

INTER-AMERICAN COURT OF HUMAN RIGHTS

AMICI CURIAE BRIEF

Presented by

**Amnesty International
ARC International
Center for Constitutional Rights
Consultaría para los Derechos Humanos y el
Desplazamiento
Council for Global Equality
Human Rights Watch
International Gay and Lesbian Human Rights
Commission**

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National Center for Lesbian Rights
National Economic and Social Rights Initiative
New York City Bar Association
Women's Link Worldwide**

in the case of

**Karen Atala and daughters
(Case 12.502)
against the State of Chile**

CDH-S/2092

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Amnesty International, ARC International, the Center for Constitutional Rights, Consultaría para los Derechos Humanos y el Desplazamiento, the Council for Global Equality, Human Rights Watch, the International Gay and Lesbian Human Rights Commission, the International Women’s Human Rights Clinic at the City University of New York, Lawyers for Children, Inc., the Legal Aid Society of New York, Legal Momentum, MADRE, the National Center for Lesbian Rights, the National Economic and Social Rights Initiative, the New York City Bar Association, and Women’s Link Worldwide (collectively the “Amici”) respectfully submit this brief of amici curiae in support of the application filed by the Inter-American Commission on Human Rights (the “Commission”) before the Inter-American Court of Human Rights (the “Court”) in the case of Karen Atala and daughters against the State of Chile (Case 12.502).

I. INTEREST OF AMICI

Amnesty International is a worldwide movement of people working for respect and protection of internationally recognized human rights principles. The organization has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest, or religion. It bases its work on international human rights instruments adopted by the United Nations and regional bodies. It has consultative status before the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, and the Council of Europe, has working relations with the Inter-Parliamentary Union and the African Union, and is registered as a civil society organization with the Organization of American States.

ARC International plays a unique role in facilitating strategic planning around lesbian, gay, bisexual, and transgender (“LGBT”) issues internationally, strengthening global networks, and enhancing access to UN mechanisms. It is the only organization with a full-time presence in

Geneva committed to advancing LGBT issues within the UN human rights system. ARC International played a key role in the development of the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

The Center for Constitutional Rights (“CCR”) is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1996 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

Consultaría para los Derechos Humanos y el Desplazamiento (the Consultancy for Human Rights and Displacement) (“CODHES”) is a private non-profit organization that was established on February 15, 1992 by a group of people from various related disciplines within the fields of research and academia committed to the issue of human rights, international humanitarian law, and the search for peaceful alternatives to Colombia’s internal armed conflict. CODHES promotes the consolidation of peace in Colombia and the realization of human rights through advocacy and incidence before the government to guarantee policies that benefit the entire population, with an emphasis on those people and communities most affected by Colombia’s conflict. CODHES works for the effective and comprehensive implementation of human rights and international humanitarian law, and the strengthening of social capacities of populations who are at risk of displacement, or already displaced, through a perspective of democratic peace building coupled with social justice. CODHES operates with the vision of finding a democratic solution to Colombia’s internal armed conflict and overcoming the

country's humanitarian crisis through the protection and promotion of equitable human rights, social justice, and sustainable development.

The Council for Global Equality brings together international human rights activists, foreign policy experts, LGBT leaders, philanthropists, and corporate officials to encourage a clearer and stronger U.S. voice on human rights concerns impacting LGBT communities around the world. Together, Council members seek to ensure that those who represent the United States abroad use the diplomatic, political, and economic leverage available to them to oppose human rights abuses that are too often directed at individuals because of their sexual orientation, gender identity, or gender expression.

Human Rights Watch ("HRW") is a nonprofit organization established in 1978 that investigates and reports on violations of fundamental human rights in over seventy countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others to end abusive practices. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

The International Gay and Lesbian Human Rights Commission ("IGLHRC") works to secure the full enjoyment of human rights for all people and communities subject to discrimination or abuse on the basis of sexual orientation, gender identity or expression, and/or HIV status. A U.S.-based nonprofit, non-governmental organization ("NGO"), IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

The International Women’s Human Rights Clinic (“IWHR”) at the City University of New York (“CUNY”) School of Law is devoted to defending and implementing the rights of women under international law and ending all forms of discrimination based on gender and sexual orientation. IWHR is part of the nonprofit clinical program, Main Street Legal Services, Inc. at CUNY School of Law, where third-year law students, under the supervision of experienced attorneys and human rights experts, have an opportunity to engage directly in international human rights advocacy. Since its inception in 1992, IWHR has given particular attention to the development of women’s and gender rights in the Inter-American system. IWHR directors participated in the first meeting of experts that drafted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”) and in the advisory group of the Commission’s first Special Rapporteur on Women. Experts from IWHR have provided testimony to this Court for *Gonzalez, Herrera Monreal, and Ramos Monarrez v. The United Mexican States*, and have consulted with petitioners’ and their counsel in other cases before this Court as well.

Lawyers For Children, Inc. (“LFC”) is a nonprofit legal corporation founded in 1984. LFC is dedicated to protecting and promoting the health and welfare of children in New York State. LFC provides free, integrated legal and social work services to over 4,000 individual children each year in custody, visitation, foster care, abuse, neglect, termination of parental rights, and adoption cases. In addition, LFC publishes handbooks and other materials for both children and legal practitioners, conducts state-certified professional training sessions, and works to reform system-wide problems affecting vulnerable children in New York State. LFC’s in-depth involvement in hundreds of high-conflict custody and visitation cases allows LFC to provide informed, child-centered commentary on policy issues affecting children.

The Legal Aid Society of New York (the “Society”) is the nation’s largest and oldest provider of legal services to poor people. The Society’s three practice areas represent clients throughout New York City in more than 300,000 cases and legal matters annually in a variety of civil, criminal, and family court matters. The Society’s Juvenile Rights Practice provides comprehensive representation as attorneys for children who appear before the New York City Family Court in child protective and other proceedings affecting children’s custody, rights, and welfare. The Society’s Family Law practice handles child custody and related cases. The Society also conducts extensive law reform litigation and policy advocacy in all areas of practice.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is dedicated to promoting the rights of all persons to live free of discrimination based on stereotypes regarding gender, sex, or sexual orientation.

MADRE is an international women’s human rights organization that works in partnership with community-based women’s organizations worldwide to address issues of health and reproductive rights, economic development, education, and other human rights. MADRE advances women’s human rights by providing resources and training to enable its sister organizations to meet urgent needs in their communities and partners with women to create long-term solutions to the crises they face. Its programs areas are: Peace Building, Women’s Health & Combating Violence Against Women, and Economic & Environmental Justice. MADRE works toward a world in which all people enjoy the fullest range of individual and collective human rights; in which resources are shared equitably and sustainably; in which women participate effectively in all aspects of society; and in which people have a meaningful say in

policies that affect their lives. MADRE's vision is enacted with an understanding of the inter-relationships between the various issues it addresses and by a commitment to working in partnership with women at the local, regional, and international levels who share its goals. MADRE is also a proud member of the Women Human Rights Defenders International Coalition, a resource and advocacy network for the protection and support of women human rights defenders worldwide.

The National Center for Lesbian Rights ("NCLR") is a national, nonprofit legal organization with offices in California and Washington, D.C. NCLR is committed to advancing the human rights and safety of lesbian, gay, bisexual, and transgender people and their families. NCLR has a special commitment to ensuring that parents are treated equally, regardless of their sexual orientation or gender identity.

In partnership with communities, the National Economic and Social Rights Initiative ("NESRI") works to build a broad movement for economic and social rights, including health, housing, education, and work with dignity. Based on the principle that fundamental human needs create human rights obligations on the part of government and the private sector, NESRI advocates for public policies that guarantee the universal and equitable fulfillment of these rights in the United States.

The New York City Bar Association ("the Association"), founded in 1870, has over 23,000 members in the New York area, around the United States, and in over fifty countries. The Association has long been concerned with the denial of basic human rights at both the domestic and international levels and has a strong interest in protecting those denied their rights on the basis of sexual orientation.

Women’s Link Worldwide is an international human rights non-profit organization working to ensure that gender equality is a reality worldwide. Founded in 2001, Women’s Link has 501(c)(3) status in the United States, foundation status in Spain, and NGO status in Colombia, as well as regional offices in Europe (Madrid, Spain) and Latin America (Bogotá, Colombia). Women’s Link takes a multilayered approach to advancing women’s rights. Women’s Link maintains a state-of-the-art body of information with court decisions from around the world and with strategies for working with courts and tribunals to advance women’s rights and gender justice. They critically examine the structure, actors, and arguments available in a given context with the purpose of identifying the most strategic avenues to address issues of concern. They conduct field-based research when information is not available and it is necessary to undertake strategic litigation in areas of concern. They identify and litigate cases that will have an impact beyond individual interests by changing policies, practices, setting precedent, or creating social change. Finally, Women’s Link offers technical assistance to advocates, NGOs, and others to work strategically with the courts to promote gender equality through the development and implementation of human rights standards.

II. INTRODUCTION

Amici submit this brief in support of the Commission’s application to this Court and the Commission’s finding that the decision of the Supreme Court of Chile, which stripped Karen Atala of custody of her three daughters for the sole reason that she is a lesbian living with her female partner, constituted “discriminatory treatment and . . . arbitrary interference in [her] private and family life” in violation of the American Convention on Human Rights (the “Convention”). (Inter-American Commission on Human Rights Application Before the Inter-American Court of Human Rights in the Case of Karen Atala and Daughters (Case 12.502) Against the State of Chile, Sept. 17, 2010 (“IACHR Application”) ¶¶ 1-2.)

Article 1.1 of the Convention obligates member states to “undertake to respect the rights and freedoms recognized [in the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or *any other social condition*.”¹ As the Commission explains, while “sexual orientation does not explicitly appear in the text of the nondiscrimination clause contained in Article 1.1 of the American Convention, the language used in the clause does . . . indicate that it is an open provision, allowing the inclusion of additional categories under the wording “other social condition.” (*Id.* at ¶ 91.) Discrimination on the basis of sexual orientation constitutes discrimination “for reasons of . . . any other social condition” in violation of the obligations contained in Article 1.1. (*Id.* ¶ 95.) The Convention must be interpreted in light of customary international law, which reflects the current status of international human rights precedents. Amici therefore urge the Court to clarify for member states—*for the first time*—that the Convention prohibits state-sponsored discrimination on the basis of an individual’s sexual orientation and grant the relief requested by the Commission.²

Amici previously submitted a brief on January 20, 2006, in support of Judge Atala’s petition to the Commission. (*Id.* ¶ 21.) That brief argued that the Supreme Court of Chile improperly denied custody of Judge Atala’s minor children to Judge Atala based on unsupported and negative assumptions about lesbian and gay parents that were contrary to the weight of

¹ Organization of Am. States, Am. Convention on Human Rights ch.1, art. 1.1, Nov. 22, 1969, O.A.S.T.S. No. 36 (emphasis added). The United Nations Universal Declaration of Human Rights similarly provides: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” G.A. Res. 217A (III) art. 2 (Dec. 10, 1948).

² The Commission recommends that the State of Chile provide Judge Atala and her children comprehensive redress for the human rights violations that arose from denying her custody on the basis of her sexual orientation. (IACHR Application ¶¶ 5-6.) The Commission also recommends that the State of Chile adopt legislation, public policies, programs, and initiatives that prohibit and eradicate discrimination on the basis of sexual orientation from all spheres of public power, including the administration of justice. (*Id.* ¶ 6.)

international authority and decades of psychological and social science research. Amici demonstrated that the use of such negative assumptions in custody disputes reflected a persistent pattern of discrimination against lesbian and gay parents, and presented serious human rights violations with potentially far-reaching effects. Amici renew these arguments in support of the Commission's application to this Court.

The idea that discrimination against LGBT individuals based on sexual orientation violates fundamental human rights has long been recognized in the jurisprudence and legislative decisions of numerous states and international bodies. In addition, research on children and adolescents raised by lesbian and gay parents continues to support the conclusion that courts should not consider a parent's sexual orientation as a factor when making custody determinations:

Regardless of whether researchers have studied the offspring of divorced lesbian and gay parents or those born to lesbian and gay parents, their findings have been similar. Regardless of whether researchers have studied children or adolescents, they have reported similar results. Regardless of whether investigators have examined sexual identity, self-esteem, adjustment, or qualities of social relationships, the results have been remarkably consistent. In study after study, the offspring of lesbian and gay parents have been found to be at least as well adjusted overall as those of other parents.³

The results of empirical research thus provide no justification for courts to deny custody to lesbian and gay parents because of their sexual orientation. To hold otherwise would allow courts to discriminate against individuals on the basis of sexual orientation, which is inconsistent with the Convention and the international obligations of member states. Amici thus urge the Court to affirm that the Convention prohibits discrimination on the basis of sexual orientation and grant the relief requested by the Commission.

³ Charlotte J. Patterson, *Children of Lesbian and Gay Parents: Psychology, Law, and Policy*, 64 Am. Psychologist 727, 732 (2009).

III. ARGUMENT

A. **The Weight of International Authority Holds That Discrimination on the Basis of Sexual Orientation Violates Human Rights Under Customary International Law, and That Lesbian and Gay Parenting Is Compatible with the Best Interests of the Child.**

Clause (b) of Article 38(1) of the Statute of the International Court of Justice states that the Court shall apply “international custom, as evidence of a general practice accepted as law.”⁴ Additionally, the Restatement (Third) on Foreign Relations Law of the United States provides that customary international law may be developed even when the state practice is only of “comparatively short duration” and “can be general even if not universally followed.”⁵ The Restatement also provides that although “[t]here is no precise formula to indicate how widespread a practice must be . . . it should reflect wide acceptance among the states particularly involved in the relevant activity.”⁶

Here, the international community is clear: discrimination on the basis of sexual orientation violates protected human rights. Over the last twenty years, the General Assembly of the Organization of American States (“OAS”), the Commission, the European Court of Human Rights (“ECHR”), United Nations (“UN”) treaty monitoring bodies, the UN Human Rights Council, and numerous UN human rights experts have concluded that discrimination on the basis of sexual orientation violates human rights. In addition, international and state courts that have addressed lesbian and gay parents’ custody rights—including the ECHR and national courts both inside and outside Latin America—have granted custody of children to lesbian and gay parents and held that sexual orientation should not play a role in determining what is in the best interests

⁴ Statute of the International Court of Justice, art. 38, Oct. 24, 1945, 59 Stat. 1055, 3 Bevans 1179.

