

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

I.A. No. _____ OF 2018

IN

WRIT PETITION (CRIMINAL) No. 76 OF 2016

IN THE MATTER OF :

An application seeking intervention filed by mental health professionals

AND IN THE MATTER OF:

Navtej Singh Johar and Ors ... Petitioners

Versus

Union of India ...

Respondents

AND IN THE MATTER OF:

Dr. Alok Sarin

Son of B.K. Sarin

Aged about 51 years

Residing at A 52/1, SFS Flats,

Saket, New Delhi 110017

...Applicant

TO,

**THE HON'BLE CHIEF JUSTICE AND
AND HIS COMPANION JUSTICES OF THE
HON'BLE SUPREME COURT**

**THE HUMBLE APPLICATION
OF THE APPLICANT ABOVENAMED**

MOST RESPECTFULLY SHEWETH:

1. That the applicant abovenamed has filed the present application seeking to intervene in the Writ Petition (Criminal) No. 76 of 2016. It is submitted that the said Writ Petition prays for a Writ of mandamus declaring the “Right to Sexuality,” “Right to Sexual Autonomy” and the “Right to Choice of a Sexual Partner” to be part of the Right to Life guaranteed under Article 21 of the Constitution of India; and Writ of mandamus declaring Section 377 of the Indian Penal Code, 1860 to be unconstitutional; and Writ of mandamus declaring that Section 377 IPC does not apply to consensual sexual acts between adults in private. It is submitted that the applicant has been involved in a long-standing litigation which is currently pending at the stage of a Curative Petition before this Hon’ble Court arising our proceedings seeking similar prayers.
2. That the applicant was an Intervenor in *Suresh Kumar Koushal and Ors v. Naz Foundation and Ors*, Civil Appeal No. 10972 of 2013 which arose out of a challenge to the decision of the Hon’ble High Court in the judgment in *Naz Foundation and Ors v Government of NCT of Delhi*, Writ Petition (C) 7455 of 2001, holding Section 377 of the Indian Penal Code, 1908 insofar as it criminalises consensual sexual acts of adults in private to be

unconstitutional and in violation of Articles 14, 15 and 21 of the Constitution. The intervenor supported the respondents in the proceedings before this Hon'ble Court at the stage of Appeal arising out of a Special Leave Petition. Vide order dated 11 December 2013, this Hon'ble Court was pleased to reverse the Hon'ble Delhi High Court's decision in *Naz Foundation v. Union of India*. Applicant thereafter filed Review Petition No. 221 of 2014 impugning this Hon'ble Court's order dated 11 December 2013 in Civil Appeal 10972 of 2013. That review petition was rejected vide order dated 28 January 2014. Applicant then filed Curative Petition No. 106 of 2014, impugning order dated 11 December 2013 in Civil Appeal No. 10972 of 2013 and order dated 28 January 2014 in Review Petition No. 221 of 2014. Vide order dated 02 February 2016, in Curative Petition 106 of 2014, this Hon'ble Court observed that the batch of Curative Petitions raised issues of considerable importance and public interest and therefore found it appropriate to be placed before a Constitution Bench comprising five judges of the Hon'ble Supreme Court of India. Copy of the order annexed as **Annexure I-1**.

3. That, the Constitution Bench has not yet been constituted in terms of this Hon'ble Court's order dated 02 February 2016 in Curative Petition No. 106 of 2014.
4. That, media reports indicated that this Hon'ble Court had issued notice on a fresh petition under Article 32 of the Constitution of India in which certain eminent individuals in the field of Arts and Commerce from the LGBT Community approached this hon'ble court seeking a fresh challenge to section 377 of the Indian Penal Code, 1860 as being violative of Article 14, 16, 19 and 21 of the Constitution. Vide order dated 08 January 2018 in the same Writ Petition (Crl) 76 of 2016, this Hon'ble Court

referred the matter to a larger bench, stating that the petition dealt with issues of Constitutional Importance. The said order also went to the extent of stating that the decision of this Hon'ble Court in the judgment in *Suresh Kumar Koushal v Naz Foundation*, in Civil Appeal No. 10972 of 2009 required re-consideration. A true copy of the order dated 08.01.2018 in WP(Crl) 76 of 2016, is annexed herewith as **Annexure I-2**.

5. That the applicant has also been informed that a Constitution bench has been constituted which will commence hearings on 17 January 2018 and that the Writ Petition (Crl) 76 of 2016, *Navtej Singh Johar v Union of India*, has been listed before that Constitution Bench.
6. That having participated in the proceedings which challenged the decision of the Hon'ble Delhi High Court in *Naz Foundation v Government of NCT of Delhi* in Writ Petition (C) 7455 of 2001 from the stage of the SLP – the applicant seeks to intervene in these proceedings in support of *Navtej Singh Johar's* petition challenging the Constitutionality of Section 377 of the Indian Penal Code, 1860.
7. That the Applicant respectfully submits that because of the paucity of time, vakalatnamas from the other parties in Curative Petition No. 106/2014 have not yet been obtained. However, the Applicant has received oral and written consent from the rest of the parties, who are desirous of being parties to these proceedings as well, and craves leave of this Hon'ble Court to join them to these proceedings as and when this Hon'ble Court may deem fit.

A. BRIEF BACKGROUND OF THE APPLICANT AND

**OTHER PETITIONERS IN CURATIVE PETITION NO.
106/2014**

8. The Applicant herein is a mental health professional, who along with 12 other mental health professionals had intervened in Civil Appeal No. 10972/2009, *Suresh Kumar Koushal v Naz Foundation*. They have been practising as psychiatrists, clinical psychologists, behavioural psychologists in the field of mental health in reputed medical institutions throughout India. The Applicant submits that sexual orientation is an immutable characteristic and is present at birth. Much like being left handed, a homosexual orientation is something that individuals are born with.
9. The Applicant, who was Petitioner No. 2 before the Curative Proceedings, is a senior psychiatrist, practicing in New Delhi for the last twenty-four years, and currently heads the psychiatric services at the Sitaram Bhartia Institute of Science and Research, New Delhi, a leading multi-speciality hospital in New Delhi. Applicant has been involved in clinical practice, research and teaching for the last two decades, and is today regarded as one of the leading psychiatrists of the city.
 - a. The Applicant is an MBBS, and an MD in Psychiatry, from the All India Institute of Medical Sciences, New Delhi. Applicant is a Fellow of the Indian Psychiatric Society, a member of the Indian Medical Association, the World Psychiatric Association, the Indian Association of Private Psychiatry, the Indian Association of Biological Psychiatry, the Indian Association of Social Psychiatry, a corresponding member of the American Psychiatric Association and the International Board Member of the World

Association of Psychosocial Rehabilitation.

