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New York, March 5, 2021

Judge Paul Enrique Franco Zamora  
President  
Plurinational Constitutional Court  
Sucre – Bolivia

## Subject: Human Rights Watch *Amicus Curiae* in Case No. 35012-AAC 2

José Miguel Vivanco, Graeme Reid, and Cristian González Cabrera on behalf of Human Rights Watch, located at 350 Fifth Avenue, New York, NY, 10118, United States, present this amicus brief to the Honorable Plurinational Constitutional Court of Bolivia in Case No. 35012-AAC 2 concerning free unions between persons of the same sex. For that purpose, we respectfully state:

### I. PURPOSE AND SUMMARY OF THIS SUBMISSION

Human Rights Watch respectfully requests that the Plurinational Constitutional Court accept this submission for its consideration of the international legal standards regarding access of same-sex couples to free unions.

This brief is structured as follows: Section II of this brief provides background on Human Rights Watch and our interest in the case. Section III provides an overview of international human rights standards regarding same-sex unions, including with respect to the right to form a family, the right to privacy, and the rights to non-discrimination and equality before the law.

### II. STATEMENT OF INTEREST

#### *a. History and Mandate of Human Rights Watch*

Human Rights Watch is a nonprofit, nongovernmental organization that investigates and reports on violations of human rights in some 100 countries worldwide with the goal of securing the respect of those rights for all persons. By exposing and calling attention to human rights abuses committed by both state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others to end abusive practices.

Human Rights Watch is known for accurate and impartial fact-finding. To ensure its independence, the group does not accept government funding, directly or indirectly, or support from any private funder that could compromise its objectivity in reporting on human rights violations.

*b. Human Rights Watch's Work on LGBT Rights*

Human Rights Watch has a dedicated Lesbian, Gay, Bisexual, and Transgender (“LGBT”) Rights Program that leads the organization’s work documenting and highlighting the violence and inequality that LGBT people around the world face based on their sexual orientation or gender identity, including in Latin America and the Caribbean.

Human Rights Watch advocates for laws and policies that will protect the dignity of all people by allowing LGBT individuals to enjoy their fundamental human rights. Such advocacy includes legal interventions in relevant cases, such as before the European Court of Human Rights in the case of *Kaos GL v. Turkey* on the freedom of expression of an LGBT organization,<sup>1</sup> before the Inter-American Commission on Human Rights in the case of *Gareth Henry et al. v. Jamaica* on laws criminalizing same-sex conduct,<sup>2</sup> and before the United States Supreme Court and the Constitutional Courts of Colombia and Ecuador on same-sex marriage.<sup>3</sup>

### III. APPLICABLE INTERNATIONAL HUMAN RIGHTS STANDARDS

*a. Preliminary Considerations*

The Constitution of Bolivia states that international human rights treaties ratified by Bolivia’s Plurinational Legislative Assembly prevail over internal law and that the rights and duties consecrated in the Constitution shall be interpreted in accordance with said agreements.<sup>4</sup>

The Inter-American Court of Human Rights, the court charged with interpreting the American Convention on Human Rights (“American Convention”), which Bolivia has ratified, has repeatedly held that states parties have a duty to take its case law into consideration when interpreting their legal obligations under the American Convention.

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<sup>1</sup> *Kaos GL v. Turkey*, Judgment of 22 November 2016, Eur. Ct. H.R., Application no. 4982/07, available at <http://hudoc.echr.coe.int/eng?i=001-168765>.

<sup>2</sup> *Gareth Henry et al. v. Jamaica*, Report No. 400/20, Case 13.637, Inter-Am. Comm. H.R., OAE/Ser.L/V/II, Doc. 418 (31 December 2020), available at <https://www.humandignitytrust.org/wp-content/uploads/resources/2020.02-GH-SE-v-JAM-IACHR-final-decision.pdf>.

<sup>3</sup> *Obergefell v. Hodges*, Judgment of 26 June 2015, U.S. Supreme Court, 576 U.S. 644, available at [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf); Judgment SU214/16, Judgment of 28 April 2016, Colombia Constitutional Court, available at <https://www.corteconstitucional.gov.co/relatoria/2016/su214-16.htm>; *Case 0011-18-CN*, Judgment of 12 June 2019, Ecuador Constitutional Court, available at <http://sgc.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=11-18-CN/19>.

<sup>4</sup> Bolivian Constitution, art. 13(IV), available at [https://www.oas.org/dil/esp/constitucion\\_bolivia.pdf](https://www.oas.org/dil/esp/constitucion_bolivia.pdf).