⁵ Restatement (Third) of Foreign Relations Law § 102 (1987).

⁶ *Id.*

of the child for purposes of awarding custody.⁷ The weight of international authority stands in stark contrast to the discriminatory decision rendered by the Supreme Court of Chile, as customary international law recognizes that discrimination based on sexual orientation violates human rights law.

1. Discrimination Based on Sexual Orientation Violates the Plain Language of the American Convention on Human Rights, the Charter of the Organization of American States, and the American Declaration of the Rights and Duties of Man.

Other bodies of the Inter-American system for human rights have determined that discrimination on the basis of sexual orientation exists—and that it constitutes a violation of the norms and standards set forth by the Convention, the Charter of the OAS, and the American Declaration of the Rights and Duties of Man. The precedents and actions of the Commission and the OAS establish that the Inter-American system is opposed to discrimination on the basis of sexual orientation.

a. The Inter-American Commission on Human Rights Has Held That Discrimination Based on Sexual Orientation Violates the American Convention on Human Rights.

Prior to Judge Atala’s case, the Commission found that discrimination on the basis of sexual orientation violates protected human rights. In 1999, for example, the Commission admitted a petition brought by a lesbian incarcerated in a Colombian prison who was denied the right to conjugal visits with her partner.⁸ In *Giraldo*, Colombia argued that same-sex conjugal visits would disrupt the prison and “that Latin American culture has little tolerance towards homosexual practices in general.”⁹ Colombia acknowledged that the petitioner was “being treated in an inhuman[e] and discriminatory manner,” but stated that “the prohibition [on

⁷ The “best interest” standard is in the Chilean Civil Code. Cód. Civ. art. 22, 225, 242. It is also commonly used by courts throughout the world in making custody decisions. *See, e.g., infra* sections III.A.4-5.

⁸ *Marta Lucía Álvarez Giraldo* (Colombia) (“*Giraldo*”), Case 11.656, Inter-Am. Comm’n H.R., Report No. 71/99 (1999).

⁹ *Giraldo* ¶ 2.

homosexuality] is based upon a deeply rooted intolerance in Latin American culture of homosexual practice.”¹⁰ The Commission deemed the *Giraldo* case admissible on the grounds that the state’s action could constitute a violation of Article 11(2) of the Convention.¹¹

In addition to its actions in *Giraldo*, the Commission has addressed the issue of discrimination on the basis of sexual orientation in myriad other ways. The Commission has issued precautionary measures on discrimination against lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) individuals,¹² held thematic hearings,¹³ issued statements,¹⁴ conducted country visits,¹⁵ and given special emphasis to LGBTI rights in the work of its Special Rapporteur on Human Rights Defenders.¹⁶

¹⁰ *Id.* ¶ 12.

¹¹ *Id.* ¶ 21.

¹² “The IACHR has granted multiple precautionary measures for members of the LGTB Community.” IACHR: *Honduras: Human Rights and the Coup d’état*. OEA/Ser.L/V/II., Doc. 55 (Dec. 30, 2009).

¹³ Inter-American Commission on Human Rights thematic hearings related to discrimination on the basis of sexual orientation or gender identity include: *Risks and Vulnerabilities Affecting Defenders of Women’s Rights in the Americas* (2008); *Situation of Lesbians, Gays, Bisexuals and Transgender Persons in Colombia* (2009); *Discrimination against the Transsexual, Transgender, and Transvestite Population in Brazil* (2010); *Punitive Measures and Discrimination on the Basis of Sexual Identity in Caribbean Countries* (2010); *Hate Crimes Against Members of the LGBT Community and Impunity in Central America* (2010); *Citizen Security, Prisons, Sexual Diversity, and Equality in Venezuela* (2010); *Human Rights, Sexual Orientation, and Gender Identity in Haiti* (2011), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=32>.

¹⁴ “[T]he Commission urges the State of Mexico to immediately and urgently adopt all necessary measures to guarantee the life, integrity, and safety of those who defend the rights of LGBTI persons in Guerrero. . . . [T]he IACHR urges the State of Mexico to take urgent steps to prevent and respond to human rights abuses, including adopting public policy measures and campaigns against discrimination based on sexual orientation. . . .” No. 42/11, IACHR CONDEMNS MURDER OF LGBTI RIGHTS ACTIVIST IN MEXICO, available at <http://www.cidh.org/comunicados/english/2011/42-11eng.htm>.

¹⁵ “In particular, the IACHR found the violent persecution and fear to which gays and lesbians are subject in Jamaica to be deplorable. . . . The State must take measures to ensure that people within this group can associate freely, and exercise their other basic rights without fear of attack. . . . The IACHR reminds the government and the people of Jamaica that the right of all persons to be free from discrimination is guaranteed by international human rights law, specifically the American Convention on Human Rights. The IACHR urges Jamaica to take urgent action to prevent and respond to these human rights abuses, including through the adoption of public policy measures and campaigns against discrimination based on sexual orientation, as well as legislative reforms designed to bring its laws into conformity with the American Convention on Human Rights.” Excerpt from: No. 59/08, IACHR ISSUES PRELIMINARY OBSERVATIONS ON VISIT TO JAMAICA, <http://www.cidh.org/comunicados/english/2008/59.08eng.htm>.

¹⁶ No. 28/11, IACHR Concludes Its 141st Regular Session, available at <http://www.cidh.org/comunicados/english/2011/28-11eng.htm>.

Notably, the Commission has argued that discrimination based on sexual orientation is incompatible with the full realization of human rights throughout the Americas. In its report on the 137th session, the Commission stated:

The IACHR observes that inequality and discrimination are serious structural problems in the hemisphere that pose major obstacles to the respect for the human rights of all the region's inhabitants. Discrimination against . . . *various groups based on sexual orientation*, among others, is a serious problem in all countries of the region.¹⁷

As a result of its deep concern “about information it received regarding the situation of systematic discrimination and violence” against LGBTI persons, at the close of its 140th session, the Inter-American Commission decided “to intensify its efforts to defend the rights of LGBTI persons.”¹⁸

b. Bodies of The Organization of American States Have Held That Discrimination Based on Sexual Orientation Violates Human Rights.

The General Assembly of the OAS has repeatedly recognized that discrimination on the basis of sexual orientation violates human rights and affirmed that the Charter of the Organization of American States, American Declaration of the Rights and Duties of Man, and the Universal Declaration of Human Rights compel the Inter-American system to work actively to respect and protect the human rights of all people regardless of sexual orientation. Indeed, the General Assembly, which acts solely by consensus, has made this commitment in four successive annual resolutions on the topic since 2008.¹⁹

These resolutions, which have included progressively stronger language and more concrete actions, evidence a powerful agreement among the American states that discrimination

¹⁷ Annex to Press Release 78/09 on the 137th Regular Period of Sessions of the IACHR, *available at* <http://www.cidh.org/comunicados/english/2009/78-09engan.htm> (emphasis added).

¹⁸ No. 109/10, IACHR Concludes Its 140th Period of Sessions, <http://www.cidh.org/comunicados/english/2010/109-10eng.htm>.

¹⁹ AG/RES. 2435 (XXXVIII-O/08), AG/RES. 2504 (XXXIX-O/09), and AG/RES. 2600 (XL-O/10) on “Human Rights, Sexual Orientation and Gender Identity.”

based on sexual orientation is inconsistent with human rights norms. The resolution passed at the most recent session of the OAS General Assembly called upon the body:

1. To condemn discrimination against persons by reason of their sexual orientation and gender identity, and to urge states, within the parameters of the legal institutions of their domestic systems, to adopt the necessary measures to prevent, punish, and eradicate such discrimination.
2. To condemn acts of violence and human rights violations committed against persons because of their sexual orientation and gender identity; and to urge states to prevent and investigate these acts and violations and to ensure due judicial protection for victims on an equal footing and that the perpetrators are brought to justice.
3. To encourage the member states to consider, within the parameters of the legal institutions of their domestic systems, adopting public policies against discrimination by reason of sexual orientation and gender identity.²⁰

Stripping custodial rights from a mother solely because of her sexual orientation contravenes the human rights standards contained in these resolutions prohibiting discrimination based on sexual orientation.

2. The European Court of Human Rights Has Held That Discrimination Based on Sexual Orientation Violates Human Rights.

The existing jurisprudence of the ECHR has long reflected the recognition and affirmation that discrimination based on sexual orientation violates protected human rights.²¹ Indeed, the ECHR has specifically rejected a member state's attempt to deny custody of a child to a gay father living with his same-sex partner based on unfounded stereotypes about the father's sexual orientation.²² The ECHR has also rejected Austria's disparate treatment of

²⁰ AG/RES. 2653 (XLI-O/11) on "Human Rights, Sexual Orientation, and Gender Identity." The resolution further called upon the body to request that the IACHR and the Inter-American Juridical Committee prepare studies on sexual orientation and gender identity discrimination and urge states to protect human rights workers fighting against this discrimination. *Id.*

²¹ See, e.g., *Smith & Grady v. United Kingdom*, Eur. Ct. H.R. 33985/96 (1999). As early as 1999, the European Court held that the discharge of members of the Royal Air Force on the basis of their homosexuality violated the European Convention on Human Rights.

²² *Salgueiro da Silva Mouta v. Portugal*, Eur. Ct. H.R. 176 (1999) (holding that a Portuguese appellate court violated Article 8 (respect for private and family life) and Article 14 (prohibition against discrimination) of the European Convention on Human Rights).

lesbians and gay men under a succession law in 2003,²³ and rejected Britain’s discrimination against lesbians and gay men in the military in successive cases in 1999.²⁴

Of particular relevance to this case, the ECHR has directly addressed the question of discrimination in parenting disputes arising from a parent’s sexual orientation. In 1999, in *Salgueiro da Silva Mouta v. Portugal*—under facts similar to those in Judge Atala’s case—the ECHR held that a Portuguese court’s decision to deny custody to a gay father violated his human rights. In *Mouta*, the Lisbon Court of Appeal (“Lisbon Court”) stripped custody from a father based solely on his sexual orientation.²⁵ The Lisbon Court explained its belief that the father’s sexual orientation might have a negative impact upon the well-being of the child who the court thought should be raised in a “traditional Portuguese family.”²⁶ The Lisbon Court denied the father custody because it believed that he could not give his children a “traditional” home environment that would conform to the “dominant [family] model” in Portuguese society.²⁷

Portugal defended the Lisbon Court’s ruling before the ECHR, arguing that member states “enjoyed a wide margin of appreciation” with regard to questions of parental responsibility.²⁸ The ECHR disagreed, holding that member states had a more limited “margin

²³ *Karner v. Austria*, Eur. Ct. H.R. 395 ¶¶ 6-7 (2003) (rejecting the Austrian government’s argument that discrimination on the basis of sexual orientation protected “the traditional family”). In *Karner*, the ECHR noted that “[t]he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures can be used to implement it,” and found that the government had not shown why it was necessary to exclude gay people from the protections provided by the succession law to achieve that aim.

²⁴ See *Lustig-Prean & Beckett v. United Kingdom*, Eur. Ct. H.R. 31417/96 (1999); *Smith & Grady*, Eur. Ct. H.R. 33985/96 (holding that discharging gays from the military based on their sexual orientation violates Article 8 of the European Convention of Human Rights). In *Smith & Grady*, the ECHR rejected the British government’s attempt to justify its discriminatory policy on the basis of the “unique nature” of the armed forces and their intimate connection to national security. The Court held that the discriminatory policies “were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation” and that such negative attitudes cannot justify discrimination “any more than similar negative attitudes towards those of a different race, origin or colour.” Eur. Ct. H.R. 33958/96.

²⁵ *Mouta*, Eur. Ct. H.R. 176 (holding that a Portuguese appellate court violated Article 8 (respect for private and family life) and Article 14 (prohibition against discrimination) of the European Convention on Human Rights).

²⁶ *Id.* ¶ 34.

²⁷ *Id.* ¶ 8.

²⁸ *Id.* ¶ 10.

of appreciation,” and that it should decide whether member states treated similarly situated persons differently with regard to protected rights and freedoms and, if so, whether the difference was justified.²⁹ Portugal, much like Chile in the present case, argued that the Lisbon Court—in reaching its decision—was concerned exclusively with the overriding interests of the child rather than the applicant’s sexual orientation and that the applicant had not therefore been discriminated against in any way.³⁰ Nonetheless, and relying in part on the discriminatory language used by the Lisbon Court, the ECHR found that the Lisbon Court’s decision violated the father’s protected human rights because it was improperly based on the father’s sexual orientation (“applicant’s homosexuality was a factor which was decisive in the final decision”), “a distinction which is not acceptable under the Convention” and for which there was no reasonable justification.³¹

In a case that both affirmed and renewed the holding in the *Mouta* case nine years earlier, the ECHR more recently recognized that a member state that allows adoption by single persons may not consider that person’s sexual orientation when considering petitions for adoption.³² In 2008, in *E.B. v. France*, the ECHR rejected the decision of French authorities to deny a lesbian’s application for adoption.³³ The government asserted that its decision was based on two legitimate grounds: (1) the lack of a paternal referent in the applicant’s household; and (2) the

²⁹ *Id.* ¶ 11; see also *Karner*, Eur. Ct. H.R. 395 ¶ 7 (margin of appreciation afforded to member states is narrow where there is a difference in treatment based on sexual orientation). The ECHR has called for respect of family life in other similar cases recognizing family bonds. In the case of *X, Y and Z v. United Kingdom*, the ECHR also recognized that *de facto* family bonds existed despite the absence of biological or legal ties in the relationship between a female-to-male transsexual, his partner, and their two children, who were conceived through alternative insemination by donor. App. No.21830/93 (Mar. 20, 1997), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=21830/93&sessionid=6055592&skin=hudoc-en> (last visited Aug. 12, 2011)

³⁰ *Mouta*, Eur. Ct. H.R. 176 ¶ 24.

³¹ *Id.* ¶¶ 12-15, 35.

³² *E.B. v. France*, Eur. Ct. H.R. 43546/02 (2008).

³³ *Id.*

attitude toward the adoption of the applicant's declared partner.³⁴ The ECHR rejected these grounds as illegitimate, finding that they served merely as a pretext for rejecting the application because of the petitioner's sexual orientation.³⁵ Because the government failed to prove that basing a decision on these grounds was valid, the ECHR held that the decision had caused the applicant to suffer a difference in treatment based on her sexual orientation and had therefore violated Articles 14 and 8 of the European Convention. The ECHR's position is clear: discrimination based on sexual orientation violates protected human rights.

