The expression ‘sex’ used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female. . . Article 21 has used the expression ‘person’ . . . and [is] not as such limited to male or female gender.*”).

Similarly, most people instinctively choose romantic partners of the opposite binary sex. However, this too is not true for everybody. Science is clear that “*homosexuality is something that is based on sense of identity*” and “*is just as much ingrained, inherent and innate as heterosexuality,*” *Navtej Singh Johar & Ors. v. Union of India*, (2018) 10 SCC 1 at 113 (Para. 155), and so the Hon’ble Supreme Court has ruled that “*[h]uman sexuality cannot be reduced to a binary formulation*” and our Constitution “*protects the fluidities of sexual experience.*” *Id.*, at 239 (Para. 478).

A heterosexual is not automatically superior to a homosexual, and denying LGBTQ+ persons legal rights based on their sexuality or gender identity is unconstitutional. *Id.*, at 195 (Para. 369) (“*We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity. . . We further declare that [they] are entitled to the*

*protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them.”).*

## II. THE FUNDAMENTAL RIGHT TO MARRY:

*“The right to marry a person of one’s choice is integral to Article 21 of the Constitution.” Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368 at 405 (Para. 86) (emphasis added). As the Hon’ble Supreme Court elaborated, “[w]hen two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.” Shakti Vahini v. Union of India, (2018) 7 SCC 192 at 212 (Para. 45). To safeguard this “absolute right of an individual to choose a life partner,” the Hon’ble Supreme Court has mandated that “[n]either the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.” Shafin Jahan (supra), (Para. 84) (emphasis added).*

Nonetheless, India’s secular marriage statute, the Special Marriage Act, 1954 (the “Act”), purportedly impels that “males” marry only “females,” and “females” marry “males.” Although the statute states that “[n]otwithstanding anything contained in any other law. . . , a marriage between any two persons may be solemnized under this Act,” the preconditions for solemnization enumerated in the statute are generally construed as needing one “male” and one “female.” Section 4 (emphasis added).

Consequently, despite the Hon'ble Supreme Court's promise that "[t]he LGBT community possess[es] **the same human, fundamental and constitutional rights** as other citizens," Navtej Singh Johar (*supra*), at 140 (Para 255) (emphasis added), members of this community are denied their so-called "absolute right" to marry the person they love.

### **III. INDIVIDUAL AND SOCIETAL COST:**

The Special Marriage Act, 1954, is a secular legislation which was intended to free the institution of marriage from the shackles of religious impediments. Its intent was to provide access to civil marriage independent of, and without deference to, the vagaries of customary beliefs and laws. The Act embodies the core democratic value that access to fundamental rights should not depend on religion, custom or faith. Failure to interpret the provisions of the Act as neutral to gender and sexual orientation is inconsistent with Part III of the Constitution, and in particular with Articles 14, 15, 19 and 21, and inflicts immense harm on LGBTQ+ individuals as well as Indian society at large. The Petitioners humbly submit that they are but mild illustrations of this harm. The Petitioners are openly homosexual and enjoy the privilege of not risking damaging retribution for publicly demanding their fundamental rights. Through this Petition, the Petitioners hope to safeguard their own and the Indian LGBTQ+ community's right to marry and advance society towards greater inclusion.

**Petitioner No. 1** was born and raised in New Delhi and is a citizen of India. He excelled in debate and public speaking while at St. Columba's School, New Delhi, which he graduated with a gold medal in

computer science (Class XII (2006), 98%), and then won multiple international moot court competitions during his legal education at the [REDACTED] Kolkata. Petitioner No. 1 graduated [REDACTED] with a gold medal in intellectual property law, and spent three years litigating civil disputes before this Hon'ble Court and the Hon'ble Supreme Court of India. In 2014, when he decided to pursue an LL.M. at the [REDACTED] Petitioner No. 1 assured his family, friends, mentors, and employer that he would return in a year, after his studies. But witnessing fellow queer people in Palo Alto, California live freely, married to partners of their own choosing and protected equally under the law, Petitioner No. 1 was faced with a difficult and unfair choice. He realized he could not forfeit the opportunity for a just future with a lawful life partner. Although Petitioner No. 1 today works with a leading international law firm, litigating commercial and intellectual property cases in U.S. federal courts, he remains deeply nostalgic about the life and loved ones he was forced to leave behind in the country of his birth. The denial of an equal opportunity to marry in the country of his birth and citizenship constitutes a deprivation of Petitioner No. 1's rights guaranteed to him under Part III of our Constitution.

**Petitioner No. 2** was raised in Delhi and Mumbai, and is an Indian citizen. He excelled at music and theatre in [REDACTED] Road, which he graduated with accolades in 2003 (All Delhi Rank 2, Humanities). He then studied Economics at [REDACTED] University, where he received its highest award, the Centenary Medal, in

2006. Next, in 2009, he obtained an MPhil (with distinction) at Oxford University. Although he initially accepted a lucrative economic consulting position in London, Petitioner No. 2 was drawn back to India in 2012 by *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 160 DLT 277 (DB), and the desire to contribute to the cultural and economic development of the country. Upon returning, Petitioner No. 2 acted in, wrote, directed and produced several plays, short films, commercials and TV serials, in addition to appearing in Ashutosh Gowariker's Everest (2014) and the Bollywood film Badmashiyaan (2015). He also established himself as an economic consultant specializing in antitrust litigation, and advised on merger, cartel and abuse of dominance cases before the Hon'ble Competition Commission of India and the Hon'ble National Company Law Appellate Tribunal, ultimately establishing his own practice.

However, a promising career and artistic fulfilment proved insufficient compensation for being denied the freedom to love. Petitioner No. 2 and his partner, who have been living together in a marriage-like relationship since 2014, faced discrimination that heterosexual married couples do not, including difficulty renting a home to live in together. Not being able to marry and live freely, Petitioner No. 2 reversed his earlier views (when he moved back to India from London) and made the economically and emotionally devastating decision to relocate to Vancouver (Canada) with his partner. Today, as he works towards a PhD in Business Economics at the [REDACTED]

[REDACTED] Petitioner No. 2 remains hopeful that he will someday be

permitted to marry his partner in India and share with his partner the joys India offers heterosexual couples. When Petitioner No. 2 made enquires about whether, following the decision of the Hon'ble Supreme Court in *Navtej Singh Johar (supra)*, he and his partner would be permitted to marry under the laws of India, he was advised that the law, as it is interpreted today, does not permit two gay men to marry each other.

**Petitioner No. 3**, is an Artificial Intelligence scientist, who once dreamed of working for the Indian Government, but instead now works with a tech giant in California, USA. Petitioner No. 3, an Indian citizen, attended [REDACTED] in Chennai, where she stood first and third in her Class X and XII examinations, respectively. Recognized as a budding scientist, Petitioner No. 3 was invited to the CSIR Programme on Youth Leadership in Science (CPYLS), a program for top fifty students from across CBSE, ICSE and State Boards schools. Also a vocal advocate for social justice, Petitioner No. 3 organized events for raising awareness about social evils like female infanticide during her time in India, and was awarded a Women's Achiever Award for her work around social justice and women empowerment. Upon graduating with a Bachelors in Technology from the [REDACTED] [REDACTED] 2016, Petitioner No. 3 accepted a position as a Software Engineer at a renowned tech company in Hyderabad. However, she remained committed to someday working with the Indian government as a Civil Servant. Eventually, the unfortunate mindset toward same-sex relationships in India, reinforced by law through the pre-*Navtej* Section 377 of the Indian Penal Code and extant discriminatory family laws,

placed Petitioner No. 3 in an untenable situation: she could not pursue her dream of serving her country while simultaneously living an authentic life. Accepting that she had no choice but to pursue a career in a place where she could be true to herself, Petitioner No. 3 applied and was accepted to [REDACTED] University's coveted Master's program in Computer Science. She earned her degree in 2019 and began an exciting career in machine learning (or AI) with a leading Bay Area tech company. Although Petitioner No. 3 now lives in a democratic society that values her, including recognizing her right to marry whom she loves, Petitioner No. 3 experiences frustration, helplessness and despair about being unable to care for her aging parents and grandparents or live closer to her friends and community back home in India. The denial of an equal opportunity to marry in the country of her birth and citizenship constitutes a deprivation of Petitioner No. 3's rights guaranteed to her under Part III of our Constitution.

**Petitioner No. 4**, grew up and lives in New Delhi, but is now considering moving to Canada so that he and his partner may marry and live together. Petitioner No. 4 is a [REDACTED] year old gay man, who struggled to accept his sexuality growing up, but found strength connecting with and supporting others within the LGBTQ+ community. While pursuing a degree in Biotech Engineering at [REDACTED], Petitioner No. 4 devoted himself to an initiative called 'QueerCampus' or 'QC,' whose mission is to empower LGBTQ+ youth in Delhi, including guiding and offering resources to those contemplating suicide. Upon graduating in 2013, Petitioner No. 4 was hired as a Software Consultant by a leading

software company with offices in Gurgaon, and was subsequently promoted to Business Development Representative and then Business Development Manager. During his seven years with his company, Petitioner No. 4 received a number of awards in recognition of his talents both as an executive and as manager, including a “Most Valuable Player” award for two consecutive years. In May 2017, at a friend’s wedding ceremony, Petitioner No. 4 met his partner and the two grew close to each other’s families and friends. Now, while their loved ones continue to live in and around Delhi, Petitioner No. 4 and his partner are being drawn by their desire to marry and live together to jurisdictions where same-sex couples like them are not denied this fundamental right. In August 2020, Petitioner No. 4’s partner moved to Toronto, Canada, and Petitioner No. 4 is now exploring the option of joining him in Canada. When Petitioner No. 4 enquired about marrying his partner under the Indian law, he was advised that the law, as being construed today, would not recognize such a union. Although Petitioner No. 4 and his partner are relieved that they will finally be able to live together freely in Canada, they are heartbroken about being forced to leave their loved ones behind, including Petitioner No. 4’s aging mother, who suffers from a chronic illness and depends on Petitioner No. 4 for support.

Unlike the present Petitioners, for many in the LGBTQ+ community, speaking out against deprivation of basic civil rights is not an option given the social ostracism or career setbacks that would follow. Indeed, far too many are denied the support they deserve amongst their family, friends and wider social communities, which would otherwise

enable them to demand the equal treatment LGBTQ+ individuals deserve. The Petitioners have preferred the present Petition because they believe it is wrong to exert normativity or superiority over others on the basis of gender or sexuality, and because this social malady cannot be cured while the Respondents legislatively and unconstitutionally exclude certain genders and certain sexualities from access to foundational civil rights.

Additionally, the Petitioners have preferred the present Petition because they recognize that denying an entire group of society basic human liberties comes at a significant cost. A 2014 World Bank study, for example, estimates that India loses up to 1.3% of GDP because of higher rates of suicide, HIV and depression among the LGBTQ+ community. A 2019 study suggests that exclusion reduces labour productivity by 10% for LGBTQ+ individuals, leading to a further 0.4% annual GDP loss. These estimates, however, are only the tip of the iceberg and do not account for the wider economic loss of non-inclusiveness. Prominent academics emphasize that more tolerant and inclusive nations attract entrepreneurs, educated workers, and the families that produce them, leading to a high observed correlation between LGBTQ+ rights and economic development. Indeed, international studies suggest that the right to marry for same-sex couples is associated with a 54% - 64% higher per capita GDP.

