

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

AMICI CURIAE BRIEF

Presented by the

**New York City Bar Association
Human Rights Watch
International Gay and Lesbian Human Rights Commission
International Women's Human Rights Law Clinic at the
City University of New York,
Lawyers for Children, Inc.
Legal Aid Society of New York
Legal Momentum
National Center for Lesbian Rights**

in the case of

Karen Atala Riffo (and daughters)

Case No. P-1271-04 (Chile)

Dorothy L. Fernandez
Margaret L. Wu
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Charles E. Tebbe III
Rachel M. Wertheimer
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104

Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page
I. INTEREST OF AMICI.....	1
II. INTRODUCTION	3
III. BACKGROUND	4
IV. ARGUMENT.....	6
A. The Commission Previously Has Held That Discrimination On The Basis Of Sexual Orientation Can Violate Protected Human Rights.....	6
B. The Chilean Supreme Court’s Decision Is Contrary To The Weight Of International Authority.....	7
1. The European Court of Human Rights And The United Nations Human Rights Committee Have Held That Sexual Orientation Discrimination Violates Human Rights.	7
2. Courts In Other Countries Have Found That Giving Custody Of A Child To A Gay Or Lesbian Parent Is Compatible With A Child’s Best Interests.	11
3. Latin American Courts Have Granted Custody Of Children To Gays And Lesbians, And Latin American Institutions Have Started Addressing The Needs Of Diverse Families.....	15
C. Well-Established Empirical Research Contradicts The Chilean Supreme Court’s Negative Stereotypes Of Gay And Lesbian Parents.	16
1. Being Raised In A Gay Or Lesbian Household Does Not Harm A Child’s Psychological Development.	17
2. Studies Prove That Parent’s Sexual Orientation Does Not Affect Child’s Gender Identity Or Sexual Orientation.	20
3. Studies Show That Children Raised By Gay And Lesbian Parents Are No More Affected By Stigma Than Other Children.....	21
4. Lesbian Mothers’ Parenting Skills Are Equivalent To Those Of Heterosexual Mothers.	23
D. The Chilean Supreme Court’s Decision Is Based On Improper Bias, Not The Best Interests Of Ms. Atala’s Children.....	25
V. CONCLUSION.....	28

The New York City Bar Association, Human Rights Watch, International Gay and Lesbian Human Rights Commission, International Women’s Human Rights Law Clinic of the City University of New York, Lawyers for Children, Inc., Legal Aid Society of New York, Legal Momentum, and the National Center for Lesbian Rights (the “Amici”) respectfully submit this brief of amicus curiae in support of the petition filed with the Inter-American Commission on Human Rights (the “Commission”) by Karen Atala Riffo (and daughters) against the State of Chile.

I. INTEREST OF AMICI

The Association of the Bar of the City of New York (“the Association”), founded in 1870, has over 22,000 members in the New York area, around the United States and in over 50 countries. The Association has long been concerned with the denial of basic human rights on both a domestic and international level and has a strong interest in protecting those denied their rights on the basis of sexual orientation.

Human Rights Watch (“HRW”) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 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 and thus bring pressure on them to end abusive practices. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

International Gay and Lesbian Human Rights Commission (“IGLHRC”) works to secure the full enjoyment of human rights of 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 non-profit, non-governmental organization (NGO), IGLHRC affects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

The International Women's Human Rights Law Clinic ("IWHR") at the City University of New York is dedicated to teaching and advocacy of women's human rights under international law. Working with partners abroad and in the United States as appropriate, IWHR has engaged in litigation, conferences, negotiations and advocacy of norms and instruments respecting gender equality and women's rights in international, regional and national contexts. IWHR has previously appeared before the Inter-American Commission on Human Rights as *amicus curiae* in *Caso Maria Eugenia Morales de Sierra* and as counsel for Haitian and North American women's groups in Communications on behalf of Haitian Women during the period of the illegal Cedras regime.

Lawyers For Children, Inc. ("LFC") is a not-for-profit 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 guidebooks and other materials for both children and legal practitioners, conducts state certified professional training sessions, and seeks reform of child welfare systems affecting vulnerable children. LFC's in-depth involvement in hundreds of high-conflict custody and visitation cases allows LFC to provide informed, child centered, commentary on the policy issues affecting children that are raised in the instant case.

The Legal Aid Society of New York 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 a variety of civil, criminal and family court matters. The Society's Juvenile Rights

Division provides comprehensive representation as law guardians to children who appear before the New York City Family Court in child protective and other proceedings affecting children's custody and their rights and welfare. Last year, our Juvenile Rights attorneys and social workers represented more than 29,000 children.

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is dedicated to the rights of all women and men, including lesbians and gay men, to live free of discrimination based on stereotypes regarding gender, sex or sexual orientation.

The National Center for Lesbian Rights ("NCLR") is a national, non-profit legal organization with offices in California, Florida 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.

II. INTRODUCTION

The Amici submit this brief in response to the May 31, 2004 decision of the Supreme Court of Chile (the "Decision"), which stripped Ms. Atala of custody of her three daughters for the sole reason that she is a lesbian living with her female partner. The decision presents a serious human rights violation with potentially far-reaching effects. As detailed in Ms. Atala's petition, the Decision violates the essential human rights protected by the American Convention on Human Rights (the "American Convention"). The Supreme Court improperly based the Decision on negative stereotypes about gays and lesbians. The Court's use of these stereotypes, which have been disproven by reputable psychological and sociological studies, reflects a persistent pattern of discrimination against lesbian and gay parents in custody disputes, and,

specifically, constitutes blatant discrimination against Ms. Atala due solely to her sexual orientation.

The principal function of the Commission is “to promote the observance and defense of human rights.”¹ This includes the right of all persons to be free of “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.”² In light of the Commission’s crucial role in combating all forms of discrimination, the Amici urge the Commission to clarify for member states that it will not tolerate discrimination based on an individual’s sexual orientation. The Commission should mandate appropriate redress, including the return of Ms. Atala’s daughters to her custody.