In this case, the Government of Chile has similarly claimed that its decision to award custody to the father was based on legitimate grounds. The Chilean Supreme Court alleged that there was a "deterioration of the social, family and educational environment of the girls since the mother began to cohabit with her homosexual partner" and "that the girls could be the target of social discrimination arising from this fact." (*See* Decision of Chilean Supreme Court (4th Division) Relieving Judge Atala of Legal Custody of Her Daughters (May 31, 2004) ("Decision") ¶ 15.) The Chilean Supreme Court further stated that, "given their ages, the potential confusion over sexual roles that could be caused in them by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected." (*Id.* ¶ 17.) On this basis, the Chilean Supreme Court concluded that these developments could place the daughters in a "vulnerable position in their social environment, since clearly their unique family environment differs significantly from that of their school companions and acquaintances in the neighborhood where they live, exposing them to ostracism and discrimination, which would also affect their personal development." (*Id.* ¶ 18.)

³⁴ *Id.*

³⁵ *Id.* ¶ 73.

The implication of the ruling of the Chilean Supreme Court is that its decision was, at least in part, based on Judge Atala's sexual orientation, but the jurisprudence of the cases of *Mouta* and *E.B.* make clear that such a defense in fact constitutes discrimination on the basis of sexual orientation. Furthermore, in the absence of evidence that the best interests of the child would be harmed, discriminatory notions about the effect of a parent's sexual orientation cannot serve as an adequate basis for a custody determination.

3. United Nations Human Rights Bodies Have Held That Discrimination Based on Sexual Orientation Violates Human Rights.

For nearly twenty years, the UN system has repeatedly affirmed the right of LGBT persons to live free from discrimination. The range and depth of the UN's commitment to this fundamental principle makes clear that discrimination based on sexual orientation in custody disputes should be strictly prohibited.

a. UN Human Rights Treaty Monitoring Bodies

The State of Chile has signed and ratified six of the major UN human rights treaties and thus has a direct obligation under international law to abide by their terms.³⁶ These principal human rights treaties have from 149 to 193 state parties from all parts of the world, signifying trends in customary international law. The monitoring bodies for all six of these treaties have made explicit reference to protections against violations on the basis of sexual orientation. Many

³⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (1989); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (1984); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (1979); Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014 (1966).

of the references to sexual orientation throughout the UN system stem from the Human Rights Committee's ("HRC") landmark decision in 1994 in *Toonen v. Australia*.³⁷

In *Toonen*, the HRC addressed the equality provisions contained within the International Covenant on Civil and Political Rights (the "ICCPR").³⁸ Article 2 of the ICCPR, similar to Article 1 of the Convention, states that:

[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁹

The Human Rights Committee found that this provision of the ICCPR "is to be taken as including sexual orientation."⁴⁰

Since *Toonen v. Australia*, references to the protection from discrimination on the basis of sexual orientation have been included in General Comments and Recommendations by the Committee on the Rights of the Child (the "CRC");⁴¹ the Committee Against Torture (the "CAT");⁴² the Committee on the Elimination of All Forms of Discrimination Against Women (the "CEDAW Committee");⁴³ and the Committee on Economic, Social and Cultural Rights (the

³⁷ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (holding that a Tasmanian law criminalizing consensual sexual contact between men was not "essential to the protection of morals in Tasmania" and arbitrarily interfered with the petitioner's rights under Article 17 of the ICCPR (right to privacy)).

³⁸ *Id.* ¶¶ 8.1, 8.7.

³⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

⁴⁰ *Toonen*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, ¶ 8.7.

⁴¹ See, e.g., Committee on the Rights of the Child, General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (July 1, 2003); Committee on the Rights of the Child, General Comment No. 3 (2003): HIV/AIDS and the Rights of the Child, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003).

⁴² Committee Against Torture, General Comment No. 2 (2008): Implementation of Article 2 by States Parties, ¶ 21, UN Doc. CAT/C/GC/2 (Jan. 24, 2008).

⁴³ See e.g., General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/2010/47/GC.2; General Recommendation No. 27 on Older Women and Protection of Their Human Rights, CEDAW/C/2010/47/GC.1. "The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. . . .

“CESCR”).⁴⁴ Of particular importance to the question of the scope of the American Convention on Human Rights and the meaning of the open-ended clause “any other social condition” of Article 1.1, like the Human Rights Committee, the CESCR has taken the position that the phrase “[o]ther status” in Article 2 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) includes sexual orientation, and that states therefore should “ensure that a person’s sexual orientation is not a barrier to realizing ICESCR rights.”⁴⁵

Most recently, the CEDAW Committee also has made clear that addressing discrimination against women under Article 2 of the Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”) requires the consideration of all factors that intersect with the phenomenon of discrimination against women, including sexual orientation and gender identity.⁴⁶ A court that deems a woman to be an unfit mother on the basis of her sexual orientation would thus violate the terms of CEDAW.

States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.”

⁴⁴ See, e.g., CESCR, General Comment No. 18: The Right to Work (art. 6), U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); CESCR, General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); CESCR, General Comment No. 14 (2000): The right to the Highest Attainable Standard of Health (art. 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

⁴⁵ General Comment 20 calls on states to address the ways discrimination, including on the basis of sexual orientation, manifests in private, including amongst families. Committee on Economic, Social and Cultural Rights, General Comment No. 20, ¶ 32, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20 (2009); see also International Covenant on Economic, Social and Cultural Rights, art. 2, ¶ 2, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc A/6316 (1966).

⁴⁶ CEDAW General Recommendation No. 28 states:

The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity...States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and General Recommendation No. 25.

Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 18, U.N. Doc. CEDAW/C/GC/28 (2010).

Notably, UN treaty monitoring bodies have specifically addressed Chile’s record with regard to LGBTI rights. In 2007, the CRC, which monitors states’ compliance under the Convention on the Rights of the Child (“CRC Convention”), explicitly condemned what was then Chile’s criminalization of same-sex relations as indicative of discrimination on the basis of sexual orientation.⁴⁷ The CRC called upon Chile to “increase its efforts to review, monitor and ensure implementation of legislation guaranteeing the principle of non-discrimination.”⁴⁸ Furthermore, the CRC Committee perceives Chile’s treaty obligations as requiring not just legislative change but also action to “adopt a proactive and comprehensive strategy to eliminate discrimination on gender, ethnic, religious or any other grounds and against all vulnerable groups throughout the country.”⁴⁹

The HRC has similarly addressed on-going homophobic discrimination in Chile, particularly before the courts.⁵⁰ It recently stated:

[T]he Committee remains concerned about the discrimination to which some people are subject because of their sexual orientation, for instance, before *the courts* and in access to health care (articles 2 and 26 of the Covenant). The State party should guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation, including equality before the law. . . . It should also launch awareness-raising programmes to combat social prejudice.⁵¹

The HRC’s concerns about discrimination by Chilean courts are directly relevant to this case.

The HRC has explicitly called upon Chile to guarantee “equality before the law.”⁵² Chile cannot be in compliance if it denies custody to a parent on the basis of her sexual orientation.

⁴⁷ CRC/C/CHL/CO/3, ¶ 29 (Apr. 23, 2007) “Furthermore, the Committee is concerned that homosexual relations, including those of persons under 18 years old, continue to be criminalised, indicating discrimination on the basis of sexual orientation.”

⁴⁸ *Id.* ¶ 30.

⁴⁹ *Id.*

⁵⁰ U.N. Doc. No. CCPR/C/CHL/CO/5 (Jan. 22, 2009).

⁵¹ *Id.* (emphasis added).

⁵² *Id.*

b. UN Human Rights Council

The most recent position of the UN HRC regarding discrimination based on sexual orientation has been one of outward and utmost condemnation. On June 17, 2011, the HRC passed UN Resolution A/HRC/17/L.9/Rev.1 on “Human Rights, Sexual Orientation and Gender Identity”—which the State of Chile voted in favor of—condemning violence and discrimination based on sexual orientation or gender identity. The resolution states:

Expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity . . . [the HRC] [d]ecides to convene a panel discussion during the 19th session of the Human Rights Council, informed by the facts contained in the study commissioned by the High Commissioner and to have constructive, informed and transparent dialogue on the issue of discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.⁵³

In its most recent Universal Periodic Review (“UPR”), the HRC cited human rights violations based on discriminatory treatment of LGBT persons at every one of its sessions.⁵⁴ For instance, the HRC issued recommendations on sexual orientation or gender identity to thirteen out of sixteen states under review at the 10th session of the UPR,⁵⁵ and to fifteen states under review at the 11th session.⁵⁶ These recent UPR sessions demonstrate that the HRC is committed to analyzing states’ records of discrimination based on sexual orientation and gender identity as an integral part of the examination of their human rights records.

⁵³ UN Resolution A/HRC/17/L.9/Rev.1, *Human Rights, Sexual Orientation and Gender Identity*, available at <http://www.ighrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1417.html>.

⁵⁴ For the Final Reports of the UPR Working Group from UPR Sessions 1–10 see *Final Reports + Add.–UPR Info*, <http://www.upr-info.org/-Final-outcome-.html>; for the Final Reports of the UPR Working Group from UPR Session 11 see *Documentation*, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>.

⁵⁵ See <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx> (then follow “11th Session (May 2-13, 2011)” for meeting highlights).

⁵⁶ For the Final Report of the UPR Working Group from UPR Session 10 see *Final Reports + Add.–UPR Info.*, <http://www.upr-info.org/-Final-outcome-.html>.

In addition, this year, eighty-five states joined in the “Joint Statement on Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity,” demonstrating the trend in state condemnation of human rights violations based on sexual orientation.⁵⁷ Such a position is no recent development. At the third session of the UN Human Rights Council in 2006, fifty-four states banded together to issue the “Joint Statement on Human Rights Violations Based on Sexual Orientation and Gender Identity,” condemning human rights violations based on sexual orientation and calling upon the HRC to take action.⁵⁸

These actions in the HRC demonstrate the commitment of the Council and of member states—including Chile—to recognize and eradicate discrimination based on sexual orientation.

c. UN Human Rights Experts

The UN Special Procedures, independent experts who address either thematic or country-specific issues, have been similarly condemning human rights violations on the basis of sexual orientation. Special rapporteurs on housing,⁵⁹ education,⁶⁰ the independence of lawyers and judges,⁶¹ racism,⁶² freedom of religion or belief,⁶³ human rights defenders,⁶⁴ violence against women,⁶⁵ minorities,⁶⁶ health,⁶⁷ migrants,⁶⁸ torture,⁶⁹ terrorism,⁷⁰ and extrajudicial executions,⁷¹

⁵⁷ <http://www.ighrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1368.html>.

⁵⁸ U.N. Human Rights Council, Third Session, Summary Record of the 6th Meeting, U.N. Doc. A/HRC/3/SR.6 (Dec. 19, 2006).

⁵⁹ Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, United States, A/HRC/13/20/Add.4 (Feb. 12, 2010).

⁶⁰ Report of the Special Rapporteur on the Right to Education, Bosnia and Herzegovina, A/HRC/8/10/Add.4 (May 27, 2008).

⁶¹ Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/8/4 (May 13, 2008).

⁶² Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Estonia, A/HRC/7/19/Add.2 (Mar. 17, 2008).

⁶³ Report of the Special Rapporteur on Freedom of Religion or Belief, United Kingdom of Great Britain and Northern Ireland, A/HRC/7/10/Add.3 (Feb. 7, 2008).

⁶⁴ Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/HRC/13/22 (Dec. 30, 2009).

⁶⁵ Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, A/HRC/11/6/Add.1 (May 26, 2009).

⁶⁶ Report of the Independent Expert on Minority Issues, A/HRC/13/23 (Jan. 7, 2010).

⁶⁷ Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, A/64/272 (Aug. 10, 2009).

along with country-specific rapporteurs and the working groups on arbitrary detention⁷² and mercenaries,⁷³ have all issued statements related to human rights violations based on sexual orientation or gender identity.

The Special Rapporteur on Violence Against Women, Its Causes and Consequences, for example, has rejected discrimination based on gender stereotypes and sexual orientation within marriage and families. The Special Rapporteur's May 2009 report, notes:

The mandate has applied international standards of equality and non-discrimination, in the context of marriage and the family, upholding the right to privacy, sexual health (including sexual orientation) and reproductive rights within the context of family. In doing so, the mandate has rejected conventional critiques judging interventions to address oppressive family forms as being anti-family.⁷⁴

Many high-ranking UN officials have issued similar statements admonishing discrimination based on sexual orientation as a human rights violation. UN Secretary-General Ban Ki-moon has stated unequivocally that every country must ensure equal rights for all people, regardless of sexual orientation or gender identity,⁷⁵ and UN High Commissioner for Human

⁶⁸ Report of the Special Rapporteur on the Human Rights of Migrants, United States of America, A/HRC/7/12/Add.2 (Mar. 5, 2008).

⁶⁹ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nigeria, A/HRC/7/3/Add.4 (Nov. 22, 2007).

⁷⁰ Report of the Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, General Assembly, A/HRC/64/211/Add.21 (Aug. 3, 2009).

⁷¹ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Guatemala, A/HRC/11/2/Add.7 (May 4, 2009).

⁷² Report of the Working Group on Arbitrary Detention, Colombia, A/HRC/10/21/Add.3 (Feb. 16, 2009).

⁷³ Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination [transgender/gender identity hate crimes], Peru, A/HRC/7/7/Add.2 (Feb. 4, 2008).

⁷⁴ Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Fifteen Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences—A Critical Review*, p. 11 (2009), <http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf>.

⁷⁵ See http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=1034#. In remarks on December 10, 2010, International Human Rights Day, the Secretary General stated:

As men and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity Yes, we recognize that social attitudes run deep. Yes, social change often comes only with time. But let there be

Rights Navanetham Pillay has consistently affirmed that discrimination based on sexual orientation is a recognized violation of international human rights law.⁷⁶ The High Commissioner also has condemned the use of homophobic cultural attitudes to justify discrimination based on sexual orientation. The High Commissioner has made clear that culture is neither monolithic nor immutable and that respect for universal human rights without discrimination must at all times prevail. She has stated that:

[a]ll too often those who are identified as not sharing a community's history, traditions and values, or who challenge stereotypical or traditional roles are perceived as threats to the stability of that community's belief system and customs. Yet no society, regardless of its geographic location or level of economic development, can be said to be represented by a single and comprehensive set of shared values. Traditions, beliefs and values change over time, and are viewed and interpreted differently within societies. There are traditions of hate, just as there are traditions of tolerance; traditions of repression, just as there are traditions of liberation; and traditions of deprivation and exclusion, just as there are traditions of social justice. These contrasts can be found in the histories of all countries and of many systems of belief. Our task is to be squarely and unequivocally on the side of those in every society who promote and defend human rights, to stand with those who believe in human dignity and equality.⁷⁷

When the Chilean Supreme Court issued its decision in Judge Atala's case, it did just what the UN human rights experts have condemned: it relied on homophobic stereotypes instead of the facts of the individual case, scientific evidence, or a legal rationale in deciding a custody dispute. The Chilean Supreme Court's position is indefensible. UN human rights treaties, the

no confusion: where there is tension between cultural attitudes and universal human rights, rights must carry the day.