The Petitioners respectfully submit that the just outcome in this case is not elusive. *See, e.g., Arunkumar v. Inspector General of Registration*, AIR 2019 Mad 265 (expansively construing the *Hindu*

*Marriage Act, 1955*, to recognize marriage involving transgender individuals; observing that, by its holding, “*this Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart.*”). The Constitution does not selectively offer the Article 21 fundamental right to marry—the Article applies to every “person”—and therefore LGBTQ+ people are as entitled to this right as anybody else. Indeed, a Constitution Bench of the Hon’ble Supreme Court already foreshadowed this pronouncement by citing *Shafin Jahan (supra)* and *Shakti Vahini (supra)* with approval in the context of same-sex relationships, and emphasizing that “*the organisation of intimate relations is a matter of complete personal choice especially between consenting adults.*” *Navtej Singh Johar (supra)*, (Paras. 119, 245, 255, 334-335, 479-481, 561.5, 618.3, 640.2.4). The Petitioners humbly submit that it is time that the Respondents *invest* in this country’s LGBTQ+ population instead of perpetuating discrimination against it.

#### **IV. TIMEWORN AND UNPERSUASIVE ARGUMENTS IN OPPOSITION:**

The Petitioners submit that the marriage equality argument has already been adjudicated in numerous jurisdictions. Indeed, same-sex marriages and civil unions are presently recognized in at least 29 democracies: Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Norway (2008), Sweden (2009), Iceland (2010), Portugal (2010), Argentina (2010), Denmark (2012), Uruguay (2013), New Zealand (2013), France (2013), Brazil (2013), United

Kingdom (2014), Finland (2014), Luxembourg (2015), Ireland (2015), Greenland (2015), United States of America (2015), Colombia (2016), Germany (2017), Malta (2017), Australia (2017), Austria (2019), Taiwan (2019), and Ecuador (2019), Costa Rica (2020). Opposition to judicial recognition of marriage equality for the LGBTQ+ community apparently takes one of three forms.

*First*, opponents argue that the courts must not intervene, and should instead leave the issue for the legislature to address. However, the present Petition does not involve an issue fit for resolution by a political majority. To the contrary, the Petition concerns unlawful curtailment, by majoritarian statute, of a constitutionally guaranteed fundamental right. *“The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.”* *Puttuswamy (supra)*, at 421 (Para. 144). The Petitioners respectfully submit that, in India, not only is the judiciary empowered to intervene, it is the courts’ constitutional duty to safeguard fundamental rights. Therefore, asking this Hon’ble Court to step aside while constitutionally guaranteed human rights continue to be infringed would be nothing short of the Respondents inviting the Hon’ble Court to abdicate its primary constitutional duty, and the *“argument. . . that change in society, if any, can be reflected by amending laws by the elected representatives of the people,”* is an *“argument [that] must be emphatically rejected.”* *Navtej Singh Johar (supra)* (Para 352 at Pg. 185).

*Second*, opponents emphasize that marriage has traditionally and historically been limited to “male” and “female” partnerships. However, generations of denial is not in itself an argument for its perpetuation. “*If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.*” *Obergefell v. Hodges*, 576 US 644 (2015) at 671. When science has evolved, so must the thinking regarding how our laws should be used to organize society. Prolonged injustice underscores the urgency of the relief sought in this petition—not constitute an argument against it. *Navtej Singh Johar (supra)*, at 289, 310 (Paras 616, 644) (“*A hundred and fifty-eight years is too long a period for the LGBT community to suffer the indignities of denial,*” and it is “*time to invoke the transformative power of the Constitution.*”).

*Finally*, opponents prophesy that upholding everybody’s fundamental right to marry would diminish the worth of heterosexuals’ marriages. However, “[i]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.” *Obergefell (supra)*, at 679 (internal citations and original alterations omitted). Besides, because India is a constitutional democracy, neither popular morality nor perceived behavioural implications for third parties constitutes valid justification for continued deprivation of individual constitutional liberties. *Navtej Singh Johar (supra)*, at 288 (Para. 606) (“*Constitutional morality,*” as opposed to

popular morality, “*will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship.*”).

Constitutional morality—pursuant to the landmark ruling of a Nine Judge Bench of the Hon’ble Supreme Court—is clear: sexuality is a private matter, and the Respondents cannot dictate who marries whom. *K.S. Puttuswamy v. Union of India*, (2017) 10 SCC 1 (Paras. 144, 146, 323, 645, 647) (sexual orientation is a facet of a person’s privacy, and the right to privacy is a fundamental right under the Constitution). Indeed, the Bench quoted with approval the United States Supreme Court’s observations that “*it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society*” to conclude that the “*unhindered fulfilment of one’s sexual orientation [is] an element of privacy and dignity.*” *Id.*, (Paras. 146, 194). Therefore, any suggestion that the sensibilities of heterosexual couples should dictate a homosexual couple’s enjoyment of privacy, dignity, or the fundamental right to marry, is antithetical to the Constitution of India.

## V. CONCLUSION:

The Petitioners humbly submit that Constitution of India is not a stagnant document. Recognizing that “*decriminalisation is a first step,*” the Hon’ble Supreme Court in *Navtej Singh Johar (supra)* directed that “*constitutional principles which have led to decriminalization must continuously engage in a rights discourse to ensure that same-sex relationships find true fulfilment in every facet of life.*” (Paras. 561.7,

564) (emphasis added). The Petitioners most respectfully submit that because “[t]he right to love and to a partner, to find fulfilment in a same-sex relationship is essential to a society which believes in freedom under a constitutional order based on rights,” *id.* (Para 561.5), this Hon’ble Court ought to grant the present Petition.

For the above reasons, explained more fully below, the Petitioners pray for a declaration that, to the extent Section 4(c) and any other provisions of the *Special Marriage Act, 1954*, are construed as requiring, for the solemnization of marriage, one “male” and one “female,” those provisions are unconstitutional; and that preserving constitutionality requires that those provisions be read as neutral to gender and sexual orientation. In the alternative, the Petitioners pray for a declaration, by reading down any restrictions, that the Act applies, regardless of sex, to any two persons who wish to marry. The Petitioners further pray that this Hon’ble Court affirm that “a marriage between **any two persons** may be solemnized” under the Act, regardless of sex, provided those persons are above the permissible age for marriage and meet the other conditions prescribed in Section 4 of the Act.

#### **LIST OF DATES & EVENTS**

DATE	EVENT
1872	The <i>Special Marriage Act, 1872</i> , was enacted in the wake of the <i>Brahmo Samaj</i> movement that represented a departure from Hindu customs, including caste. The movement, which was most influential in the struggle for social reform,

	<p>advocated for a progressive secular marriage law. However, vehement opposition and accusations of interference with religious affairs ultimately led to the act conditioning access to marriage under its provisions on a complete severance from one's faith.</p>
10.12.1948	<p>India voted in favour of adoption of the Universal Declaration of Human Rights. The declaration emphasizes that all human beings are "<i>born free and equal in dignity and rights</i>" (Article 1).</p>
1954	<p>The <i>Special Marriage Act, 1954</i>, was enacted, replacing the 1872 statute. Under the Act, <i>any</i> two Indians—whether living in India or in a foreign country, and whether professing the same religion or different religions (or no religion at all)—could marry. An Indian citizen and a foreign citizen may also marry under the statute. The statute was enacted as a foundational step toward the uniform civil code envisioned under Article 44 of the Constitution.</p>
10.04.1979	<p>India ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These conventions provide that "<i>everyone</i>" is entitled to the conventions' enumerated rights "<i>without distinction of any kind</i>" based on "<i>sex</i>" or "<i>other status</i>" (Article 26, ICCPR; Article 2, ICESCR). It was subsequently clarified that "<i>sex</i>" and "<i>other status</i>" "<i>includes sexual orientation</i>" (United Nations Committee on Economic, Social and Cultural Rights 2009 Report).</p>
2006	<p>The <i>Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006</i> were promulgated,</p>

	codifying further protections for LGBTQ+ individuals and addressing a broad range of human rights standards and their application to sexual orientation and gender identity.
15.04.2014	The Hon'ble Supreme Court of India passed its landmark judgment in <i>NALSA v Union of India</i> , (2014) 5 SCC 438, recognizing the fundamental rights of the transgender community, and also emphasizing that “[e]ach person’s self defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self determination, dignity and freedom.” <i>Id.</i> at 465 (Para 22).
24.08.2017	The Hon'ble Supreme Court of India passed its landmark judgment in <i>K.S. Puttaswamy v Union of India</i> , (2017) 10 SCC 1, reaffirming the fundamental right to privacy and explaining its various dimensions. In the context of sexual orientation, the Hon'ble Nine Judge Bench observed that “[d]iscrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform, [and] the protection of sexual orientation lie[s] at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.” <i>Id.</i> at 422 (Para. 144).
2018	The Hon'ble Supreme Court passed landmark judgments affirming that “[t]he right to marry a person of one’s choice is integral to Article 21 of the Constitution.” <i>Shafin Jahan v. Asokan K.M.</i> , (2018) 16 SCC 368 at 405 (Para. 86) (emphasis added). The Hon'ble Supreme Court ruled that, “[w]hen two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that

	<p><i>it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.” Shakti Vahini v. Union of India, (2018) 7 SCC 192 at 212 (Para. 45). To safeguard this “absolute right of an individual to choose a life partner,” the Supreme Court mandated that “[n]either the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.” Shafin Jahan (supra), (Para. 84).</i></p>
06.09.2018	<p>The Hon’ble Supreme Court of India passed its landmark judgment in <i>Navtej Singh Johar &amp; Ors. v. Union of India, (2018) 10 SCC 1</i>, holding that Section 377, Indian Penal Code, 1860, so far as it penalizes consensual sexual relationship between two adults, is unconstitutional. Additionally, Hon’ble Constitution Bench ruled that India’s LGBTQ+ citizens are entitled to “<i>the same human, fundamental constitutional rights as other citizens.</i>” <i>Id.</i>, at 140 (Para 255). The Constitution Bench further emphasized that “<i>LGBT persons, like other heterosexual persons, are entitled to. . . the right to lead a dignified existence, without fear of persecution,</i>” and that “[<i>t]hey are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners.</i>” <i>Id.</i>, at 302 (Para. 640.2.4).</p>
14.10.2020	<p>This Hon’ble Court issued notice in <b><i>W.P. (C) No. 7657/2020 (Vaibhav Jain &amp; Anr. v. Union of India &amp; Anr.)</i></b> and <b><i>W.P. (C) 7692/2020 (Dr. Kavita Arora &amp; Anr. v. Union of India &amp; Anr.)</i></b> wherein Petitioners impugn the provisions of the <i>Foreign Marriage Act, 1969</i>, and the <i>Special Marriage Act, 1954</i>, respectively, to the extent they exclude same-sex couples.</p>

19.11.2020	This Hon'ble Court issued notice in <i>W.P. (C) No. 6371/2020 (Abhijit Iyer Mitra v. Union of India)</i> wherein the Petitioner seeks a declaration that Section 5 of the <i>Hindu Marriage Act, 1955</i> , does not distinguish between homosexual and heterosexual couples, and that the Act recognizes the right of same-sex couples to marry. The case was directed to be listed along with <i>W.P. (C) No. 7657/2020</i> and <i>W.P. (C) 7692/2020</i> .
	Hence, this Petition praying for a declaration that, to the extent Section 4(c) and any other provisions of the Special Marriage Act, 1954, are construed as requiring, for the solemnization of a marriage, one "male" and one "female," those provisions are unconstitutional unless read as neutral to gender and sexual orientation to avoid unconstitutionality. In the alternative, the Petitioners pray for a declaration, by reading down any restrictions, that the Act applies, regardless of sex, to <i>any</i> two persons who wish to marry. The Petitioners further pray that this Hon'ble Court affirm that " <i>a marriage between <u>any two persons</u> may be solemnized</i> " under the Act, regardless of sex, provided those persons are above the permissible age for marriage and meet the other conditions prescribed in Section 4 of the Act.