- b. The Applicant published a number of research papers, has spoken at many conferences, and has organised many continuing medical education programmes. The Applicant is the listowner, and moderator of the mailing list Indian_Psychiatry@yahoogroups.com., an internet discussion group for psychiatrists, which is India's first psychiatry e-group, started in 2001, and is very active till today.
 - c. The Applicant in his practice, has dealt with many patients with issues of homosexuality, and has helped LGBT persons become more comfortable with their sexuality. A list of Applicant's publications and presentations is annexed herewith as **Annexure I-3.**
10. The Petitioner No 1 in the Curative Petition is a reputed Professor of Psychiatry at the National Institute of Mental Health And Neuro Sciences (NIMHANS) Bangalore, a deemed University that functions under the authority of the Ministry of Health and Family Welfare, Government of India. The Petitioner No. 1 has been a faculty member at NIMHANS in the Department of Psychiatry for twenty five years. The Petitioner No 1 is a highly qualified and well-recognised professional in his field. The Petitioner No. 1's qualifications include an MBBS from the Maulana Azad Medical College, University of Delhi , MD in Psychological Medicine and Diploma in Psychological Medicine from NIMHANS. Bangalore University.

- a. The Petitioner No. 1 has published widely in a

range of professional journals of international standing in the field of psychiatry. The Petitioner No. 1 has in the course of his professional career of over twenty five years presented and participated in numerous professional conferences.

- b. As part of his clinical practice the Petitioner No. 1 is providing professional assistance to numerous clients including clients who happen to be Lesbian, Gay, Bisexual and Transgender (hereinafter referred to as LGBT) who approach the Department of Psychiatry. In addition, the Petitioner No 1 has provided consultations to referrals from other units of NIMHANS. The Petitioner No. 1 has also provided numerous professional consultations with family members of LGBT persons. The Petitioner No. 1 is also currently the Guide of a doctoral dissertation on establishing the legitimacy of homosexuality and addressing egodystonicity as internalised homophobia, the protocol of which has been cleared by NIMHAN's Ethics Committee.
- c. The Petitioner No. 1's professional consultations have related to:
 - i. establishing the client's sexual orientation,
 - ii. assessing the client's personal and family issues
 - iii. assisting in family psychoeducation and reconciliation,
 - iv. correcting misconceptions of clients and establishing their health and well-being.
 - v. Correcting misconceptions of family members of LGBT persons with respect to homosexuality being a natural part of human

sexuality.

Over extended sessions with these LGBT patients the Petitioner No. 1 has become aware of the level of mental distress caused by the unscientific and irrational perspective that homosexuality is a mental illness. The Petitioner No. 1 has provided professional inputs to raise his clients awareness and knowledge that it is the social stigma attached to homosexuality which needs redressal and not the client's own sexual orientation.

d. The Petitioner No. 1 based on his wide and thorough reading of the latest scientific and medical literature, as well as his own clinical experience, is of the firm opinion that homosexuality is not a disorder or pathology, but a normal and natural expression of human sexuality and the Petitioner No. 1 has publicly advocated this opinion. The reason the Petitioner No. 1 has felt impelled to publicly advocate the rights of Lesbian, Gay, Bisexual and Transgender persons is because of the level of social stigma and irrational prejudice faced by this group. This according to the Petitioner No. 1 is totally at odds with the scientific position of homosexuality being a natural variant of human sexuality. The Petitioner No. 1 was further of the opinion that the criminalisation of homosexuality was a cause of great psychological distress in many of his patients. To take forward public advocacy on the decriminalisation of homosexuality, the Petitioner No. 1 has become a Board Member of a Sangama a human rights organisation in Bangalore that advocates the rights of sexual minorities. The Petitioner No. 1's public advocacy work has been

recognised and the Petitioner No 1 has been invited as an expert to share his conclusions based on both research and clinical experience in a number of public fora:

- i. Presentation titled 'Homosexuality is not an mental health problem', at Seminar on Gay Rights, National Law School of India University, Bangalore , 1997
- ii. Workshop for volunteers of Swabhava, a Bangalore based non-profit NGO that run telephone helplines for Lesbian, Gay, Bisexual and Transgender persons, January, 2000.
- iii. Workshop on Mental Health and Sexuality at Good As You, Bangalore, a support group for Lesbian, Gay, Bisexual and Transgender persons, November 30th, 2000.
- iv. Presentation on Sexuality and LGBT Persons in India at Seminar titled “Lessons for India:Freedom of Nepalese Sexuality Minorities” at the Town Hall, Bangalore, November 2008.
- v. Workshop for the Sexual Health Intervention Project run by the Association for the Promotion of Social Action (APSA), a Bangalore-based child rights organisation on dealing with street youth and their sexuality, 2009.
- vi. Seminar on “Perspective of Mental sciences on Sexual Minorities”, organised by Sangama at the Indian Medical Association Hall, Bangalore, August 17, 2010.

11. The Petitioner No. 3 in the curative petition is a

reputed psychiatrist, presently a consultant at Ruby Hall Clinic, Pune. The Petitioner No.3's professional qualifications include:

- i. M. R. C. Psych, Royal College of Psychiatrists, London
 - ii. M.D. (Psychiatry), University of Mumbai (Gold Medallist)
 - iii. Diploma in Psychological Medicine, University of Mumbai
 - iv. M.B.B.S., Seth G.S. Medical College and K.E.M. Hospital, Mumbai.
- b. The Petitioner No. 3 is a consultant to the Department of Mental Health and Substance Dependence, World Health Organisation, Geneva. The Petitioner No. 3 has been a Consultant Psychiatrist (May 1999- April 2000) to the Maharashtra Institute Mental Health, Sasson Hospital Campus, Pune which is the Maharashtra Government's state level apex mental health institute. The Petitioner No. 3 is a member of the Royal College of Psychiatrists, UK and registered with the Maharashtra Medical Council, Mumbai, India.
- c. The Petitioner No. 3 is on the International Advisory Board, International Journal of Social Psychiatry since January 2002. The Journal is a premier international peer reviewed publication in the field of social psychiatry, published quarterly by SAGE Publications, London. The Petitioner No. 3 has also been the Co-Editor, Journal of Mental Health, a multidisciplinary peer reviewed journal dealing with Mental Health (October 1997 to April 1999).