⁷⁶ The High Commissioner has stated:

[I]n speaking up for the rights of those who are lesbian, gay, bisexual, transgender or intersex, we are not calling for the recognition of new rights or trying to extend human rights into new territory. We are simply reinforcing what the UN human rights treaty monitoring bodies and human rights rapporteurs have confirmed repeatedly: existing international law protects everyone from violence and discrimination, including on grounds of their sexuality or gender identity.

Navi Pillay, *No Place for Homophobia Here*, International Gay & Lesbian Human Rights Commission (June 16, 2011), <http://www.iglhrc.org/cgi-bin/iowa/article/publications/reportsandpublications/1416.html>.

⁷⁷ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10920&LangID=e>.

UN Human Rights Council, UN human rights experts, and statements from ranking members make clear that UN bodies have consistently espoused the same message: discrimination based on sexual orientation is a violation of human rights.

4. A Growing Number of States Prohibit Discrimination Based on Sexual Orientation Through Legislation and Constitutional Amendments.

At least twenty-two states and several municipalities have passed legislation prohibiting discrimination based on sexual orientation.⁷⁸ States including Ecuador, Fiji, Portugal, South Africa, and Switzerland have expressly incorporated the right to protection from discrimination based on sexual orientation into their constitutions.⁷⁹

In the United States, there is a rapidly growing acknowledgment that sexual orientation “bears no relation to ability to perform or contribute to society,”⁸⁰ and no state provides that a gay, lesbian, or bisexual parent is *per se* unfit because of his or her sexual orientation.⁸¹ In addition, a growing number of U.S. states have implemented statutes that protect the right of same-sex couples to adopt.⁸² Furthermore, the recent repeal of the “Don’t Ask, Don’t Tell”

⁷⁸ These include legislation in Argentina, Australia, Brazil, Canada, Costa Rica, Denmark, Finland, France, Hungary, Iceland, Ireland, Israel, Luxembourg, Mexico, Namibia, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, and the United States, specifically in the states of California, Colorado, Connecticut, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 Wm. & Mary L. Rev. 797, 825, 832 (2008).

⁷⁹ Constitución Política de 1998, art. 23, § 3 (Ecuador), available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html>; Constitution of Fiji (1998) sec. 38 (2) (a), available at http://www.oefre.unibe.ch/law/icl/fj00000_.html; Constituição da República Portuguesa (2005) art. 13, § 2, available at <http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx> (Portugal); Constitution of South Africa (1996), ch. 2, X'7F' 9 (3), available at <http://www.info.gov.za/documents/constitution/index.htm>; Federal Constitution of the Swiss Confederation (2002) art. 8(2), available at <http://www.admin.ch/org/polit/00083/index.html?lang=en> (Switzerland).

⁸⁰ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

⁸¹ See Courtney G. Joslin & Shannon P. Minter, *Lesbian, Gay, Bisexual and Transgender Family Law* 13 (West 2011).

⁸² States with such policies include: California, Maryland, Massachusetts, Nevada, New Jersey, New York, Connecticut, Illinois, Indiana, Pennsylvania, Vermont, and the District of Columbia. See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 878, 879 (Alaska 1985); *In re Gill*, 45 So. 3d 79 (Fla. Ct. App. 2010); *Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *In re K.M. & D.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Adoption of Carolyn B.*,

policy,⁸³ United States Supreme Court jurisprudence (including *Lawrence*⁸⁴ and *Romer*⁸⁵), shifting societal attitudes, and the weight of social science regarding LGBT rights demonstrate that sexual orientation does not and should not bear on legitimate policy objectives.⁸⁶

5. Latin American Courts Have Granted Custody of Children to Lesbian and Gay Parents, and Latin American Institutions Are Addressing the Needs of Diverse Families.

Courts and other institutions in Latin America are giving increasing recognition to families headed by lesbian and gay parents, granting lesbian and gay parents custody of their children and recognizing their right to adopt.

In 2003, an Argentinean court granted a gay father custody of his two children.⁸⁷ The court held that consideration of the father's sexual orientation in its custody determination would be unacceptable discrimination. Furthermore, the Court criticized the mother's derogatory remarks about the father's sexual orientation as harmful to the children in terms of raising them in a diverse and inclusive society.⁸⁸

Adoptions by lesbian and gay parents have been permitted in Brazil since at least 1996, and Brazil's first adjudication on this issue occurred in 2005. In that case, the Brazilian court

774 N.Y.S.2d 227 (N.Y. App. Div. 2004); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

⁸³ Former U.S. policy prohibiting military personnel from discriminating against or harassing homosexual or bisexual service members or applicants, while simultaneously barring openly gay, lesbian, or bisexual persons from military service. 10 U.S.C. § 654 (1993).

⁸⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas sodomy law).

⁸⁵ *Romer v. Evans*, 517 U.S. 620 (1996) (striking down Colorado constitutional amendment that would have prevented any city, town or county in the state from taking legislative, executive, or judicial action to recognize gays and lesbians as a protected class).

⁸⁶ Department of Justice, Office of Public Affairs, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011). President Barack Obama, in response to Congress' vote allowing gays to serve openly in the military, stated: "It is time to close this chapter in our history. . . . It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed." *Senate Votes to Repeal "Don't Ask, Don't Tell"*, NPR (Dec. 18, 2010), <http://www.npr.org/2010/12/18/132164172/-dont-ask-dont-tell-clears-vital-hurdle> (last visited Aug. 17, 2011).

⁸⁷ *Juzgado de Menores de Cuarta Nominación de Cordoba*, No. 473 (Jurisprudencia de Córdoba, Arg. Aug. 6, 2003), Brief for International Women's Human Rights Law Clinic et al. as Amici Curiae Supporting Petitioner, *Karen Atala Riffo v. Chile*, Case No. P-1271-04, Inter-Am. Comm'n H.R. (2006).

⁸⁸ *Id.*

approved a same-sex couple as adoptive parents,⁸⁹ and affirmed that there is no valid reason for denying a same-sex couple the right to adopt children.⁹⁰ Adoption rights for gay and lesbian parents were again upheld in a unanimous Superior Court decision in 2010, where the court held that a lesbian couple had the right to adopt children.⁹¹ More recently, the Supreme Court of Brazil unanimously ruled that partners in a same-sex union are entitled to the same rights as a man and woman in a marriage.⁹² Accordingly, the Court declared that no individual can be denied the right to adopt children because of his or her sexual orientation.⁹³

Non-judicial institutions in Costa Rica have taken significant steps toward recognizing diverse family structures. In March 2003, the Costa Rican child welfare agency granted a transgender woman provisional custody of a young boy she had been caring for since infancy.⁹⁴ In addition, in June 2003, the Costa Rican National Insurance Institute confirmed that insurance holders may designate any person of their choice as an insurance beneficiary “without any discrimination based on race, age, sexual preference or other criteria.”⁹⁵

The Colombian Constitutional Court has recognized since 1994 that lesbians and gay men are protected by the fundamental rule of equal protection by the law and, because they share

⁸⁹ *Two Brazilian Gay Men Adopt Girl*, BBC Worldwide Monitoring (22 November 2006).

⁹⁰ *Brazilian Judge OKs Gay Couple Adoption*, 365Gay.com Newscenter, 23 November 2006, available at <http://www.asylumlaw.org/docs/sexualminorities/Brazil112306.pdf> (decision cited a policy statement by the Psychology Council which declared that “homosexuality was not a disease, a disturbance or a perversion”).

⁹¹ See Allen C. Unzelman, *Latin America Update: The Development of Same-Sex Marriage and Adoption Laws in Mexico and Latin America*, 17 *Law & Bus. Rev. Am.* 135, 136 (2011) (citing to Felipe Seligman, *Casal homosexual pode adotar crianca, decide STJ* (Apr. 27, 2010), <http://www1.folha.uol.com.br/folha/cotidiano/ult95u726711.shtml>).

⁹² *Brazil's Supreme Court Recognizes Gay Partnerships*, Reuters, <http://www.reuters.com/article/2011/05/06/us-brazil-gayrights-idUSTRE74503V20110506> (5 May 2011) (last visited Aug. 13, 2011); see also *Brazilian Supreme Court Gives Unanimous Judgment in Favour of the Legal Recognition of Same Sex Partnerships*, Equal-Jus (5 May 2011), <http://www.equal-jus.eu/node/416> (last visited Aug. 13, 2011).

⁹³ *Id.*

⁹⁴ See International Gay and Lesbian Human Rights Commission, *Action Alert Update: Transwoman Mairena Is Granted Custody of Her Child* (Apr. 4, 2003), <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=417>.

⁹⁵ See International Gay and Lesbian Human Rights Commission, *National Insurance Institute Confirms the Eligibility of Same-Sex Partners and Their Families for Social Security* (July 16, 2003), <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=457>.

the same fundamental rights as heterosexuals, there is nothing that justifies discrimination based on sexual orientation.⁹⁶ In 2007, the Constitutional Court further declared that rights granted *de facto* to opposite-sex couples had to be granted to same-sex couples.⁹⁷ In 2009, it held that cohabiting same-sex couples must receive the same rights and benefits as opposite-sex married couples.⁹⁸ Most recently, recognizing that same-sex couples continue to lack certain rights afforded to opposite-sex couples, the Constitutional Court instructed Colombia's Congress to remedy the problem through "comprehensive, systematic, and orderly legislation" addressing discrimination based on sexual orientation.⁹⁹

6. Courts Outside of Latin America Have Recognized that Lesbian and Gay Parents' Rights to Custody of a Child Is Compatible with a Child's Best Interests.

Many courts outside of Latin America reject the stereotypes relied on by the Chilean Supreme Court in denying custody to Judge Atala and have recognized lesbian and gay parents' rights to custody of their children, finding that a parent's sexual orientation is not relevant to the best interests of the children.

The United Kingdom recognizes sexual orientation as a prohibited ground for discrimination.¹⁰⁰ A court in the United Kingdom, holding that the United Kingdom's adoption law permitted lesbians to adopt, stated that "[a]ny other conclusion would be both illogical, arbitrary and inappropriately discriminatory in a context where the court's duty is to give first

⁹⁶ Judgment No. T-539-94 of 30 November 1994; *see also* No. T-42370 and T-42955.

⁹⁷ *Marcela Sanchez, et al.*, Decision C-075/2007, Constitutional Court of Colombia, 7 February 2007, *available at* <http://www.corteconstitucional.gov.co/relatoria/2007/C-075-07.htm>.

⁹⁸ *Rodrigo Uprimny Yepes, et al.*, Decision C-029/2009, Constitutional Court of Colombia, 28 January 2009, *available at* <http://www.corteconstitucional.gov.co/relatoria/2009/C-029-09.htm>.

⁹⁹ *Court gives Colombia Congress 2 years to pass gay marriage bill*, Colombia Reports (27 July 2011), <http://colombiareports.com/colombia-news/news/17896-colombian-supreme-court-calls-on-congress-to-pass-gay-marriage-bill-in-two-years.html>.

¹⁰⁰ *Rodriguez v. Minister of Housing of the Government and Another*, UKPC 52, 28 BHRC 189 (2009) (finding that a government agency's decision to refuse housing was based solely on the applicant's sexual orientation, and that "the impact of that denial constituted a serious invasion of their dignity" and constituted treatment of "an indirectly discriminatory manner.").

consideration to the need to safeguard and promote the welfare of the child throughout his childhood.”¹⁰¹

In 1999, a New Zealand court granted a lesbian custody of her biological son over the protests of the deceased father’s family.¹⁰² The court was not persuaded by arguments that the child might be the subject of teasing or that he would lack a male role model.¹⁰³

In South Africa, two women in a longstanding relationship challenged sections of the South African Child Care Act that prevented them from jointly adopting siblings that had been in their joint care for several years.¹⁰⁴ The couple challenged the law on the grounds that the adoption would be in the best interests of the child and that the law violated equality provisions of the South African Constitution, limiting their human dignity.¹⁰⁵ The South African Constitutional Court sided with the couple on every ground and deemed it necessary to revise the Child Care Act. In reaching its decision, the court stated:

[T]he applicants constitute a stable, loving and happy family. Yet the first applicant’s status as a parent of the siblings cannot be recognized. This failure by the law to recognize the value and worth of the first applicant as parent to the siblings is demeaning. I accordingly hold that the impugned provisions limit the right of the first applicant to dignity.¹⁰⁶

No state in the United States finds that being lesbian, gay, or bisexual makes a parent unfit.¹⁰⁷ Furthermore, in no U.S. state can sexual orientation be the sole determining factor in determining parental custody.¹⁰⁸

¹⁰¹ *In re W. (A Minor)*, [1998] Fam. 58 at 6 (U.K. Fam. 1997).

¹⁰² *B. v. P.*, [1992] N.Z.F.L.R. 545 (N.Z.D.C.).

¹⁰³ *Id.* at 2-3.

¹⁰⁴ *Du Toit v. Minister of Welfare & Population Dev.*, 2002 (10) BCLR 1006 (CC) (S. Afr.).

¹⁰⁵ *Id.* ¶¶ 20, 23.

¹⁰⁶ *Id.* ¶ 29 (internal footnote omitted).

¹⁰⁷ Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. Soc. Issues 29, 34 (1996).

¹⁰⁸ See Joslin & Minter, *supra* note 81, at 13.