III. BACKGROUND

Ms. Atala is a judge in Chile. She married Ricardo Jaime Lopez on March 29, 1993, and the couple had three daughters together. The couple separated in March 2002. During the course of marital counseling, prior to the parties’ separation, Ms. Atala realized that she was a lesbian. By mutual agreement between Mr. Lopez and Ms. Atala, legal custody and personal care of the girls were left with Ms. Atala, with Mr. Lopez having weekly visitation rights. Ms. Atala continued to seek counseling for herself and her daughters following the separation.

In June 2002, Ms. Atala began a relationship with Emma de Ramón Acevedo, a professor. In November 2002, Ms. Atala and her daughters began living with Ms. Acevedo. A

¹ Inter-American Commission on Human Rights, Statute of the Inter-Am. C.H.R. art. 1.1, *entry into force* July 18, 1978, O.A.S.T.S. No. 36.

² Organization of Am. States, Am. Convention on Human Rights ch.1, art. 1.1, Nov. 22, 1969, O.A.S.T.S. No. 36. 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).

psychologist's report indicated that, from the beginning, Ms. Atala's daughters had a positive relationship with Ms. Acevedo.

In January 2003, Mr. Lopez filed an action for custody of his daughters. In October 2003, the Court of Villarrica issued a detailed, thirty-page decision rejecting Mr. Lopez's request. Among other things, the court noted that a psychologist who examined the girls determined that they were not confused about gender roles and had not been discriminated against because of their mother's sexual orientation. Moreover, the court held that there was no reason to presume Ms. Atala was unable to care for her children. In fact, the court held that Ms. Atala displayed constant attention to the health and education of her daughters and that all three of her daughters expressed a preference to be returned to her. Mr. Lopez appealed the ruling. Six months later, however, the Appeals Court of Temuco affirmed it. Mr. Lopez again appealed and, in May 2004, the Supreme Court of Chile reversed the appeals court and granted custody of the girls to Mr. Lopez.

The Supreme Court's Decision is discriminatory. In contrast to the factual findings of the lower courts, the Decision was based almost wholly on the unfounded speculation that Ms. Atala's daughters would eventually suffer psychological harm from living with Ms. Atala and Ms. Acevedo. The Supreme Court also speculated that Ms. Atala's daughters would eventually become confused about gender roles and be subject to discrimination and isolation. The Supreme Court rejected the analyses of psychologists and social workers that the lower courts had found persuasive and, instead, substituted its own personal convictions in concluding that minors must live in a family that is structured "normally" and considered "traditional" and "proper."³ The Supreme Court's bias against gays and lesbians had nothing to do with the

³ Decision ¶¶ 14, 15, 20.

specific facts of Ms. Atala’s case. Moreover, the negative stereotypes on which the Supreme Court relied are contradicted by nearly thirty years of reputable psychological and sociological research in the area of gay and lesbian parenting.

IV. ARGUMENT

A. The Commission Previously Has Held That Discrimination On The Basis Of Sexual Orientation Can Violate Protected Human Rights.

In 1999, the Commission deemed admissible a case, *Marta Lucía Álvarez Giraldo* (Colombia), Case No. 11.656, Inter-Am. C.H.R., Report No. 71/99 (1999) (“*Giraldo*”) (*see* Tab 1), brought by a lesbian prisoner in Colombia who had been denied the right to have conjugal visits with her life partner.⁴ 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.”⁵ Colombia acknowledged that the petitioner was “being treated in an inhuman[e] and discriminatory manner,” but stated that “the prohibition [on homosexuality] is based upon a deeply rooted intolerance in Latin American culture of homosexual practice.”⁶

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 American Convention.⁷ Ms. Atala seeks relief under the same provision. Like the petitioner in *Giraldo*, Ms. Atala has been subjected to disparate treatment by a member state based on her sexual orientation. Indeed, Ms. Atala’s situation presents an even stronger case on the merits, because the Chilean Supreme Court’s Decision affects not only Ms. Atala’s rights, but also those of her young children.

⁴ Attached for the Commission’s convenience are copies of a few select authorities cited herein.

⁵ *Giraldo* ¶ 2.

⁶ *Id.* ¶ 12.

⁷ *Id.* ¶ 21.

Consistent with the *Giraldo* ruling and the cases discussed in the following section, the Commission should rule in Ms. Atala's favor.

B. The Chilean Supreme Court's Decision Is Contrary To The Weight Of International Authority.

1. The European Court of Human Rights And The United Nations Human Rights Committee Have Held That Sexual Orientation Discrimination Violates Human Rights.

The European Court of Human Rights (the "European Court") and the United Nations Human Rights Committee (the "U.N. Committee") have held that discrimination on the basis of sexual orientation violates human rights. These cases are instructive.

In particular, the European Court rejected a member state's attempt to deny a parent custody of a child based on unfounded stereotypes about the parent's sexual orientation. In *Salgueiro da Silva Mouta v. Portugal*, [1999] Eur. Ct. H.R. 176 ("*Salgueiro*") (see Tab 2), the European Court held that a Portuguese appellate court violated Article 8 (respect for private and family life) and Article 14 (prohibition against discrimination) of the European Convention of Human Rights by denying the custody of his children to a father who was living with his same-sex partner.

