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**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**SAN JOSE, COSTA RICA**

**SERAFINA CONEJO GALLO AND ADRIANA TIMOR**

***Petitioner***

**V**

**THE STATE OF ELIZABETIA**

***Respondent***

**MEMORIAL FOR**

**THE REPRESENTATIVES OF THE VICTIMS**

**­**

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# STATEMENT OF FACTS

Serafina Conejo Gallo, born a biological male Serafin and a descendant of the Granti people,[[1]](#footnote-1) faced a tumultuous struggle in the path towards recognition of her gender identity in the State of Elizabetia. Though Elizabetia currently experiences political stability, it has a history of civil unrest.[[2]](#footnote-2) During colonial times, the Granti, an enslaved indigenous population, [[3]](#footnote-3)worshipped a supreme god, Granti’Itna, who was born a male and died a female.[[4]](#footnote-4) They considered Granti’Ina as the epitome of perfection, and was exalted in ceremonies involving men and women cross-dressing as their opposite sex.[[5]](#footnote-5) The colonial elites attempted to completely eradicate these practices over several centuries, considering them “barbaric and immoral.”[[6]](#footnote-6) Despite this, some elements of Granti beliefs and idiosyncrasies were assimilated into Elizabetian society.[[7]](#footnote-7) However, there are still instances of Granti descendants living in servitude.[[8]](#footnote-8)

In her formative years, as Serafin, she was repeatedly reprimanded by school authorities due to outward feminine behavior.[[9]](#footnote-9) This school was under the patronage of a descendant of the colonial elites,[[10]](#footnote-10) who agreed Serafin was hopelessly destined to be homosexual under the care of his Granti parents.[[11]](#footnote-11) This culminated in him being removed from his parents, who were rebuked for “failing to let go of the barbaric values of Granti culture.”[[12]](#footnote-12) Even after his removal, he continued to willfully explore his feminine behaviors and expressions. During this period of confinement, he was raped several times by custodians and detainees.[[13]](#footnote-13) After escaping, Serafin obtained operations to alter his body, and insisted others view him as a woman, Serafina.[[14]](#footnote-14)

After “endless… humiliating moments” of being associated with her previous male gender, she worked towards attaining official legal recognition of her female gender identity.[[15]](#footnote-15) She filed administrative requests and multiple petitions for a constitutional remedy, only to be rejected in all of her domestic judicial recourses. It was only after the IACHR declared that Elizabetia violated the ACHR, that Elizabetia passed the Gender Identity Act. Serafina was the first trans woman in Elizabetia to obtain legal recognition of her gender identity in 2007,[[16]](#footnote-16) over two centuries after the State gained independence.

Elizabetia ratified the ACHR and all other Inter-American human rights instruments without any reservations, accepting the contentious jurisdiction of the IACtHR.[[17]](#footnote-17) The Elizabetian Constitution, adopted in 1960, enshrines the right to equality and nondiscrimination and protects plurality of religious beliefs.[[18]](#footnote-18) However, marriage under Article 396 of the State Civil Code and the concept of family in Article 85 of the Constitution is solely restricted to heterosexual couples.[[19]](#footnote-19) Also, the provision on domestic partnerships, Article 406 of the State Civil Code, bestows less substantive rights and benefits on same-sex couples than it does on heterosexual couples.[[20]](#footnote-20)

In 2010, Serafina who self-identifies as a lesbian, attempted to marry her partner Adriana Timor after cohabiting for a year.[[21]](#footnote-21) This was soon after the election of President de la Goblana del Atelo, of the right-wing Pink Party and a descendant of the colonial aristocracy.[[22]](#footnote-22) In his inaugural address, he promised to “defend the family, the essential core of our society, and marriage as the basis of the family.” He also indicated that he would not let anyone make marriage into something “it is not, and will never be.”[[23]](#footnote-23)This coincided with public polling results indicating a 76% public disapproval rating for the equating of same-sex domestic partnerships to marriage.[[24]](#footnote-24) Subsequently, Serafina and Adriana’s application for marriage was denied by the National Secretariat of the Family, on the basis of Article 396, despite their submissions highlighting the incompatibility of Article 396 with Article 9 of the Constitution.[[25]](#footnote-25) They filed a motion to vacate before Court No. 7 for the Review of Administrative Decisions on the same grounds, which was also rejected and is not subject to appeal.[[26]](#footnote-26) The Court held that, in light of Article 9 of the Constitution, “excluding a same-sex couple from the institution of marriage is a reasonable restriction necessary to preserve the concept of family.”[[27]](#footnote-27)

In November 2011, Serafina and Adriana filed a petition for a constitutional remedy challenging the above-mentioned decision. Though the Family Court No. 3 took the maximum three-month period under domestic law to render a decision, normally reserved for “particularly complex cases,” it dismissed the action without ruling on the merits.[[28]](#footnote-28) The Court only stated that there weren’t sufficient facts to show that the challenged court decision was “manifestly arbitrary.”[[29]](#footnote-29) This decision was affirmed on appeal on May 16, 2012.

In view of the foregoing, Petition P-600-12 was filed before the IACHR in February 2012, which the IACHR determined it was subject to ‘priority initial review’ on the basis that it involved sexual orientation and gender identity.[[30]](#footnote-30) The IACHR began processing the petition on May 10, 2012, and issued Admissibility Report 179-12 on September 22, 2012 declaring it admissible and finding alleged violations of Articles 1.1, 8, 11, 17, 24 and 25. The IACHR subsequently issued Merits Report 1-13, confirming that Elizabetia had indeed violated all the articles alleged, in addition to Article 2, by virtue of the principle of iura *novit curia*. The case has now been submitted to the IACtHR, and is scheduled for hearing in May 2013.