- d. The Petitioner No.3 has taught undergraduate medical students as well as postgraduate psychiatry residents at the Maharashtra Institute of Mental Health, Pune. The Petitioner No.3 works with patients who are distressed by their homosexuality by helping him/her accept their sexuality.
12. The Petitioner No. 4 in the Curative Petition is an internationally renowned psychiatrist with a special interest in global mental health. The Petitioner No. 4 is currently an International Professor in Global Mental Health, and Senior Clinical Research Fellow in Tropical Medicine at the Centre for Global Mental Health, London School of Hygiene and Tropical Medicine, which focuses on research, teaching and training in policy, prevention, treatment and care in issues related to mental health.
 - a. The Petitioner No. 4 has made significant contributions to the field of mental health. The Petitioner No. 4 co-founded an NGO that works on mental health issues in Goa called Sangath that won the Macarthur Foundation's International Prize in 2008. The Petitioner No. 4 is an editor of the influential Lancet series on Global Health (2007). The Petitioner No. 4 has been a leader in setting up a new movement for global mental health.
 - b. The Petitioner No. 4 is the author of the book, "Where There is No Psychiatrist", a mental health care manual for non specialist health care workers, which is widely used in developing countries. The Petitioner No. 4 is involve with research related to social and cultural determinants, epidimiology, and treatment of mental disorders in community and primary health care settings in India and other developing countries.

13. The Petitioner No. 5 in the Curative Petition is the head of Department, Department of Psychiatry at the Kamala Nehru Hospital, Pune Municipal Corporation, Pune. The Petitioner No. 5 is a well-recognised psychiatrist and the Member Secretary, CPS (College of Physicians and Surgeons of Bombay) Selection Committee, Pune Municipal Corporation. The Petitioner No.5 is the former President of the Indian Medical Association, Maharashtra state and the former President of the Pune Psychiatric Association. The Petitioner No.5 is a highly qualified and experienced psychiatrist holding a MBBS, DPM, DPH, and LGS and has 25 years of experience in the field.

a. The Petitioner No.5 has professionally assisted individuals of homosexual orientation in coming to terms with their sexuality and helping them become comfortable with it.

14. The Petitioner No.6 in the Curative petitioner is a highly qualified psychiatrist with 14 years of professional experience, and is attached with to the K.E.M. Hospital, Pune. The Petitioner No.6 is an elected member of the Indian Psychiatric Society and is a former Executive Member of the Pune Psychiatrists Association. The Petitioner No.7 in the Curative petitioner is a reputed psychiatrist and a former Lecturer in Psychiatry at the Maharashtra Institute of Mental Health, Pune. The Petitioner No.8 in the Curative petitioner is a Consultant Psychiatrist with Inlaks and Budhrani Hospital, Pune and a Visiting Consultant Psychiatrist at Joshi Hospital and Ratna Hospital, Pune. The Petitioner No.8 in the Curative petitioner is an Associate Member of the Indian Psychiatry Society and a Life Member of the Bombay Psychiatry Society. The Petitioner No.9 in the Curative petitioner is

an experienced psychiatrist and psychotherapist with over 20 years experience. The Petitioner No.10 in the Curative petitioner is a reputed psychiatrist based with the Institute of Psychiatry, Kolkata. The Petitioner No. 11 in the Curative petitioner is a psychiatrist with a private practice in Kolkata and is a consultant to a number of organisations that work on mental health issues in Kolkata. The Petitioner No. 12 in the Curative petitioner is a counsellor and is the Honorary Secretary of Ishwar Sankalpa, a non-profit organization in Kolkata founded by professionals from the field of psychological well being. The Petitioner No. 13 in the Curative petitioner is a psychotherapist with over 30 years experience associated with Samikshani, a Kolkata based NGO dealing with mental health.

15. The Applicant submits that he along with the other Curative Petitioners are all reputed mental health professionals dealing with a diversity of mental health issues which they have come across in their practice. As psychologists, psychiatrists and reputed academics in the field of mental health, the Applicant and the Petitioners have a wide range of experiences in dealing with patients who may be Lesbian, Gay, Bisexual or Transgender and hence have had considerable expertise in addressing the mental health concerns of Lesbian, Gay, Bisexual and Transgender Persons.

B. MENTAL HEALTH

16. The Applicant submits that sexual intimacy is a sensitive, aspect of human relationships. It is central to family life, community, individual well being and the development of the human personality. The applicant further seeks to submit that mental health professionals have for several decades recognized that sexual intimacy

is a core aspect of human relationships and it is very important for individuals to lead productive and psychologically healthy lives. The Applicant submits that the fact that Section 377 IPC even applies to adult consensual sexual relationships means that the State seeks to deny the very opportunity to participate in these profound aspects of the human experience to a particular class of persons namely Lesbian, Gay, Bisexual and Transgender (LGBT) persons.

17. The Applicant further submits that the existence of Section 377 IPC and its applicability to consensual adult homosexual relations has created a social perception of homosexuality as illegal and abnormal. Therefore, even though homosexuality is a normal variant of human sexuality, it is perceived and treated as abnormal. This larger public climate of intolerance fostered by the law encroaches on the individual rights of LGBT persons and causes severe mental distress and loss of self-esteem. Section 377 IPC creates immense pressure on homosexuals which severely affects the ability of the homosexual to live his/her lives normally. Therefore, the Applicant submits that, the criminalization of homosexuality by Section 377 contributes to social isolation of homosexuals and leads to harassment of homosexuals. The presence of Section 377 results in homosexuals being forced to live a dual life, causing significant anguish and leading to a range of mental health problems.