In *Salgueiro*, a lower court originally had awarded custody to the father, who was gay. On appeal, the reviewing court did not question the father's love or his ability to care for his daughter and acknowledged that society is becoming more tolerant of gay relationships. Nonetheless, purporting to base its decision on the paramount interests of the child, the Portuguese appellate court gave custody of the children to the mother, stating that the father could not give them a "traditional" home environment that would conform to the "dominant [family] model" in Portuguese society.⁸ Portugal defended this ruling by arguing that member

⁸ [1999] Eur. Ct. H.R. 176 at 8.

states “enjoyed a wide margin of appreciation” with regard to questions of parental responsibility and that national courts were better suited than an international court to examine the best interests of a child.⁹

The European Court rejected Portugal’s arguments. It held that, with regard to protected rights and freedoms, it must examine whether its member states treated similarly situated persons differently and, if so, whether the difference was justified.¹⁰ In finding that a human rights violation had occurred, the European Court concluded that the Portuguese decision was improperly based on the father’s sexual orientation, “a distinction which is not acceptable under the Convention” and for which there was no reasonable justification.¹¹

The European Court also has curtailed other governmental attempts to justify discrimination against gays and lesbians. The European Court has rejected the disparate treatment of gays and lesbians in a case involving succession to tenancy. In *Karner*, the Austrian government attempted to justify discrimination on the basis of sexual orientation by arguing that it protected “the traditional family.”¹² The European Court noted, however, 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.” It 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.¹³

⁹ *Id.* at 10.

¹⁰ *Id.* at 11; *see also Karner v. Austria*, [2003] Eur. Ct. H.R. 395 at 7 (“*Karner*”) (margin of appreciation afforded to member states is narrow where there is a difference in treatment based on sexual orientation).

¹¹ *Salgueiro*, [1999] Eur. Ct. H.R. at 12-15.

¹² [2003] Eur. Ct. H.R. 395 at 6.

¹³ *Id.* at 7.

In addition, the European Court has held that discharging gays from the military based on their sexual orientation violates Article 8 of the European Convention of Human Rights.¹⁴ The British government attempted to justify its discriminatory policy on the basis of the “unique nature” of the armed forces and their intimate connection to national security.¹⁵ The European Court, however, 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.”¹⁶

The U.N. Committee also has rejected discrimination based on sexual orientation. The U.N. Committee has held that both Australia’s refusal to grant pension benefits to the same-sex partner of a military veteran and Tasmania’s criminalization of certain forms of sexual contact between men violate the International Covenant on Civil and Political Rights.¹⁷

In *Young v. Australia*, the petitioner challenged the Australian Repatriation Commission’s denial of his request for benefits based on his status as a dependent of “Mr. C,” a war veteran with whom Young had a long-term relationship and for whom Young had cared during the last years of Mr. C’s life. The U.N. Committee rejected Australia’s arguments that Young had not established that Mr. C’s death was “war-caused” or that a heterosexual partner

¹⁴ See *Lustig-Prean & Beckett v. United Kingdom*, [1999] Eur. Ct. H.R. 31417/96; *Smith & Grady v. United Kingdom*, [1999] Eur. Ct. H.R. 33985/96.

¹⁵ *Smith & Grady*, [1999] Eur. Ct. H.R. 33985/96 ¶ 85.

¹⁶ *Id.* ¶¶ 89-90.

¹⁷ See U.N. Comm. On Human Rights, *Young v. Australia*, Comm. No. 941/2000 (Sept. 18, 2003) (“*Young*”), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument); *Toonen v. Australia*, Comm. No. 488/1992 (Mar. 31, 1994) (“*Toonen*”), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/22a00bcd1320c9c80256724005e60d5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/22a00bcd1320c9c80256724005e60d5?Opendocument). Article 26 of the International Covenant on Civil and Political Rights provides “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” United Nations Int’l Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 6 I.L.M. 360, 375.

would have been entitled to pension benefits. The U.N. Committee held that Australia “provide[d] no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and [held that] no evidence which would point to the existence of factors justifying such a distinction ha[d] been advanced.”¹⁸

In *Toonen v. Australia*, a gay-rights activist challenged a Tasmanian law criminalizing various forms of sexual contact between men, arguing that the law did not permit him to be open about his sexuality, and that the law contributed to a “campaign of official and unofficial hatred against homosexuals and lesbians.”¹⁹ Tasmania argued that the law was justified because, among other things, it was intended to protect Tasmanian citizens from the spread of HIV/AIDS and because the law reflected the moral position of a significant portion of the Tasmanian populace.²⁰ The U.N. Committee rejected these arguments, holding that these criminal laws were not “essential to the protection of morals in Tasmania” and that the laws arbitrarily interfered with the petitioner’s rights under article 17 of the International Covenant on Civil and Political Rights, which provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”²¹

As this body of law demonstrates, and as discussed below, it was improper for the Chilean Supreme Court to use the purported prejudices of its country’s citizenry to justify discriminatory policies. There is by no means a uniform bias among Chileans against gays and lesbians. Indeed, two lower courts had deemed Ms. Atala an appropriate custodial parent, and

¹⁸ *Young* ¶ 10.4.

¹⁹ *Toonen* ¶ 2.6.

²⁰ *Id.* ¶¶ 6.5, 7.1, 8.6.

²¹ United Nations Int’l Covenant on Civil and Political Rights art. 17, 6 I.L.M. at 373.

the Chilean Supreme Court itself was closely divided on this issue, deciding against Ms. Atala by the narrowest of margins. Furthermore, to justify discrimination on the basis of individual prejudice would render the protections of the American Convention meaningless. The very purpose of the American Convention and this Commission is to protect those “essential rights [that] are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.”²² For the same reasoning applied by the European Court and the U.N. Committee in the above cases, the Commission should remedy the Chilean Supreme Court’s wrong and hold that the lower courts correctly awarded custody of the children to Ms. Atala.

2. Courts In Other Countries Have Found That Giving Custody Of A Child To A Gay Or Lesbian Parent Is Compatible With A Child’s Best Interests.

Many other courts around the world have rejected the very same stereotypes that the Chilean Supreme Court used in its Decision. Moreover, many courts have given gay and lesbian parents custody of children, finding that doing so would be in the best interests of the children.