Three days before the Court hearing, Adriana suffered hemorrhaging and lost consciousness due to a ruptured congenital cerebral aneurysm, for which there are only two possible medical options: (i) urgent intracranial surgery which, if successful, would result in the full maintenance of Adriana’s faculties; or (ii) merely monitoring the situation which would almost certainly result in anterograde amnesia.[[31]](#footnote-31) Adriana had previously indicated multiple times to Serafina that the surgery is the only option she would be willing to take.[[32]](#footnote-32) However, under Elizabetian law, only a spouse or relative is allowed to give consent.[[33]](#footnote-33) Given Elizabetia’s denial of Adriana and Serafina’s attempt to marry, Serafina is prevented from providing consent. Adriana’s parents are dead, and she was excluded from her family 15 years ago because of her sexual orientation. If a relative is not found within 5 days, the decision will go to the Regional Medical Committee, which will almost certainly decide against the surgery.[[34]](#footnote-34) As such, provisional measures are now needed to allow Serafina to provide informed consent for Adriana in this “urgent health situation.”[[35]](#footnote-35)

# LEGAL ANALYSIS

## ADMISSIBILITY

### Statement of Jurisdiction

Elizabetia ratified the American Convention on Human Rights (“ACHR”) and accepted the contentious jurisdiction of this Court on January 1, 1990. All the facts upon which the alleged violations of the ACHR are based occurred after said date. Therefore, by virtue of Article 62.3 of the Convention, this Honorable Court possesses the requisite jurisdiction *ratione materiae* and *ratione temporis* over the matter. The Court also possesses the necessary *ratione personae* and *ratione loci*.

### Iura Novit Curia

This Court has repeatedly affirmed the use of the principle of *iura novit curia*, which empowers it with the duty “to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.”[[36]](#footnote-36) This is further buttressed by Article 29(f) of the Commission’s Rules of Procedure, which provides that the petitioner is not required to reference the specific articles of the Convention in his/her petition. The validity of the use of *iura novit curia* is entirely contingent upon the relevance of the Article in question to the essential facts pleaded by the petitioner.[[37]](#footnote-37) If the Article of the ACHR relates to the essential facts pleaded, then the State would have already been given an opportunity to adequately defend itself against any violations emanating from those facts.

Article 2 possesses a similar non-autonomous nature to Article 1(1), and this feature allows for its automatic combination with violations of substantive Convention rights.[[38]](#footnote-38) It encapsulates the general obligation of State parties to implement legislative measures with the aim of guaranteeing all substantive Convention rights. Given that the inadequacy of Article 396 of the State Civil Code in Elizabetia is a central feature of the facts which were pleaded before the Commission, and now before this Court, it follows that Article 2 is sufficiently relevant and the use of *iura novit curia* by the Commission was valid. Alternatively, given that pleadings specific to Article 2 are included in these present submissions to the Court, the State will be afforded an opportunity to defend itself against Article 2 directly at the Court hearing. As such, the matter is admissible before this Court.

### Exhaustion of Domestic Remedies

In order for a petition to be admitted, domestic remedies must be pursued and exhausted in accordance with general principles of international law.[[39]](#footnote-39) However, this rule is not absolute and this Court has ruled that it is not sufficient for a domestic remedy to exist formally[[40]](#footnote-40) but that it must also be an effective remedy capable of producing the anticipated result.[[41]](#footnote-41) A domestic remedy is ineffective where it is of a discretionary nature[[42]](#footnote-42) and its procedural availability is restricted.[[43]](#footnote-43) Further, remedies, which due to general conditions of a country or specific circumstances are rendered illusory, cannot be deemed effective.[[44]](#footnote-44)

The grant of an unconstitutionality action under Article 110 of the Elizabetian Constitution is discretionary in nature, being contingent up the approval of the Office of Human Rights Prosecutor. Further, the procedural availability governing the approval of a request for an unconstitutionality action is restricted and dependent upon legal relevance and political advisability. The notion of political advisability requires an assessment to be made on whether the action is advisable for collective coexistence within the nation.[[45]](#footnote-45) Having regard to: (i) President Goblana del Atelo’s promise to preserve marriage as the basis of family; (ii) public opinion poll results disapproving of same-sex domestic partnerships being equivalent to marriage; and (iii) the decision of Court No. 7 rejecting same-sex marriage as “a reasonable restriction necessary to preserve the concept of family” raises a reasonable inference that an unconstitutionality action is illusory in light of the political situation existing in Elizabetia and is therefore ineffective.

Alternatively, this Court has held that given that an unconstitutionality action is an extraordinary recourse whose purpose is to question the constitutionality of a law and not to have a court ruling reviewed, it cannot be included among the domestic remedies that a petitioner is necessarily required to pursue and exhaust.[[46]](#footnote-46) The remedies to which Serafina and Adriana had recourse were all pursued with a view to reviewing the court ruling to reject the application for marriage. Therefore it was not necessary for Serafina and Adriana to pursue and exhaust the unconstitutionality action.