18. The Applicant submits that in the course of his professional lives, the Applicant has interacted with hundreds of LGBT persons in India. Many of them are well known successful people, who are forced to live in the closet because of Section 377 IPC. This situation

results in many men and women forcibly getting married thereby ruining lives of their wives and husbands respectively, as they continue to have emotional and sexual relationships with men. Those that resist, lead double lives or lonely lives, thereby predisposing them to depression & even suicide. The Applicant submits that Section 377 IPC prior to the judgment of the Hon'ble High Court has resulted in marginalisation and stigmatisation of LGBT persons and caused enormous mental distress stress to Lesbian Gay Bisexual and Transgender individuals thereby placing them at greater risk of psychiatric morbidity and even fatal outcomes like suicide.

19. The Applicant submits that it is the scientific consensus that homosexual and bisexual orientation per se is not a mental disorder. The Applicant submits that the entire international mental health fraternity recognises and follows the diagnostic manual of the American Psychiatric Association (APA) referred to as the Diagnostic and Statistics Manual IV (DSM IV) along with the World Health Organisation (WHO) classification system International Classification of Diseases (ICD-10). Both these classification systems unequivocally posit that homosexuality is not a disease. The conclusion of both the APA and the WHO is based on rigorous studies and hard scientific evidence which proves that the link between homosexuality and mental illness does not withstand rigorous scientific testing. It is in fact based on rigorous scientific evidence that the APA in 1973 removed homosexuality from its list of mental disorders. The rationale put forward by the APA was that for a mental or psychiatric condition to be considered a psychiatric disorder, it must either regularly cause subjective distress, or regularly be associated with some generalized

impairment in social effectiveness or functioning. In the considered opinion of the APA, homosexuality, per se, does not meet the requirements to be classified as a psychiatric disorder. A similar process of intense deliberation based upon scientific data resulted in the WHO in 1992 dropping homosexuality per se from the list of mental disorders in ICD 10 Guidelines. The Clinical Descriptions and Diagnostic Guidelines of the ICD 10 reads: "Disorders of sexual preference are clearly differentiated from disorders of gender identity, and homosexuality in itself is no longer included as a category."

20. The Applicant also submits that sexual orientation is an immutable characteristic and is present at birth. Much like being left handed, a homosexual orientation is something that individuals are born with. According to the *amicus* brief filed in 2002 by the American Psychiatric Association before the United States Supreme Court in the case of *Lawrence v. Texas* 539 U.S. 558 (2003):

"According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience."

He further argues that:

"More recent studies have reported that most gay men and most or many lesbians experience either no choice or very little choice in their sexual attraction to members of their own sex. In a study that included a community-

based sample of 125 gay men and lesbians, 80% of the gay men and 62% of the lesbians said they had “no choice at all” about being gay, lesbian, or bisexual. See G.M. Herek et al., Correlates of Internalized Homophobia In a Community Sample of Lesbians and Gay Men, 2 J. Gay & Lesbian Med. Ass’n 23 (1998). The same researchers subsequently conducted a larger study that included 898 gay men and 980 lesbians. In that larger study, 85% of the gay men and 68% of the lesbians reported having either “no choice” or “very little choice” about their sexual orientation.”

It further argues that since all sexual orientation cannot be changed:

“All major national mental health organizations have officially expressed concerns about therapies promoted to change sexual orientation. Given the strong stigma against homosexuality that remains in place in our society, however, it is perhaps not surprising that some persons who experience sexual attractions towards members of their own sex nonetheless feel that they should attempt to change their sexual orientation and seek treatment to that end...To date, however, there has been no scientifically adequate research to show that interventions aimed at changing sexual orientation are effective or safe. Moreover, critical examinations of reports of the effectiveness of these therapies have highlighted numerous problems with such claims.”

21. The applicant is deeply pained and worried at the 'unscientific' narrative which is often put forward regarding homosexuality and towards LGBT individuals in India. It is submitted that it is incorrect to assume that homosexuality is a condition which spreads from person to person in a manner similar to a contagious disease. The Applicant submits that a person's sexual orientation appears to emerge between middle childhood and early adolescence. It has been credibly established that men and women who identify themselves as homosexual consistently report little or no choice in their sexual attractions to those of the same sex. It is submitted that people have at the core of their personality, a sexuality and that it is immutable and hence the question of the youth or any other category of persons becoming homosexuals does not arise. It is also incorrect to link homosexuality to child sexual abuse and to value disorientation in children. The Applicant is deeply concerned about the existence and extent of child sexual abuse and in his professional capacities have worked with survivors of child sexual abuse. The Applicant submits that there is no connection between decriminalising same sex acts in private and the causing of so called value disorientation in children. On the contrary, in the opinion of the Applicant the judgment in Civil Appeal 10972/2009 would have a positive impact by promoting the values of inclusiveness, tolerance of diversity and respect for difference.

22. To summarize, the Applicant is of the opinion that Section 377 IPC should not apply to consensual adult relationships inter-alia on account of following reasons:

a. The application of Section 377 would violate the mandate of equality if the State were to deny the

very opportunity to a certain class of persons, namely the LGBT community to participate in a profound aspect of the human experience, namely the experience of sexual intimacy.

- b. The criminalisation of homosexuality stigmatizes homosexuals which results in social isolation, depression, mental distress and loss of self esteem for members of the LGBT community thereby violating the right of LGBT persons to life with dignity.
- c. Since homosexuality per se is not a mental disorder according to established scientific evidence and is an immutable characteristic, it is arbitrary to criminalise its expression.

It is for the above mentioned reasons that the Applicant welcomed the judgment of the Hon'ble High Court of Delhi in WP(C) 7455/2001, titled Naz Foundation v. Government of the National Capital Territory of Delhi & Ors., which declared section 377 unconstitutional insofar as it applied to consensual same-sex sexual acts between adults in private. The applicant is of the firm opinion that a major source of the stigma and discrimination faced by LGBT persons in India had been rightly removed through the judgement of the Hon'ble Delhi High Court.

23. Furthermore, the Applicant is of the firm opinion that Section 377 IPC:
 - a. Causes mental stress and anxiety in LGBT persons as it forces LGBT persons to hide their sexuality.
 - b. Causes LGBT persons to be looked at criminals, for no fault of their own.
 - c. Encourages discrimination, harassment and abuse

of LGBT persons as Section 377 conveys the message that LGBT persons are criminals and are hence to be accorded less dignity than other citizens.

