IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. 260 OF 2023

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

<u>IN THE MATTER OF:</u>
Rituparna Borah & Ors. …PETITIONERS

Versus

Union of India ...RESPONDENT

<u>REBUTTAL SUBMISSIONS ON BEHALF OF THE PETITIONERS BY MS. VRINDA GROVER, ADVOCATE</u>

1. The batch of petitions tagged with *Supriyo Chakraborty and Anr. Vs. Union of India* [WP(C) 1011/2022] seek *inter-alia* legal recognition of queer and transgender intimacies in the form of marriage, as a right guaranteed by the Constitution of India.

2. A denial of the fundamental right to marriage and found a family will be met with consequences of heightened stigma, discrimination and violence by natal families, the police and other third parties as a moral judgment on the inherent dignity of queer and trans persons. During these proceedings, queer and trans persons across the country have continued to flee their natal families to seek protection from psychological trauma, forced marriages and corrective rape.

3. In addition to the aforesaid, the following declaratory relief and consequential directions are pressed, listed as prayers (v-vii) in the captioned petition, *Rituparna Borah & Ors. v. Union of India, WP (C) No. 260/2023* (Compilation I: Written Submissions, PG No. 901, PDF No. 904), which are not opposed in written or oral submissions on behalf of the Respondents:

v. recognition of the constitutional right to have a "chosen family", for queer and trans persons, as an intrinsic part of the right to relational equality under Articles 14 and 15 and the right to privacy, associational autonomy and dignified life under Article 21, which includes at its core the preservation of personal intimacies, the sanctity of family life including the choice to form atypical families, marriage, procreation, the home, sexual orientation and gender identity (*KS Puttaswamy (I), para. 323; Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088 at para. 26; X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321 at paras. 40-45; Principle 24(B) of the Yogyakarta Principles (2007); Article 23 of ICCPR).*

vi. unmarried persons be permitted nominate 'any person(s)' to act as their nominee or next of kin, irrespective of whether such person is a 'guardian, close relative or family member', with respect to assigning any legal right, interest, title, claim or benefit accrued to the person;

vii. protection from violence for queer and trans persons in a protocol based on the preventive, remedial and punitive measures as laid down in *Shakti Vahini v. Union of India, (2018) 7 SCC 192* jointly read with orders of the Hon'ble High Court of Madras on establishment of Garima Greh-like safe houses as directed in *S. Sushma & Anr. v. Commissioner of Police & Ors., WP (C) No. 7284/2021,* in order to ensure that such safe houses operate to facilitate the agency of at-risk LGBT persons (Compilation I: Written Submissions, PG No. 823-824, PDF No. 826-827).

The interpretation of SMA need not be frozen in time, but must gain nourishment from the doctrine that statutes must be treated as "always speaking"

viii. SMA can be interpreted to recognize LGBT couples' right to marriage and found a family on basis of the ratio that statutes must be treated as "always speaking" in *Dharani Sugars & Chemicals Ltd. v. Union of India & Ors., (2019) 5 SCC 480 (paras. 34-38):*

4.1 The fundamental right to marriage and found a family could never have been in consideration by legislators in 1954 due to the dominant pathological and criminological lens through which LGBT individuals were treated, therefore, there can be no *a priori* assumption that SMA cannot apply to the Petitioners in 2023.

4.2 It would be unreasonable to confine the intention of the Parliament at the time SMA was enacted in 1954, as the progressive development of jurisprudence on rights of LGBT persons under Part III of the Constitution, as declared by this Hon'ble Court in *NALSA (2014), KS Puttaswamy (2017), Navtej Singh Johar (2018)* and others, warrant a liberal interpretation to the provisions of SMA.

4.3 The concept of marriage under SMA will have the same meaning with the grant of relief today as it did in 1954, even when it includes LGBT families who seek assimilation within the same framework *simplictor*.