### The Submission of the Petition

The submission of Petition P-600-12 to the Commission prior to the date on which a final domestic judgment was rendered does not bar the admissibility of the present case. The date on which a petition is submitted by the complainant is different from the admission and processing of said petition by the Commission.[[47]](#footnote-47) The Commission evaluates the admissibility of a petition at the time it is analyzed, not at the time the petition is filed.[[48]](#footnote-48) In the present case, the requisite domestic remedies had already been exhausted by the time admissibility was determined by the Commission.[[49]](#footnote-49)

Further, the commencement of petition processing 6 days before the final domestic judgment does not render the case inadmissible before this Court. The Commission deemed the petition as necessitating ‘priority initial review’, the *per saltum* mechanism, which is a procedure facilitating the expeditious processing of petitions in cases which present structural implications.[[50]](#footnote-50) The Commission has declared that petitions involving violations relating to sexual orientation and gender identity have such structural implications.[[51]](#footnote-51) As such, the present case validly qualified for the expedited review.

## REQUEST FOR PROVISIONAL MEASURES

This Court has the power to order provisional measures in cases where the facts establish a *prima facie* situation of extreme gravity and urgency, and where irreparable damage is likely to occur.[[52]](#footnote-52) Further, the granting of provisional measures is not only done with a view to preserving the legal situation but also protect human rights by seeking to prevent irreparable damage to persons.[[53]](#footnote-53) It is submitted therefore in light of the existing urgent health situation that provisional measures be granted to prevent irreparable damage to Adriana’s right to privacy and humane treatment

### Extreme gravity

In order to establish a situation of extreme gravity, regard must be had to the specific context within which the threat occurs and it must also be evident that if the fundamental rights afforded to an individual under the ACHR are compromised by these kinds of threats; “the context is in principle one that merits considering the adoption of protective measures.”[[54]](#footnote-54)

This requirement of extreme gravity is satisfied by the fact that Adriana is in a comatose state resulting from a ruptured congenital cerebral aneurysm and internal hemorrhaging and is currently in the intensive care unit. If Serafina does not provide consent Adriana will suffer from, *inter alia*, anterograde amnesia.

### Urgency

The *corpus juris* of this Court indicates that “the urgency required for the adoption of provisional measures alludes to the special and exceptional situations that require and merit immediate actions and responses oriented toward averting the threat.”[[55]](#footnote-55) It was further noted that, “the response must, above all, be immediate and, in principle, timely in order to address such a situation, as a lack of response would in itself imply a danger.”[[56]](#footnote-56)

 The intracranial surgery must be performed within one week at the most and requires the consent of a spouse or relative. If no one is able to provide consent within five days the decision will go to the Regional Medical Board which has invariably ruled against intracranial surgery in circumstances comparable to Adriana’s. The requirement of urgency is further satisfied by the near impossibility of finding a relative of Adriana to provide informed consent within five days.

### Irreparable Damage

In order to fulfil this requirement it must be proved that not only will the damage or injury that is to be avoided by provisional measures be irreparable but also that there is a reasonable probability that the damage will occur.[[57]](#footnote-57) The irreparable damage that will result from the Court’s refusal to grant precautionary measures will be that Adriana will suffer from anterograde amnesia. The “near certainty” that Adriana would experience anterograde amnesia if the surgery does not occur satisfies the requirement of reasonable probability of damage.

Further this Court has maintained that provisional measures can be granted to protect the emotional, moral, and psychological integrity of persons from irreparable damage.[[58]](#footnote-58) Privacy under the ECHR has been interpreted to cover the physical and psychological integrity of an individual.[[59]](#footnote-59) In *Y.F. v Turkey*,[[60]](#footnote-60) the ECtHR held that a person’s body is linked to the most intimate aspect of private life and that compulsory medical intervention, however minor, constitutes an interference with the right to privacy. Article 11 of the ACHR which is similar to Article 8 of the European Convention on Human Rights (“ECHR”) should therefore be interpreted to include the physical and psychological integrity of an individual. The ACHR goes a step further than the ECHR through the existence of Article 5.1 of the ACHR which affords every person the right to have his physical, mental and moral integrity respected. In the circumstances of the present case, Adriana had indicated her choice to undergo intracranial surgery on several occasions prior to her entering into a comatose state.[[61]](#footnote-61) Therefore, the failure to give effect to Adriana’s wishes will violate her right to privacy under Article 11 and her rights under Article 5.1.

Having satisfied the elements of extreme gravity, urgency and irreparable harm, it is submitted that provisional measures should be granted in this case.

## MERITS

### ARTICLE 24 AND ARTICLE 1(1): EQUALITY AND NON-DISCRIMINATION

The rights of equality and non-discrimination have been characterized by this Court as fundamental principles underpinning the entire human rights framework, and as norms of a *jus cogens* stature.[[62]](#footnote-62) The general non-discrimination provision encapsulated in Article 1.1 of the American Convention requires that State parties guarantee rights enshrined within the Convention to all persons within their jurisdiction without discrimination. Further, Article 24 ACHR enshrines equality before the law in relation to all ACHR rights, and laws approved by the State and in their application.[[63]](#footnote-63) These principles of non-discrimination and equality are also enshrined in Article 9 of Elizabetia’s Constitution, and other Inter-American treaties[[64]](#footnote-64) binding on Elizabetia.[[65]](#footnote-65)

While sexual orientation is not explicitly mentioned in Article 1.1 ACHR, this Court in the *Atala Riffo* case affirmed the position of the ECtHR and other human rights bodies,[[66]](#footnote-66) that the grounds listed therein are non-exhaustive, and that sexual orientation falls within the purview of “any other social condition”.[[67]](#footnote-67) This analysis also applies to the phrase “without discrimination” in Article 24, when it is interpreted in light of Article 1.1. Furthermore, the category of sexual orientation is explicitly listed under the right to equality and nondiscrimination enshrined in Article 9 of the Elizabetian Constitution.