FILED:

  
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NEW DELHI

22.02.2021

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W.P. (C) NO. \_\_\_\_ OF 2021**

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R.

**CIVIL WRIT PETITION UNDER ARTICLE 226 OF THE  
CONSTITUTION OF INDIA**

TO,

THE HON'BLE CHIEF JUSTICE AND HIS COMPANION JUDGES OF  
THE HON'BLE HIGH COURT OF DELHI AT NEW DELHI

THE HUMBLE PETITION OF THE PETITIONERS ABOVE  
NAMED

**MOST RESPECTFULLY SHEWETH:**

1. The present writ petition asserts the LGBTQ+ community's fundamental right to marry. The Petitioners are openly gay or lesbian and have personally been affected by the Respondents' unconstitutional denial of this right. By way of the present Petition, the Petitioners hope to safeguard their own fundamental rights, and consequentially those of other Indian LGBTQ+ individuals, many of whom lack the Petitioners' privilege of being able to publicly demand equal treatment. The Petitioners respectfully submit that exclusion of same-sex couples from the

*Special Marriage Act, 1954* (the “Act”), violates Articles 14, 15 and 19 of the Constitution of India, and deprives LGBTQ+ individuals like the Petitioners their fundamental rights under Article 21. Denying foundational civil rights like marriage inflicts harm not only on the LGBTQ+ community, but on Indian society as a whole.

2. By way of the present Petition, the Petitioners humbly pray for a declaration that, to the extent Section 4(c) and any other provisions of the Act are construed as requiring, for the solemnization of a marriage, one “male” and one “female,” those provisions are unconstitutional unless read as neutral to gender and sexual orientation to avoid unconstitutionality. In the alternative, the Petitioners pray for a declaration, by reading down any restrictions, that the Act applies, regardless of sex, to *any* two persons who wish to marry. The Petitioners further pray that this Hon’ble Court uphold non-discriminatory access to the Act, which provides that “a marriage between any two persons may be solemnized under *this Act*,” by invalidating any preconditions for marriage that are based on sex.
3. The Petitioners respectfully submit that the landmark decisions of the Hon’ble Supreme Court in *NALSA v. Union of India*, (2014) 5 SCC 438; *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1; *Navtej Singh Johar & Ors. v. Union of India*, (2018) 10 SCC 1;

*Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368; and *Shakti Vahini v. Union of India*, (2018) 7 SCC 192, foreclose any argument for denying same-sex couples the right to marry. These cases either discuss the “*absolute right of an individual to choose a life partner*” and emphasize that this right “*is integral to Article 21,*” or they affirm that the LGBTQ+ community possesses “*the same human, fundamental and constitutional rights as other citizens do.*” Together, it necessarily follows that LGBTQ+ individuals are constitutionally entitled to decide whom to love and marry.

4. Thus, the Petitioners have preferred the present Petition to assert an equal right to enter into the union of marriage as is available to heterosexual citizens of India and humbly pray that this Hon’ble Court recognize and uphold the same.

#### **BRIEF FACTS**

5. The Petitioners humbly submit that each of them is an Indian citizen, born, raised, and educated in India. Each is a capable and talented young professional, with multiple accolades to boast in science, arts, business, and law. Three of the four Petitioners have moved, at considerable personal cost, to democracies that uphold marriage equality in pursuit of a life of equality and dignity. For similar reasons, the fourth Petitioner is preparing to leave New Delhi, home to his chronically-ill mother who depends on him for support. He is attempting to move to Toronto, Canada, so that he

and his partner may marry. Because the Petitioners have the privilege of being open about their sexuality, and are generally supported by their friends, family, and colleagues, they have banded together to assert their fundamental right to marry, and describe to this Hon'ble Court the harm the Respondents' unlawful denial of this right to marry inflicts on them and other members of the LGBTQ+ community.

6. **Petitioner No. 1**, Udit Sood, was born and raised in New Delhi and is a citizen of India. He excelled in debate and public speaking while at [REDACTED] School, New Delhi, which he graduated with a gold medal in computer science (Class XII (2006), 98%), and then won multiple international moot court competitions during his legal education at the [REDACTED] [REDACTED] Kolkata. Petitioner No. 1 graduated [REDACTED] with a gold medal in intellectual property law, and spent three years litigating civil disputes before this Hon'ble Court and the Hon'ble Supreme Court of India. In 2014, when he decided to pursue an LL.M. at the [REDACTED] Petitioner No. 1 assured his family, friends, mentors, and employer that he would return in a year, after his studies. But witnessing fellow queer people in Palo Alto, California live freely, married to partners of their own choosing and protected equally under the law, Petitioner No. 1 was faced with a difficult and unfair choice. He realized he could not forfeit the opportunity for a just future with a lawfully

recognized life partner. Although Petitioner No. 1 today works with a leading international law firm, litigating commercial and intellectual property cases in U.S. federal courts, he remains deeply nostalgic about the life and loved ones he was forced to leave behind in the country of his birth. The denial of an equal opportunity to marry in the country of his birth and citizenship constitutes a deprivation of Petitioner No. 1's rights guaranteed to him under Part III of our Constitution.

7. **Petitioner No. 2**, Saattvic, was raised in Delhi and Mumbai, and is an Indian citizen. He excelled at music and theatre in ██████████ ██████████, which he graduated with accolades in 2003 (All Delhi Rank 2, Humanities). He then studied Economics at ██████████ University, where he received its highest award, the Centenary Medal, in 2006. Next, in 2009, he obtained an MPhil (with distinction) at ██████████ University. Although he initially accepted a lucrative economic consulting position in London, Petitioner No. 2 was drawn back to India in 2012 by *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 160 DLT 277 (DB), and the desire to contribute to the cultural and economic development of the country. Upon returning, Petitioner No. 2 acted in, wrote, directed and produced several plays, short films, commercials and TV serials, in addition to appearing in Ashutosh Gowariker's Everest (2014) and the Bollywood film Badmashiyaan (2015). He also established himself as an economic

consultant specializing in antitrust litigation, and advised on merger, cartel and abuse of dominance cases before the Hon'ble Competition Commission of India and the Hon'ble National Company Law Appellate Tribunal, ultimately establishing his own practice.

However, a promising career and artistic fulfilment proved insufficient compensation for being denied the freedom to love. Petitioner No. 2 and his partner, who have been living together in a marriage-like relationship since 2014, faced discrimination that heterosexual married couples do not, including difficulty renting a home to live in together. Not being able to marry and live freely, Petitioner No. 2 reversed his earlier views (when he moved back to India from London) and made the economically and emotionally devastating decision to relocate to Vancouver (Canada) with his partner. Today, as he works towards a PhD in [REDACTED] [REDACTED] at the University [REDACTED], Petitioner No. 2 remains hopeful that he will someday be permitted to marry his partner in India and share with his partner the joys India offers heterosexual couples. When Petitioner No. 2 made enquires about whether, following the decision of the Hon'ble Supreme Court in *Navtej Singh Johar (supra)*, he and his partner would be permitted to marry under the laws of India, he was advised that the law, as it is interpreted today, does not permit two gay men to marry each other.

8. **Petitioner No. 3**, Lakshmi Manoharan, is an Artificial Intelligence scientist, who once dreamed of working for the Indian Government, but instead now works with a tech giant in California, USA. Petitioner No. 3, an Indian citizen, attended [REDACTED] [REDACTED] School in Chennai, where she stood first and third in her Class X and XII examinations, respectively. Recognized as a budding scientist, Petitioner No. 3 was invited to the CSIR Programme on Youth Leadership in Science (CPYLS), a program for top fifty students from across CBSE, ICSE and State Boards schools. Also a vocal advocate for social justice, Petitioner No. 3 organized events for raising awareness about social evils like female infanticide during her time in India, and was awarded a Women's Achiever Award for her work around social justice and women empowerment. Upon graduating with a Bachelors in [REDACTED] in 2016, Petitioner No. 3 accepted a position as a Software Engineer at a renowned tech company in Hyderabad. However, she remained committed to someday working with the Indian government as a Civil Servant. Eventually, the unfortunate mindset toward same-sex relationships in India, reinforced by law through the pre-*Navtej* Section 377 of the Indian Penal Code and extant discriminatory family laws, placed Petitioner No. 3 in an untenable situation: she could not pursue her dream of serving her country while simultaneously living an authentic life. Accepting

that she had no choice but to pursue a career in a place where she could be true to herself, Petitioner No. 3 applied and was accepted to ██████ University's coveted Master's program in Computer Science. She earned her degree in 2019 and began an exciting career in machine learning (or AI) with a leading Bay Area tech company. Although Petitioner No. 3 now lives in a democratic society that values her, including recognizing her right to marry whom she loves, Petitioner No. 3 experiences frustration, helplessness and despair about being unable to care for her aging parents and grandparents or live closer to her friends and community back home in India. The denial of an equal opportunity to marry in the country of her birth and citizenship constitutes a deprivation of Petitioner No. 3's rights guaranteed to her under Part III of our Constitution.

9. **Petitioner No. 4**, Gagan Paul, grew up and lives in New Delhi, but is now exploring the option of moving to Canada so that he and his partner (who is also an Indian citizen) may marry and live together. Petitioner No. 4 is a ██████ year old gay man, who struggled to accept his sexuality growing up, but found strength connecting with and supporting others within the LGBTQ+ community. While pursuing a degree in Biotech Engineering at ██████ University, Noida, Petitioner No. 4 devoted himself to an initiative called 'QueerCampus' or 'QC,' whose mission is to empower LGBTQ+ youth in Delhi, including guiding and offering resources

to those contemplating suicide. Upon graduating in 2013, Petitioner No. 4 was hired as a Software Consultant by a leading software company with offices in Gurgaon, and was subsequently promoted to Business Development Representative and then Business Development Manager. During his seven years with his company, Petitioner No. 4 received a number of awards in recognition of his talents both as an executive and as manager, including a “Most Valuable Player” award for two consecutive years. In May 2017, at a friend’s wedding ceremony, Petitioner No. 4 met his partner and the two grew close to each other’s families and friends. Now, while their loved ones continue to live in and around Delhi, Petitioner No. 4 and his partner are being drawn by their desire to marry and live together to jurisdictions where same-sex couples like them are not denied this fundamental right. In August 2020, Petitioner No. 4’s partner moved to Toronto, Canada, and Petitioner No. 4 is considering joining him in Canada. When Petitioner No. 4 enquired about marrying his partner under the Indian law, he was advised that the law, as is construed today, would not recognize such a union. Although Petitioner No. 4 and his partner are relieved that they will finally be able to live together freely in Canada, they are heartbroken about being forced to leave their loved ones behind, including Petitioner No. 4’s aging mother, who suffers from a chronic illness and depends on Petitioner No. 4 for support.