4.4 This Hon'ble Court applied the ratio of *Dharani Sugars (2019)* to recognize the statutory and constitutional right of single women to seek abortion under the Medical Termination of Pregnancy Act, 1971, despite the impugned rules being limited in its text to married women (*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321*).

ix. The declaratory relief under SMA falls squarely within Article 142 as declared in *Shilpa Sailesh v. Varun Sreenivasan, 2023 SCC Online SC 544 (paras. 9-16):*

5.1 The proposition that powers under Article 142 to do complete justice are subject to statutory 'prohibitions' posed by SMA's interplay with personal law (Sections 19-21A) and other secular laws (Sections 43-44) is erroneous, as that would convey the idea that statutory provisions override a constitutionally vested extraordinary discretion. As the question of recognizing the right to marriage and found a family under SMA in the ultimate analysis turns on the breach of constitutional rights in Part III, any purported inconsistency of declaratory relief under SMA with the aforesaid statutory provisions in the current proceedings must not detain this

Hon'ble Court, as the said provisions would get streamlined, applied and interpreted incrementally with the passage of time by the appropriate authorities.

5.2 This Hon'ble Court has the power to issue declaratory relief under SMA as the fundamental principle of public policy that governs the statutory framework is the legal recognition of marriages and families which are hitherto treated as outcastes in society and law, not succession to property, which is only the limited mandate of Chapter IV of SMA. Therefore, the provisions governing succession to property by/of parties married under SMA are severable from the statute as a whole.

5.3 This court, while issuing declaratory relief to recognize the right to marriage and found a family under SMA, can go to the extent of relaxing or exempting the parties from the provisions of SMA relating to interplay with personal law and other secular laws in the current proceedings.

x. Issues of 'workability' in statutory provisions do not preclude this Hon'ble Court from protecting Part III rights:

6.1 This Hon'ble Court issued landmark declarations under Articles 14,15, 16, 19 and 21 to protect the fundamental rights of the transgender community under Article 32, inspite of the prevailing inconsistency in application of S. 377 of the *Indian Penal Code, 1860* ('IPC') to the most intimate aspect of expression of sexuality of transgender persons, which was read-down only in 2018 (*NALSA (2014), para. 20*).

6.2 This Hon'ble Court took cognizance of extant Indian legislations coded in terms of male and female, which deny equal protection to the transgender community with respect to marriage, adoption, inheritance/succession, tax and welfare. This context of binary-coded legislations and the resultant inequality, compelled the court to protect the fundamental rights by reading-in binding international conventions as well as non-binding principles of international human rights law in Part III to protect the rights of the transgender community, instead of recommending a legislative and/or administrative route to amend suitable laws (*NALSA, para. 53*).

6.3 The legal recognition of self-determination of gender identity is, in effect, already raising queries on workability of extant Indian legislations with *NALSA (2014)* and the *Transgender Persons (Protection of Rights) Act, 2019* ('TG Act') as documented in **Annexure-P9**. The mandate of anti-discrimination under Section 3 read with Section 20 of the TG Act leads to the inescapable conclusion that SMA and other laws must be applied to recognize the right to marriage and found a family for transgender persons, in order to protect transgender individuals in marital relationships from discrimination in context of joint ownership of residential property, employment related spousal benefits, access to support services for survivors of gender based violence, among others.

6.4 As illustration, multiple High Courts have routinely found workable solutions and granted relief to transgender individuals seeking equal protection of laws, whether with respect to reservation in public employment (*Sangma & Anr. v. State by its Chief Secretary & Ors. WP No. 8511/2020*), access to social determinants of health (*Ashish Kumar Mishra v. Bharat Sarkar through Sachiv Khadya and*

Prasanskaran Mantralay, AIR 2015 All 124), remedy for domestic violence (*order dt. 16.03.2023 in Vithal Manik Khatri v. Sagar Sanjay Kamble @ Sakshi Vithal Khatri, WP (C) No. 4037/2021, para. 11*) or other aspects, by a harmonious and purposive interpretation of existing laws with *NALSA (2014)* and the Act of 2019.

6.5 Additionally, a complete reading of the *Transgender Persons (Protection of Rights) Rules, 2020* reveals that Parliament already recognizes the legal validity of pre-existing marriages where one party might transition to their self-determined gender identity. This is borne out by Rules 5(3) and 7(3) read with Annexure 1 (Item 12) which clearly provide that such persons can change their name and gender on the marriage certificate to reflect their self-determined gender identity.