This Court has declared that “no regulation, decision, or practice of domestic legislation…may diminish or restrict, in any way whatsoever, the rights of a person based on their sexual orientation.”[[68]](#footnote-68) While Article 17.2 ACHR allows States to prescribe conditions in the domestic law for the granting of marital status and the right to form a family, it also maintains that these conditions should not “affect the principle of nondiscrimination established in this Convention.”[[69]](#footnote-69) Furthermore, States are obliged to implement measures with the aim of removing impediments which perpetuate discrimination against historically disadvantaged sections of the populous.[[70]](#footnote-70) This is underscored by the State’s obligations under Article 2 to implement domestic legislation with the aim of guaranteeing fundamental rights under the ACHR.

The restriction of the right to marry in Article 396 of Elizabetia’s State Civil Code to only heterosexual couples[[71]](#footnote-71) constitutes a discriminatory domestic regulation on the basis of sexual orientation. By virtue of the State’s denial of Serafina and Adriana’s marriage application on the basis of Article 396 and the subsequent failure of Elizabetia to impugn said legislative provision, it violated Article 1(1) ACHR[[72]](#footnote-72) in relation to Article 17.2, in addition to Article 24, to the detriment of Serafina and Adriana. Additionally, the restriction of the right to a family, in Article 85 of the Elizabetian Constitution, to only heterosexual couples[[73]](#footnote-73) also constitutes a discriminatory provision against same-sex couples on the basis of sexual orientation. It is also submitted that Article 406(2), by offering less substantive benefits to same-sex couples than that which is afforded to heterosexual couples and precluding same-sex couples from adopting jointly, also constitutes discrimination. These provisions affirm discriminatory attitudes against LGBTI individuals, who have been historically disadvantaged in the context of Elizabetian society, due to their sexuality and gender identity. While this Court has opined that not all distinctions in treatment are equivalent to prohibited discrimination,[[74]](#footnote-74) those which lack objective and reasonable justifications are discriminatory. Any regulation which restricts a right should be proportionate and necessary to the purpose stated.[[75]](#footnote-75) This Court has emphasized that “these aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.”[[76]](#footnote-76) Furthermore, the IACHR has maintained that any category of discrimination prohibited under Article 1.1, such as sexual orientation, is considered to be a ‘suspect’ category, thus requiring heightened scrutiny of the reasons invoked as justification for the distinction, in order to ensure that such distinction is not driven by prejudicial notions.[[77]](#footnote-77) In other words, a distinction based on any ground prohibited under Article 1.1 ACHR is presumed to be incompatible with the ACHR, and the burden then shifts to the State to provide “an especially weighty interest and compelling justification for the distinction.”[[78]](#footnote-78)

The ECtHR has taken a similar approach by requiring “particularly serious reasons” for distinctions based on sexual orientation.[[79]](#footnote-79) Furthermore, it should be noted that Article 29 ACHR invites an interpretation of Convention rights in a manner in which rights are not restricted to a greater extent than what is provided within the laws of any State Party.[[80]](#footnote-80) Article 9 of the Elizabetian Constitution provides further support for a strict scrutiny analysis, as it requires justification by compelling reasons, suitability, necessity and strict proportionality.[[81]](#footnote-81) As such, this Court should adopt a strict scrutiny analysis in relation to this matter.

The rationales posited by the State for the restriction of marriage to heterosexual couples fail to provide a sufficiently compelling justification for the distinctions perpetuated in the legislative and Constitutional provisions. These justifications include the statement by President de la Goblana in which he touted the need to preserve “marriage as the basis of the family”, and the ruling of Court No. 7 for the Review of Administrative Decisions that the law contained a “reasonable restriction necessary to preserve the concept of family.” This stated objective is not in accord with the interpretation of the family unit in this Court’s jurisprudence. In Atala *Riffo,[[82]](#footnote-82)* this Court endorsed the conceptualization of a family unit which does not conform to traditional heterosexual notions. Furthermore, the ECtHR in *Schalk and Kopf v Austria* decided that, as in the case of a heterosexual couple, a cohabiting same-sex couple in a stable partnership falls within the notion of “family life.”[[83]](#footnote-83) Also, the right to raise a family should not be linked to the biological procreative capacity of a couple.[[84]](#footnote-84) In light of these expansive interpretations of the familial structure, a traditional conceptualization of family as comprising a man and a woman would not constitute a “reasonable and objective” purpose for discriminating against same-sex couples in relation to the right to marry.

Even if this Court considered the purpose stated as a sufficiently legitimate aim, it would need to assess the proportionality of the measure. The objective of preserving the concept of family encompasses maintaining institutional support to promote and protect the forming of heterosexual unions. In a proportionality analysis, the interest pursued by the legislation should not outweigh the impact on human dignity and freedom, and there should be no less restrictive means of achieving the stated aim. It is submitted that the exclusion of same-sex couples from marriage is not necessary to encourage procreation, childbearing and companionship amongst heterosexual couples. This is not a matter of balancing the interests of competing groups, as allowing same-sex couples to marry does not simultaneously deprive opposite-sex couples of their access to marriage and ensuing protection. Therefore, allowing same-sex marriage would not preclude Elizabetia from continuing to provide institutional support to heterosexual couples and thus preserve the concept of family.

