

Federal Supreme Court

Of Brazil

Relating to:

RECURSO EXTRAORDINÁRIO COM AGRAVO

888.815 RIO GRANDE DO SUL

HOME SCHOOL LEGAL DEFENSE ASSOCIATION,

LEGAL OPINION*

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<i>People v. Levisen</i> , 404 Ill. 574 (1950),	9
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<i>State v. Peterman</i> , 70 N.E. 550, 551 (Ind. 1904).....	9

Other Authorities

Alan Scher Zagier, <i>Colleges Coveting Home-Schooled Students</i> , AP, September 30, 2006.....	34
Brian D. Ray <i>Home educated and now adults: Their community and civic involvement, views about homeschooling, and other traits</i> (Salem, OR: National Home Education Research Institute, 2004)	30, 31, 38
Brian D. Ray, <i>A nationwide study of home education: Family characteristics, legal matters, and student achievement</i> (Salem, OR: National Home Education Research Institute, 1990); <i>Research Project</i> . Home School Researcher, 6(4), 1-7; (1990)	35, 36
Brian D. Ray, <i>Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study</i> , Academic Leadership Live: The Online Journal, 8 no. 1 (February 2010).....	35
Brian D. Ray, <i>Home education in Oklahoma: Family characteristics, student achievement, and policy matters</i> , National Home Education Research Institute (Salem, OR, 1992)	36
Brian D. Ray, <i>Home schooling: The ameliorator of negative influences on learning?</i> Peabody Journal of Education 75(1 & 2), 71, 83, 90 (2000).....	36, 37

Catherine E. Snow, Wendy S. Barnes, Jean Chandler, Irene F. Goodman, & Lowry Hemphill, <i>Unfulfilled expectations: Home and school influences on literacy 2-3</i> (Cambridge, MA: Harvard University Press, 1991)	37
Cheng, A. (2014). Does homeschooling or private schooling promote political intolerance? Evidence from a Christian university. <i>Journal of School Choice</i> 8: 49-68.....	23
Clive R Belfield, <i>Home-schoolers: How well do they perform on the SAT for college admission?</i> in Bruce S. Cooper (Ed.), <i>Home schooling in full view: A reader</i> (Greenwich, CT: Information Age Publishing; Galloway, 2005).....	38
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Elaine Regus, <i>UC Riverside a leader in courting home-schooled students</i> , <i>The Press-Enterprise</i> , November 23, 2007.....	35
Gary Neil Marks, <i>Are father's or mother's socioeconomic characteristics more important influences on student performance? Recent international evidence</i> . <i>Social Indicators Research</i> , 85(2), 293-309, (January 2008)	37
Georgina Gustin, <i>Home-school numbers growing</i> , <i>St. Louis Post-Dispatch</i> , October 3, 2007	35
Gordon Dahl & Lance Lochner, <i>The impact of family income on child achievement</i> . Discussion Paper No. 1305-05, Institute for Research on Poverty, 2005.....	37
Howard B. Richman, William Girtten, & Jay Snyder, <i>Academic achievement and its relationship to selected variables among Pennsylvania homeschoolers</i> , <i>Home School Researcher</i> , 6(4), 9, 13, (1990)36	
James S. Coleman & Thomas Hoffer, <i>Public and private high schools: The impact of communities</i> Chapter 5 (New York, NY: Basic Books, Inc, 1987).....	37
Jennie F. Rakestraw, <i>Home schooling in Alabama</i> , <i>Home School Researcher</i> , 4(4), 1, 5 (1988).....	36
Joan Ellen Havens, <i>A study of parent education levels as they relate to academic achievement among home schooled children</i> . Doctoral (Ed.D.) dissertation, Southwestern Baptist Theological Seminary, Fort Worth TX (1991).....	36
Jon Wartes, <i>The relationship of selected input variables to academic achievement among Washington's homeschoolers</i> . (Woodinville, WA, September 1990)	37
Lawrence M. Rudner, <i>Scholastic achievement and demographic characteristics of home school students in 1998</i> , <i>Educational Policy Analysis Archives</i> , 7(8). (1999).....	36, 37, 38
Moller, K. (2012). <i>The Global Model of Constitutional Rights</i> . Oxford, England: Oxford University Press.....	24
Murphy, J. (2012). <i>Homeschooling in America: capturing and assessing the movement</i> . Thousand Oaks, CA: Corwin Press.	23