- d. Encourages hatred and prejudice in society as it conveys the message that people who are different are not to be tolerated.

C. CHALLENGE TO SECTION 377

24. The Applicant submits that in his experience as mental health professionals he has repeatedly come across instances of LGBT persons who suffer from mental health problems ranging from depression, low sense of self esteem to suicidal tendencies. The origin points of the mental health problems faced by LGBT persons is the stigma, social isolation and discrimination fostered by Section 377 of the IPC. Section 377 of the IPC causes mental stress and anxiety in LGBT persons as it forces LGBT persons to hide their sexuality. It also encourages discrimination, harassment and abuse of LGBT persons by conveying the message that LGBT persons are criminals who by their very nature do not deserve to be treated in a dignified manner. The Applicant is of the opinion that Section 377, both through the social attitudes it fosters and the direct impact on the mental well-being of LGBT persons violates the right of LGBT persons to live with dignity.

25. The Applicant submits that Section 377 violates the right to equality of LGBT persons. Though the law ostensibly targets only acts and not identities in its operation it ends up targeting LGBT persons as a community. By criminalising sexual acts which are a part of the very sexual expression of LGBT persons, the State seeks to deny LGBT persons the right to form intimate

attachments. By denying LGBT persons as a class the very possibility of forming intimate attachments with others of the same sex, the state violates the mandate of equality.

26. The Applicant further submits that Section 377 IPC generates a presumption of criminality towards LGBT persons who, as a consequence of this presumption face adverse consequences including blackmail and sexual abuse in addition to consequences such as social stigmatisation and discrimination. Section 377 both in its operation as well as over its broad classification which includes consensual sexual acts between adults violates the mandate of equality in Article 14.

27. The Applicant further submits that the criminalisation of consensual same sex sexual acts is arbitrary. In the opinion of the Applicant homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is merely a natural variant of human sexuality. To criminalize what is a innate characteristic of particular individual over which the individuals have no control, is akin to criminalizing left handed people for being left handed or blue eyed people for having blue eyes. Therefore, the Applicant submits that the very criminalisation of homosexuality which is not only natural but also an inborn characteristic of LGBT persons lacks any clear rationale, is prima facie arbitrary and a violation of Art 14.

28. The Applicant also submits that Section 377 targets individuals on the basis of stereotypical perceptions regarding sexuality. The Applicant submits that the prohibition against discrimination on grounds of sex embodied in Art 15 would include within its purview the discrimination faced on grounds of sexual orientation.

29. The Applicant submits that there exists no compelling State interest which justifies the existence of Section 377. The three key arguments by the petitioners which make out a compelling state interest to continue to preserve Section 377 are that
- a. Section 377 is necessary to prevent the spread of the HIV epidemic
 - b. Section 377 prevents child sexual abuse.
 - c. Section 377 protects public morality
30. The Applicant submits that it has been established in the affidavit before the Hon'ble High Court of the National AIDS Control Organisation (NACO) that Section 377 IPC instead of preventing HIV/AIDS actually allows HIV/AIDS to spread further.
31. The Applicant also submits that the decision of the Hon'ble Delhi High Court to retain the applicability of Section 377 IPC to all sexual acts between adults and those below the age of eighteen takes care of the valid concern with respect to having laws to prosecute certain forms of child sexual abuse.
32. With respect to the contention that Section 377 IPC is necessary to protect public morality, the Applicant contends that public morality by itself does not constitute a ground to establish compelling state interest in favour of continued criminalisation of homosexuality. In the absence of any harm caused by consensual adult same sex behaviour, its criminalisation cannot be a compelling state interest.
33. Finally, the Applicant submits that the scientific consensus is that sexual orientation is an immutable characteristic, and a person's sexual orientation is not a matter of choice. To continue to criminalise an immutable

characteristic such as the expression of one's sexual orientation which causes no harm to any third party, cannot under any circumstances be construed to be a compelling state interest. The Applicant concludes that since the interest harmed by Section 377 IPC that is the freedom to choose one's sexual partner, is so basic and the state interest served through continued criminalization, is non-existent, the provision is a violation of the non-discrimination guarantee under Article 15 of the Constitution of India.

34. The Applicant submits that Section 377 IPC by criminalizing homosexual acts has a chilling effect on the free speech and expression of LGBT persons. The shadow of criminality cast by Section 377 curtails a free and frank discussion on issues of sexuality, which enables people to publicly own their identity. Whereas, wearing religious symbols or other markers of one's identity is a public expression something that is essential to one's identity and is protected by the law, Section 377 IPC does not allow sexual minorities to openly express their sexuality, an aspect that is intrinsic to whom they are, and is hence in violation of their right to expression. The Applicant submits that the consequence of the culture of silence fostered by Section 377 IPC is on the mental well-being of LGBT persons.

35. The Applicant further submits that since the issue of decriminalisation has become so deeply controversial with the expression of so many conflicting and varying subjective opinions, it is necessary to come to a conclusion based upon objective scientific opinion drawing upon extensive research. The Applicant also submits that through their clinical practice, he is familiar with the sad history of isolation and stigmatization of

LGBT persons and that the Applicant seeks to represent the concerns of LGBT persons who have been victimised by Section 377 IPC. It is in the interests of justice that for the above mentioned reasons, the Applicant, who is a renowned experts in the field be allowed to intervene to the Present Petition.

**D. JUDGMENT DATED 11 DECEMBER 2013 IN
SURESH KUMAR KOUSHAL v NAZ FOUNDATION,
HON'BLE SUPREME COURT OF INDIA, C.A. No.
10972/2009 NEEDS RECONSIDERATION**

36. The Applicant submits that the Hon'ble Delhi High Court had correctly appraised the constitutionality of the said provision based both on the current history of use of the law as well as the latest medical and scientific opinion. In particular the applicant is in agreement with the following observations of the Hon'ble High Court:
- a. The Hon'ble High Court correctly observed at para 67 of its judgment that there is a unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality. Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973 after reviewing evidence that homosexuality is not a mental disorder. In 1992, the World Health Organisation removed homosexuality from its list of mental illnesses in the International Classification of Diseases (ICD 10). Guidelines of the ICD 10 reads: "disorders of sexual preference are clearly differentiated from disorders of gender identity and homosexuality in itself is no longer included as a category."