In decisions dating back half a century, courts have held that it is factually and legally erroneous to consider a parent unfit solely based on sexual orientation.¹⁰⁹ In 1967, for example, a California appellate court reversed a lower court decision to award custody to a father based solely on the fact that the mother was a lesbian.¹¹⁰ The court held that the lower court failed to exercise discretion to determine the best interest of the child by finding as a matter of law the mother to be unfit because of her sexual orientation.¹¹¹

More recent court decisions throughout the United States continue to hold that courts cannot deny custody to parents based solely on the fact that they are lesbian or gay. The Florida Court of Appeals, reversing a lower court's decision to award custody to a father based on conjecture that the children would be negatively affected because their mother was a lesbian, held that the sexual orientation of the parent can only be considered if it has a "direct effect or impact on the children."¹¹² Similarly, New York courts have held that "where a parent's sexual preference does not adversely affect the children, such preference is not determinative in a child custody dispute."¹¹³ In addition, a Pennsylvania court rejected an evidentiary presumption requiring that a lesbian or gay parent prove the absence of harm to the children.¹¹⁴ The court held that sexual orientation is irrelevant for purposes of determining custody and, instead, the sole focus of a custody proceeding is the best interests of the child.

Courts in the United States have also affirmed and protected the right of same-sex couples seeking to adopt. These courts recognize a violation of the U.S. Constitution's equal protection guarantee where regional policies have sought to exclude lesbians and gay men from

¹⁰⁹ See, e.g., *Nadler v. Superior Court*, 255 Cal. App. 2d 523 (1967).

¹¹⁰ *Id.* at 525.

¹¹¹ *Id.*

¹¹² *Jacoby v. Jacoby*, 763 So. 2d 410, 413 (Fla. Ct. App. 2000).

¹¹³ *Paul C. v. Tracy C.*, 209 A.D.2d 955, 956 (N.Y. App. Div. 1994).

¹¹⁴ *M.A.T. v. G.S.T.*, 2010 PA Super 8, 2010 WL 204158, at *5 (Pa. Super. Ct. Jan. 21, 2010).

being adoptive parents or deny custody or visitation rights to same-sex parents.¹¹⁵ Sexual orientation is thus an improper basis for exclusion from consideration as an adoptive parent. Indeed, court decisions and statutes in approximately sixteen states and the District of Columbia have affirmed the right of lesbians and gay men to adopt their partner's children.¹¹⁶

In 1995, for example, the District of Columbia Court of Appeals reversed a lower court's decision and permitted a gay couple to file a joint petition for adoption.¹¹⁷ In 2004, the Supreme Court of New York affirmed the right of two lesbian women in a committed relationship to file a joint petition seeking adoption of a child.¹¹⁸ Also in 2004, the Court of Appeals of Indiana reversed a lower court's decision to deny the same-sex partner of the biological mother her uncontested petition to adopt her partner's children, with whom she had established a healthy parent-child relationship.¹¹⁹

In 2006, the Supreme Court of Arkansas upheld a lower court's decision striking down a state regulation that barred lesbians and gay men, and heterosexuals who have lesbian and gay household members, from foster parenting, finding that "there is no correlation between the health, welfare, and safety of foster children *and* the blanket exclusion of any individual who is a homosexual or who resides in a household with a homosexual."¹²⁰

Most recently, in 2010, the Florida Third District Court of Appeal struck down the last law in the United States expressly barring lesbians and gay men from adopting, holding that the

¹¹⁵ See, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 878, 879 (Alaska 1985); *In re Gill*, 45 So.3d 79 (Fla. Ct. App. 2010); *Dep't of Human Servs. v. Howard*, 367 Ark. 55 (Ark. 2006); *K.M. & D.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Adoption of Carolyn B.*, 6 A.D.3d 67 (N.Y. App. Div. 2004); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

¹¹⁶ *Joslin & Minter, supra* note 81, 343-44. These states include California, Colorado, Connecticut, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Vermont, Washington, and the District of Columbia. *Id.*

¹¹⁷ *In re M.M.D.*, 662 A.2d 837 (D.C. Ct. App. 1995).

¹¹⁸ *In re Adoption of Carolyn B.*, 6 A.D.3d 67 (N.Y. App. Div. 2004).

¹¹⁹ *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004).

¹²⁰ *Dep't of Human Servs. v. Howard*, 367 Ark. 55, 65 (Ark. 2006).

statute's ban on adoption was unconstitutional because it had no rational relationship to the best interests of children.¹²¹

One of the most thorough opinions dissecting irrational stereotypes of lesbian and gay parents is a 1995 decision from the Ontario Court (Provincial Division) of Canada.¹²² In *K. (Re)*, the court was faced with four lesbian couples who had been denied joint applications for adoption of the children in their respective relationships. One member of each couple was a biological parent of the children whose adoption was being sought.¹²³

In reaching the conclusion that same-sex couples may jointly adopt, the Ontario Court reviewed extensive social science research confirming that gays and lesbians can be excellent parents.¹²⁴ The Ontario Court debunked the same stereotypes that the Chilean Supreme Court used to justify its decision in Judge Atala's case. The Ontario Court specifically found that:

- Homosexual individuals do not exhibit higher levels of psychopathology than do heterosexual individuals, and there is no good evidence to suggest that homosexual individuals are less healthy psychologically and therefore less able to be emotionally available to their children.¹²⁵
- [T]here is no evidence to support the suggestion that most gay men and lesbians have unstable or dysfunctional relationships.¹²⁶
- [T]here is to date no indication that the possible stigma or harassment to which children of gay or lesbian parents may be exposed is necessarily worse than other possible forms of racial or ethnic stigma, or the stigma of having mentally ill parents. . . .¹²⁷

¹²¹ *Fla. Dep't of Children & Families*, 45 So.3d 79, 91 (Fla. Ct. App. 2010).

¹²² *K. (Re)* (1995), 23 O.R. 3d 679 (Ont. Ct.).

¹²³ *Id.* at 681.

¹²⁴ *Id.* at 689.

¹²⁵ *Id.* at 691.

¹²⁶ *Id.*

¹²⁷ *Id.* at 693.

The Ontario court recognized that the “prevailing opinion of researchers in this area seems to be that the traditional family structure is no longer considered as the only framework within which adequate child care can be given.”¹²⁸ Rather, a “multiplicity of pathways through which healthy psychological development can take place” exists in a “diversity of home environments.”¹²⁹ The Ontario court stated that it was “bound by law and common sense to decide this issue on the basis of the evidence . . . and not on speculation, unfounded prejudice and fears, or on a reaction to the vociferous comments of an isolated and uninformed segment of the community.”¹³⁰

The Chilean Supreme Court’s decision to deny Judge Atala custody of her children, in contrast, based its reasoning on the same kind of stereotypes that international human rights courts, international human rights bodies, and courts and legislatures both inside and outside of Latin America have rejected and condemned. In doing so, the Chilean Supreme Court not only bucked the clear weight of international law and the conclusions of international human rights experts, but rejected the mandates of human rights treaties to which Chile is a party.

7. Sexual Orientation Is a Suspect Category of Distinction.

Both the ECHR and United States courts have addressed the test that should be used for determining whether a particular law, policy, or treatment is discriminatory.

The ECHR has held that under the European Convention and European Union law,¹³¹ direct discrimination occurs when: (1) an individual is treated unfavorably; (2) by comparison to how others, who are in a similar situation, have been or would be treated; (3) and the reason for

¹²⁸ *Id.* at 690.

¹²⁹ *Id.* at 691 (citation omitted).

¹³⁰ *Id.* at 707.

¹³¹ See European Union Racial Equality Directive, Council Directive 2000/43/EC, art. 2(2), 2000 O.J. (L 180) 22 (EC); Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC); Council Directive 2004/113, 2004 O.J. (L 373) 37 (EC).

this is a particular characteristic he or she holds, which falls under a “protected ground.”¹³²

“Protected grounds” under Article 14 of the European Convention include “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹³³ In *Salgueiro da Silva Mouta v. Portugal*, discussed *supra* in section III.A.2.a, the Court confirmed that Article 14 includes a prohibition of discrimination based on sexual orientation.¹³⁴

The requirement of a causal link between less favorable treatment and a protected ground has been interpreted broadly by both the ECHR and the European Court of Justice. Generally, the law or conduct at issue need not refer explicitly to a “protected ground,” as long as the factor being complained of cannot be separated from the “protected ground.”

United States courts will apply a strict or heightened scrutiny test to actions that affect groups falling within a suspect class, and require that the action be justified by a compelling government interest, that it be narrowly tailored, and that it be the least restrictive means for achieving the government interest in question.¹³⁵ When assessing whether a class of persons is suspect, U.S. courts consider (1) whether the group in question has suffered a history of

¹³² See European Union Racial Equality Directive 2000/43/EC art. 2(2) (29 June 2000); *Carson and Others v. UK* [GC], No. 42184/05, § 61, ECHR 2010; see also *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (28 May 1985), § 61, Series A No. 94. The European Court of Human Rights articulates its test for discrimination under Article 14 of the European Convention of Human Rights as follows:

The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or “status,” are capable of amounting to discrimination within the meaning of Article 14 [citation omitted]. Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations [citation omitted]. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Carson and Others v. UK [GC], No. 42184/05, § 61, ECHR 2010; see also *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (28 May 1985), § 61, Series A No. 94.

¹³³ *European Convention for the Protection of Human Rights and Fundamental Freedoms* art. 14 (Nov. 4, 1950), 213 U.N.T.S. 222.

¹³⁴ *Salgueiro da Silva Mouta v. Portugal*, No. 33290/96, § 28, ECHR 1999-IX; see also *E.B. v. France* [GC], No. 43546/02 (Jan 22, 2008); and *Fretté v. France*, No. 36515/97, § 32, ECHR 2002-I.

¹³⁵ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

discrimination,¹³⁶ (2) whether individuals “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group,”¹³⁷ (3) whether the group is a minority or is politically powerless,¹³⁸ and (4) whether the group’s characteristics are unrelated to legitimate policy objectives or to an individual’s “ability to perform or contribute to society.”¹³⁹

United States courts have not reached a consensus as to whether LGBT persons constitute a suspect class,¹⁴⁰ but the U.S. Department of Justice has urged that LGBT persons should be treated as a suspect class and that laws discriminating against LGBT persons should be reviewed under heightened scrutiny.¹⁴¹ Indeed, the Department of Justice will no longer defend federal legislation that discriminates on the basis of sexual orientation unless it meets this heightened scrutiny.¹⁴² As the United States Department of Justice notes, there is a “significant history of purposeful discrimination against gay and lesbian persons, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today.”¹⁴³

As explained by the Commission, sexual orientation is a suspect category and discrimination based on sexual orientation should be subject to strict scrutiny. (See IACHR Application ¶¶ 90-95.) Indeed, rather than resting on “meaningful considerations,” laws that discriminate based on sexual orientation—like laws that discriminate based on race, national

¹³⁶ See *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

¹⁴⁰ Some courts in the United States have applied a heightened scrutiny to discrimination based on sexual orientation. See, e.g., *In re Marriage Cases*, 43 Cal. 4th 757, 841-44 (Cal. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432-61 (Conn. 2008).

¹⁴¹ There is currently no binding precedent in the two districts the Department of Justice references in its letter to Congress that govern what standard of review should apply for cases of discrimination based on sexual orientation. See *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.).

¹⁴² Department of Justice, Office of Public Affairs, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, (Feb. 23, 2011), available at <http://www.aila.org/content/default.aspx?bc=1016%7C8450%7C12043%7C34956>.

¹⁴³ Department of Justice, Office of Public Affairs, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011).

origin, or sex—target a characteristic that “bears no relation to [an individual’s] ability to perform or contribute to society.”¹⁴⁴

Amici respectfully urge the honorable Court to find that LGBT persons constitute a “suspect class” or have a particular characteristic falling under a “protected ground,” and to review any law, policy, or treatment of LGBT persons under heightened or strict scrutiny, as proscribed under customary international law. Amici further urge the honorable Court to find that Chile’s actions violate the strict scrutiny test in that there is no compelling government interest served by the Chilean court’s holding in Judge Atala’s case.¹⁴⁵

B. The Court May Consider Social Science Data When Interpreting the Convention.

As this Court has explained, Human Rights treaties, including the Convention, are “living instruments whose interpretation must consider the changes over time and present-day conditions.”¹⁴⁶ When considering a question of international human rights, the Court considers the question “in the context of the evolution of the fundamental rights of the human person in contemporary international law.”¹⁴⁷

The ECHR, which also has concluded that international human rights instruments are “living instrument[s] which must be interpreted in the light of present-day conditions,”¹⁴⁸ has held that, because such instruments are “first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to

¹⁴⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

¹⁴⁵ Indeed, for this same reason, the Amici urge that Chile’s actions would violate even the less restrictive “rational basis” test.

¹⁴⁶ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (Oct. 1 1999).

¹⁴⁷ *Id.*

¹⁴⁸ *EB v France*, Eur. Ct. H.R. 43546/02 ¶¶ 46, 92 (Jan. 22, 2008).

the standards to be achieved.”¹⁴⁹ The ECHR therefore looks “at the situation within and outside the Contracting State to assess . . . what is now the appropriate interpretation and application of the Convention.”¹⁵⁰ The Court should similarly look to evolving human rights standards when interpreting the Convention.

1. The Court May Consider Any Evidence It Deems Useful to Rendering an Informed Decision.

The Rules of the Inter-American Court permit the Court to obtain and consider “any evidence it considers helpful and necessary.”¹⁵¹ The Court has determined that it may, at its discretion, request “additional elements of evidence to help it make a more informed decision.”¹⁵² In this case, reference to empirical research is relevant to the consideration of whether the assumptions stated in the Chilean Supreme Court’s decision were simply a pretext for discrimination based on sexual orientation. As the empirical research discussed *infra* in section III.C conclusively establishes, children raised by lesbian and gay parents suffer no adverse consequences. They are as well-adjusted and as emotionally and psychologically healthy as children raised by heterosexual parents. Review and consideration of this information is thus critical to evaluating the discriminatory nature of Chile’s actions.

2. Courts Routinely Consider Empirical Research When Considering Human Rights Violations.

International human rights courts often consider arguments based on social science studies. The ECHR, for example, explicitly gave weight to arguments based on “studies by child-welfare professionals, which have stressed that it is in the child’s interests to enjoy stable

¹⁴⁹ *I v. United Kingdom*, (Grand Chamber) ECHR 25680/94 ¶ 54 (July 11, 2002).

¹⁵⁰ *Id.* ¶ 55.

¹⁵¹ Rules of Procedure of the Inter-American Court of Human Rights, Art. 58.