*Human Dignity*

This Court has proclaimed that “the notion of equality…is linked to the essential dignity of the individual.”[[85]](#footnote-85) The concept of human dignity is intricately linked to the notion of equality, and constitutes a core foundational element in a plethora of international human rights instruments.[[86]](#footnote-86) This Court has opined that restrictions of ACHR rights must not be in conflict with the “essential oneness and dignity of humankind.”[[87]](#footnote-87) The American Declaration and the Pact of San Salvador, to which Elizabetia is a party, emphasizes the importance of dignity as a principle from which all human rights are inherently derived. [[88]](#footnote-88)The Preambles of both instruments affirm that recognition should be accorded to the dignity of the human person. Also the Preamble of the ACHR speaks to rights being “based upon attributes of the human personality.” Furthermore, Article 11.1 ACHR enshrines the right of everyone to have their honor and dignity recognized and respected. Comparative constitutional jurisprudence has increasingly relied on a dignity-centered argument for supporting the right to same-sex marriage.[[89]](#footnote-89) The preclusion of same-sex couples from the institution of marriage perpetuates the notion that they are “not worthy of the same respect and recognition as opposite-sex couples.”[[90]](#footnote-90) As such, it places them in a status of inferiority by infusing the dichotomy of heterosexuals as first-class citizens and their LGBTI counterparts as second-class citizens.[[91]](#footnote-91) The State’s denial of the institution of marriage to same-sex couples “negates their right to self-determination in a most profound way” given its “legal and social significance.”[[92]](#footnote-92)

Elizabetia, by precluding the access of same-sex couples to marriage, violated the dignity of Serafina and Adriana, as members of a historically disadvantaged class of LGBTI Elizabetian citizens. Also, Article 406, by offering less substantive benefits to same-sex couples than what is offered to heterosexual couples and their preclusion from family under Article 85, further emphasizes the classification of LGBTI persons as an inferior social group. The affirmation from the executive and judicial arm of Elizabetia on the validity of these laws and their correlation with Elizabetian societal values[[93]](#footnote-93) serves to endorse the systematic marginalization of homosexuals as a group, unworthy of equivalent relationship status to heterosexuals. Given that Granti indigenous persons exhibited signs of transsexualism, the historical acts of cultural oppression against persons of Granti ancestry underscores the marginalization of LGBTI persons. As such, Elizabetia has failed to undertake its positive obligation to guarantee the fundamental ACHR rights as required by Article 1(1), and has violated the dignity of Serafina and Adriana, in violation of Article 11.1 ACHR.

### ARTICLE 17: RIGHT TO MARRY AND RIGHT TO FAMILY

The right to protection against arbitrary or unlawful interference with the family of an individual under Article 11.2 is closely linked to the right to protection of the family and to live in a family under Article 17 of the Convention[[94]](#footnote-94) and any violation of Article 11.2 implicitly gives rise to a violation of Article 17.[[95]](#footnote-95) This right has been recognized in a number of international instruments.[[96]](#footnote-96) The family as the natural and fundamental group unit of society is entitled to protection by society and the state.[[97]](#footnote-97) There is no single model of the family.[[98]](#footnote-98) This has led to same sex couples living in stable de facto relationships being included in the notion of ‘family’ in the same way as the relationship of a heterosexual couple in the same situation.[[99]](#footnote-99)

Article 85 of the Elizabetian Constitution, affording special protection to the family resulting from the cohabitation of a man and a woman, is arbitrary and violates the right to the creation and protection of the family afforded to all models of the family under Article 17 of the ACHR. Article 406(2) further violates the right to form and raise a family by precluding same sex couples from adopting jointly. It is unclear upon the facts whether in same sex domestic partnerships a couple is allowed to adopt separately and further in determining whether adoption should be granted the competent authority takes into account socio-cultural, psychological, financial and health studies.[[100]](#footnote-100) While it is unclear as to the extent to which each of the aforementioned factors influences the decision to grant an adoption it noteworthy that none of the factors specifically impugn joint adoption by same sex couples. This is especially true given that the public opinion polls show disapproval of equating same sex domestic partnerships with marry and not disapproval of same sex couples to form a family.

In light of the broad interpretation afforded to the concept of the family, Elizabetia through the continued existence of Article 85 of the constitution and Article 406(2) of the State Civil Code has violated Serafina and Adriana’s right to form and raise a family under Article 17 of the ACHR.

*Article 17.2 – Right to Marry and Raise a Family*

This Court has held that human rights treaties are “living instruments whose interpretation must consider the changes over time and present day conditions.”[[101]](#footnote-101) In interpreting the Convention in light of its object and purpose,[[102]](#footnote-102) this Court has opined that Convention rights should be interpreted to afford the greatest level of protection to the individual as long as such interpretation does not modify the system.[[103]](#footnote-103) In applying the *pro homine* principle, this Court has also argued that guarantees must be practical and effective (*effet utile*).[[104]](#footnote-104) Article 29(c) ACHR mandates that the Convention cannot be interpreted so as to preclude “other rights that are inherent in the human personality”, and the Preamble of the Convention makes reference to essential rights being derived from the attributes of the human personality.