10. Unlike the present Petitioners, who have the support they need to assert their fundamental rights, for many members of the LGBTQ+ community, speaking out against deprivation of basic civil rights is not feasible for fear of social ostracism and career setbacks. Indeed, far too many are denied the support they deserve among their family, friends and wider social communities, which would otherwise enable them to demand the equal treatment they deserve. The Petitioners bring this Petition because they believe it is wrong to exert normativity or superiority over others on the basis of gender or sexuality, and because the Petitioners maintain that this social malady cannot be cured while the Respondents legislatively and unconstitutionally exclude certain genders and certain sexualities from access to foundational civil rights.
11. The Petitioners additionally bring this Petition because they recognize that depriving a segment of society basic human liberties comes at a significant cost. A 2014 World Bank study, for example, estimates that India loses up to 1.3% of GDP because of higher rates of suicide, HIV and depression among the LGBTQ+ community. A 2019 study suggests that exclusion reduces labour productivity by 10% for LGBTQ+ individuals, leading to a further 0.4% annual GDP loss. However, as discussed below, these studies are only the tip of the iceberg and do not account for the wider economic loss of non-inclusiveness. Prominent academics emphasize that more tolerant and inclusive nations attract

entrepreneurs, educated workers, and the families that produce them, leading to a high observed correlation between LGBTQ+ rights and economic development. Indeed, one international study suggests that the right to marry for same-sex couples is associated with a 54% higher per capita GDP.

12. Finally, the Petitioners bring this Petition because they believe that marriage equality should be affirmed without further delay. The Constitution of India does not selectively offer the suite of Article 21 fundamental rights, of which the right to marry is an “*integral*” one, and therefore persons of the LGBTQ+ community are as entitled to this right as anybody else. Indeed, a Constitution Bench of the Hon’ble Supreme Court already foreshadowed this pronouncement by citing *Shafin Jahan (supra)* and *Shakti Vahini (supra)* with approval in the context of same-sex relationships, emphasizing the autonomy of an individual to choose a sexual partner and mandating that “*the organisation of intimate relations is a matter of complete personal choice especially between consenting adults.*” *Navtej Singh Johar (supra)*, 104, 138, 140, 176-178, 239-240, 271, 290, 302 (Paras. 119, 245, 255, 334-335, 479-481, 561.5, 618.3, 640.2.4).

### GROUNDS

13. The relief sought in the present Petition is based on the grounds below, which are pleaded in the alternative and without prejudice

to each other. For this Hon'ble Court's convenience, the Petition organizes its grounds into the following seven sections: **(I)** The Constitution Of India Guarantees Equality To LGBTQ+ Individuals; **(II)** The Constitution Of India Guarantees LGBTQ+ Individuals The Right To Marry; **(III)** Governing International Law Recognizes Marriage Equality; **(IV)** The Special Marriage Act, 1954, Unlawfully Excludes LGBTQ+ Individuals; **(V)** Part III Of The Constitution Invalidates Any Gender And Sexuality Based Preconditions For Marriage In The Special Marriage Act, 1954; **(VI)** Denying LGBTQ+ Individuals The Right To Marry Inflicts Personal Harm; and **(VII)** Denying LGBTQ+ Individuals The Right To Marry Inflicts Economic Cost On The Country.

I. **THE CONSTITUTION OF INDIA GUARANTEES EQUALITY TO LGBTQ+ INDIVIDUALS.**

- A. That the Constitution of India guarantees certain inalienable and fundamental rights to **all people**, including members of the LGBTQ+ community. These rights, enshrined *inter-alia* in Articles 14, 15, and 21 in Part III of the Constitution, include the right to equality, the right to be protected against discrimination on the basis of gender identity or sexual orientation, and the right to lead a dignified life. Article 19(1)(a) additionally guarantees to **all citizens**, including members of the LGBTQ+ community, the right to freedom of speech and expression, which includes full expression of gender

identity and sexual orientation. Failure to permit marriage between members of the LGBTQ+ community violates these rights.

- B. **Article 14** promises every “*person*” “*equality before the law*” and “*the equal protection of the laws,*” and thus requires that the law treat LGBTQ+ individuals as equals to binary-gendered heterosexuals. *NALSA (supra)*, at **487 (Para. 62)** (“*Discrimination on the grounds of sexual orientation or gender identity. . . impairs equality before law and equal protection of law and violates Article 14 of the Constitution.*”); *Navtej Singh Johar (supra)*, at **195 (Para. 369)** (“*We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity. . . We further declare that [sexual minorities] are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them.*”).
- C. **Article 15** prohibits discrimination against any citizen on grounds of “*sex,*” which includes gender identity. *NALSA (supra)*, at **488 (Para. 66)** (“*The discrimination on the ground of “sex” under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression ‘sex’ used in Articles 15 and 16 is not just limited to*

*biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.”).*

- D. **Article 15** similarly protects against discrimination on grounds of sexual orientation. *Navtej Singh Johar (supra)*, at **219-222, (Paras. 431-440) and 299-300 (Para 638.2)** (“*Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their “sexual identity and character.” The J.S. Verma Committee had recommended that “sex” under Article 15 must include “sexual orientation”: -- “.....[W]e are clear that Article 15(c) of the Constitution of India uses the word ‘sex’ as including sexual orientation.”*).
- E. **Article 19(1)(a)** guarantees to all citizens the fundamental right to freedom of speech and expression, including full expression of gender identity and sexual orientation. *NALSA (supra)*, at **490 (Para 72)** (“*Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India*”); *Navtej Singh Johar (supra)*, at **234 (Para. 467)** (“*To deny the members of the LGBT community the full expression of the right to sexual orientation is to deprive them of their entitlement to full citizenship under the Constitution.*”).

- F. **Article 21** guarantees the fundamental right to life and personal liberty, which includes dignity, privacy, and personal autonomy for LGBTQ+ individuals. *Navtej Singh Johar (supra)*, at **109, 119, 231-232, 302 (Paras. 139, 175, 462, 640.2.4)** (“*Sexual orientation is innate to a human being. It is an important attribute of one's personality and identity. Homosexuality and bisexuality are natural variants of human sexuality. . . . LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected under Article 21. The right to life and liberty would encompass the right to sexual autonomy, and freedom of expression.*”).
- G. In sum, Part III of our Constitution outlaws discrimination against LGBTQ+ individuals. *Puttaswamy (supra)*, at **422 (Para. 144)** (“*Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform, [and] the protection of sexual orientation lie[s] at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.*”).

## II. THE CONSTITUTION OF INDIA GUARANTEES LGBTQ+ INDIVIDUALS THE RIGHT TO MARRY.

- A. That “[t]he right to marry a person of one’s choice is integral to Article 21 of the Constitution.” *Shafin Jahan (supra)*, at 405 (Para 86). As the Hon’ble Apex Court held in *Shakti Vahini (supra)*, at 212 (Para 45), “[w]hen two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.”<sup>1</sup>
- B. To safeguard this “absolute right of an individual to choose a life partner,” the Hon’ble Supreme Court has mandated that “[n]either the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.” *Shafin Jahan (supra)*, at 405 (Para 84) (emphasis added).
- C. LGBTQ+ individuals are entitled to “*the same human, fundamental constitutional rights as other citizens.*” *Navtej Singh Johar (supra)*, at 140 (Para 255). This means that

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<sup>1</sup> Notably, under Indian law, the right to marry is considered so inalienable that one is not even permitted to contract it away. Section 26 of the Indian Contract Act, 1872, provides that every agreement in restraint of the marriage of any person (other than a minor) is void.

LGBTQ+ individuals, like other citizens, have the “*absolute right. . . to choose a life partner,*” and even as to LGBTQ+ individuals, “[n]either the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.” *Shafin Jahan (supra)*, at 405 (Para 84); see also *Navtej Singh Johar (supra)*, at 104, 138, 140, 176-178, 239-240, 271, 290, 302 (Paras. 119, 245, 255, 334-335, 479-481, 561.5, 618.3, 640.2.4). (citing *Shafin Jahan* and *Shakti Vahini* with approval; emphasizing the autonomy of an individual to choose a sexual partner and holding that “*the organisation of intimate relations is a matter of complete personal choice especially between consenting adults*”).

### III. GOVERNING INTERNATIONAL LAW RECOGNIZES MARRIAGE EQUALITY.

- A. That principles of international law are enforceable by the Indian Courts. *Gramophone Company Of India Ltd v. Birendra Bahadur Pandey*, (1984) 2 SCC 534, at 540 (Para. 5) (“*There can be no question that nations must march with the international community and the municipal law must respect rules of International law. . .*”). In particular, “*any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions e.g. Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the*

*object of constitutional guarantee.” NALSA (supra), at 486 (Para. 59).* As shown below, international law supports this Petition for reasons similar to those discussed in Sections I and II above.

- B. Part III of the Constitution of India embodies universally-accepted principles of human rights. For example, like Article 14 of the Constitution, Article 1 of the **Universal Declaration of Human Rights, 1948 (“UDHR”)**, mandates that “[a]ll human beings are born free and equal in dignity and rights” (emphasis added). Likewise, consistent with Articles 15 and 16 of the Constitution, Article 2 of the **International Covenant on Economic, Social and Cultural Rights, 1966 (“ICESCR”)**, prohibits discrimination on the basis of “sex. . .or other status.” Similarly, like Article 19 of the Constitution, UDHR’s Article 19 recognizes that “[e]veryone has the right to freedom of opinion and expression,” and ICCPR’s Article 19 provides “[e]veryone. . . the right to freedom of expression.” Further, like Article 21 of the Constitution, Article 16 of the **International Covenant on Civil and Political Rights, 1966 (“ICCPR”)**, recognises that “[e]very human being has the inherent right to life,” and UDHR’s Article 12 and ICCPR’s Article 17 elaborate that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence” (emphases added).

A copy of the Universal Declaration of Human Rights, 1948 is annexed hereto and marked as **ANNEXURE – A**. A copy of the International Covenant on Civil and Political Rights, 1966 is annexed hereto and marked as **ANNEXURE – B**. A copy of the International Covenant on Economic, Social and Cultural Rights, 1966 is annexed herewith and marked as **ANNEXURE – C**.

- C. Notably, like Article 21 of the Constitution of India, international law recognizes marriage as a human right. “*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence*” (**Article 12, UDHR; Article 17, ICCPR**), and adults “*have the right to marry*” and “*are entitled to equal rights as to marriage.*” (**Article 16, UDHR**).
- D. Consistent with Articles 14, 15, 19 and 21 of the Constitution of India, the UDHR, ICCPR, and ICESCR prohibit discrimination against LGBTQ+ individuals. For example, each of these conventions provides that “*[e]veryone*” is entitled to the conventions’ enumerated rights “*without distinction of any kind*” based on “*sex*” or “*other status*” (**Article 7, UDHR; Article 26, ICCPR; Article 2, ICESCR**), which “*includes sexual orientation.*” (United Nations Committee on Economic,

Social and Cultural Rights 2009 Report.) Member states, including India,<sup>2</sup> are obliged to “*ensure that a person's sexual orientation is not a barrier to realising Covenant rights.*” (Paragraph 32, 2009 Report.)