¹⁵² *Cf. Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala*. Reparations and Costs. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 76, ¶¶ 50-51 (May 25, 2001).

emotional relations” when considering whether France had violated article 8 of the European Convention on Human Rights (Right to Private Life).¹⁵³

The ECHR also considered survey data showing that “transsexual people were conscious of certain problems which did not have to be faced by the majority of the population,” as well as evidence showing “a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals” in determining that the United Kingdom’s failure to take steps to legally recognize the gender of a post-operative transsexual violated articles 8 and 12 of the European Convention of Human Rights.¹⁵⁴

Other courts also consider social science data. For instance, the Ontario Court of Appeal, when determining whether a practice is discriminatory and violates provisions of the Canadian Charter of Rights and Freedoms, considers “*any demonstration* by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being.”¹⁵⁵ In that court, because “[t]he assessment of whether a law has the effect of demeaning a claimant’s dignity should be undertaken from a subjective-objective perspective,” the court must “consider the individual’s or group’s traits, history, and circumstances in order to evaluate whether a reasonable person, in circumstances similar to the claimant, would find that the impugned law differentiates in a manner that demeans his or her dignity.”¹⁵⁶

¹⁵³ *Kearns v. France*, Eur. Ct. H.R. 35991/04 at ¶ 80 (Jan. 10, 2008).

¹⁵⁴ *I v. United Kingdom*, (Grand Chamber) Eur. Ct. H.R. 25680/94 ¶¶ 33, 38-39, 59-60, 64-65 (July 11, 2002).

¹⁵⁵ *Halpern and others v. A-G of Canada and others* [2003] 14 BHRC 687 ¶ 80 (Can. Ont. C.A.) (quoting *Law v Canada* (Minister of Employment and Immigration) [1999] 1 SCR 497, 535 (Can SC) (emphasis added)).

¹⁵⁶ *Id.* ¶ 79.

3. International Human Rights Courts May Consider Any Evidence That Establishes Prima Facie Discrimination

The Grand Chamber of the ECHR recognizes that “applicants may have difficulty in proving discriminatory treatment.”¹⁵⁷ As a result, “[i]n order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination.”¹⁵⁸ In the European System, European Council Directives 97/80/EC and 2000/43/EC (on the burden of proof in cases of discrimination based on sex and implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, respectively) “stipulate that persons who consider themselves wronged because the principle of equal treatment has not been applied to them may establish, before a domestic authority, *by any means*, including on the basis of statistical evidence, facts from which it may be presumed that there has been discrimination.”¹⁵⁹

With regard to the question of what constitutes prima facie evidence of discrimination, the Grand Chamber has found that “in proceedings before it there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment.”¹⁶⁰ Rather, that court “adopts the conclusions that are, in its view, supported by the free evaluation of all evidence.”¹⁶¹

Both human rights courts and national courts have thus considered social science data in ruling on human rights and discrimination claims. The Court’s consideration of such data here is entirely consistent with international precedent.

¹⁵⁷ *DH and others v. Czech Republic*, (Grand Chamber) Eur. Ct. H.R. 57325/00 ¶ 186 (Nov. 13, 2007).

¹⁵⁸ *Id.* (accepting statistical data as evidence of discrimination against Roma children).

¹⁵⁹ *Id.* ¶ 187 (emphasis added).

¹⁶⁰ *Id.* ¶ 178.

¹⁶¹ *Id.*

C. Well-Established Empirical Research Supports the Commission’s Conclusion That Courts Should Not Consider a Parent’s Sexual Orientation as a Factor When Making Custody Determinations.

The Supreme Court of Chile based its decision to deny custody to Judge Atala on unfounded generalizations about how parents’ sexual orientation *might* affect their children. The Court speculated, for example, that the children of lesbian and gay parents could suffer impaired psychological and emotional development, gender identity confusion, and social isolation and discrimination.¹⁶² Over thirty years of research by leading pediatric, psychological, psychiatric, and child welfare service providers and scholars, however, demonstrates that there are no statistically significant differences between the psychological, gender, or social development of children raised by lesbian and gay parents than by heterosexual parents. Research also shows that there are no statistically significant differences between the parenting skills of lesbian and gay parents and heterosexual parents, or in the quality and nature of their parent-child relationships.

Every mainstream child welfare and health organization to weigh in on whether lesbians and gay men should be parents has issued statements opposing restrictions on lesbian and gay parenting. The Child Welfare League of America—the oldest and largest membership-based child welfare organization—for example, “affirms that gay, lesbian, and bisexual parents are as well suited to raise children as their heterosexual counterparts,” and emphasizes that “[e]xisting research comparing lesbian and gay parents to heterosexual parents, and children of lesbian and gay parents to children of heterosexual parents, shows that common negative stereotypes are not supported.”¹⁶³ The American Academy of Pediatrics—a membership organization of

¹⁶² See Decision of Chilean Supreme Court (4th Division) Relieving Judge Atala of Legal Custody of Her Daughters (May 31, 2004) (“Decision”) ¶¶ 17-18.

¹⁶³ Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, available at <http://www.cwla.org/programs/culture/glbtposition.htm>.

approximately 60,000 pediatricians—similarly “recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual.”¹⁶⁴ These and other groups that have issued similar statements¹⁶⁵ are driven by empirical research and widely accepted standards that guide how to assess and deliver what children need.

A recent study that was the first to track children raised by lesbian parents from birth to adolescence confirmed previous findings showing no difference in children’s development and behavior as a function of their parents’ sexual orientation.¹⁶⁶ In addition, the study found that children raised by lesbian parents actually scored higher on some psychological measures of self-esteem and confidence, performed better academically, and were less likely to have behavioral problems involving rule-breaking and aggression than gender matched samples of children raised by heterosexual parents.¹⁶⁷ This and other studies make clear that—when making custody determinations—courts in member states should not substitute unsupported stereotypical and discriminatory assumptions for solid empirical research.¹⁶⁸

¹⁶⁴ American Academy of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339>.

¹⁶⁵ Similar statements have been issued, for example, by the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the National Association of Social Workers, the North American Council on Adoptable Children, and the American Academy of Family Physicians. See Leslie Cooper and Paul Cates, *Too High a Price: The Case Against Restricting Gay Parenting*, American Civil Liberties Union, 15-24 (2006), http://www.aclufl.org/take_action/download_resources/too%20high%20a%20price.pdf (collecting statements from children’s health and welfare organizations).

¹⁶⁶ Nanette Gartrell & Henny Bos, *U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 *Pediatrics* 1, 2 (2010).

¹⁶⁷ *Id.* at 2, 6-7.

¹⁶⁸ See, e.g., *Boots v. Sharrow*, 2004 CarswellOnt 25 ¶¶ 136, 106-09 (Can. Ont. Sup. Ct. J.) (“[T]here is no evidence that heterosexual parents are better able to meet the physical, psychological, emotional or intellectual needs of children than are families with homosexual parents. . . . [T]he research shows that ‘the most important element in the healthy development of a child is a stable, consistent, warm, and responsive relationship between a child and his or her caregiver.’”) (quoting *K.(Re)*, (1995) 23 O.R. 3d 679 (Ont. Ct.)).

1. The Psychological Development and Well-Being of Children Raised by Lesbian and Gay Parents Are Comparable to That of Children Raised by Heterosexual Parents.

Well-established research has dispelled the unfounded assumption (*see, e.g.*, Decision ¶ 17) that the psychological development and well-being of children raised by lesbian and gay parents might be impaired or compromised. In different studies, researchers have assessed a wide range of measures, including mental health, psychological and emotional adjustment, self-esteem, academic performance, behavioral problems, and moral judgment, among others. Research on these measures of psychological and personal development reveals no significant differences between the children of lesbian and gay parents and heterosexual parents: instead, children from both types of households are comparable on key psychological development outcomes.¹⁶⁹

One early study based on information collected from children's parents and teachers, for example, found no significant differences in the prevalence of emotional or behavioral problems including sociability, emotional difficulty, hyperactivity, or conduct problems among children

¹⁶⁹ *See, e.g.*, Gartrell & Bos, *supra* note 166, at 2; Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 J. Developmental & Behav. Pediatrics 224 (2005); Beth Perry, *et al.*, *Children's Play Narratives: What They Tell Us About Lesbian-Mother Families*, 74 Am. J. Orthopsychiatry 467 (2004); Jennifer Wainright, *et al.*, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 Child Dev. 1886 (2004); Katrien Vanfraussen, *et al.*, *What Does It Mean for Youngsters to Grow Up in a Lesbian Family Created by Means of Donor Insemination?*, 20 J. Reprod. & Infant Psychol. 237, 249-50 (2002); Norman Anderssen, *et al.*, *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 Scandinavian J. Psychol. 335 (2002); Judith Stacey & Timothy J. Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159 (2001); Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. Marriage & Fam. 1052 (2000); Raymond Chan, *et al.*, *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 Child Dev. 443 (1998); *see also* Joseph R. Price, *Bottoms III: Visitation Restrictions and Sexual Orientation*, 5 Wm. & Mary Bill Rts. J. 643, 648 (1997) (discussing surge in publication of academic research since the 1980s finding no developmental differences between children of lesbian and gay parents and heterosexual parents); Patricia J. Falk, *The Gap Between Psychosocial Assumptions and Empirical Research in Lesbian-Mother Child Custody Cases, in Redefining Families: Implications for Children's Development* 131, 151-52 (A.E. Gottfried and A.W. Gottfried, eds. 1994) (discussing lack of empirical evidence that children of lesbian mothers suffer any detrimental effects); Shelley Casey, *Homosexual Parents and Canadian Child Custody Law*, 32 Fam. & Conciliation Courts Rev. 379, 386 (1994) ("Researchers have concluded that there is no significant difference in the emotional development, social behavior, [or] psychopathology of children raised by a gay or lesbian parent.").

raised by lesbian and gay parents and heterosexual parents.¹⁷⁰ Subsequent research consistently confirms and lends support to earlier research on children's psychological development and well-being. A recent study that compared young children adopted in infancy by lesbian and gay parents and heterosexual parents showed "no significant differences among children as a function of parental sexual orientation on measures of internalizing, externalizing, or total behavior problems."¹⁷¹ Researchers concluded that the children of lesbian, gay, and heterosexual parents "appeared to be thriving."¹⁷²

A pair of studies focused on adjustment in a national sample of adolescents showed that children living with lesbian parents did not significantly differ from their counterparts living with heterosexual parents on measures of anxiety, depressive symptoms, self-esteem, delinquency, and victimization, or in their use of tobacco, alcohol, or marijuana.¹⁷³ Another study assessing the maturity of moral judgment among adolescents raised by lesbians and heterosexual mothers similarly revealed no differences.¹⁷⁴ Later studies confirm that young adults raised in female-headed households "show[] lower levels of anxiety, depression, hostility and problematic alcohol use than their counterparts from traditional families, and higher levels of self-esteem, indicating more positive psychological adjustment among young adults who had grown up in solo and lesbian mother homes, with no difference between the two."¹⁷⁵

¹⁷⁰ Susan Golombok, et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. Child Psychol. & Psychiatry 551, 570-71 (1983).

¹⁷¹ Rachel H. Farr, et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 Applied Developmental Sci. 3, 174-75 (2010).

¹⁷² *Id.*

¹⁷³ Jennifer Wainright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents with Female Same-Sex Parents*, 20 J. Fam. Psychol. 526 (2006); Wainright, et al., *supra* note 169.

¹⁷⁴ Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 1025, 1033 (1992) (citing R.L. Rees, *A Comparison of Children of Lesbian and Single Heterosexual Mothers on Three Measures of Socialization* (unpublished doctoral dissertation, California School of Professional Psychology, Berkeley, CA) (1979)).

¹⁷⁵ Susan Golombok & Shirlene Badger, *Children Raised in Mother-Headed Families from Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers, at Early Adulthood*, 25 Hum. Reprod. 1, 155-56 (2010).

As discussed above, a recent study of adolescents raised by lesbian parents showed that the teenagers were well-adjusted and actually exhibited increased strengths and competencies compared with their peers, including fewer behavioral problems.¹⁷⁶ Existing studies thus unequivocally show that children of lesbian and gay parents are psychologically stable, establishing without a doubt that denying lesbian and gay parents custody of children on the opposite assumption is without justification.

2. Parents' Sexual Orientation Does Not Affect Children's Gender Development.

The consensus of research disproves the assumption (*see, e.g.*, Decision ¶ 17) that having lesbian or gay parents affects or compromises children's gender development. Studies on gender development focus on three general areas: (1) children's normative gender identity (children's sense of themselves as male or female); (2) children's gender role behavior (behavior conforming to prevailing masculine or feminine norms); and (3) children's sexual orientation. Research comparing children raised by lesbian and gay parents and heterosexual parents fails to uncover differences in the development of children's normative gender identity or gender role behavior as a function of parents' sexual orientation.¹⁷⁷ Children raised by lesbian and gay parents are also no more likely to identify as gay or lesbian than children raised by heterosexual parents.¹⁷⁸

Research confirms that gender identity is not affected by parents' sexual orientation. For example, in a study examining gender identity among children of lesbian mothers and single-parent heterosexual mothers, researchers concluded that there was no evidence of gender identity

¹⁷⁶ Gartrell & Bos, *supra* note 166, at 2.

¹⁷⁷ *See, e.g.*, Golombok, *et al.*, *supra* note 170; Anne Brewaeys, *et al.*, *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 Hum. Reprod. 1349 (1997); Farr, *et al.*, *supra* note 171.

¹⁷⁸ *See, e.g.*, Golombok, *et al.*, *supra* note 170.

confusion in any of the children.¹⁷⁹ A panel of the American Academy of Pediatrics reviewing the body of research on children raised by lesbian and gay parents similarly concluded that none of the children studied “ha[s] shown evidence of gender identity confusion.”¹⁸⁰

Indeed, studies do not find that gender role behavior is affected by parents’ sexual orientation. For example, researchers examining gender role behavior based on interviews with children and their lesbian or heterosexual mothers found no differences in the children’s interests or activities, which were also closely in accord with results obtained from a general population sample.¹⁸¹ Recent research on children adopted in infancy by lesbian, gay, and heterosexual parents found that “[r]egardless of whether their parents were lesbian, gay, or heterosexual, most boys exhibited behavior typical of other same-aged boys, and most girls exhibited behavior typical of other same-aged girls.”¹⁸²

Another study based on interviews with children who had grown up with divorced lesbian mothers or divorced heterosexual mothers reported no differences between children with respect to preferred television programs, television characters, games, or toys.¹⁸³ A study of adolescent children of lesbian mothers also confirms that there are no differences in their gender role preferences.¹⁸⁴ Studies that used the Preschoolers’ Activities Inventory—a parental report questionnaire designed to assess children’s preferences for gendered games, toys, and activities—to assess gender development further support these findings.¹⁸⁵

¹⁷⁹ *Id.* at 562.