- b. The Hon'ble High Court was also correct in para 68 of the judgment in Civil Appeal 10972/2009, in referring to the *Amicus* brief filed by the American Psychiatric Association before the United States Supreme Court in the case of *Lawrence v. Texas* 539 U.S. 558 (2003), wherein it was stated that :

“According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience.”

Thus, the Hon'ble High Court was correct in its observation at para 68 of the judgment in Civil Appeal 10972/2009 that homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality.

- c. The studies conducted in different parts of world including India show that the criminalisation of same-sex conduct has a negative and deleterious impact on the lives and mental health of LBGT people. The Hon'ble High Court correctly observed at para 50 that “Even when the penal provisions are not enforced, they reduce gay men or women to what has been referred to as “unapprehended felons”, thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion

and discrimination.”

- d. At para 47 of the judgment in Civil Appeal 10972/2009, it is correctly observed that “For every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.”
37. That the Hon’ble Delhi High Court’s judgment decriminalising consensual sexual relationships between adults in private was rooted in a concrete understanding of the mental and psychological harm that Section 377 IPC inflicts on the LGBT population. The judgment was also based on an understanding of the current medical and scientific opinion on homosexuality as well as the meaning of citizenship under the Indian Constitutional order.
38. It is submitted that the Applicant is not alone in welcoming the judgment of the Delhi High Court as numerous public intellectuals, lawyers, teachers, academics, artists and politicians as well as common

people welcomed the judgment of the Delhi High Court. However, the Applicant is deeply distressed to note the protests which followed the judgement of the Delhi High Court.

39. The Applicant also submits that the specific decision of the Delhi High Court to retain the applicability of Section 377 IPC to all sexual acts between adults and those below the age of eighteen takes care of the valid concern with respect to having laws to prosecute certain forms of child sexual abuse. The applicant further submits that there is no link between the spread of HIV/AIDS and the decriminalisation of homosexuality.

40. However, Applicant was deeply saddened when the appeal against the judgment of the Delhi High Court was allowed by this Hon'ble Court in its judgment in *Suresh Kumar Koushal v Naz Foundation*, Civil Appeal No. 10972/2009 vide its judgment dated 11 December 2013.

41. It is respectfully submitted, that in the conclusion stating that:

“Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes”,

The judgment in *Suresh Koushal* is in material error since there is no intelligible differentia, i.e.,– no ‘real and substantial difference’, no ‘yardstick or measure’, ‘no policy or principle’ for guidance to distinguish ‘carnal intercourse in the ordinary course’ from ‘carnal intercourse against the order of nature’. The judgement itself, after reviewing reported judgements on section 377, recorded at para 38 that not only was it not possible to list acts which were covered by section 377, but no test could

be laid down to differentiate “carnal intercourse against the order of nature”. Section 377 therefore, from the judgment in Civil Appeal 10972/2009’s review of reported judgements that applied section 377, failed the first test of Article 14, i.e., there was no intelligible differentia to distinguish ‘carnal intercourse in the ordinary course’ from ‘carnal intercourse against the order of nature’. (**See *Chiranjit Lal Chowdhury v. The Union of India and Others*, [1950] S.C.R. 869, page 913 and 932, *State of West Bengal v. Anwar Ali Sarkar* , [1952] SCR 294, page 315)**)

42. The judgement in *Suresh Koushal* is also in error since the test of whether there was a rational nexus of the classification of acts punished by section 377 with what the section sought to achieve was not applied. Indeed there has never been clear consensus about what section 377 sought to achieve. The judgement itself notes deliberate obviation of all discussion around the section at the time of its legislation (at para 37), and also notes, (at para 38), the complete lack of judicial consensus of the acts which fall within section 377. The judgement has, it is respectfully submitted, carried the presumption of constitutionality of section 377 to the extent of assuming an "undisclosed intention or reason" for the classification of acts into "carnal intercourse against the order of nature" and "carnal intercourse within the order of nature". In doing so, the protection of article 14 has been rendered "a mere rope of sand, in no manner restraining state action." The error in applying the presumption of unconstitutionality is compounded by the fact that “good faith and knowledge of existing conditions” on the part of the body that legislated the Indian Penal Code cannot be presumed, since the Legislative Council consisted of 12

unelected Englishmen.(**See State of West Bengal v. Anwar Ali Sarkar , [1952] SCR 294, page 316**)

43. That, the judgment has further erred in its application of the ‘object and form’ test of ‘A.K. Gopalan’ case, discarded by this Hon’ble Court in favor of the ‘intended and real effect’ or the ‘direct and inevitable effect’ test of Maneka Gandhi to examine whether section 377 unduly burdened a class.(**See Maneka Gandhi vs Union Of India, 1978 SCR (2) 621, State of Maharashtra & Anr. Versus Indian Hotel & Restaurants Assn. & Ors., CIVIL APPEAL NO.2705 OF 2006, decided on July 16, 2013**)
44. That the judgement is also in factual error in concluding that in the “last more than 150 years less than 200 persons have been prosecuted (as per the reported orders)”. Most prosecutions do not reach the appellate stage, and not all appellate judgements are reported. The judgement is therefore clearly in error in assuming that the number of reported judgments offers any indication of the numbers of persons prosecuted. Further, FIRs may be registered, intrusive investigations conducted into private affairs, searches carried out, bail applications granted or refused, cases tried and persons convicted without finding any reflection in the docket of the appellate courts.
45. That, it is further submitted that the error is also in the judgement’s failure to even attempt at identifying a compelling state interest requisite to justify the denial of the rights to privacy and dignity - guaranteed by article 21 of the Constitution - by the criminalization of consensual acts in private.
46. That the Applicant submits that this Hon’ble Court’s argument in *Suresh Koushal*, rested upon a distinction between “conduct” and “identity”. This Hon’ble Court held

that because Section 377 only classified “acts” or “conduct” (‘carnal intercourse against the order of nature’ or ‘in accordance with the order of nature’) and not “persons”, Articles 14 and 15 were not attracted. The Applicant respectfully submits that the judgment in *Suresh Koushal*, is inconsistent, and cannot hold the field simultaneously with the judgment in **NALSA v Union of India, (2014) 5 SCC 438**, which was delivered a few month after.