<i>Once Again Home-schoolers Score High on the ACT Exam</i> , HSLDA, July 31, 2007	38
Oregon Department of Education, Office of Student Services, <i>Annual report of home school statistics 1998-99</i> (Salem, OR. May 20, 1999).....	35
Patrick Basham, John Merrifield & Claudia R. Hepburn, <i>Home Schooling: From The Extreme To The Mainstream</i> , 2nd ed 6, The Fraser Institute 2007	34
Paul Jones & Gene Gloeckner, <i>First-Year College Performance: A Study of Home School Graduates & Traditional School Graduates</i> , Journal of College Admission 183 (Spr. 2004), at 17, 20.....	38
Paula Wasley, <i>Home-Schooled Students Rise in Supply and Demand</i> , The Chronicle of Higher Education 54(7), 1, (Oct. 12, 2007)	34
Rhonda A. Galloway & Joe P. Sutton, <i>Home schooled and conventionally schooled high school graduates: A comparison of aptitude for and achievement in college English</i> , Home School Researcher, 11(1), 1-9 (1995).....	38
Rhonda A. Galloway, “Home Schooled Adults: Are They Ready for College?,” in <i>American Educational Research Association</i> (San Francisco: 1995).....	31
Richard G. Medlin, <i>Homeschooled Children’s Social Skills</i> , Home School Researcher 17(1), 1-8, (2006)	33
Richard G. Medlin, Ph.D., <i>Homeschooling and the Question of Socialization Revisited</i> , Peabody Journal of Education, Volume 88, Issue 3, 2013	30, 33
Richard G. Medlin, <i>The Question of Socialization</i> , Peabody Journal of Education 75(1 & 2), 107-123, 117, (2000).....	32, 33
Scott White, et al., <i>Emotional, Social & Academic Adjustment to College: A Comparison Between Christian Home Schooled & Traditionally Schooled College Freshman</i> , Home School Researcher 17(4), 1-7, (2007).....	32, 34
Scott White, Megan Moore, and Josh Squires, <i>Examination of Previously Homeschooled College Students with the Big Five Model of Personality</i> , Home School Researcher 25(1), 1-7, (2009)	32
Spiegler, T. (2015). Home education versus compulsory schooling in Germany: The contribution of Robert K. Merton’s typology of adaption to an understanding of the movement and the debate about its legitimacy, In P. Rothermel (Ed.), <i>International perspectives on home education: do we still need schools</i> , Palgrave Macmillan.	21
Tanya K. Dumas, Sean Gates, & Deborah Schwarzer, “Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research,” <i>Widener Law Review</i> (forthcoming)	30
Tennessee Department of Education. <i>Tennessee statewide averages, home school student test results, Stanford Achievement Test, grades 2, 5, 7 and 9</i> (Nashville, TN, 1988).....	35

Terry Russell, <i>Cross-validation of a multivariate path analysis of predictors of home school student academic achievement</i> , Home School Researcher, 10(1), 9, (1994).....	37
Thomas C. Smedley, <i>Socialization of Home School Children</i> , Home School Researcher 8(3), 9-16, (1992)	32
U.S. Department of Education, National Center for Education Statistics, <i>1.5 Million Homeschooled Students in the United States in 2007</i> , NCES 2009–030, December 2008	30
U.S. Department of Education, National Center for Education Statistics, <i>Parent and Family Involvement in Education, from the National Household Education Surveys Program of 2012</i>	30
UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, available at: http://www.refworld.org/docid/3ae6b39ec.html	26
UNITED NATIONS, General Assembly HUMAN RIGHTS COUNCIL Fourth session, A/HRC/4/29/Add.3 9, March 2007, IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006, Report of the Special Rapporteur on the right to education, Vernor Muñoz Addendum MISSION TO GERMANY (13-21 February 2006).....	15
Treaties	
Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.	vii
European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221	1
International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.	vi
International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.	vi
Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).....	vi

INTEREST OF AMICUS CURIAE

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SUMMARY OF ARGUMENT

The right to home education falls well within the scope of any properly understood conception of the human right to education. Both parents and children possess rights relevant to the right to home education; parents possess the right to direct the education of their children and children have a right to a meaningful education, including through private alternative means. Brazil has an opportunity to show great leadership as an emerging free and democratic society to this important and fundamental right in a constitutional context and in recognition of Brazil's international legal obligations.