¹⁸⁰ Ellen C. Perrin & Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341, 342 (2002).

¹⁸¹ Golombok, *et al.*, *supra* note 170.

¹⁸² Farr, *et al.*, *supra* note 171, at 175.

¹⁸³ Patterson, *supra* note 3, at 731 (citing Green, *et al.*, *Lesbian Mothers and Their Children: A Comparison With Solo Parent Heterosexual Mothers and Their Children*, 15 *Archives of Sexual Behavior* 167-84 (1986)).

¹⁸⁴ Wainright, *et al.*, *supra* note 169, at 1887.

¹⁸⁵ *See, e.g.*, Farr, *et al.*, *supra* note 171 (assessing gender role behavior of children adopted by lesbian and gay parents and heterosexual parents); Brewaeys, *et al.*, *supra* note 177 (assessing gender development among children conceived via donor insemination and reared by lesbian couples).

Researchers studying the sexual orientation of children raised by lesbian and gay parents and heterosexual parents consistently find no statistically significant difference in the children's sexual orientation. For example, an early study based on interviews of children raised by lesbian or heterosexual mothers found that no child of a lesbian mother identified as lesbian or gay, but one child of a heterosexual mother did.¹⁸⁶ Subsequent studies consistently find that the vast majority of lesbians and gay men were raised by heterosexual parents, and the vast majority of children raised by lesbian and gay parents (and heterosexual parents) grow up to be heterosexual.¹⁸⁷ This research confirms that sexual orientation is not a learned behavior, “develop[s] independently of one's parents and should not be a factor that courts weigh in custody determinations.”¹⁸⁸

The Chilean Supreme Court's assumption that being raised by a lesbian mother affects the development of a child's gender identity, gender role behavior, and sexual orientation “betrays a projection of judicial fear . . . of lesbians as contagious or converting.” (See Decision ¶ 17.)¹⁸⁹ This assumption also reflects the invidiousness of decisions to deny custody to lesbian and gay parents based on their sexual orientation—that a child growing up to identify as gay or

¹⁸⁶ Patterson, *supra* note 174, at 1031 (citing S.L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in *Homosexuality and the Family* (F.W. Bozett, ed., 1989)).

¹⁸⁷ See, e.g., Nanette Gartrell, et al., *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual Orientation, Sexual Behavior, and Sexual Risk Exposure*, Archives of Sexual Behavior (2010); Golombok & Badger, *supra* note 175; Perrin & Committee on Psychosocial Aspects of Child and Family Health, *supra* note 180; Stacey & Biblarz, *supra* note 169.

¹⁸⁸ Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent Is Homosexual or Lesbian—An Empirical Study*, 23 Suffolk U. L. Rev. 711, 724 (1989); see also Katja M. Eichinger-Swainston, *Fox v. Fox: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families*, 32 Tulsa L. J. 57, 67 (1996) (general consensus in scientific community is that sexuality is not a learned behavior); Casey, *supra* note 169, at 386 (studies disprove the assumption that “children develop their sexual orientation based on environmental factors and parental modeling”); Sandra Pollack, *Lesbian Mothers: A Lesbian-Feminist Perspective on Research*, in *Politics of the Heart: A Lesbian Parenting Anthology*, at 320 (Sandra Pollack and Jeanne Vaughn, eds., 1987) (“Courts need to be educated” to combat the “wrong assumption . . . that children of gay parents will grow up to be gay or will have confused sex-role identification.”).

¹⁸⁹ Jenni Millbank, *Lesbians, Child Custody, and the Long Lingering Gaze of the Law*, in *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* 280, 288 (Susan B. Boyd, ed., 1997).

lesbian is something to be prevented. Such an assumption undermines the exact protections created by the Convention.

3. Children Raised by Lesbian and Gay Parents Are No More Affected by Stigma Than Other Children.

The fear that children of lesbian and gay parents will be socially isolated (*see* Decision ¶ 18) is premised on “the presumption that the children of gay parents will be stigmatized by societal indignation of homosexuality.”¹⁹⁰ Reliance on this presumption is a particularly inappropriate basis for custody decisions because it is not linked to parental fitness or the parent-child relationship.¹⁹¹ In any case, this presumption is disproven by well-established research, which consistently shows that children and adolescents raised by lesbian and gay parents report normal social relationships with peers, family members, and adults outside of their nuclear families.¹⁹² For example, in one study based on information collected from interviews with lesbian and heterosexual mothers, children from both households “showed definite evidence of good peer relationships—meaning that they were able to make and maintain relationships with people of their own age, there being no difficulties of any significance.”¹⁹³ A similar study examining networks of extended family and friendship relationships of children with lesbian and heterosexual parents demonstrated that the contact children of lesbian parents have with grandparents, other relatives, and adult non-relatives does not significantly differ from that of children raised by heterosexual parents.¹⁹⁴

¹⁹⁰ Felicia Meyers, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 Whittier L. Rev. 839, 843-44 (1993).

¹⁹¹ Kelly A. Causey & Candan Duran-Aydintug, *Tendency to Stigmatize Lesbian Mothers in Custody Cases*, 28 J. Divorce & Remarriage 171 (1998).

¹⁹² *See, e.g.*, Golombok, *et al.*, *supra* note 170; Megan Fulcher, *et al.*, *Contact with Grandparents Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 2 Parenting: Sci. & Prac. 61 (2002); Vanfraussen, *et al.*, *supra* note 169; Jennifer L. Wainright & Charlotte J. Patterson, *Peer Relations Among Adolescents with Female Same-Sex Parents*, 44 Developmental Psychol. 117 (2008).

¹⁹³ Golombok, *et al.*, *supra* note 170, at 567.

¹⁹⁴ Fulcher, *et al.*, *supra* note 192, at 67-71.

When making custody determinations, judges nevertheless often exaggerate the possibility that the social relationships of children raised by lesbian and gay parents will be compromised, assuming erroneously that “teasing based on a parent’s sexual orientation is more serious than teasing based on other attributes such as physical characteristics, intelligence, or ethnicity.”¹⁹⁵ Studies comparing children raised by lesbian parents and heterosexual parents uncover “no evidence to support the concern that children of lesbian mothers would experience more teasing or bullying and more difficulties in their relationships with their peers.”¹⁹⁶ A recent study compared peer relations among adolescents living with lesbian parents with a nationally representative sample of adolescents living with heterosexual parents.¹⁹⁷ Based on peer reports and the adolescents’ self-reports about friendships, social activities, and popularity among classmates, as well as measures of network density (how likely adolescents were to know their peers) and centrality (prominence of position) in peer networks among other measures of adolescent peer relations, the study found no significant differences as a function of parents’ sexual orientation.¹⁹⁸

4. The Skills of Lesbian and Gay Parents Are Equivalent to Those of Heterosexual Parents.

There is simply no evidence that lesbian and gay parents are deficient in parenting skills when compared to heterosexual parents.¹⁹⁹ For decades, research has shown that lesbian and gay

¹⁹⁵ Causey and Duran-Aydintug, *supra* note 191, at 173.

¹⁹⁶ Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families from Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, 45 *J. Child Psychol. & Psychiatry* 1407, 1416 (2004); *see also* Henny M. W. Bos & Frank Balen, *Children in Planned Lesbian Families: Stigmatisation, Psychological Adjustment and Protective Factors*, 10 *Culture, Health & Sexuality* 3, 230-31 (2008) (children in sample “generally reported low levels of stigmatization and their scores on psychological adjustment were similar [to sample of general population]”); Wainright & Patterson, *supra* note 173; Bridget Fitzgerald, *Children of Lesbian and Gay Parents: A Review of the Literature*, 29 *Marriage & Fam. R.* 57, 65 (1999).

¹⁹⁷ Wainright & Patterson, *supra* note 192.

¹⁹⁸ *Id.*

¹⁹⁹ John Tobin & Ruth McNair, *Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?* 23 *Int’l J.L. Pol’y & Fam.* 110, 115 (2009); Shreya Atrey, *Continuing to Meet the Parents, Through the*

parents exhibit parenting styles, parental competence, and share experiences similar to those of heterosexual parents.²⁰⁰ Although little research exists specific to gay fathers, the research that has been done clearly demonstrates no significant difference in parental skills between gay fathers and heterosexual fathers.²⁰¹ Summarizing the existing research, the American Psychological Association declared that:

[t]here is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation. . . . On the contrary, results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children. . . . Overall, the results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents.²⁰²

International Law Route, 12 J.L. & Soc. Challenges 1, 4 (2010) (citing David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 Fam. L.Q. 523, 539 (1999)).

²⁰⁰ Farr, *et.al*, *supra* note 171; Henny M.W. Bos, *et. al.*, *Experience of Parenthood, Couple Relationship, Social Support, and Child-Rearing Goals in Planned Lesbian Mother Families*, 45 J. of Child Psychol. & Psychiatry 755, 759 (2004); *see also* Carlos A. Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* 158 (“The social science literature indicates that lesbians and gay men as a group meet their responsibilities toward their children as well and as completely as do heterosexual parents.”); *see also* Charlotte J. Patterson & Jennifer L. Wainright, *Adolescents with Same-Sex Parents: Findings from the National Longitudinal Study of Adolescent Health*, in *Lesbian and Gay Adoption: A New American Reality* (Brodzinsky, *et al.*, eds., Oxford Univ. Press 2007); Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 Harv. L. & Pol’y Rev. 31, 46 (2010); The Evan B. Donaldson Adoption Institute, *Expanding Resources for Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care*, 44 (2008), http://www.adoptioninstitute.org/publications/2008_09_Expanding_Resources_Legal.pdf); Tobin & McNair, *supra* note 199, at 115-16.

²⁰¹ Jerry J. Bigner & R. Brooke Jacobsen, *Adult Responses to Child Behavior and Attitudes Toward Fathering: Gay and Nongay Fathers*, 23 J. of Homosexuality 99, 101-02 (1992).

²⁰² William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 The Future of Children J. 97, 102 (2005). Other professional organizations from across North America and other parts of the world—including, for example, the American Academy of Child and Adolescent Psychiatry, the American Academy of Family Physicians, the American Academy of Pediatrics, the American Bar Association, the American Medical Association, the American Psychiatric Association, the American Psychoanalytic Association, the American Psychological Association, the Child Welfare League of America, the National Adoption Center, the National Association of Social Workers, the North American Council on Adoptable Children, the Voices for Adoption, the Australian Medical Association, and the Victorian Law Reform Commission—have issued similar statements in support of lesbian and gay parenting rights, which discuss social science research and explain there is no difference between the parenting skills of lesbian and gay parents and heterosexual parents.

There is no material difference between lesbian and gay parents and heterosexual parents with respect to mental health and attitude toward parenting.²⁰³ Recent studies have indicated that gay and lesbian couples are knowledgeable about parenting skills, aware of the skills necessary for effective parenting, and superior in their ability to identify critical issues in child care situations and quickly formulate appropriate remedies to the identified problems.²⁰⁴ Research on lesbian mothers and heterosexual mothers reveals similarities in terms of psychological well-being, self-esteem, parenting stress, and attitudes toward child-rearing.²⁰⁵ Similarly, gay fathers were found to have high self-esteem and to evaluate themselves positively in terms of parenting roles.²⁰⁶ Further, research refutes the notion that lesbian mothers are not as child-oriented or maternal as heterosexual mothers and reveals—to the contrary—that lesbian mothers strongly endorse child-centered attitudes, commit to their maternal roles, and describe themselves similarly to heterosexual mothers in maternal interests, lifestyles, and child-rearing practices.²⁰⁷

Research also suggests that gay and lesbian couples create home environments that are beneficial to child-rearing. For example, gay and lesbian parents tend not to use corporal

²⁰³ Joslin, *supra* note 200, at 46 (citing Perrin & Committee on Psychosocial Aspects of Child and Family Health, *supra* note 180, at 342); *see also* Charlotte J. Patterson, *Lesbian and Gay Parents and Their Children: A Social Science Perspective*, in *Contemporary Perspectives on Lesbian, Gay, and Bisexual Identities: The Nebraska Symposium on Motivation* (Springer 2009).

²⁰⁴ Susan L. Pollet, *Breaking Up is Hard[er] to Do*, 83 N.Y. State Bar J. 10, 12 (2011) (citing Monica K. Miller & Brian H. Borenstein, *Determining the Rights and Responsibilities of Lesbian Parents*, *Monitor on Psychol.*, Nov. 2005, at 85, *available at* <http://www.apa.org/monitor/nov05/jn.aspx>); David K. Flaks, *et al.*, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 *Dev. Psychology* 105 (1995); *see also* Bigner & Jacobsen, *supra* note 201, at 109.

²⁰⁵ Perrin & Committee on Psychosocial Aspects of Child and Family Health, *supra* note 180 (stating that few differences exist in two decades of research comparing lesbian mothers' self-esteem, psychological adjustment, and attitudes toward child rearing); *see also* Patterson, *supra* note 203.

²⁰⁶ Kim Bergman, *Gay Men Who Become Fathers via Surrogacy: The Transition to Parenthood*, *J. of GLBT Fam. Studies* 111, 114 (2010).

²⁰⁷ Cheryl A. Parks, *Lesbian Parenthood: A Review of the Literature*, 68 *Am. J. Orthopsychiatry* 376 (1998); Susan Golombok *et al.*, *Children with Lesbian Parents: A Community Study*, 39 *Developmental Psychol.* 20 (2003); Perrin & Committee on Psychosocial Aspects of Child and Family Health, *supra* note 180, at 342; James G. Pawelski, *et al.*, *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 *Pediatrics* 349, 359 (2006).

punishment on their children and have infrequent disputes with their children.²⁰⁸ Growing up in households where parents display less power assertion has been associated with healthier psychological development for children.²⁰⁹ Because gay and lesbian couples tend to split childcare and household activities equally, there is a more equitable division of household responsibilities.²¹⁰ Research proves that children benefit from such an equitable division of labor in the home:

[O]ne of the key strengths noted by lesbian parents themselves is the prevalence of supportive and egalitarian co-parenting and positive couple relationships, show[ing] that two mothers take on the full range of parenting roles needed by their children, and do so in a flexible way. . . . These findings are important as shared and consistent parenting positively affects child outcomes.²¹¹

Further, gay and lesbian parents demonstrate a high level of interaction and emotional involvement with their children.²¹² Notably, studies show that lesbian mothers score significantly higher on supportive presence and respect for children's autonomy, and spend more time on childcare and less time on employment.²¹³

Research thus makes clear that lesbian and gay parents' skills are equal to heterosexual parents in terms of capacity to rear children in a healthy and happy environment.