Specifically, the Court has held: “[T]he Judiciary must exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”<sup>5</sup>

*b. The Fundamental Right to Form a Family*

The right to form a family is a fundamental right recognized in Article 23 of the International Covenant on Civil and Political Rights (“ICCPR”) and Article 17 of the American Convention on Human Rights.<sup>6</sup> International law does not limit the recognition of the right to heterosexual couples.

The UN Human Rights Committee, the body charged with making authoritative interpretations of the ICCPR, noted in its General Comment No. 19 that the concept of family did not conform to a single model.<sup>7</sup> With respect to Hungary, the Committee expressed concern about its legal framework, which posits a “restrictive definition of family [and] may give rise to discrimination, since it does not cover certain types of family arrangements, including same-sex couples.”<sup>8</sup> It has urged Hungary,<sup>9</sup> as well as other countries such as Bulgaria,<sup>10</sup> to prohibit all forms of discrimination on the basis of sexual orientation in law and in practice, including in the context of “family arrangements.” To the Dominican Republic<sup>11</sup> and Lithuania,<sup>12</sup> the Committee has recommended that they review relevant legislation and “fully recognize the equality of same-sex couples.”

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<sup>5</sup> *Almonacid-Arellano v. Chile*, Judgement of 26 September 2006, Inter-Am. Ct. H.R., Series C. No. 154, para. 124, available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_154\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf); American Convention on Human Rights (“American Convention”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, ratified by Bolivia on June 20, 1979, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>6</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1996), 999 U.N.T.S. 302, ratified by Bolivia on August 12, 1982, entered into force March 23, 1976, art. 23; American Convention, art. 17.

<sup>7</sup> UN Human Rights Committee, General Comment No. 19, HRI/GEN/1/Rev.1, at 29, para. 2. *See also* CEDAW Committee, General Recommendation No. 21 (13th session, 1994), at 4 para. 13; UN Committee on the Rights of the Child, Report on the Fifth Session, January 1994, CDC/C/24, Annex V, p. 63; UN Committee on the Rights of the Child, General Comment 7: Implementing child rights in early childhood, September 2006, para. 15.

<sup>8</sup> UN Human Rights Committee, Concluding observations on the sixth periodic report of Hungary, CCPR/C/HUN/CO/6, para. 19.

<sup>9</sup> *Id.*, para 20(a).

<sup>10</sup> UN Human Rights Committee, Concluding observations on the fourth periodic report of Bulgaria, CCPR/C/BGR/CO/4, para. 12(a).

<sup>11</sup> UN Human Rights Committee, Concluding observations on the sixth periodic report of the Dominican Republic, CCPR/C/DOM/CO/6, para 10.

<sup>12</sup> UN Human Rights Committee, Concluding observations on the fourth periodic report of Lithuania, CCPR/C/LTU/CO/4, para 10.

The Inter-American Court of Human Rights stipulated in its Advisory Opinion 24/17 that an interpretation of the concept of “family” that does not include same-sex relationships “would defeat the object and purpose of the [American] Convention.”<sup>13</sup> As such, the Court found that the Convention requires that “the rights and obligations established by the domestic law of each State applicable to the family relationships of heterosexual couples” should extend to same-sex couples.<sup>14</sup>

*c. The Right to Privacy*

The right to form a family is closely linked to the right to privacy.<sup>15</sup> The American Convention, Article 11, prohibits “arbitrary or abusive interference with [a person’s] private life, his family, his home or his correspondence” and grants “the right to the protection of the law against such interference.”<sup>16</sup> The ICCPR, Article 17, provides the same protections.

The Inter-American Court of Human Rights held in its Advisory Opinion 24/17 that the right to privacy is implicated with respect to the family ties of same-sex couples, requiring their rights under domestic law to be equal to those provided to different-sex couples.<sup>17</sup> The Court has also repeatedly held that the right to private life, taken in conjunction with the right to form a family, requires states to adopt positive measures to protect families, including same-sex couples. In *Atala Riffo v. Chile*, the Court held that the right to privacy “is closely linked to the right to protection of the family and to live in a family [...] which requires the State [...] to favor, in the broadest possible terms, the development and strength of the family unit.”<sup>18</sup>

The Human Rights Committee has also noted that “the notion of privacy refers to the sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into a relationship with others or alone.”<sup>19</sup> In a case before the Committee in 2019, it held that forcing a transgender woman to decide between altering her legally recognized gender and preserving her marriage to a cisgender woman amounted to an arbitrary interference with her right to privacy.<sup>20</sup>

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<sup>13</sup> Advisory Opinion 24/17, Inter-Am. Ct. H.R., Series A. No. 24, November 24, 2017, para. 189, available at [https://www.corteidh.or.cr/docs/opiniones/seriea\\_24\\_eng.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf).