In adjudicating cases, this Court has repeatedly affirmed its practice of examining the *corpus juris* of international human rights law.[[105]](#footnote-105) The Commission has held that the decisions of other international tribunals may provide constructive insights into the interpretation of Convention rights.[[106]](#footnote-106) The ECtHR in *Goodwin v UK* in upholding the right of a post-operative transsexual to marry, reasoned that though Article 12 of the ECHR, which is similar to Article 17.2 ACHR, is worded as “the right to marry and found a family” the second aspect is not a condition of the first and “the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision.”[[107]](#footnote-107) By expanding the interpretation of the terms man and woman beyond biological criteria to include psychological gender identity, the European Court moved away from the traditional notion of the procreative purpose of marriage. It is this kind of expansive interpretation, in light of the principles discussed above, which this Court is invited to undertake in construing the Article 17.2 provision. The wording of Article 17.2 should not therefore be interpreted as only protecting the right of heterosexuals to marry.

While the ECtHR in *Schalk and Kopf* has decided that there is no right to same-sex marriage protected under the ECHR, and the Human Rights Committee (“HRC”) in *Joslin v New Zealand[[108]](#footnote-108)* made the same determination in relation to the ICCPR, it is submitted that these decisions are distinguishable from the present case. The ECtHR was not tasked with considering the right to marry in conjunction with a stand-alone equality right akin to Article 24 ACHR. In the European framework, this equality right is contained in Protocol 12 of the ECHR, which was not binding on the defendant State in the matter. Furthermore, the ECtHR did not consider the right to marry in light of the ECHR equivalent[[109]](#footnote-109) to the nondiscrimination provision in Article 1.1 ACHR, and it is submitted that the result would have been different had it done so.[[110]](#footnote-110)

Furthermore, though it did not rule that States are obliged to provide for same-sex marriage, the ECtHR did acknowledge that in present times the right to marry is not restricted to same-sex couples.[[111]](#footnote-111) The ECtHR based its decision almost entirely on ascribing a wide margin of appreciation to the State on the issue due to lack of European consensus on the matter.[[112]](#footnote-112) It is submitted that such a wide margin of appreciation should not be ascribed to Elizabetia in this case, in light of the concurrent violations established in relation to the *jus cogens* principles of equality and nondiscrimination. [[113]](#footnote-113)

The *Joslin v New Zealand* case also was not considered in light of equality and non-discrimination provisions in the ICCPR, and the decision was rendered in 2002 when only one State in the world had legalized same-sex marriage. The law in this area is constantly evolving and therefore that which did not constitute a violation of a particular right ten years ago could very well be a violation to day. In light of the living instrument principle and the need to apply an evolutionary interpretation to ACHR rights in affording the maximum protection to individuals, this Court should render Article 17.2 as guaranteeing the right to marry to same-sex couples.

A similar expansive interpretation should be applied to the right to raise a family. This right is also contained in the American Declaration and the Protocol of San Salvador,[[114]](#footnote-114) which are also binding on Elizabetia. This Court has developed a practice of utilizing the provisions of other treaties which are binding on the State to clarify and provide content to Convention rights.[[115]](#footnote-115) Also, Article 29(d) ACHR provides that interpretations of Convention provisions should not exclude or limit the effect of the American Declaration. As such, Article 17.2 should be interpreted in light of the wider right enshrined in the American Declaration, which expressly bestows the right to raise a family upon “everyone,” as opposed to the limiting language of “men and women” used in the Article 17.2.

### ARTICLE 11: RIGHT TO PRIVACY

Under Article 11 ACHR, everyone has the right to have his honour respected and his dignity recognized and a State is precluded from arbitrary interference into the private life and family of an individual. As stated by this Court the protection of private life encompasses a series of factors associated with the dignity of the individual, including, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life also encompasses physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings.[[116]](#footnote-116) This Court maintained that personal relationships with other individuals in the context of the right to a private life extends to the public and professional spheres.[[117]](#footnote-117) In *Au meeruddy-cziffra et al v Mauritius[[118]](#footnote-118)* in construing an equivalent provision of Article 11.2 of the ACHR the HRC considered marriage as one such way of establishing and developing a relationship with other human beings entitled to protection against arbitrary interference by the State. Further this Court has held that the right to private life includes the decision to become a parent.[[119]](#footnote-119)

It is submitted that the very existence of Article 396 of the State Civil Code preventing Serafina and Adriana from getting married directly affects their private life in relation to the development of their relationship with each other and their ability to make a public statement about their relationship. Further, it contravenes Serafina’s right to have her dignity respected, as being a male to female transsexual she would have to choose between giving effect to the law by relinquishing her acquired identity as a woman or maintain her acquired gender identity and be prevented from marrying. Further, Article 406(2) of the State Civil Code which prevents same sex couples from adopting jointly, infringes their right to choose whether or not to become a parent.

The right to privacy may be restricted by States provided that the measures are regulated by the law, pursues a legitimate goal, and fulfill suitability, necessity and proportionality.[[120]](#footnote-120) The HRC has noted that even if an interference is provided by law it must be done “in accordance with the provisions aims and objectives of the Covenant.”[[121]](#footnote-121) This line of analysis has been adopted by this Court in precluding a State from using domestic legislation as a justification for State interference into the private and family lives of individuals.[[122]](#footnote-122)

It is submitted that Elizabetia has failed to advance any compelling reasons justifying these interferences into the private lives of Serafina and Adriana. In rejecting the motion to vacate, Court No. 7 reasoned that the exclusion from the institution of marriage of same sex couples was a reasonable restriction necessary to preserve the concept of family in the Elizabetian constitutional system. As previously highlighted, the concept of the family is not restricted to heterosexual couples and encompasses other family units, heterosexual or otherwise.[[123]](#footnote-123)