6.6 Therefore, it is humbly submitted that a declaration *simplictor* on recognition of the right to marriage and found a family under SMA or even otherwise will be workable in a manner similar to *NALSA (2014)* and the Act of 2019's interplay with extant Indian statutes and development of law on a case by case basis.

Directions under Articles 14, 15, 19 and 21 can be issued to protect rights

xi. Constitutional declaration of rights as the bulwark of socio-legal change

7.1 This Hon'ble Court passed wide-ranging directions under Articles 14, 15, 16, 19 and 21 to recognize self-determination of gender identity, grant reservation in public education institutions and employment opportunities, access to trans specific and affirmative healthcare services, framing welfare policies, among others (*NALSA (2014), para. 135*).

7.2 In the alternative to a declaration under SMA, this Hon'ble Court may similarly be pleased to issue declarations under Articles 14, 15, 19 and 21 of the Constitution in order to do complete justice to protect social and economic rights of LGBT families, in a manner similar to *NALSA (2014).* Such a declaration must mandate that state and non-state actors must not discriminate against LGBT families (conjugal and non-conjugal) on basis of marital status in the context of any legal right, interest, title, claim or benefit that otherwise accrues to parties as a direct incidence of a lawfully solemnized marriage under a statute.

7.3 This Hon'ble Court's declarations must also apply to non-state actors in order to fully respect, protect and fulfil rights of LGBT families, by recognizing the public function/duty of private bodies, wherever applicable (*Binny Limited v. V. Sadasivan, (2005) 6 SCC 657*). The mandate of Articles 15, 17, 19, 21 and 23 are recognized as imposing duties and liability on non-state actors in ensuring they are not contravened (*Dr. Sanghamitra Acharya v. NCT of Delhi, 2018 SCC Online Del 8450; Kaushal Kishore v. State of Uttar Pradesh, 2023 SCC Online SC 6; Indian Medical Association v. Union of India, (2011) 7 SCC 179*).

7.4 The Union of India's suggestion to constitute a committee to recommend measures to protect fundamental rights of LGBT families ought to be accompanied by a direction of this Hon'ble Court that such an exercise must translate into legislative amendments in a manner consistent with the declarations issued under Part III of the Constitution, as held in *NALSA (2014) at para. 135.1*. It is pertinent to note that administrative regulations can only secure rights of LGBT families (conjugal and non-conjugal) in so

far as they are consistent with the conception of a 'family' under parent statutes, and thus only administrative changes would fail to do complete justice.

7.5 That further, the said committee should also be directed to fulfill its mandate by implementation of its recommendations and measures within a time-bound period, as was directed by this Hon'ble Court in *NALSA (2014)* at *para. 136*.

xii. Separate framework to recognize and protect fundamental rights of LGBT families, which are unique and do not subscribe to prevailing notions of family

8.1 This Hon'ble Court ostensibly derives the framework on protecting rights of 'cohabiting' LGBT families from the DV Act. In *Indra Sarma v. VK Sarma, (2013) 15 SCC 755* this Hon'ble Court laid down the following standards to meet the test of '*relationships in the nature of marriage'* for protection under the law:

- Duration of relationship;
- Shared household;
- Pooling of financial resources;
- Domestic arrangements;
- Sexual relationship;
- Child rearing
- Socialization in public;
- Intention and conduct of parties.

8.2 However, these standards rest on a stereotypical and myopic notion of heterosexual, marital relationships, whereas LGBT families might not conform to every standard of such a framework, particularly, cohabitation, raising children and publicly identifying as an 'atypical family'.

8.3 Instead, a more reliable and inclusive test to recognize and protect LGBT families may focus on caregiving, economic inter-dependence and/or shared domestic responsibilities – as has been proposed for legal recognition of chosen families in the non-conjugal context.

9 Judicial retrofitting as an aid to implement transformative constitutional morality

9.1 It was submitted by Ld. Senior Counsel for the Respondents that any exercise by this Hon'ble Court to interpret terms in the SMA to include queer and trans persons within its fold would amount to 'judicial retrofitting'. With respect, it is not explained why retrofitting is in itself a bad idea, especially when such interpretation can save archaic provisions by keeping pace with the transformative constitutional morality, which must infuse all statutory laws when under judicial review.