<sup>14</sup> *Id.*, para. 198.

<sup>15</sup> See e.g., *Artavia Murillo v. Costa Rica*, Judgment of 28 November 2012, Inter-Am. Ct. H.R., Series C. No. 310, paras. 144-45, available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf).

<sup>16</sup> ICCPR, *supra* note 6, Article 17.

<sup>17</sup> Advisory Opinion 24/17, *supra* note 13, para. 199.

<sup>18</sup> *Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012, Inter-Am. Ct. H.R., Series C. No. 329, para. 169, available at [https://corteidh.or.cr/docs/casos/articulos/seriec\\_239\\_ing.pdf](https://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf).

<sup>19</sup> UN Human Rights Committee, Views of 31 October 1994, *Coeriel et al. v. The Netherlands*, Communication No. 453/1991, CCPR/C/52/D/453/1991 (1994), para. 10(2).

<sup>20</sup> UN Human Rights Committee, Views of 17 March 2017, *G v. Australia*, Communication No. 2172/2012, CCPR/C/119/D/2172/2012 (2017), paras. 7(2)-7(10).

*d. The Rights to Non-Discrimination and Equality Before the Law*

The rights to non-discrimination and equality before the law are affirmed through multiple international human rights covenants and treaties, many of which contain open-ended provisions against discrimination and have been interpreted to include discrimination based on sexual orientation. For example, in *Toonen v. Australia*, the Human Rights Committee held that discrimination on the basis of “sex” includes that based on “sexual orientation.”<sup>21</sup> The Inter-American Court has also taken this view in, for instance, *Azul Rojas Marín v. Peru*.<sup>22</sup>

As noted above, the Human Rights Committee, in its statements on laws in Bulgaria and Hungary that violate the right to form a family by excluding same-sex couples, also indicated that the two countries were in violation of non-discrimination principles.<sup>23</sup>

The Inter-American Court has held that distinctions based on sexual orientation require close scrutiny. In *Atala Riffo v. Chile*, the Court held that “as regards the prohibition of discrimination based on sexual orientation, any restriction of a right would need to be based on rigorous and weighty reasons. Furthermore, the burden of proof is inverted, which means that it is up to the authority to prove that its decision does not have a discriminatory purpose or effect.”<sup>24</sup> In its Advisory Opinion 24/17, the Inter-American Court concluded that “without discrimination in relation to families constituted by heterosexual couples,” states should “ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples” and added that “States may need to amend existing institutions by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples.”<sup>25</sup>

#### IV. PETITION

For the abovementioned reasons, we ask this Honorable Court to:

1. Accept Human Rights Watch as a Friend of the Court in this case, and
2. Uphold the right of same-sex couples to access free union, in light of the international standards outlined in this brief.

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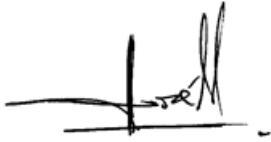
<sup>21</sup> *Toonen v. Australia*, UN Human Rights Committee, Communication No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1992, para. 8(7).

<sup>22</sup> *Azul Rojas Marín v. Peru*, Judgment of 12 March 2020, Inter-Am. Ct. H.R., Series C. No. 402, para. 90 available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_402\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_402_esp.pdf).

<sup>23</sup> UN Human Rights Committee, Concluding observations on the fourth periodic report of Bulgaria, CCPR/C/BGR/CO/4, para. 11, 12(b); UN Human Rights Committee, Concluding observations on the sixth periodic report of Hungary, CCPR/C/HUN/CO/6, para. 20(a).

<sup>24</sup> *Atala Riffo and Daughters v. Chile*, *supra* note 18, para. 124.

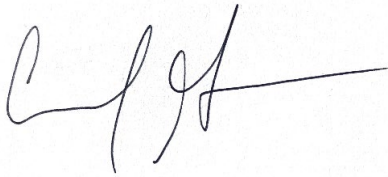
<sup>25</sup> Advisory Opinion 24/17, *supra* note 13, para. 228.



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