A printout of the webpage of the digital library of the United Nations reflecting India voting Yes on the Universal Declaration of Human Rights, 1948; last accessed on 20.02.2021, is annexed herewith and marked as **ANNEXURE – D.**

A printout of the webpage from the website of the Office of the United Nations High Commissioner for Human Rights reflecting that India ratified the ICCPR & ICESCR on 10.04.1979; last accessed on 20.02.2021, is annexed herewith and marked as **ANNEXURE – E.**

A copy of the United Nations Committee on Economic, Social and Cultural Rights 2009 Report is annexed hereto and marked as **ANNEXURE – F.**

E. *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and*

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<sup>2</sup>India voted in favour of adopting the UDHR on 10.12.1948 (<https://digitallibrary.un.org/record/670964?ln=en&p=Resolution+217%28III%29+A>) and ratified the ICCPR and the ICESCR on 10.04.1979 (<https://tbinternet.ohchr.org/layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN>).

*Gender Identity, 2006*, further codify protections, “*address[ing] a broad range of human rights standards and their application to. . . sexual orientation and gender identity.*” *NALSA (supra)*, at 466-471 (Para. 24-25). The **First Yogyakarta Principle** is that “*human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.*”

A copy of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006 is annexed herewith and marked as **ANNEXURE – G**.

- F. This Hon’ble Court ought to uphold the international law discussed above because each of UDHR, ICCPR, ICESCR and Yogyakarta principles is “*not inconsistent with the various fundamental rights guaranteed under the Indian Constitution,*” and “*must be recognized and followed.*” *NALSA (supra)*, at 487 (Para. 60).
- G. In sum, like the Constitution of India, international law recognizes the right to marry as a human right, and guarantees every LGBTQ+ person “*the right to recognition everywhere as a person.*” (**Third Yogyakarta Principle**.) Accordingly, countries like India that “*recognize*” and “*follow*” the Yogyakarta Principles have a duty to ensure that their citizens,

including LGBTQ+ individuals, are guaranteed the right to marry.

#### IV. THE SPECIAL MARRIAGE ACT, 1954, UNLAWFULLY EXCLUDES LGBTQ+ INDIVIDUALS.

##### The Special Marriage Act, 1954, Was Enacted To Allow “Any Two Persons” To Marry, Notwithstanding Prevailing Religious Or Other Prejudices.

- A. That the Special Marriage Act, 1954, illustrates that, as faith and science evolve, so must social institutions like marriage. The Act owes its origin to recognition in the late 1800s that two consenting adults wishing to marry should not be prevented from doing so by religion, caste, or faith. The statute, as detailed below, was intended to expansively provide access to marriage. It therefore uses the words “*any two persons*” in defining who may marry.
- B. The Act’s predecessor, the Special Marriage Act, 1872, was enacted in the wake of the *Brahmo Samaj* movement, which represented a departure from traditional Hindu customs, including caste. The Brahmo Samaj of India, organized in 1866, “*was most influential in the struggle for social reform*” and “*encouraged the education of women, and campaigned for the remarriage of widows and for legislation to prevent child marriages.*” In the face of stiff opposition, the movement advocated for a progressive secular marriage law.

A printout of Britannica, T. Editors of Encyclopaedia, ‘Brahmo Samaj,’ Encyclopedia Britannica, February 19, 2015 last accessed on 20.02.2021 is annexed hereto and marked as **ANNEXURE – H.**

C. Although the secular marriage statute initially conceived provided citizens the ability to freely choose the statute over their respective personal laws, vehement opposition and accusations of interference with religious affairs ultimately led to the Special Marriage Act, 1872, conditioning access on a complete severance from one’s faith. A subsequent amendment in 1923 granted special privileges to certain religions.<sup>3</sup> After adoption of the Constitution in 1950, the Special Marriage Bill, 1952, was introduced as a foundational step toward attainment of the uniform civil code envisioned under Article 44. Avoiding past missteps, under this new law, any two Indians—whether living in India or in a foreign country, and whether professing the same religion or different religions (or no religion at all)—could marry.<sup>4</sup> The Bill was enacted in the form of the Special Marriage Act, 1954, replacing the old Special Marriage Act, 1872.

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<sup>3</sup> Hindus, Buddhists, Sikhs and Jains were allowed to marry without renouncing their faith. The amendment also allowed two persons belong to different religions (from amongst these four) to inter-marry without renouncing their respective faiths.

<sup>4</sup> An Indian citizen and a foreign citizen may also marry under the statute.

D. The Act therefore provides a legal framework for “any two persons” to solemnize marriage, without deference to customary beliefs or laws like Hindu Marriage Act, 1955; Indian Christian Marriage Act, 1872; and Muslim Personal Law (Shariat) Application Act, 1937. The Act provides access to civil marriage independent of the vagaries of customary laws, and embodies the core democratic value that access to fundamental rights should not depend on religion or custom.

**The Special Marriage Act, 1954, Is Interpreted As Excluding Same-Sex Couples.**

E. That the Special Marriage Act, 1954, provides that, “[n]otwithstanding anything contained in any other law..., a marriage between any two persons may be solemnized under *this Act*” subject to certain conditions. **Section 4** (emphasis added). Condition (a) requires that neither party’s spouse be alive; condition (b) requires consent; and condition (c) prescribes minimum age—eighteen if you are “female” and twenty-one if you are “male.”

F. However, because **Section 4(c)** references “male” and “female,” the statute is generally understood as limiting access to couples comprising of one “male” and one “female.”<sup>5</sup>

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<sup>5</sup> Although this Petition focuses on Section 4 since it concerns “*Conditions relating to solemnization of special marriages*,” the Act also uses gendered language like “husband” / “wife” and “bride” / “bridegroom” in other provisions. Accordingly, to the extent the Respondents contend that those

Pertinently, this Hon'ble Court while issuing notice vide Order dated 14.10.2020 in *Dr. Kavita Arora v. Union of India (W.P.(C) 7692/2020)* noted the contention of the Petitioners therein (a same-sex couple) that the authorities under the Act had refused to entertain their application for solemnization of marriage. This Hon'ble Court *prima facie* observed that the Act, while prescribing the conditions in respect of age for solemnization of marriage, refers to “male” and “female”.

A copy of Order dated 14.10.2020 in *Dr. Kavita Arora v. Union of India (W.P.(C) 7692/2020* is annexed hereto and marked as ANNEXURE – I.

**V. PART III OF THE CONSTITUTION INVALIDATES ANY GENDER AND SEXUALITY BASED PRECONDITIONS FOR MARRIAGE IN THE SPECIAL MARRIAGE ACT, 1954.**

- A. That the Petitioners respectfully submit that Section 4(c) and other provisions of the Special Marriage Act, 1954, must necessarily be interpreted as gender-neutral for consistency with Part III of the Constitution. Specifically, the statute provides for marriage between “any two persons,” and any provisions limiting availability of marriage under the Act to *one* “male” and one “female” necessarily fail judicial review under Article 14, Article 15, Article 19 and Article 21.

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provisions give rise to gender or sexuality based conditions for solemnization of special marriages, this Petition challenges the constitutionality of those provisions as well.

**Article 14 Invalidates Gender Or Sexuality Based Preconditions.**

- B. Article 14 prohibits classifying people, *inter alia*, when (i) the law or the classification is arbitrary; (ii) there is no intelligible differentia between those included within the class and those excluded; or (iii) there is intelligible differentia but it lacks rational nexus to the object of the law in question. Any one of the foregoing is sufficient to invalidate a statutory classification. Preconditions for marriage based on gender or sexuality in the Special Marriage Act, 1954, survive none of these three tests.
- C. First, Article 14 invalidates arbitrary classifications. Explaining that the State cannot embrace unscientific and moral notions surrounding sexuality that perpetuate “*a way of life in which sexual contact without procreation is an aberration,*” the Hon’ble Supreme Court has ruled that a law that “*subjects the LGBT community to societal pariah and dereliction. . . [is] manifestly arbitrary.*” *Navtej Singh Johar (supra)*, at **212 (Para 417)** and **147 (Para. 268.15)**. Excluding sexual minorities from India’s sole secular marriage constitutes total exclusion from the institution of marriage, a foundational element of family and society, and perpetuates dereliction of the LGBTQ+ community. Further, these exclusions are based on unscientific and moral notions surrounding marriage. Thus,

any preconditions for solemnization of marriage under the Act that are based on gender or sexuality are manifestly arbitrary.

D. Second, Article 14 invalidates classifications devoid of intelligible differentia. Per the Hon'ble Supreme Court, “[w]here a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia.” *Navtej Singh Johar (supra)*, at 297 (Para. 637.3). “A person’s sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality.” *Id.*, at 298 (Para. 637.5). Thus, any preconditions for solemnization of marriage under the Act that are based on gender or sexuality lack intelligible differentia.

E. Third, Article 14 invalidates classifications based on differentia that lacks rational nexus to the object of the law in question. The object of the Special Marriage Act, 1954, as discussed above, is to expansively provide access to the fundamental right to marry, notwithstanding societal prejudices. Conditioning marriage on compliance with outdated and unscientific heteronormative values and binary notions of gender, excludes

LGBTQ+ individuals. It denies LGBTQ+ individuals what the Hon’ble Supreme Court described as an “*absolute right*,” while “*unequivocally. . . stat[ing] that. . . any infringement of the said right is a constitutional violation.*” *Shafin Jahan (supra)*, at **405 (Para. 86)**; *Shakti Vahini (supra)*, at **212 (Para 45)**. Thus, any preconditions for solemnization of marriage under the Act that are based on gender or sexuality lack rational nexus to the object of the Act.

- F. Further, denial of the right to marry denies same-sex couples legal benefits that the Respondents make available to gender-binary heterosexual couples and hence deprives them of the “equal protection of the laws” guaranteed by Article 14. For example, same-sex couples are denied benefits relating to alimony and maintenance, and property and succession. Likewise, same-sex couples are denied protections of spousal privilege under the Indian Evidence Act, 1872, benefits under the Transplantation of Human Organs Act, 1994, as well as the economic benefits under the Income Tax Act, 1961, the Employment Provident Fund Scheme, 1952, Payment of Gratuity Act, 1972 and Workmen’s Compensation Act, 1923, and other labour and employment legislations.
- G. In sum, to the extent Section 4(c)—or any other provisions of the Special Marriage Act, 1954—are construed as requiring one

“male” and one “female” for the solemnization of a marriage, those provisions violate Article 14.

**Article 15 Invalidates Any Gender Or Sexuality Based Preconditions.**

H. Article 15 prohibits discrimination founded directly or indirectly on a stereotypical understanding of sex and gender roles. *Navtej Singh Johar (supra)*, at 222 (Para. 438) (“*If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.*”). Because “sex” includes gender identity and sexual orientation, as discussed in Grounds (I)(C) and (I)(D) above, laws cannot differentiate between individuals based solely on the antiquated notions that genders come in but two forms—“male” and “female”—and only opposite genders may partner romantically. *Id.*, at 240-241 (Para. 482).