One of the most thorough opinions dissecting stereotypes of gay and lesbian parents is a 1995 decision from the Ontario Court (Provincial Division) of Canada, *K. (Re)*, 23 O.R.3d 679 (Ont. Ct. 1995) (“*K. (Re)*”). In that case, 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.²³ Canada’s Child and Family Services Act permitted applications for adoption by individuals regardless of their sexual orientation, and it also permitted joint applications by

²² Organization of Am. States, Am. Convention on Human Rights Preamble.

²³ *Id.* at 681.

spouses. The Act, however, defined “spouse” as a person of the “opposite sex.”²⁴ The question before the Ontario court was whether the lesbian couples, who were not technically “spouses,” should be allowed to apply for joint adoption.²⁵ In analyzing this question, the court stated that the “paramount and overriding objective of the legislation” was “to promote the best interests, protection and well-being of the children.”²⁶

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.²⁷ Specifically, the court debunked the same stereotypes that the Chilean Supreme Court used to justify the Decision in Ms. Atala’s case. The Ontario court specifically stated the following:

- “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.”²⁸
- “[T]here is no evidence to support the suggestion that most gay men and lesbians have unstable or dysfunctional relationships.”²⁹
- “[T]here is no reason to believe the sexual orientation of the parents will be an indicator of the sexual orientation of the children in their care.”³⁰
- “[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”³¹

²⁴ *Id.* at 682-83.

²⁵ *Id.* at 683.

²⁶ *Id.* at 706.

²⁷ *Id.* at 689.

²⁸ *Id.* at 691.

²⁹ *Id.*

³⁰ *Id.* at 692.

³¹ *Id.* at 693.

The Ontario court further 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.”³² Rather, a “multiplicity of pathways through which healthy psychological development can take place” exists in a “diversity of home environments.”³³ 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.”³⁴

The reasoning in *K. (Re)* has been applied in Canada in a cross-cultural context. In *Boots v. Sharrow*, No. 03-66, 2004 A.C.W.S.J. 696 (Ont. S.C. 2004), a case involving a custody battle between two members of the native Mohawk tribe, the Ontario Superior Court of Justice in Canada awarded a lesbian mother custody of her children. This decision relied on the social science findings analyzed in *K. (Re)*.³⁵ According to the court, past precedent that balanced the law with social science findings supported the conclusion that “same sex preference of a parent is merely one of the many factors which a court should consider when determining the best interests of children.”³⁶

Courts in the United Kingdom, New Zealand, Australia and South Africa also have reached results similar to these Canadian cases. In *In re W. (A Minor)*, [1998] Fam. 58 (U.K. Fam. 1997), a court in the United Kingdom granted a lesbian, who was in a same-sex relationship, the right to adopt a child over the biological mother’s objections. In concluding that

³² *Id.* at 690.

³³ *Id.* at 691 (citation omitted).

³⁴ *Id.* at 707.

³⁵ *Boots*, 2004 A.C.W.S.J. 696 ¶¶ 105-108.

³⁶ *Id.* ¶ 136.

the adoption law at issue permitted lesbians to adopt, the court held 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 consideration to the need to safeguard and promote the welfare of the child throughout his childhood.”³⁷ In *B. v. P.*, [1992] N.Z.F.L.R. 545 (N.Z.D.C.), a New Zealand court granted a lesbian mother custody of her biological son over the protests of the deceased father’s family. The court was not persuaded by arguments that the child might be the subject of taunts or that he would lack a male role model.³⁸ In *In the Marriage of C and JA Doyle*, [1992] 15 Fam. L.R. 274 (Austl.), an Australian court granted a gay father custody of his children despite his ex-wife’s objections. In granting the father custody, the court applied a “nexus approach,” for which “[t]he parent’s lifestyle is of no relevance without a consideration of its consequences on the child’s well-being.”³⁹

In *Du Toit v. Minister of Welfare and Population Development*, 2002 (10) BCLR 1006 (CC) (S. Afr.), two women in a long-standing lesbian 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. The couple challenged the law on several grounds, maintaining 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. The South African Constitution Court sided with the couple on every ground, determining it necessary to take the drastic step of revising the Child Care Act without first giving the legislature the opportunity to do so. In reaching its decision, the court ruled:

[T]he applicants constitute a stable, loving and happy family. Yet the first applicant’s status as a parent of the siblings cannot be

³⁷ [1998] Fam. 58 at 6.

³⁸ [1992] N.Z.F.L.R. 545 at 2-3.

³⁹ [1992] 15 Fam. L.R. 274 at 3.

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.⁴⁰

In custody cases in the United States, a majority of states have adopted the “nexus test,” a standard that rejects the discriminatory presumption that a gay parent is unfit, and instead requires a case-by-case determination of whether a gay or lesbian parent’s conduct has caused harm to the child.⁴¹ Thus, for example, in applying the nexus test, the Supreme Court of Alaska found “sexual preference discrimination” in lower court decisions that denied a lesbian mother custody and that referred repeatedly to the fact that she was a lesbian but presented no evidence that this fact had affected or was “likely to affect the child adversely.”⁴²

3. Latin American Courts Have Granted Custody Of Children To Gays And Lesbians, And Latin American Institutions Have Started Addressing The Needs Of Diverse Families.

Notwithstanding societal and judicial prejudices, there are, of course, gays and lesbians raising families in Latin America, just as they are elsewhere.⁴³ Courts and other institutions in Latin America are now recognizing these relationships.

Courts in Latin America have granted gays and lesbians custody of their children and recognized their right to adopt. In 2003, an Argentinean court granted a gay father custody of his two children.⁴⁴ The court held that consideration of the father’s sexual orientation in its custody

⁴⁰ *Id.* ¶ 29 (internal footnote omitted).

⁴¹ Jennifer Naeger, *Note: And Then There Were None: The Repeal of Sodomy Laws After Lawrence v. Texas and Its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 St. John’s L. Rev. 397, 415 (2004) (citations omitted).