5. Sexual Orientation Is Immaterial to the Formation and Importance of Children's Attachments.

Nearly thirty years of research confirms that (1) when two adults participate in raising a child, the child generally develops significant attachment bonds with *both* parents; (2) these

²⁰⁸ Meezan & Rauch, *supra* note 202, at 105; Gartrell & Bos, *supra* note 166, at 7; Golombok, *et al.*, *supra* note 207; Bigner & Jacobsen, *supra* note 201, at 109.

²⁰⁹ Gartrell & Bos, *supra* note 166, at 7.

²¹⁰ Bos, *et. al.*, *supra* note 200, at 762; Bergman, *supra* note 206, at 114.

²¹¹ Louise Chang, *Study: Same-Sex Parents Raise Well-Adjusted Kids*, 2005, available at <http://www.webmd.com/mental-health/news/20051012/study-same-sex-parents-raise-well-adjusted-kids>; Tobin & McNair, *supra* note 199, at 123.

²¹² Brewaeys, *et al.*, *supra* note 177, at 1356; see also Bigner & Jacobsen, *supra* note 201, at 101.

²¹³ Henny Bos, *Child Adjustment and Parenting in Planned Lesbian-Parent Families*, 77 *Am. J. of Orthopsychiatry* 38, 42-45 (2007).

bonds form notwithstanding the sexual orientation of those parents; and (3) breaking this parent-child attachment bond can be devastating to the child. As such, the best interest of children is to compel custody, visitation, and support decrees that preserve children's relationships with functional parents, regardless of the sexual orientation of those parents.

Decades of child development research demonstrates unequivocally that children form important attachment bonds to parental figures and that these bonds strengthen and develop as the children grow older.²¹⁴ Attachment bonds are the “reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver” and constitute the most important relationships in the child's life.²¹⁵ Infants who receive sensitive and responsive care from familiar adults in the course of feeding, holding, talking, playing, soothing, and general proximity to those adults become securely attached to them.²¹⁶ These bonds promote emotional well-being, social competence, and resilience in the face of adversity, providing a framework for adaptation to life experiences.²¹⁷ Studies have shown that a security of attachment in infancy strongly predicts characteristics of self-reliance, effective peer relationships, and positive relationships with teachers in pre-school.²¹⁸ In contrast, children without secure attachments “not only were significantly less competent in all of these respects, but also showed distinctive

²¹⁴ See, e.g., John Bowlby, *Attachment* 177, 265-68 (2d ed. 1982); Melvin Konner, *Childhood* 84-87 (1991).

²¹⁵ Beverly James, *Handbook for Treatment of Attachment-Trauma Problems in Children* 2 (1994); Mary D. Ainsworth, et al., *Patterns of Attachment: A Psychological Study of the Strange Situation* 20-21 (1978).

²¹⁶ Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 *Fam. & Conciliation Courts Review* 298 (2000).

²¹⁷ Daniel Siegel, *The Developing Mind, How Relationships and the Brain Interact to Shape Who We Are* 84-87 (1999).

²¹⁸ W. Andrew Collins & L. Alan Sroufe, *Capacity for Intimate Relationships: A Developmental Construction, in The Development of Romantic Relationships in Adolescence* 125-28 (Wyndol Furman, et al., eds., 1999).

patterns of maladaptation.”²¹⁹ Thus, for infants and young children, attachment relationships are the major factors that shape the development of the brain during its period of maximal growth.²²⁰

Research consistently shows that a parent’s sexual orientation is immaterial to the formation and importance of children’s attachment bonds, and that children are just as likely to form close bonds with lesbian and gay parents as with heterosexual parents.²²¹ Where both same-sex parents participate in the child’s upbringing, for example, the child will form a significant attachment relationship with each parent. A clinical evaluation of preschool children of lesbian couples determined that when both partners care for a child, the child becomes attached to both parents.²²² Further, bonds between a child and a caregiver are not dependent on blood relations and are not limited to one member of each sex.²²³

The insignificance of a parent’s sexual orientation to the formation of attachment bonds has been recognized by professional organizations, such as the American Psychoanalytic Association, which issued the statement:

²¹⁹ *Id.*

²²⁰ Siegel, *supra* note 217, at 85; *see also* Nat’l Research Council & Inst. of Med., *From Neurons to Neighborhoods: The Science of Early Childhood Development* 226, 265 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) (“[W]hat young children learn, how they react to the events and people around them, and what they expect from themselves and others are deeply affected by their relationships” with their caregivers. Secure attachment bonds lead to “the development of self-awareness, social competence, conscience, emotional growth, and emotional regulation.”).

²²¹ *See* Edward L. Schor, *et al.*, *Family Pediatrics: Report of the Task Force on the Family*, 111 *Pediatrics* 1541, 1550 (2003) (“[R]esearch has found that parental sexual orientation per se has no measureable effect on the quality of parent-child relationships.”); Brewaeys, *et al.*, *supra* note 177, at 1354 (“[T]he quality of the parent-child interaction [does] not differ significantly between the biological mother and the [non-biological] mother.”); Susanne Bennett, *Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families*, 20 *Child & Adolescent Social Work J.* 3, 166-68 (June 2003) (finding that attachment bonds are formed with lesbian parents and the “quality of care was the salient factor in the establishment of an attachment hierarchy” rather than the sexual orientation of the parent); Barbara M. McCandlish, *Against All Odds: Lesbian Mother Family Dynamics*, in *Gay and Lesbian Parents* 30-31 (Frederick W. Bozett, ed., 1987) (finding that children of lesbian couples become attached to both mothers).

²²² McCandlish, *supra* note 221, at 30-31.

²²³ D’Arcy L. Reinhard, *Recognition of Non-Biological, Non-Adoptive Parents in Arkansas, Florida, Mississippi, and Utah: A De Facto Parent Doctrine to Protect the Best Interests of the Child*, 13 *J. Gender Race & Just.* 441 (2010) (citing Susan Dundas & Miriam Kaufman, *The Toronto Lesbian Family Study*, 40 *J. Homosexuality* 65, 75-76 (2000)). For example, a study of children raised on an Israeli kibbutz, a communal living community, observed the attachment between a child and his mother versus a child and a metapelet, a female caretaker and for most of the children, the mother and the metapelet were interchangeable attachment figures. H. Rudolph Schaffer, *Making Decisions About Children* 77-78 (1990).

Accumulated evidence suggests the best interest of the child requires attachment to committed, nurturing, and competent parents. Evaluation of an individual or couple for these parental qualities should be determined without prejudice regarding sexual orientation. Gay and lesbian individuals and couples are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents.²²⁴

Research has proven that it is the nature of these attachment bonds, rather than the nature of a child's family structure, that is a more important predictor of a child's outcome.²²⁵

Research has also proven that continuity of these attachment bonds rather than detachment is essential to a child's healthy development and overall well-being.²²⁶ In fact, when a child's attachment relationship with a person who has functioned as a parent has been severed, such as when a court makes a custody decision removing children from a parent's custody, the psychological impact can be traumatic, as numerous empirical findings "provide a solid research basis for predictions of long term harm associated with disrupted attachment [relationships]."²²⁷ This traumatic distress occurs regardless of whether that parental figure is lesbian or gay,²²⁸ or if there is a biological or adoptive connection between parent and child.²²⁹

Breaking an attachment bond can be so traumatizing as to completely change the child's style of forming attachments, leading to "insecure or avoidant attachment [in future relationships], interference with healthy object relations, and reorganization of cognitive

²²⁴ American Psychoanalytic Association Statement (2002), available at http://www.apsa.org/About_APsaA/Position_Statements/Gay_and_Lesbian_Parenting.aspx.

²²⁵ Farr, *et al.*, *supra* note 171.

²²⁶ Joseph Goldstein, *et al.*, *Beyond the Best Interests of the Child* 85 (2d ed. 1979)

²²⁷ Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee*, 10 *Psychol. Pub. Pol'y & L.* 5, 11 (2004); H. Rudolph Schaffer, *Making Decisions about Children* 28, 35; James X. Bembry, *Therapeutic Termination with the Early Adolescent Who Has Experienced Multiple Losses*, 16 *Child & Adolescent Soc. Work J.* 3, 183 (1999).

²²⁸ Fiona L. Tasker & Susan Golombok, *Growing Up in a Lesbian Family: Effects on Child Development* 12 (1997) (finding that cessation of the parent-child bond between a child and a lesbian psychological parent "can cause [the child] extreme distress").

²²⁹ See, e.g., Yvon Gauthier, *et al.*, *Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care*, 25 *Infant Mental Health J.* 379, 394 (2004) (explaining that children suffer greatly when separated from non-biological parent figures).

understandings.”²³⁰ Severing a child’s attachment bond with a person who has functioned as his or her parent can lead to overall behavioral problems, internalizing problems, anxiety, aggression, academic problems, and elevated psychopathology.²³¹ Other behavioral difficulties that may develop due to disrupted attachment include “hiding or hoarding food, excessive eating . . . or drinking . . . , rumination, self-stimulating and repetitive behaviors . . . , and sleep disturbance.”²³² Further, these harmful consequences of severing a child’s attachments cannot be completely offset by the child’s formation of new attachments.²³³ As a result, severing an attachment bond should be avoided, given the severe consequences such an action has on the child.

Thus, research shows that family processes, such as parenting quality and attachment, rather than sexual orientation, are more important predictors of child outcomes. Research clearly demonstrates that children form attachment bonds to parental figures that are important for normal psychological development, that these bonds form irrespective of the sexual orientation of the parental figure, and that severing of these bonds can cause traumatic psychological consequences for the children. As such, it is in the best interest of children for courts to issue custody determinations that preserve healthy attachment relationships irrespective of the sexual orientation of the parental figures.

D. The Consideration of Sexual Orientation in Custody Determinations Is Discriminatory.

As discussed above, the Commission’s findings agree that the Supreme Court of Chile based its decision to deny custody to Judge Atala on improper bias, prejudice, and mistaken

²³⁰ William F. Hodges, *Interventions for Children of Divorce: Custody, Access, and Psychotherapy* 8-9 (2d ed. 1991)

²³¹ Dyer, *supra* note 227, at 10; Ana H. Marty, *et al.*, *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 *Early Child Development & Care* 271, 274 (2005); James G. Byrne, *et al.*, *Practitioner Review: The Contribution of Attachment Theory to Child Custody Assessments*, 46 *J. Child Psychol. & Psychiatry* 115, 118 (2005).

²³² Mark Simms, *et al.*, *Health Care Needs of Children in the Foster Care System*, 106 *Pediatrics* 909, 912 (2000).

²³³ Dyer, *supra* note 227.

stereotypes. To make custody decisions on perceived harms reinforces derogatory stereotypes and homophobic prejudice. Indeed, discriminatory rulings on this basis would likely encourage lesbian and gay parents to hide their sexual orientation to maintain custody, which can have a detrimental effect on children. Studies show that the healthiest parental relationships for children in lesbian and gay households are those where the parents can be open about their sexual orientation.²³⁴ A study of children raised by lesbian and gay parents in Mexico reached this same conclusion, finding that if parents are comfortable with their sexual orientation, children benefit because they do not feel ashamed.²³⁵ A court's preference for lesbian and gay parents to be "discreet" is "counter to any interest in the well-being of [the] children," as it encourages "the isolation of lesbian and gay parents, cutting them off from their most significant sources of support," thus "ensuring the isolation of the children."²³⁶

In an analogous context, the United States Supreme Court refused to treat social prejudices and potential condemnation resulting from a mother's interracial marriage to deny her custody.²³⁷ The Supreme Court explained that while the United States Constitution "cannot control such prejudices[,] neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."²³⁸

²³⁴ D.L. Hawley, *Custody and Visitation of Children by Gay and Lesbian Parents*, 64 Am. Jur. Proof of Facts 3d 403, § 7 (2005) ("[T]he more open and relaxed a lesbian mother was about her sexual orientation, the more accepting the child was of this. The more realistic and understanding of issues and potential problems of being lesbian the mother was, the more successful were the children's adjustment.").

²³⁵ Gabriela Granados, *Las Otras Familias*, Milenio, Nov. 17, 2003, at 62 (discussing study of gay and lesbian families in Mexico).

²³⁶ Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbians and Gay Parents and Their Children*, 71 Ind. L.J. 623, 647-49 (1996).

²³⁷ See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (private bias was unconstitutional consideration for divesting natural mother of custody of her infant child because of her remarriage to a person of a different race).

²³⁸ *Id.* at 433.

An increasing number of courts are recognizing that “it is impermissible to rely on any real or imagined social stigma” attached to lesbian and gay parents in denying them custody.²³⁹ They acknowledge that most important is “that within the context of a loving and supportive relationship there is no reason to think that the [children] will be unable to manage whatever anxieties may flow from the community’s disapproval of their [parent].”²⁴⁰ Thirty years ago, a court granting custody to a lesbian mother summarized:

[I]t may be that because the community is intolerant of [the mother’s] differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

Taking the children from [their mother] can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forbearance and feelings of protectiveness, it will foster in them a sense of shame for their mother. Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. Lastly, it diminishes their regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others.²⁴¹

Indeed, courts serve children’s best interests when they “recognize the reality of children’s lives, however unusual or complex.”²⁴²

²³⁹ *S.N.E.*, 699 P.2d at 879; see also *Blew v. Verta*, 617 A.2d 31, 35 (Pa. Super. Ct. 1992) (“Would a court restrict a handicapped parent’s custody because *other people* made remarks . . . which embarrassed, confused and angered the child? We think not.”); *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) (“This court cannot take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship.”).

²⁴⁰ *M.P. v. S.P.*, 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979).

²⁴¹ *M.P.*, 404 A.2d at 1263.

²⁴² *Blew*, 617 A.2d at 36.

IV. CONCLUSION

The weight of international authority makes clear that discrimination on the basis of sexual orientation violates protected human rights. Empirical research demonstrates that lesbian and gay parents can and do provide the same loving and secure parent-child relationship provided by heterosexual parents. There is thus no justification for courts to consider parents' sexual orientation when making custody determinations. To allow such consideration violates individual rights protected by the Convention and would foster—rather than eradicate—discrimination against lesbians and gay men in member states. For the foregoing reasons, Amici respectfully request that the Court grant the relief recommended by the Commission.

Date: September 8, 2011

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