I. Preconditions for marriage based on gender or sexuality, by definition, constitute distinctions based on gender stereotypes. They are grounded in the belief that “males” must marry “females,” and “females” marry “males.” This belief altogether denies the existence of other genders as well as non-heterosexual orientations. The belief is unscientific and based

on inherited stereotypes, and thus cannot form the basis for any constitutional legal classification.

**Article 19 Invalidates Any Gender Or Sexuality Based Preconditions.**

- J. Article 19(1)(a) prohibits laws that “*inhibit[] [LGBTQ+ individuals] from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified existence,*” as well as laws that have a “*chilling effect*” on these right. *Navtej Singh Johar (supra)*, at **186, 307 (Paras. 354, 641.1)**. Notably, although Article 19(2) tolerates reasonable limitations for “*decency or morality,*” the Hon’ble Supreme Court has emphasized that “*the morality that is conceived of under the Constitution is constitutional morality,*” as opposed to popular morality. *Id.*, at **115 (Para 161)**.
- K. The Petitioners humbly submit that any preconditions for marriage in the Act based on gender or sexuality operate to defeat LGBTQ+ individuals’ expression of a long-term romantic and sexual commitment. These preconditions do not advance constitutional morality—and indeed, are contrary to it—nor should this Hon’ble Court entertain any odious arguments regarding “decency” requiring LGBTQ+ individuals to be dishonest to themselves and others in order to marry. In sum, “*public decency and morality. . . cannot be accepted as*

*reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community,” particularly since sexual orientation is “innate” and “an inalienable part of [a person’s] identity,” id., at 115, 147 (Paras. 161 and 268.16), and denying LGBTQ+ individuals their fundamental right to marry the person of their choice violates Article 19.*

**Article 21 Invalidates Any Gender Or Sexuality Based Preconditions.**

L. *“Article 21 is the most precious human right and forms the ark of all other rights.” Navtej Singh Johar (supra), at 301 (Para 640.2.1.) (citation and internal quotation marks omitted). It guarantees every “person,” including LGBTQ+ individuals, a bundle of fundamental rights like the right to dignity, privacy, and health. Navtej Singh Johar (supra), at 301 (Para 640.1) (“The right to life and liberty affords protection to every citizen or non-citizen, irrespective of their identity or orientation, without discrimination.”). As discussed in Grounds II (A) to (C) above, Article 21 also safeguards every person’s “absolute right” to marry the individual of their choosing without State interference. As shown below, exclusion from India’s only secular vehicle to exercise the right of marriage constitutes a denial not only of the right to marry, but also the right to dignity, privacy, and health.*

M. First, Article 21 guarantees a right to dignity, and “*LGBT persons, like other heterosexual persons, are entitled to. . . the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners.*” *Navtej Singh Johar (supra)*, at 302 (Para. 640.2.4). “[D]ecisions concerning marriage are among the most intimate that an individual can make.” *Id.*, at 269 (Para. 554) (internal quotations and citation omitted). Conditioning an LGBTQ+ individual’s access to the right to marry on the individual first establishing that they identify as either “male” or “female,” and then demonstrating that their intended spouse identifies as the opposite sex, constitutes a total deprivation of autonomy with respect to a decision over which the Constitution guarantees the individual “*absolute*” autonomy. Thus, preconditions for solemnization of marriage under the Act that are based on gender identity or sexual orientation deprive LGBTQ+ individuals their right to dignity and are unconstitutional.

N. Second, “[t]he right to privacy” is “*an intrinsic part of the right to life and personal liberty under Article 21.*” *Navtej Singh Johar (supra)*, at 304 (Para. 640.3.1). It includes the “*right to be let alone*” and the “*right to safeguard the privacy of his/her own, his/her family, marriage. . . , among other*

*matters.*” *Id.*, at 166 (Para. 166) (citation omitted). Whether to marry—and whom to marry—are therefore protected aspects of privacy, and “[n]either the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.” *Shafin Jahan (supra)*, at 405 (Para 84). When the Respondents condition an individual’s access to marriage on the individual choosing a partner of the opposite binary-gender, then the Respondents unconstitutionally “dictate a choice of partners,” and robs LGBTQ+ individuals the “free ability” the Constitution guarantees them in deciding whom to marry. Thus, the Petitioners humbly submit that preconditions for solemnization of marriage under the Act that are based on gender identity or sexual orientation violate LGBTQ+ individuals’ right to privacy and are unconstitutional.

O. Third, “[t]he right to health” is a “crucial facet[] of the right to life guaranteed under Article 21 of the Constitution.” *Navtej Singh Johar (supra)*, at 305 (Para. 640.4.1). “Health” is not limited to absence of disease, but also includes physical, mental, and social wellness. *See, e.g., Constitution of the World Health Organization*, adopted by the International Health Conference, New York (signed on July 22, 1947, entered into force on April 7, 1948), **Preamble** (“Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”). Study after study has

established the health benefits of marriage, including longer lifespan, fewer strokes and heart attacks, and greater chance of surviving cancer or major operations,<sup>6</sup> as well as the deleterious mental health implications of discriminatory laws for LGBTQ+ individuals. *Navtej Singh Johar (supra)*, at 253 (Para. 515) (noting the “*high levels of mental illness among the LGBT population*” and the “*clear correlation between political and social environments. . . and how persecutory laws against LGBT individuals are leading to greater levels of depression, anxiety, self-harm, and suicide.*”) (citation and quotation marks omitted). Thus, depriving LGBTQ+ individuals their right to marry has the spill-over effect of exacerbating the significant mental health challenges LGBTQ+ individuals already face, while simultaneously denying them the health benefits associated with marriage made available to binary-gendered heterosexuals.

A copy of the Constitution of the World Health Organization, adopted by the International Health Conference, New York is annexed hereto and marked as **ANNEXURE – J**.

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<sup>6</sup> See, e.g., Shmerling, Robert H., MD, “*The health advantages of marriage*,” Harvard Health Publishing, available online at <https://www.health.harvard.edu/blog/the-health-advantages-of-marriage-2016113010667> (last accessed on 20.02.2021).

A copy of Shmerling, Robert H., MD, “The health advantages of marriage,” Harvard Health Publishing is annexed hereto and marked as **ANNEXURE – K**.

- P. In sum, preconditions for solemnization of marriage under the Act that are based on gender identity or sexual orientation deny LGBTQ+ individuals not only their Article 21 right to marry, but also their rights to dignity, privacy, and health.<sup>7</sup>
- Q. Thus, the Petitioners humbly submit that Section 4(c) and other provisions of the Special Marriage Act, 1954, ought to be interpreted as neutral to gender and sexual orientation for consistency with Part III of the Constitution, and in particular with Articles 14, 15, 19 and 21. Notably, the Hon’ble High Court of Madras recently held that a marriage may legally be solemnized between a male and a transwoman even under the customary law, the Hindu Marriage Act, 1955, reading down binary-gender based restrictions in the statute to save it from unconstitutionality. *Arunkumar v. Inspector General of Registration*, AIR 2019 Mad 265, at 265 (Para. 1) (“A marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage in terms of

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<sup>7</sup> Although this Petition focuses on the Respondents’ violation of Article 21 through deprivation of LGBTQ+ individuals’ right to marry the individual of one’s choosing, right to dignity, right to privacy, and right to health, the Petitioners submit that they are entitled to the entire suite of liberties Article 21 affords gender-binary heterosexuals. The Petitioners therefore reserve their right to invoke other Article 21 rights, if necessary.

*Section 5 of the Hindu Marriage Act, 1955 and the Registrar of Marriages is bound to register the same. By holding so, this Court is not breaking any new ground. It is merely stating the obvious.”).*

## **VI. DENYING LGBTQ+ INDIVIDUALS THE RIGHT TO MARRY INFLICTS PERSONAL HARM.**

A. That deep-rooted prejudice springing from a lack of awareness—and reinforced by statutory denial of the opportunity to assimilate within society—leads to LGBTQ+ individuals facing widespread discrimination, rejection, and violence. For example, LGBTQ+ individuals and couples face discrimination from property owners and landlords leading to denial of housing, segregation into poorly resourced neighbourhoods, forced evictions, and homelessness. Discrimination is also common in the workplace and in all aspects of employment, including during the recruitment process, with respect to promotions, discriminatory and gendered working conditions, and bullying and harassment. Indeed, LGBTQ+ individuals who are able to conceal their identities and remain in the closet often prefer to do so than risk the consequences of coming out. Violence similarly takes numerous forms, ranging from physical force, including outright murder, to sexual assault, forced marriages, and involuntary institutionalization for “corrective” therapies.

Copies of news reports/studies documenting violence perpetrated against LGBTQ+ persons in India are annexed herewith and marked as ANNEXURE – L (COLLY).

- B. Notably, LGBTQ+ Indians grow old facing a life without lawful companionship, and confronting the reality of loneliness, which research has shown to be as lethal as smoking 15 cigarettes a day. See Julianne Holt-Lunstad, PhD, ‘*The Potential Public Health Relevance of Social Isolation and Loneliness: Prevalence, Epidemiology, and Risk Factors, Public Policy & Aging Report,*’ Volume 27, Issue 4, 2017, Pages 127–130, <https://doi.org/10.1093/ppar/prx030> (loneliness “carries a risk that is comparable, and in many cases, exceeds that of other well-accepted risk factors, including smoking up to 15 cigarettes per day, obesity, physical inactivity, and air pollution.”) (citations omitted); see also Holt-Lunstad, J., Smith, T. B., & Layton, J. B., ‘*Social Relationships and Mortality Risk: A Meta-analytic Review,*’ PLoS medicine, 7(7) (2010), <https://doi.org/10.1371/journal.pmed.1000316>.

A copy of Julianne Holt-Lunstad, PhD, ‘The Potential Public Health Relevance of Social Isolation and Loneliness: Prevalence, Epidemiology, and Risk Factors, Public Policy &

Aging Report,’ Volume 27, Issue 4, 2017 is annexed herewith and marked as **ANNEXURE – M**.

A copy of Holt-Lunstad, J., Smith, T. B., & Layton, J. B., ‘Social Relationships and Mortality Risk: A Meta-analytic Review,’ PLoS medicine, 7(7) (2010) is annexed herewith and marked as **ANNEXURE – N**.

- C. Compounding these costs, denial of the right to marry denies same-sex couples legal benefits that the Respondents make available to gender-binary heterosexual couples, including benefits relating to alimony and maintenance, property and succession and a host of economic benefits available under the laws of the country as elaborated in more detail at Ground V (F).

**VII. DENYING LGBTQ+ INDIVIDUALS THE RIGHT TO MARRY INFLICTS ECONOMIC COST ON THE COUNTRY.**

- A. That besides violating the LGBTQ+ community’s fundamental rights, exclusion from foundational civil rights like marriage imposes significant cost on India generally. A growing body of academic research, summarized briefly below, identifies, documents, and quantifies ways in which social exclusion of the LGBTQ+ community hurts economic output—an unnecessary cost all Indian citizens are forced to shoulder.