⁴² *S.N.E. v. R.L.B.*, 699 P.2d 875, 878, 879 (Alaska 1985).

⁴³ See Gabriela Granados, *Las Otras Familias*, <http://www.rompiendoelsilencio.cl/reportenero04.htm> (last visited January 10, 2006) (discussing study of gay and lesbian families in Mexico); see also www.lasotrasfamilias.cl (last visited January 10, 2006) (website resource for Chilean lesbians).

⁴⁴ *Juzgado de Menores de Cuarta Nominación de Cordoba*, No. 473 (Jurisprudencia de Córdoba, Arg. Aug. 6, 2003), http://www.graciamedina.com/archivos/auni/Cursos/Jurisprudencia_16_001.pdf (last visited Jan. 16, 2006) (see Tab 3).

determination would be unacceptable discrimination. In fact, 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.

In January 2002, a family court in Rio de Janeiro, Brazil, granted custody of an eight-year-old child to Maria Eugenia Vieira, the lesbian partner of late rock star Cassia Eller. Eller died in December 2001, and the child's biological father had passed away earlier.⁴⁵ More recently, in July 2005, a court approved a gay couple in Brazil as adoptive parents.⁴⁶

Latin American non-judicial institutions have also taken significant steps toward recognizing non-traditional families. 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.⁴⁷ 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."⁴⁸

The Chilean Supreme Court's decision to deny Ms. Atala custody of her children stands in stark contrast to these other decisions and recent reforms.

C. Well-Established Empirical Research Contradicts The Chilean Supreme Court's Negative Stereotypes Of Gay And Lesbian Parents.

The Chilean Supreme Court's decision to deprive Ms. Atala of custody of her children was not based on individualized findings regarding Ms. Atala. Rather, the court based its decision on several unfounded generalizations about how a lesbian's sexual orientation *might*

⁴⁵ Mario Osava, *Rights-Brazil: Courts Start to Recognize Same-Sex Couples*, IPS-Inter Press Service, Jan. 14, 2002.

⁴⁶ *Gay Couple in Brazil Begin Landmark Search to Adopt Child*, BBC Worldwide Monitoring, July 8, 2005.

⁴⁷ 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>.

⁴⁸ 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>.

affect her children. Far from being unique to Ms. Atala’s case, these speculative assumptions commonly surface in custody cases involving gay and lesbian parents. Nearly thirty years of research, however, has *disproven* the misconception that children raised by gay or lesbian parents suffer any emotional or developmental harm as a consequence of their parents’ sexual orientation. Instead, the research reveals that there are no significant differences between the psychological and emotional development of children raised by heterosexual and gay parents or between the parenting skills of heterosexual and gay parents. A comprehensive review in 2001 demonstrated that “*every* relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children’s mental health or social adjustment.”⁴⁹

The Chilean Supreme Court ignored this research and, instead, speculated that Ms. Atala’s children may suffer impaired psychological and emotional development, gender identity confusion, and social isolation and discrimination.⁵⁰ As detailed below, reputable research has proven each of these stereotypical assumptions to be false.

1. Being Raised In A Gay Or Lesbian Household Does Not Harm A Child’s Psychological Development.

The Chilean Supreme Court speculated that Ms. Atala’s relationship with her same-sex partner “could” negatively affect the well-being and the psychological and emotional

⁴⁹ Judith Stacey & Timothy J. Biblarz, (*How*) *Does Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159, 176 (2001) (emphasis added).

⁵⁰ Decision ¶¶ 17-18. Although the Supreme Court speculated repeatedly about negative effects that “could” occur, it made only brief mention of one potentially negative incident in the record: apparently, visits from friends of the children to their home had diminished. *Id.* ¶ 15. The court did not explain how the decrease in visits could be attributed to the children living with Ms. Atala or to what extent, if any, this decrease prevented the children from other interactions with their friends, let alone how it rose to the level of “qualifying cause” to deprive Ms. Atala of custody. The Supreme Court also concluded that testimony from maids “indicate[d]” the children were confused about their mother’s sexuality. *Id.* Whatever confusion the children may have about their mother will only be intensified, not remedied, by taking them away from Ms. Atala under the pretense that she is an unfit mother.

development of the children.⁵¹ Studies have found no differences between children raised in heterosexual and gay households in the areas of independence, ego functions, sociability, conduct problems, moral maturity or intelligence.⁵² Instead, on key psychological development outcomes, children of heterosexual and gay parents are comparable.⁵³ In fact, two researchers who reviewed the scientific literature concluded that a:

striking feature of the research on lesbian mothers, gay fathers, and their children . . . is how similar the groups of gay and lesbian parents and their children are to the heterosexual parents and their children that were included in the studies.⁵⁴

Children of gay parents do not differ, in any statistically significant way, from those raised by heterosexual parents in areas such as “I.Q., favorite television programs, the sex of favorite television characters, peer group relationships, favorite games or toys, gender identity, sex role behavior, sexual orientation, and self-esteem scores.”⁵⁵ Researchers have also found no

⁵¹ Decision ¶ 17.

⁵² Charlotte Patterson, *Children of Lesbian and Gay Parents*, 63 *Child Dev.* 1025, 1032-33 (1992) (see Tab 4) (citing Alison Steckel, *Separation-Individuation in Children of Lesbian and Heterosexual Couples* (1985) (unpublished doctoral dissertation, The Wright Institute Graduate School), and Richard Green *et al.*, *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 *Archives of Sexual Behav.* 167 (1986)); see also 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. Reproductive & Infant Psych.* 237, 249 (2002); 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); 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); Raymond Chan *et al.*, *Psychological Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 *Child Dev.* 443 (1998).

⁵³ Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 *J. Dev. & Behav. Pediatrics* 224 (2005).