47. That it is submitted, this Hon’ble court in the NALSA judgment attempted at rectifying this understanding, whereby it noted that “*Section 377, though associated with specific sexual act, highlighted certain identities, and was used as an instrument of harassment and physical abuse...*”

48. That, consequently, in *NALSA*, this Hon’ble Court correctly recognised that issues of gender identity and sexual orientation are inextricably bound up with each other. Indeed, this Hon’ble Court went on to note that:

“... gender identity is one of the most fundamental aspects of life... it refers to each person’s deeply felt internal and individual experience of gender... including the personal sense of the body which may involve a freely chosen modification of bodily appearances or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms.”

49. That it is evidently clear, the above understanding of this Hon'ble Court in NALSA is directly contrary to, the reasoning in *Suresh Koushal*, which was that Section 377 only penalizes "conduct", and does not criminalise any "person" or "identity". (see **NALSA v Union of India, para 29 and 59**)

50. That, the above reasoning of this Hon'ble Court recently resonated in the 9-judge bench judgment of this Hon'ble in *Justice K.S. Puttaswamy vs Union of India* (W.P. Civ. No. 494/2012) and even previously in decisions of foreign jurisdiction, like in the case of **Lawrence vs Texas, 539 U.S. 558 (2003)**, Justice Kennedy held that:

"When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."

This reasoning was echoed in **Elane Photography vs Willock, Docket No. 33687/213**, where the Supreme Court of New Mexico noted that:

"... when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation."

E. ISSUES RAISED IN ADDITION TO THOSE

PRESENTED IN THE WRIT PETITION

51. That in addition to the issues already presented in the writ petition, the applicant seeks to place before this Hon'ble Court the following further issues for consideration regarding infirmities in the judgment in *Suresh Koushal*:
52. That, in the conclusion of *Suresh Koushal*, the Hon'ble Supreme Court states that section 377 merely identifies certain acts as offences and does not criminalize LGBT people. This observation of the Hon'ble Supreme Court is also erroneous as, by punishing the only form of sexual intercourse available to LGBT persons – i.e., non-peno vaginal - section 377 entirely denies sexual intercourse to the class of LGBT persons.
53. That, further, none of the 200 prosecutions dealt with in reported judgement (referred to at para 43 of the judgement), involved prosecutions of sexual intercourse involving consenting heterosexual adults. In its 'effect and operation' therefore, section 377 unduly burdens the class of LGBT. The judgement of the Delhi High Court clarified and declared that there was no rationale for this uneven application of the law and henceforth, consent would remove all consensual non-peno-vaginal sexual intercourse from the ambit of section 377 altogether, whether practiced by LGBT persons or heterosexuals. (***See Khandige Sham Bhat And Others vs The Agricultural Income Tax officer, 1963 AIR 591, 1963 SCR (3) 809***)
54. The Applicant submits that when the constitutionality of any provision is tested against the vires of Article 14 and 15(1) it is the effect of that provision through which it is to be judged and not on its form, intent, or purpose. (***see Punjab Provinces vs Daulat Singh,***

(1946) 48 BOMLR 443, a Full Bench of the Bombay High Court)

55. That the same proposition was upheld by a Constitution Bench of this Hon'ble Court in **State of Bombay v Bombay Education Society**, (1955) SCR 568, wherein, it was held:

The arguments advanced by the learned Attorney-General overlook the distinction between the object or motive underlying the impugned order and the mode and manner adopted therein for achieving that object. The object or motive attributed by the learned Attorney-General to the impugned order is undoubtedly a laudable one but its validity has to be judged by the method of its operation and its effect on the fundamental right guaranteed by article 29(2). A similar question of construction arose in the case of Punjab Province v. Daulat Singh.

This proposition was further upheld in **Prem Chand Garg vs Excise Commissioner AIR 1963 SC 966**, and most recently in **Anuj Garg vs Hotel Association of India, AIR 2008 SC 663**.

56. That, the Applicant therefore submits that the judgment in Suresh Koushal, to the extent that it limited its examination of Section 377 to its form, that is, its text that punished a set of acts "carnal intercourse against the order of nature", erred in not examining its effect upon the LGBT community.
57. That the judgment in Civil Appeal 10972/2009 is erroneous in misconstruing the ratio of its judgement in A.K. Roy to hold that the 'vagaries of language' saved section 377 from the challenge of vagueness. In A.K. Roy, this Hon'ble Court made a distinction between

- a. expressions which were difficult to define since they comprehended “an infinite variety of situations”
 - b. and expressions which did not comprehend such an infinite variety of situations(See A. K. Roy, Etc vs Union Of India And Anr, 1982 SCR (2) 272, page 323)
58. In the light of the fact that section 377 describes an offence against the human body and requires penetration to constitute the offence, ‘carnal intercourse against the other order of nature’ cannot comprehend an “infinite variety of situations” and it should be possible to ‘enumerate’ the acts of penetration which constitute the offence. Absent such enumeration, the clause will be capable of wanton abuse as was held in A.K. Roy, where the phrase “maintenance of supplies and services essential to the community” was held to be not only “vague and uncertain” but “capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21.” This court in A.K. Roy cautioned that courts must strive to give even expressions which by their very nature were difficult to define, a narrower construction than the literal words suggested, limiting their application to as few situations as possible.
59. That, in ***Shreya Singhal vs Union of India***, AIR 2015 SC 1523, a two-judge bench of this Hon’ble Court, after exhaustively surveying the precedent on the subject, including the judgments of K.A. Abbas vs Union of India, (1971) 2 S.C.R. 446, Harakchand Ratanchand Banthia vs Union of India, (1969) 2 SCC 166, A.K. Roy vs Union of

India, (1982) 2 S.C.R. 272, and Kartar Singh vs State of Punjab, (1994) 3 SCC 569, held that “vagueness” was a ground for striking down a statute:

“These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge’s notion of what is “grossly offensive” or “menacing”. In Collins’ case, both the Leicestershire Justices and two Judges of the Queen’s Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen’s Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as “grossly offensive” or “menacing” are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66A is unconstitutionally vague.”