**Reduced human capital impedes LGBTQ+ workers' ability to contribute economic activity.**

B. The stress and trauma directly arising from legally sanctioned social exclusion lead to an extremely high incidence of mental and physical health problems among the Indian LGBTQ+ community. Rates of depression in the Indian LGBTQ+ community are 6-12 times higher than in the general population.<sup>8</sup> Indian LGBTQ+ individuals are much more likely to commit suicide, with 15% of participants in one study being classified as “*high risk*.”<sup>9</sup> They are disproportionately impacted by HIV and other STIs, with estimated prevalence rates of up to 16.5% for men who have sex with men, and 55% for transgender people in India.<sup>10</sup> There are also increased rates of incidence of violent victimization, substance abuse, post-traumatic stress, and anxiety among the LGBTQ+ community.<sup>11</sup>

A copy of M.V.L. Badgett. 2014. ‘The economic cost of stigma and the exclusion of LGBT people: A case study of India, World Bank Group, Washington, DC’ is annexed herewith and marked as **ANNEXURE – O**.

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<sup>8</sup> M.V.L. Badgett. 2014. The economic cost of stigma and the exclusion of LGBT people: A case study of India, *World Bank Group*, Washington, DC.

<sup>9</sup> Sivasubramanian, M., Mimiaga, M. J., Mayer, K. H., Anand, V. R., Johnson, C. V., Prabhugate, P., and Safren, S. A. 2012. “Suicidality, Clinical Depression, and Anxiety Disorders are Highly Prevalent in Men Who Have Sex with Men in Mumbai, India: Findings from a Community-recruited Sample.” *Psychology, Health and Medicine* 16 (4): 450–462.

<sup>10</sup> Setia, M.S. et al., 2008. Men Who Have Sex with Men in India: A Systematic Review of the Literature. *Journal of LGBT Health Research*, 4(2-3), pp.51–70.

<sup>11</sup> Wallace, B.C. and Santacruz, E., 2017. Health disparities and LGBT populations. *LGBT psychology and mental health: emerging research and advances*. Santa Barbara, CA: Praeger, pp.177-196.

A copy of Sivasubramanian, M., Mimiaga, M. J., Mayer, K. H., Anand, V. R., Johnson, C. V., Prabhugate, P., and Safren, S. A. 2012. “Suicidality, Clinical Depression, and Anxiety Disorders are Highly Prevalent in Men Who Have Sex with Men in Mumbai, India: Findings from a Community-recruited Sample.” *Psychology, Health and Medicine* 16 (4): 450–462 is annexed hereto and marked as **ANNEXURE – P**.

A copy of Setia, M.S. et al., 2008. Men Who Have Sex with Men in India: A Systematic Review of the Literature. *Journal of LGBT Health Research*, 4(2-3), pp.51–70 is annexed hereto and marked as **ANNEXURE – Q**.

A copy of Wallace, B.C. and Santacruz, E., 2017. Health disparities and LGBT populations. *LGBT psychology and mental health: emerging research and advances*. Santa Barbara, CA: Praeger, pp. 177-196 is annexed hereto and marked as **ANNEXURE – R**.

- C. These mental and physical health problems associated with social exclusion drastically reduce LGBTQ+ individuals’ ability to engage in productive work and contribute to overall economic activity. A 2014 World Bank Study estimated that reduced working hours and the increased loss of life from HIV,

depression and suicide among the LGBTQ+ community alone cost India up to 1.3% of GDP annually.<sup>12</sup>

A copy of Badgett, M.L., Waaldijk, K. and van der Meulen Rodgers, Y., 2019. The relationship between LGBT inclusion and economic development: Macro-level evidence. *World Development*, 120, pp.1-14 is annexed hereto and marked as **ANNEXURE – S**.

- D. Even when LGBTQ+ individuals participate in the workforce, discrimination and social exclusion prevent them from contributing to their full potential. It is estimated that LGBTQ+ individuals are 10% less productive in the same jobs as the general population, due to which India loses an additional 0.4% of GDP annually.<sup>13</sup>

A copy of M. Klawitter. 2015. Meta-analysis of the effects of sexual orientation on earnings. *Industrial Relations*, 54, pp. 4-32 is annexed hereto and marked as **ANNEXURE – T**.

- E. The total estimated annual loss of up to 1.7% of GDP does not include the negative effects on productivity of other health

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<sup>12</sup> Badgett, M.L., Waaldijk, K. and van der Meulen Rodgers, Y., 2019. The relationship between LGBT inclusion and economic development: Macro-level evidence. *World Development*, 120, pp.1-14.

<sup>13</sup> Badgett, M.L., Waaldijk, K. and van der Meulen Rodgers, Y., 2019. The relationship between LGBT inclusion and economic development: Macro-level evidence. *World Development*, 120, pp.1-14 (*Annexed above as ANNEXURE – S*) (referring to and explaining M. Klawitter. 2015. Meta-analysis of the effects of sexual orientation on earnings. *Industrial Relations*, 54, pp. 4-32.)

disparities, such as violent injury substance abuse, post-traumatic stress, and anxiety. Unfortunately, the effects of these disparities on economic output has not been studied, but they are undoubtedly substantial.

### **LGBTQ+ workplace exclusion lowers general productivity.**

F. When LGBTQ+ individuals are unable to contribute fully at work, their colleagues cannot benefit from the ideas, collaboration, and support that fully productive colleagues might provide, leading to a general lowering of productivity and profitability. Several studies have found systematically positive links between LGBTQ+ friendly company policy and financial measures like stock prices,<sup>14</sup> asset returns,<sup>15</sup> per-worker output<sup>16</sup> and employee innovation.<sup>17</sup> It is no coincidence that 91% of Fortune 500 companies included sexual orientation in their non-discrimination policies in 2019.<sup>18</sup>

A copy of Shan, L., Fu, S. and Zheng, L., 2017. Corporate sexual equality and firm performance. *Strategic Management Journal*, 38(9), pp.1812-1826 is annexed herewith and marked as **ANNEXURE – U**.

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<sup>14</sup> Shan, L., Fu, S. and Zheng, L., 2017. Corporate sexual equality and firm performance. *Strategic Management Journal*, 38(9), pp.1812-1826.

<sup>15</sup> Li, F. and Nagar, V., 2013. Diversity and performance. *Management Science*, 59(3), pp.529-544.

<sup>16</sup> *Supra note 14*

<sup>17</sup> Gao, H. and Zhang, W., 2017. Employment nondiscrimination acts and corporate innovation. *Management Science*, 63(9), pp.2982-2999.

<sup>18</sup> <https://www.hrc.org/resources/lgbt-equality-at-the-fortune-500> last accessed on 20.02.2021.

A copy of Li, F. and Nagar, V., 2013. Diversity and performance. *Management Science*, 59(3), pp.529-544 is annexed herewith and marked as **ANNEXURE – V**.

A copy of Gao, H. and Zhang, W., 2017. Employment nondiscrimination acts and corporate innovation. *Management Science*, 63(9), pp.2982-2999 is annexed hereto and marked as **ANNEXURE – W**.

A copy of the article LGBTQ Equality at the Fortune 500 which may be found at <https://www.hrc.org/resources/lgbt-equality-at-the-fortune-500> is annexed hereto and marked as **ANNEXURE – X**.

### **Exclusion leads to the “Gay Brain Drain”.**

G. Denied equal rights at home, LGBTQ+ individuals who are able to migrate do so, seeking out destination countries that afford them greater protection. ‘Sexual migration’—migration where sexual orientation is an influential factor—is a well-documented<sup>19</sup> and widespread phenomenon, of which the Petitioners are a part. Several studies focus on Indian migrants,

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<sup>19</sup> Carrillo, H., 2004. Sexual migration, cross-cultural sexual encounters, and sexual health. *Sexuality Research & Social Policy*, 1(3), pp.58-70.

documenting the lack of LGBTQ+ rights in India as a motivating factor in the migration decision.<sup>20</sup>

A copy of Carrillo, H., 2004. Sexual migration, cross-cultural sexual encounters, and sexual health. *Sexuality Research & Social Policy*, 1(3), pp.58-70 is annexed hereto and marked as **ANNEXURE – Y**.

A copy of Smith, G., 2012. Sexuality, space and migration: South Asian gay men in Australia. *New Zealand Geographer*, 68(2), pp.92-100; and Baas, M., 2019 is annexed hereto and marked as **ANNEXURE – Z**.

Queer temporalities: The past, present and future of ‘gay’ migrants from India in Singapore. *Current Sociology*, 67(2), pp.206-224 is annexed hereto and marked as Annexure **ANNEXURE – AA**.

- H. The extent of sexual migration in India is not readily quantifiable, including because LGBTQ+ Indians are often forced to remain discreet about their gender-identity or sexual orientation. But the magnitude can be approximated from a study in Hong Kong (which also does not offer LGBTQ+

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<sup>20</sup> Smith, G., 2012. Sexuality, space and migration: South Asian gay men in Australia. *New Zealand Geographer*, 68(2), pp.92-100; and Baas, M., 2019. Queer temporalities: The past, present and future of ‘gay’ migrants from India in Singapore. *Current Sociology*, 67(2), pp.206-224.

persons the right to marry): 52.5% percent of the respondents had considered leaving due to their sexuality, of whom 91.3% cited the lack of marriage equality as a reason.<sup>21</sup> The Petitioners submit that it is often the brightest, most highly-educated, and most productive who end up migrating, leading to a considerable loss to the home country.

A copy of Suen, Y.T. and Chan, R.C., 2020. “Gay Brain Drain”: Hong Kong Lesbian, Gay, and Bisexual People’s Consideration of Emigration Because of Non-inclusive Social Policies. *Sexuality Research and Social Policy*, pp.1-14 is annexed hereto and marked as **ANNEXURE – AB**.

**Exclusion deters investment in India.**

- I. Not only does LGBTQ+ exclusion push the brightest of the Indian community away, but it also scares away lucrative business in general. Research shows that successful companies prefer to locate in countries and cities with an accepting LGBTQ+ culture, since they consider it a signal of an underlying culture that is open and conducive to creativity, which is essential for business innovation.

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<sup>21</sup> Suen, Y.T. and Chan, R.C., 2020. “Gay Brain Drain”: Hong Kong Lesbian, Gay, and Bisexual People’s Consideration of Emigration Because of Non-inclusive Social Policies. *Sexuality Research and Social Policy*, pp.1-14.

J. There is well-documented evidence of a positive correlation between an acceptance of homosexuality and foreign investment,<sup>22</sup> level of entrepreneurship, overall well-being and life satisfaction human development, urbanization, and per capita GDP.<sup>23</sup> Moreover, cities with the highest concentration of homosexual residents also have the highest percentages of foreign-born residents, and are home to the most successful businesses.<sup>24</sup> Likewise, the burgeoning LGBTQ+ tourism market was worth \$211 billion in 2016. LGBTQ+ travellers spend more than their heterosexual counterparts, but are unlikely to choose travel destinations with discriminatory anti-LGBTQ+ laws and inadequate protections for LGBTQ+ individuals.<sup>25</sup>

A copy of Noland, M., 2005. Popular attitudes, globalization and risk. *International Finance*, 8(2), pp.199-229 is annexed hereto and marked as **ANNEXURE – AC**.