⁵⁴ G. Dorsey Green & Frederick Bozett, *Lesbian Mothers and Gay Fathers*, in *Homosexuality: Research Implications for Public Policy*, at 197, 213 (John C. Gonsiorek & James Weinrich eds., 1991).

⁵⁵ D.L. Hawley, *Custody and Visitation of Children by Gay and Lesbian Parents*, 64 *Am. Jur. Proof of Facts* 3d 403, § 7 (2005); see also Joseph R. Price, *Bottoms v. Bottoms III: Visitation Restrictions and Sexual Orientation*, 5 *Wm. & Mary Bill Rts. J.* 643, 648 (1997) (since the 1980s, there has been a surge in publication of academic research finding no developmental difference between children of heterosexual parents and children of gay 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*, at 131, 151-52 (A.E. Gottfried and A.W. Gottfried eds., 1994) (there is no empirical evidence that children of lesbian mothers suffer any detrimental effects, and legal decision-makers should not focus on the sexual orientation of a parent or guardian

differences in the prevalence of emotional or behavioral problems such as sociability, emotional difficulty, hyperactivity or conduct problems.⁵⁶ Assessing adolescent responses to moral dilemmas, research has shown that children raised in gay and heterosexual households display no differences in moral maturity.⁵⁷ A study of children raised by divorced mothers in two-adult households revealed no difference in the levels of self-esteem of adolescents who lived with a lesbian mother and her same-sex partner and adolescents who lived with a heterosexual mother and her opposite-sex partner.⁵⁸

The Chilean Supreme Court's ruling may also encourage gay parents to hide their sexual orientation to maintain custody of their children. This can have a detrimental effect on children. Studies show that the healthiest parental relationships for children in gay and lesbian households are those where the parent can be open about his or her sexuality.⁵⁹ A recent study of children raised by gay parents in Mexico reached this same conclusion, finding that if the parent is comfortable with his or her sexual orientation, the child benefits because he or she does not feel ashamed.⁶⁰ A professor of psychology who conducted a landmark study of gay and lesbian families in Spain and who testified before the Spanish senate regarding the country's gay marriage laws also confirmed that it is always better for children of gay parents to grow up

when making custody decisions); 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.").

⁵⁶ Susan Golombok *et al.*, *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 *J. Child Psychol. & Psychiatry* 551 (1983).

⁵⁷ Patterson, *supra* note 52, at 1033.

⁵⁸ Wainright, *supra* note 52, at 1895 (citing Sharon Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in *Homosexuality and the Family*, at 123, 132-35 (Frederick W. Bozett ed., 1989)).

⁵⁹ See, e.g., Hawley, *supra* note 55, at § 7 ("[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.").

⁶⁰ Granados, *supra* note 43.

knowing their parents are gay rather than to feel later that they were misled.⁶¹ A court's preference for "discreet" lesbians and gay men who shelter their children from all knowledge of their sexual identity 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" and thus "ensure[s] the isolation of the children."⁶² It is also counter to the U.N. Declaration of the Rights of the Child which provides that each "child shall be protected from practices which may foster racial, religious and any other form of discrimination."⁶³

2. Studies Prove That Parent's Sexual Orientation Does Not Affect Child's Gender Identity Or Sexual Orientation.

Empirical research also disproves the Chilean Supreme Court's assumption that being raised by a lesbian mother affects the development of a child's gender identity.⁶⁴ Studies of gender identity patterns have uncovered no differences in children raised by gay or heterosexual parents.⁶⁵ Nor have studies found any differences in gender role behaviors as evidenced in toy preferences, activities, interests, or occupational choices.⁶⁶ A study of adult children of lesbian mothers also confirms that there are no differences in their gender role preferences.⁶⁷ As a panel

⁶¹ Interview with Maria del Mar Gonzalez, <http://www.rompiendoelsilencio.cl/entrestudio.htm> (last visited Jan. 10, 2006).

⁶² Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbians and Gay Parents and Their Children*, 71 Ind. L.J. 623, 647-49 (1995-96).

⁶³ U.N. Comm. on Human Rights, Decl. of the Rights of the Child, G.A. Res. 1386 (XIV) principle 10 (Nov. 20, 1959).

⁶⁴ Decision ¶ 17. This is an assumption frequently relied on by courts in denying custody to gay and lesbian parents. See Hawley, *supra* note 55, at § 5 (noting fear that children will become gay or lesbian or will not have "normal" gender and sex role development as some of the misconceptions and untruths used to deny custody to gay or lesbian parents); 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) (noting that "[t]he position that homosexual and lesbian parents will influence their children to develop same[-]sex orientation" is often raised in custody cases).

⁶⁵ Patterson, *supra* note 52, at 1030 (citing Martha Kirkpatrick *et al.*, *Lesbian Mothers and Their Children: A Comparative Survey*, 51 Am. J. Orthopsychiatry 545 (1981)).

⁶⁶ *Id.* (citing Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am. J. Psychiatry 692 (1978)).

⁶⁷ Wainright, *supra* note 52, at 1887.

of the American Academy of Pediatrics concluded, “[n]one of the more than 300 children studied to date have shown evidence of gender identity confusion, wished to be the other sex, or consistently engaged in cross-gender behavior.”⁶⁸

Research also demonstrates that children of gay or lesbian parents are no more likely to be gay or lesbian than children of heterosexual parents.⁶⁹ Studies confirm that sexual orientation “is developed independent of one’s parents and should not be a factor that courts weigh in custody determinations.”⁷⁰

In any event, the assumption manifested in the Decision that lesbian parents will raise gay and lesbian children “betrays a projection of judicial fear . . . of lesbians as contagious or converting.”⁷¹ At base, it also reflects the invidiousness of the Decision — the idea that for an individual to be a gay or lesbian is a tragedy which must be prevented at all costs. This presumption undermines the very protections that Article 1.1 seeks to protect.