It is further submitted that these intrusions into their private life is neither proportional nor necessary in a democratic society. The concept of necessity as used in the context of an interference being “necessary in a democratic society” is not afforded the same measure of flexibility such as that offered to the expressions, “useful,” “reasonable,” or “desirable” but implies the existence of a “pressing social need” justifying interference.[[124]](#footnote-124) While a State is afforded a margin of appreciation in making an initial assessment of the social need, its decision remains subject to review.[[125]](#footnote-125) Further, the scope of the margin of appreciation afforded to a State is contingent upon the nature of the aim of the restriction as well as the nature of the activities involved.[[126]](#footnote-126) Further, where a restriction imposed affects an intimate aspect of private life, any interference by public authorities must be based on particularly serious reasons.[[127]](#footnote-127) Since marriage is a relationship falling under the sphere of privacy and would be considered an intimate aspect of private life interference can only be justified on particularly serious grounds.

Assuming, the purpose of restricting marriage and adoption to heterosexual couples is to foster and provide institutional support for adult relationships that allow for the possibility of procreation and child-rearing, it is submitted that the bar against same-sex marriage is not rationally connected to this aim. It is submitted that it is the exclusive and permanent commitment of marriage partners to one another, not procreation, that is the *sine qua non* of marriage.[[128]](#footnote-128) Such a narrow interpretation is inappropriate as it has been held by this Court that the decision to be a parent is solely within one’s private sphere[[129]](#footnote-129) and further the law would be making a distinction between persons who can and cannot have children and those persons who procreated outside of marriage. Further, while public opinion constitutes important indicia in assessing whether or not a restriction of a right enshrined under the Convention is necessary within a democratic society, it is not a serious ground to justify a restriction of a right.[[130]](#footnote-130)

It is further submitted that the measures adopted by Elizabetia are not proportional to the aims highlighted. It is submitted that the justifications for retaining the law in force in Elizabetia unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the private life of same sex couples.[[131]](#footnote-131)

In view of the foregoing, it is submitted that there has been a breach of Article 11 and it is not in pursuance of a legitimate aim and was not proportional and necessary within a democratic society.

### ARTICLE 8 and ARTICLE 25: RIGHT TO JUDICIAL PROTECTION and DUE PROCESS

Article 25 constitutes a fundamental pillar of the ACHR and an inherent feature of the rule of law in democratic societies.[[132]](#footnote-132) Article 25(1) mandates that State Parties provide simple, prompt and effective recourse of a judicial nature. This provision essentially enshrines the right to an effective remedy (*amparo*) against any acts which violate a person’s fundamental rights recognized by the Constitution, domestic laws, or the American Convention.[[133]](#footnote-133) Additionally, the right to a fair trial in Article 8.1 ACHR includes the concept of “due process of law” which refers to the prerequisites necessary for the adequate protection of those persons whose rights or obligations are pending judicial determination[[134]](#footnote-134) and applies to all judicial guarantees contained in the ACHR.[[135]](#footnote-135) The remedies guaranteed under Article 25 must be “substantiated in conformity with the rules of due process of law.”[[136]](#footnote-136) As such, Article 25 and Article 8(1) are ineluctably intertwined, and must also be considered in light of the State’s positive obligation to guarantee ACHR rights under Article 1(1).[[137]](#footnote-137)

*The available remedies were not effective*

In interpreting Article 25 in light of Article 1.1, States are required to take affirmative steps to not only enact effective remedies into law but also to ensure that such remedies are implemented properly by judicial authorities. It is not sufficient for a State to claim that a remedy formally exists within the domestic legal framework. Rather, it must be proven to be an effective recourse in the sense that it must be “truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it.”[[138]](#footnote-138)As such, remedies which can be deemed illusory due to the circumstances prevailing in a particular country will not satisfy the requisite level of effectiveness, and result in a breach of Article 25.[[139]](#footnote-139)

The mere existence of an unconstitutionality action in Article 110 of Elizabetia’s Constitution does not satisfy the requirements of an effective remedy under Article 25. The discretionary and unregulated nature of the approval process required to access the remedy renders the provision ineffective, particularly when one considers the political circumstances prevailing in Elizabetia. Given that access to the remedy is partially contingent upon political advisability,[[140]](#footnote-140) the anti-same-sex marriage sentiment expressed by the President of Elizabetia, and reflected in public opinion polls, suggest that access to the unconstitutionality action would not have been granted to Serafina and Adriana had they attempted to file for it. Furthermore, there is no alternative remedy available in Elizabetia which would allow Serafina and Adriana to achieve a declaration of unconstitutionality in relation to Article 396,[[141]](#footnote-141) and thus an amendment of this discriminatory provision. As such, the State has failed to undertake its positive obligation to ensure the provision of an effective remedy for the violations of the ACHR and Constitutional rights of Serafina and Adriana, and thus breached Article 25 in relation to Article 8(1) and 1(1).[[142]](#footnote-142)

*Article 8(2)(h) – Right to Appeal the Judgment to a Higher Court*

Contrary to the argument posited by the Commission in its Merits Report 1-13,[[143]](#footnote-143) the minimum due process guarantees enumerated in Article 8.2 ACHR are applicable not only to proceedings of a punitive nature, but also to proceedings related to rights of a “civil, labor, fiscal, or any other nature.”[[144]](#footnote-144) This underscores the breadth of due process rights protected under the Convention with the aim of ensuring that that fairness is exercised by the State in all aspects of decision-making involving the rights of persons. Article 8(2)(h) mandates that individuals should be afforded the “right to appeal the judgment to a higher court.” Therefore, the State’s law which provides that decisions of Court No. 7 for the Review of Administrative Decisions are not subject to appeal,[[145]](#footnote-145) is in direct violation of the minimum guarantee enshrined in Article 8(2)(h).