60. That, consequently, over the years the courts have given their own interpretation and meaning to the phrase “carnal intercourse against the order of nature”, and the precedents do not direct us to any common understanding of the said phrase. ((**Khanu v Emperor**

AIR 1925 Sind 286, para 2; **Lohana Vasantlal Devchand v The State**, (1968) 9 CLR 1052, **Brother John Anthony vs State**, **Fazal Rab Choudhary v State of Bihar (1982) 3 SCC 9**), **State of Kerala v Kundumkara Govindan**, (1969) CLJ 818, **Calvin John Francis v State of Orissa**, (1992) I OLR 316).

61. Applicant respectfully submits that even the judgment in *Suresh Kumar Koushal*, declined to define what constituted “carnal intercourse against the order of nature”, holding only that would be adjudicated on a “case to case basis.” Applicant respectfully submits that determining the ingredients of a criminal offence on a case to case basis goes against the fundamental principles of the rule of law, as well as the principle underlying Article 20(1) of the Constitution, which mandates that individuals have a clear idea of the meaning and scope of a criminal offence in advance.
62. That the issue of ‘Dignity’ as an aspect of the Right to Liberty and as explicated in the judgement of this Hon’ble Court in Justice K.S. Puttaswamy (Retd.) And Others vs Union of India And Others, which decision was rendered by this Hon’ble Court after the present petition – i.e., *Navtej Johar And Others vs Union of India And Others*, was filed, renders section 377 unconstitutional. A vital aspect of an individuals’ identity is his or her sexual orientation. The development of intimate relationships is a crucial facet in the enjoyment of life and to deny any individual his or her right to physical intimacy is an egregious affront to the person’s Human Rights and Dignity.
63. By criminalising consensual sexual activity between adults even within the privacy of a home, section 377 violates the rights to privacy and dignity, as explicated in

Justice K.S. Puttaswamy (Retd.) Vs Union of India And Others, (W.P. (C) No. 494/2012).

64. Section 377, in so far as it applies to consenting adults does not meet the three-fold requirement stipulated in Justice K.S. Puttaswamy (Retd.) Vs Union of India And Others as pre-requisite for intrusions into the privacy right to be valid (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.
65. There are no “legitimate concerns of the state”, no “legitimate state aim”, to justify the intrusion on the right to privacy that is section 377 (conclusion 6, at page 265 of Justice K.S. Puttaswamy (Retd.) Vs Union of India And Others, (W.P. (C) No. 494/2012)
66. Applicant respectfully submits, therefore, that five out of nine judges in **Justice K.S. Puttaswamy vs Union of India**, expressly held that:
 - a. **Suresh Koushal’s** rationale that sexual orientation was an issue that concerned only a “minuscule minority”, and was therefore constitutionally irrelevant, was incorrect in law.
 - b. **Suresh Koushal’s** rationale that there had been very few prosecutions under Section 377, and that therefore the section did not affect LGBT persons in any serious way, was incorrect in law.
 - c. Public morality or popular perceptions could not be a ground to deny the rights to privacy, dignity, and equality.

d. Sexual orientation was an integral aspect of the right to privacy, dignity, and autonomy, and discrimination on the basis of sexual orientation affected fundamental rights under Articles 14 and 15(1) of the Constitution.

67. Applicant therefore submits that the judgment in **K.S. Puttaswamy**, not only removed the foundations upon which **Suresh Koushal**, , was erected, but also provided an independent set of arguments that lead to only one possible conclusion: that the Hon'ble High Court of Delhi's analysis of Section 377 of the Indian Penal Code in light of Articles 14, 15(1) and 21 was correct, and consequently, that judgment ought to be resurrected by this Hon'ble Court.

68. That the judgement in *Suresh Koushal*, is also in error in introducing a numerical requirement for the protections of Chapter III of the constitution, since it is long settled that Fundamental Rights of miniscule minorities, even minorities of one, are entitled to full protection. The same was refuted in the 9-judge bench decision of this Hon'ble Court in Justice Puttuswamy (Retd.) matter in the opinion of Justice Chandrachud.

F. WHY THE APPLICANT MUST BE HEARD IN THE PRESENT WRIT PETITION

69. That if the applicant's' curative petition had been heard and allowed, he would have been in a position to advance arguments de novo, impugning the constitutionality of section 377 of the IPC and supporting the findings of the Hon'ble High Court.

70. That the judgement of this Hon'ble Court in ***Justice K.S. Puttaswamy (Retd.) versus Union of India and***

Others expressly took note of the fact, that even after the infirmities in *Suresh Koushal* (as have been highlighted above), “the challenge to Section 377 is pending consideration before a larger Bench of this Court, we would leave the constitutional validity to be decided in an appropriate proceeding”. Thereby, Justice Chandrachud in his majority opinion, unlike the decision in the ADM Jabalpur case, he did overrule *Suresh Koushal*, taking note of the fact that the curative with regards to the same was pending consideration before a larger constitutional bench. It is therefore most respectfully submitted that, in the light of those observations of this Hon’ble Court, it would be appropriate and in the interests of justice that the applicant is heard in these proceedings as well as the decision in Navtej Singh Johar’s petition will effectively render the applicant’s curative petitions irrelevant – either way the matter is decided.

71. That the Applicant is both, necessary and proper party to this petition.
72. That no prejudice will be caused to the parties if the Applicant is permitted to intervene in this matter. On the other hand, if the Applicant is not allowed to intervene in the present petition, irreparable harm will be caused as the Applicant will not be able to present objective, scientific facts, with regard to homosexuality before this Hon’ble Court. Further if the Applicant is not allowed to intervene in the present petition, they will not be able to present the harm that LGBT persons have suffered as a inevitable consequence of the existence of Section 377 IPC and hence suffer irreparable harm. That this Application is bona fide and in the interest of justice
73. It is therefore submitted that it would be in the interest of justice if the Applicant is permitted to intervene

in the present Special Leave Petition and assist this Hon'ble Court on the questions of law raised.

PRAYER

In the premises it is most respectfully prayed that this Hon'ble Court may be pleased to:

- a. Allow the present application and permit the applicant to intervene in the present proceedings;and
- b. Pass such other and further orders as this Hon'ble Court may deem fit and proper;

DRAWN BY:

FILED BY:

CHINMAY KANOJIA

Advocates

GAUTAM NARAYAN

Advocate on Record

Drawn On: .01.2018

Filed On: .01.2018