3. Studies Show That Children Raised By Gay And Lesbian Parents Are No More Affected By Stigma Than Other Children.

The Chilean Supreme Court erroneously relied on the potential for social ostracism as a basis for its Decision.⁷² This fear is premised on “the presumption that the children of gay

⁶⁸ Ellen C. Perrin & Committee on Psychological Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (2002).

⁶⁹ Patterson, *supra* note 52, at 1031; Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 *Law & Sexuality* 133, 157-61 (1991).

⁷⁰ Stone, *supra* note 64, at 724; *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 55, at 387 (studies have proven unfounded 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) (“[c]ourts 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”).

⁷¹ Jenni Millbank, *Lesbians, Child Custody, and the Long Lingered Gaze of the Law*, in *Challenging the Public/Private Divide: Feminism, Law and Public Policy*, 280, 288 (Susan B. Boyd ed., 1997).

⁷² Decision ¶ 18.

parents will be stigmatized by societal indignation of homosexuality.”⁷³ Like the other assumptions in the Decision, “[t]he assumption that the child with a homosexual mother will be stigmatized . . . is based on anticipated fear which, in many cases, goes unverified.”⁷⁴ Judges often exaggerate the harm of possible childhood teasing, 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.”⁷⁵

The Chilean Supreme Court’s conclusion is refuted by years of research. Studies comparing gay and heterosexual families uncovered “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.”⁷⁶ Moreover, children raised in gay families exhibit no differences in their perceptions of their popularity or in the quality of their friendships with peers.⁷⁷

The “social stigma” presumption is a particularly inappropriate basis for custody decisions because it “is not linked to parental fitness or the parent-child relationship.”⁷⁸ In other words, by making presumptions about social stigma, the Chilean Supreme Court made assumptions about how persons *other than* Ms. Atala would treat her children.

⁷³ Felicia Meyers, *Gay Custody and Adoption: An Unequal Application of the Law*, 14 Whittier L. Rev. 839, 843-44 (1993).

⁷⁴ Kelly Causey and Candan Duran-Aydintug, *Tendency to Stigmatize Lesbian Mothers in Custody Cases*, 28 J. Divorce & Remarriage 171, 173 (1997).

⁷⁵ *Id.*

⁷⁶ Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families from Infancy*, 45 J. Child Psychol. & Psychiatry 1407, 1416 (2004); *see also* Bridget Fitzgerald, *Children of Lesbian and Gay Parents: A Review of the Literature*, 29 Marriage & Family R. 57, 65 (1999).

⁷⁷ Golombok *et al.*, *supra* note 56.

⁷⁸ Causey & Duran-Aydintug, *supra* note 74.

In addition, article 2 of the United Nations Convention on the Rights of the Child, ratified by Chile, protects children from discrimination based on their parents' status.⁷⁹ The Convention provides that "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."⁸⁰ The Chilean Supreme Court's decision to remove Ms. Atala's children from her custody encourages discrimination that this article seeks to eradicate.

4. Lesbian Mothers' Parenting Skills Are Equivalent To Those Of Heterosexual Mothers.

Empirical research refutes the Supreme Court's assumption that gays and lesbians are unfit parents:

The research suggests that lesbian and gay parents have parenting skills that are at least equivalent to those of heterosexual parents. Studies of lesbian mothers illustrate a remarkable absence of distinguishing features between the life-styles, child-rearing practices, and general demographic data of lesbian mothers and heterosexual mothers.⁸¹

Lesbian and heterosexual mothers have proven to be equally good parents, have similar attitudes toward child rearing and display no differences in self-esteem and psychological adjustment.⁸²

⁷⁹ U.N. Comm. on Human Rights, The Convention on the Rights of the Child, G.A. Res. 44/25, art. 2, 28 I.L.M. 1456 (Sept. 2, 1990) ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.").

⁸⁰ *Id.*

⁸¹ Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 Duke J. Gender L. & Pol'y 207, 211 (1995) (citation omitted).

⁸² Katrien Vanfraussen *et al.*, *Family Functioning in Lesbian Families Created by Donor Insemination*, 73 Am. J. Orthopsychology 78, 88(2003); David K. Flaks *et al.*, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 Dev. Psychol. 105, 111 (1995); Green, *supra* note 52; Eileen S. Shavelson *et al.*, *Lesbian Women's Perceptions of Their Parent-Child Relationships*, 5 J. Homosexuality 205-15 (1980); Mildred D. Pagelow, *Heterosexual and Lesbian Single Mothers: A Comparison of Problems, Coping, and Solutions*, 5 J. Homosexuality 189 (1980); Sally L. Kveskin & Alicia S. Cook, *Heterosexual and*

The research has refuted the stereotype that lesbian mothers are not as child-oriented or maternal as heterosexual mothers.⁸³ A study of children’s play narratives showed that children from gay and heterosexual families represented their mothers as equally positive and having similar levels of discipline.⁸⁴

The Supreme Court specifically faulted Ms. Atala for purportedly putting her “own interests first” in choosing to live with her lesbian partner in the same home in which she was raising her daughters.⁸⁵ As discussed above, however, there was no evidence that Ms. Atala’s relationship with Ms. Acevedo actually, or even potentially, harmed her children. To the contrary, the evidence showed that Ms. Atala’s children had a positive relationship with Ms. Acevedo and wanted to live with Ms. Atala and Ms. Acevedo.

The Supreme Court’s criticism of Ms. Atala’s relationship with Ms. Acevedo is simply another example of the discriminatory nature of the Decision. The Supreme Court’s criticism is unfair for several reasons.⁸⁶ First, the assumption that “mothers will be selfless, never putting their needs above those of other family members, especially children . . . ignores the interrelationship between a parent’s needs being met and her ability to parent effectively.”⁸⁷ Studies have confirmed that a lesbian parent’s relationship with her partner can provide a

Homosexual Mothers’ Self-Described Sex-Role Behavior and Ideal Sex-Role Behavior in Children, 4 Nat’l J. Sexual Orientation L. 967 (1982).