*Court failed to provide a judgment on the merits*

The Commission and this Court has argued that the right to an effective remedy encompasses the right to a reasoned decision on the merits of the matter. In particular, a judicial body must provide reasons to support its conclusions.[[146]](#footnote-146) The European Court has held that the imprecise nature of the statutory threshold of “exceptional circumstances” in that case made it all the more necessary for the Court to give sufficient reasons for its decision.[[147]](#footnote-147)

The Family Court No. 3 dismissed Serafina and Adriana’s petition for a constitutional remedy without ruling on the merits,[[148]](#footnote-148) which constitutes a breach of Article 25 of the Convention. Given that the domestic Court took the maximum period of time reserved for “particularly complex cases,” it is even more compelling that it should have provided Serafina and Adriana with more than just a statement that their case did not fulfill a standard of “manifest arbitrariness.” The absence of a reasoned judgment on the matter could have impeded Serafina and Adriana from substantiating their subsequent appeal adequately before the Three-Judge Plenary Tribunal.[[149]](#footnote-149)

Furthermore, this Court has opined that an effective remedy must guarantee a full review of the decision being challenged. [[150]](#footnote-150) On the facts of the present case, there is no indication that such a review was implemented by Family Court No. 3, given that it dismissed the action without ruling on the merits. The standard required by Elizabetian law of “manifest arbitrariness” in the consideration of petitions for a constitutional remedy, also does not seem to facilitate a real possibility of a comprehensive review of the decision of Court No. 7. A full review would have been particularly necessary in the context of this case, given that Court No. 7’s judgment was rendered final and thus not subject to appeal.

# PRAYER FOR RELIEF

Based on the foregoing submissions, the Representatives of the Victims respectfully request that this Honorable Court:

1. order that the State adopt, without delay, the measures necessary to protect Adriana Timor, by allowing for Serafina to provide informed consent to the medical surgery on behalf of Adriana;
2. adjudge and declare that the State of Elizabetia violated Articles 1(1), 2, 8, 11, 17, 24 and 25 of the American Convention on Human Rights, and Article VI and Article XVIII of the American Declaration, and order Elizabetia to:
	1. Amend Article 396 of its State Civil Code to allow for same-sex couples to get married, and amend Article 85 of the Constitution to allow for cohabiting same-sex couples to be deemed as family
	2. Amend Article 406 to allow for same-sex couples in domestic partnerships to adopt jointly
	3. Publicly acknowledge responsibility for the above-mentioned violations and issue guarantees of non-repetition
	4. Pay the petitioner’s costs incurred in this litigation
	5. Adopt systematic measures to address the structural implications of the historical discrimination experienced by LGBTI persons in Elizabetia
1. Hypothetical, paras 23, 24 and 6(c) [↑](#footnote-ref-1)
2. Hypothetical, paras 3, 4 and 2 [↑](#footnote-ref-2)
3. Hypothetical, para 6(c) [↑](#footnote-ref-3)
4. Hypothetical, para 8 [↑](#footnote-ref-4)
5. Hypothetical, paras 8 and 9 [↑](#footnote-ref-5)
6. Hypothetical, para 10 [↑](#footnote-ref-6)
7. *Ibid* [↑](#footnote-ref-7)
8. Hypothetical, para 11 [↑](#footnote-ref-8)
9. Hypothetical, para 23 [↑](#footnote-ref-9)
10. Hypothetical, para 20 [↑](#footnote-ref-10)
11. Hypothetical, para 23 [↑](#footnote-ref-11)
12. Hypothetical, para 24 [↑](#footnote-ref-12)
13. Hypothetical, para 25 and 26 [↑](#footnote-ref-13)
14. Hypothetical, para 27 [↑](#footnote-ref-14)
15. Hypothetical, paras 29 and 30 [↑](#footnote-ref-15)
16. Hypothetical, para 38 [↑](#footnote-ref-16)
17. Hypothetical, para 19 [↑](#footnote-ref-17)
18. Hypothetical, paras 13 and 4 [↑](#footnote-ref-18)
19. Hypothetical, paras 12 and 15 [↑](#footnote-ref-19)
20. Hypothetical, para 17 [↑](#footnote-ref-20)
21. Hypothetical, paras 30 and 41 [↑](#footnote-ref-21)
22. Hypothetical, para 20 and 39 [↑](#footnote-ref-22)
23. Hypothetical, para 39 [↑](#footnote-ref-23)
24. Hypothetical, para 40 [↑](#footnote-ref-24)
25. Hypothetical, para 42 [↑](#footnote-ref-25)
26. Hypothetical, paras 46 and 47 [↑](#footnote-ref-26)
27. Hypothetical, para 45 [↑](#footnote-ref-27)
28. Hypothetical, para 48 [↑](#footnote-ref-28)
29. *Ibid* [↑](#footnote-ref-29)
30. Clarification Questions and Answers, No. 28 [↑](#footnote-ref-30)
31. *Ibid* [↑](#footnote-ref-31)
32. Hypothetical, para 61 [↑](#footnote-ref-32)
33. Hypothetical, para 59 [↑](#footnote-ref-33)
34. Hypothetical, para 60 [↑](#footnote-ref-34)
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