A copy of Florida, R., 2014. The global map of homophobia. Citylab. is annexed hereto and marked as **ANNEXURE – AD**.

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<sup>22</sup> Noland, M., 2005. Popular attitudes, globalization and risk. *International Finance*, 8(2), pp.199-229.

<sup>23</sup> Florida, R., 2014. The global map of homophobia. *Citylab*.

<https://www.citylab.com/equity/2014/02/global-map-homophobia/8309/>

<sup>24</sup> Florida, R. and Gates, G., 2003. *7. Technology and tolerance: the importance of diversity to high-technology growth*. Emerald Group Publishing Limited.

<sup>25</sup> Thurlow, C., 2018. The Economic Cost of Homophobia.

<https://www.petertatchellfoundation.org/wp-content/uploads/2018/06/report-a4-lo-res-1.pdf>

A copy of Florida, R. and Gates, G., 2003. 7. Technology and tolerance: the importance of diversity to high-technology growth. Emerald Group Publishing Limited is annexed hereto and marked as **ANNEXURE – AE**.

A copy of Thurlow, C., 2018. The Economic Cost of Homophobia is annexed hereto and marked as **ANNEXURE – AF**.

**The cumulative effects are enormous.**

K. Cumulatively, the direct and indirect costs are extreme. Cross-country studies have estimated that legal recognition of marriage equality is associated a long-term increase in per-capita GDP of between 54%<sup>26</sup> and 64%.<sup>27</sup> The magnitude of forfeited GDP is thus considerable, and the Respondents' prejudices should not needlessly force India to bear these costs.

A copy of Lamontagne, E., d'Elbée, M., Ross, M.W., Carroll, A., Plessis, A.D. and Loures, L., 2018. A socioecological measurement of homophobia for all countries and its public

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<sup>26</sup> Lamontagne, E., d'Elbée, M., Ross, M.W., Carroll, A., Plessis, A.D. and Loures, L., 2018. A socioecological measurement of homophobia for all countries and its public health impact. *European journal of public health*, 28(5), pp.967-972.

<sup>27</sup> Badgett, M.L., Waaldijk, K. and van der Meulen Rodgers, Y., 2019. The relationship between LGBT inclusion and economic development: Macro-level evidence. *World Development*, 120, pp.1-14. (Annexed above at **ANNEXURE – S**)

health impact. *European journal of public health*, 28(5), pp.967-972 is annexed hereto and marked as **ANNEXURE – AG**.

- L. In sum, while the harshest consequences of exclusion are borne directly by LGBTQ+ people, the country as a whole incurs significant associated costs.
14. The Petitioners humbly request this Hon’ble Court’s leave to plead additional grounds and place additional materials on record, if the need arises.
15. The Petitioners respectfully submit that same-sex marriages and civil unions are presently recognized in at least 29 democracies: Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Norway (2008), Sweden (2009), Iceland (2010), Portugal (2010), Argentina (2010), Denmark (2012), Uruguay (2013), New Zealand (2013), France (2013), Brazil (2013), United Kingdom (2014), Finland (2014), Luxembourg (2015), Ireland (2015), Greenland (2015), United States of America (2015), Colombia (2016), Germany (2017), Malta (2017), Australia (2017), Austria (2019), Taiwan (2019), and Ecuador (2019), Costa Rica (2020). The experience of LGBTQ+ communities in other jurisdictions suggests that opposition to judicial recognition of marriage equality takes three common forms.

16. First, opponents argue that the courts must not intervene, and should instead leave the issue for the legislature to address. However, it is respectfully submitted that the present Petition does not involve an issue fit for resolution by a political majority. To the contrary, the present Petition concerns unlawful curtailment, by majoritarian statute, of a constitutionally guaranteed fundamental right. *“The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.” Puttaswamy (supra), at 421 (Para. 144).* In India, not only is the judiciary empowered to intervene, the Petitioners respectfully submit that it is the Hon’ble Courts’ constitutional duty to safeguard fundamental rights. It is submitted that asking this Hon’ble Court to step aside is nothing short of inviting the Hon’ble Court to abdicate its primary constitutional duty, and thus the *“argument. . . that change in society, if any, can be reflected by amending laws by the elected representatives of the people,”* is an *“argument [that] must be emphatically rejected.” Navtej Singh Johar (supra), at 185 (Para. 352).*
17. Second, opponents emphasize that marriage has traditionally and historically been limited to “male” and “female” partnerships. However, generations of denial is not in itself an argument for its perpetuation. *“If rights were defined by who*

*exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”* ***Obergefell v. Hodges*, 576 US 644 (2015)** at 671. When science has evolved, so must the thinking regarding how our laws should be used to organize society. Prolonged injustice underscores the urgency of the relief sought in this petition—not constitute an argument against it. ***Navtej Singh Johar (supra)***, at 289, 310 (Paras. 616, 644) (“*A hundred and fifty-eight years is too long a period for the LGBT community to suffer the indignities of denial,*” and it is “*time to invoke the transformative power of the Constitution.*”).

18. Third, opponents prophesy that upholding everybody’s fundamental right to marry would diminish the worth of heterosexuals’ marriages. However, “[i]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.” ***Obergefell (supra)***, at 679 (internal citations and original alterations omitted). Besides, because India is a constitutional democracy, neither popular morality nor perceived behavioural implications for third parties constitutes valid justification for continued deprivation of individual constitutional liberties. ***Navtej Singh Johar (supra)***, at 288 (Para. 606) (“*Constitutional morality,*” as opposed to popular

morality, “*will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship.*”).

19. The Petitioners respectfully submit that Constitutional morality—especially pursuant to the ruling of a Nine Judge Bench of the Hon’ble Supreme Court—is clear: sexuality is a private matter and the Respondents cannot dictate who marries whom. ***K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, at 421-422, 509, 635-636 (Paras. 144, 146, 323, 645, 647)** (Sexual orientation is a facet of a person’s privacy, and the right to privacy is a fundamental right under the Constitution). Indeed, the Bench in ***Puttaswamy*** quoted with approval the United States Supreme Court’s observations that “*it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society*” to conclude that the “*unhindered fulfilment of one’s sexual orientation [is] an element of privacy and dignity*” ***Id.*, at 422, 448-449 (Paras. 146, 194)**. Therefore, any suggestion that the sensibilities of heterosexual couples should dictate a homosexual couple’s enjoyment of privacy, dignity, or the fundamental right to marry, is antithetical to the Constitution of India.
  
20. The Petitioners submit that the LGBTQ+ community in India, which is a progressive and liberal democracy with a robust

commitment to protection of individual liberties, deserves no less than its counterparts in Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Greenland, Iceland, Ireland, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Taiwan, United Kingdom, United States of America, or Uruguay. As the Hon'ble Supreme Court directed, "*decriminalisation is a first step,*" and "*[i]n the march of civilizations across the spectrum of a compassionate global order, India cannot be left behind.*" ***Navtej Singh Johar (supra)***, at 272 (Para. 564).

### CONCLUSION

21. For all the above reasons, the Petitioners humbly pray that this Hon'ble Court hold that, to the extent Section 4(c) and any other provisions of the Special Marriage Act, 1954, are construed as requiring, for the solemnization of a marriage, one "male" and one "female," those provisions are unconstitutional unless read as neutral to gender and sexual orientation. In the alternative, the Petitioners pray for a declaration, by reading down any restrictions, that the Act applies, regardless of sex, to *any* two persons who wish to marry. The Petitioners further pray that this Hon'ble Court affirm that "a marriage between *any two persons* may be solemnized" under the Act, regardless of sex, provided those

persons are above the permissible marriageable age and meet the other conditions prescribed in Section 4 of the Act.

22. This Petition is bona fide and in the interest of justice.
  
23. The Petitioners humbly submit that this Hon'ble Court has issued notice in the cases of *Abhijit Iyer Mitra v. Union of India* (W.P.(C) 6371/2020), *Dr. Kavita Arora v. Union of India* (W.P.(C) 7692/2020) and *Vaibhav Jain v. Union of India* (W.P. (C) 7657/2020), which have raised similar questions of constitutional law which are presently pending before this Hon'ble Court. The Petitioners humbly submit that the instant petition raises similar questions of law and involves similar issues and therefore respectfully seek that their petition be heard along with the pending cases.

Copies of Orders passed by this Hon'ble Court in *Abhijit Iyer Mitra v. Union of India* (W.P.(C) 6371/2020) are annexed herewith and marked as **Annexure – AH (Colly)**.

Copies of Orders passed by this Hon'ble Court in *Dr. Kavita Arora v. Union of India* (W.P.(C) 7692/2020) are annexed herewith and marked as **Annexure – AI (Colly)**.

Copies of Orders passed by this Hon'ble Court in *Vaibhav Jain v. Union of India* (W.P. (C) 7657/2020) are annexed herewith and marked as **Annexure – AJ (Colly)**.

24. There is no alternative remedy available to the Petitioners and the Petitioners have filed the present petition invoking the writ jurisdiction of this Hon'ble Court.
  
25. This Hon'ble Court has jurisdiction to adjudicate this case the Respondents have their head offices at New Delhi. Further, Petitioner No. 1 was born, raised, and educated in New Delhi. He also lived and worked in New Delhi until 2014, when he left for California, USA. Even today, Petitioner No. 1 maintains his permanent residence, as well as active bank accounts, in New Delhi. Likewise, Petitioner No. 2 has close ties with New Delhi. He lived in the city between 1992 and 2006, including completing his schooling and under-graduation, and then again between 2017 and 2020, before he left for Canada. Likewise, Petitioner No. 4 was born in New Delhi and even today lives in the city. Finally, this Hon'ble Court has issued notice in the cases of *Abhijit Iyer Mitra v. Union of India* (W.P.(C) 6371/2020), *Dr. Kavita Arora* (W.P.(C) 7692/2020), and *Vaibhav Jain v. Union of India* (W.P. (C) 7657/2020), which raise similar questions of constitutional law. Thus, in the humble submission of the Petitioners, this

Hon'ble Court is the appropriate forum for adjudication of the present Petition.

26. The Petitioners have not filed any other or similar Writ Petition in this Hon'ble Court or before any other Hon'ble High Court or in the Supreme Court of India.

### **PRAYER**

In view of the facts and circumstances illustrated above, it is most humbly submitted that this Hon'ble Court may be pleased to:

- a) Declare that, to the extent Section 4(c) and any other provisions of the *Special Marriage Act, 1954*, or the rules or regulations framed thereunder, are construed as requiring one “*male*” and one “*female*” for the solemnization of a marriage, those provisions are unconstitutional unless read as neutral to gender identity and sexual orientation;
- b) In the alternative, declare that the *Special Marriage Act, 1954*, applies, regardless of sex, to *any* two persons who wish to marry by reading down any gender or sexuality-based restrictions contained in the Act;
- c) Declare that “*a marriage between any two persons may be solemnized*” under the *Special Marriage Act, 1954*, regardless of sex, provided those persons are above the permitted marriageable age and meet the other conditions prescribed in Section 4 of the Act; and

- d) Pass any other or further order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the case, and in the interest of justice.

SETTLED BY:-

MR. SAURABH KIRPAL  
ADVOCATE

FILED:



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NEW DELHI  
DATE: 22.02.2021