⁸³ 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 Dev. Psychol. 20 (2003).

⁸⁴ Perry, *supra* note 52.

⁸⁵ Decision ¶ 16.

⁸⁶ Susan B. Boyd, *Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?*, 15 Can. J. Fam. L. 131, 139 (1998); *see also* Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 Am. Psychol. 941, 942 (1989) (courts commonly make erroneous assumption about lesbians being less maternal).

⁸⁷ Boyd, *supra* note 86, at 139.

“healthy, happy, and stable family unit.”⁸⁸ Where a mother’s conduct does not at all harm her children, denying her the right to have intimate, private relationships is simply punitive. Furthermore, this assumption unfairly discriminates against lesbian mothers when similar restrictions are not imposed on heterosexual men and women.⁸⁹ The Chilean Supreme Court’s Decision ignored all of these considerations.

D. The Chilean Supreme Court’s Decision Is Based On Improper Bias, Not The Best Interests Of Ms. Atala’s Children.

The Chilean Supreme Court purported to base its Decision on the “best interests of the children.”⁹⁰ The “best interest” standard is present both in the Chilean Civil Code (Articles 22, 225, 242) and in the International Convention of Children’s Rights (Articles 3, 9), which has been ratified by Chile. It is also commonly used by courts throughout the world in making custody decisions. *See, e.g., supra* Section IV.B.

As discussed above, the Chilean Supreme Court based its Decision not on specific findings of fact, but rather on unsupported assumptions. As the Court of Villarrica held, there was no evidence that Ms. Atala’s sexual orientation or cohabitation with another woman had harmed the children. In fact, the lower court relied on reports of psychologists and social workers that supported this finding.⁹¹ The Chilean Supreme Court specifically criticized the

⁸⁸ *Adoption of Tammy*, 619 N.E.2d 315, 317 (Mass. 1993); *see also, e.g., In the Matter of Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (child raised by lesbian couple had “a rich family life” and “a family structure in which to grow and flourish”).

⁸⁹ *See Shapiro, supra* note 62, at 648 (courts’ preference for “discreet” homosexual parents leads them “to penalize lesbian and gay parents for conduct that would be entirely unremarkable for heterosexual parents” such that any display of affection may be basis to deny lesbian mother or gay father custody, with no similar results following for heterosexual parents); *see also M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 966-67 (Sup. Ct. Suffolk County 1986) (noting that no adverse impact was suggested from heterosexual mother’s cohabitation with boyfriend); *In re W.*, [1998] Fam. 58 ¶ 7 (argument that it was contrary to public policy for cohabitating homosexual couple to adopt necessarily raises question whether similar policy would be applied to cohabitating heterosexual couple).

⁹⁰ Decision ¶¶ 9-10.

⁹¹ Decision ¶ 15.

court's reliance on these sources, however, favoring instead the use of speculation and bias.⁹² To base custody decisions on perceived harms is to reinforce derogatory stereotypes and place a judicial seal of approval on the very homophobic prejudice that creates and fosters a hostile environment in the first instance. The Chilean Supreme Court's Decision runs counter to the children's best interests as articulated by the lower court decisions and must, accordingly, not be permitted to stand.

In an analogous context, the United States Supreme Court refused to treat social prejudices and potential condemnation resulting from a mother's inter-racial marriage as grounds for denial of custody.⁹³ The Court noted 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."⁹⁴

Denying a lesbian mother custody because of societal homophobia is directly analogous to denying a parent in an inter-racial marriage custody of his or her children due to racism. An increasing number of courts recognize that "it is impermissible to rely on any real or imagined social stigma" attaching to gays and lesbians in denying them custody.⁹⁵ "Of overriding importance 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

⁹² *Id.* ¶¶ 14-18.

⁹³ *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 person of different race).

⁹⁴ *Id.* at 433.

⁹⁵ *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.").

community's disapproval of their [parent]."⁹⁶ Courts serve the children's best interests by "recogniz[ing] the reality of children's lives, however unusual or complex."⁹⁷ The failure to do so "perpetuate[s] the fiction of family homogeneity at the expense of the children whose reality does not fit this form."⁹⁸

In short, the Chilean Supreme Court's discriminatory decision works a grave injustice not only against Ms. Atala but also against her children, whose best interests are unquestionably paramount.

As eloquently summarized by a court nearly thirty years ago in granting custody to a lesbian mother:

[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

⁹⁶ *M.P. v. S.P.*, 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979).

⁹⁷ *Blew*, 617 A.2d at 36.

⁹⁸ *Id.*; see also *Diálogo Abierto: Comentario a los Artículos Publicados en el Boletín Informativo (No. 2, 2002 y No. 4, 2001)*, Boletín Informativo de la Sociedad Argentina de Pediatría, Año XIX, 2002, No. 3 (recognizing diversity of family structures caring for children).

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.⁹⁹

V. CONCLUSION

In deciding what custodial arrangement would be in the best interests of a child, a court should consider many different factors. The Supreme Court of Chile went too far, however, when it applied its own discriminatory beliefs to this analysis. The Court's consideration of broad and unfounded generalizations about Ms. Atala's sexual orientation violated not only her rights under the American Convention but also those of her children. If allowed to stand unchallenged, the Supreme Court's ruling would help foster, rather than eradicate, discrimination against gays and lesbians in the member states. For the foregoing reasons, the Commission should rule in favor of Ms. Atala.

Date: January 19, 2006

MORRISON & FOERSTER LLP

By: _____

Dorothy L. Fernandez
Margaret L. Wu
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Charles E. Tebbe III
Rachel M. Wertheimer
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104

Attorneys for Amici Curiae

⁹⁹ *M.P.*, 404 A.2d at 1263.