Article 26.3 of the Universal Declaration of Human Rights (UDHR) recognizes a prior parental right to choose the type of education their children will receive. A state's authority to mandate that children receive a certain minimum level of education does not grant the state authority to dictate how to provide that level of education. While state parties may create educational systems to ensure that all children can receive education, state parties may not eliminate all other forms of education, as doing so would violate the prior right of parents to select the type of education their children will receive.

Several human rights instruments impose binding legal obligations upon Brazil to protect the right to education, including the right to home education. Article 18.4 of the International Covenant on Civil and Political Rights (ICCPR) requires the State Parties to respect the religious liberty of parents to make decisions regarding the religious or moral education of their children, which Article 4.2 of the ICCPR grants non-derogable status. Article 13 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) goes even further by recognizing an individual right to send one's children to a nonpublic school. The right to home education falls within the meaning of Article 13 of the ICESCR, as the UN Special Rapporteur on the Right of Education made abundantly clear in his evaluation of Germany.

The ICESCR guarantees the right of individuals and groups to establish and direct educational institutions. Home education and distance learning through advanced technology are both valid educational options, and they are particularly important in economically disadvantaged areas that otherwise might not be able to provide sufficient education to comply with the child's right to education. The mere fact that a child is born in an economically disadvantaged area that has poor 'traditional' education options does not, and cannot strip that child of his or her right to

a meaningful education. The ICESCR and other binding human rights instruments protect the right of parents to seek alternative means of educating their children, including through home education.

The United Nations Convention on the Rights of the Child (CRC) protects a child's right to education, and requires governments to encourage the development of different forms of education and to make them accessible to every child. This right to alternative forms of education clearly seeks to guarantee the right 1) to the best available education and 2) the right to a meaningful education, even if the child lives in an area with a deficit of quality educational institutions. A ban on home education is inconsistent with the CRC's obligations to ensure that children have access to high-quality education, and thus to meaningful protection of their right to education.

Brazil's international legal obligations do permit it to regulate its education system, but there is a clear prohibition from banning alternative forms of education in their entirety. Brazil may set minimum educational standards, but may not impose a total ban on certain types of education.

Numerous international jurisdictions recognize a right to home education. The United States of America protects the right to home education at both the state and federal levels. Multiple US states treat home educating families as creating their own 'schools' for the purposes of complying with relevant educational regulations. Likewise, numerous governments across the world permit home education. While no two regulatory schemes are the same, this proves that governments have the flexibility to determine the best and most effective way to allow their citizens to exercise their human rights.

This Court should refuse to consider the European Court of Human Rights (ECtHR) review of the German Federal Constitutional Court's (FCC) decision in *Konrad v. Germany* to the present case, because doing so would seriously undermine human rights protection. The German FCC case entitled *In Re Konrad* applied proportionality review to find that home education should be banned because governments must prevent the development of parallel societies. However, in its reasoning, the FCC assumed that this interest was relevant in a home education context. The FCC improperly presumed, without evidence and in spite of evidence to the contrary, that home education contributes to the development of parallel societies. Available empirical evidence clearly contradicts this assumption. Peer-reviewed studies indicate that home-educated students

are actually more likely to be tolerant of different views. Because important questions of public policy should not be decided based on stereotypes that have been disproven by verifiable scientific data, this Court should reject the FCC's decision of *In re Konrad* as well as the ECtHR's *Konrad* decision reviewing the FCC.

Further, the existence of other regulatory systems permitting home education clearly indicates that a ban on home education is not necessary to effect the legitimate state interests at play. Many nations in the world permit home education without suffering from parallel societies as a result. Finally, a ban on home education is clearly a disproportionate measure, even when assuming that all the speculative benefits claimed by the government would actually exist. As a result, Brazil's ban on home education fails three out of the four prongs of proportionality review, so the ban violates the rights of parents and their children.

Bans on home education are not within the margin of appreciation surrounding the right to education. The rights forming the foundation of the right to home education are non-derogable rights under the ICCPR and ICESCR, so the doctrine of margin of appreciation is inapplicable in its entirety to this context. Even if the margin of appreciation did apply, however, the margin of appreciation can never be used to eliminate the exercise of a right in its entirety, so a ban on home education would not be permissible.

The ECtHR in *Konrad* argued that no international consensus existed regarding the legal status of home education, which is now outdated. Nations that still prohibit home education find themselves on the wrong side of history, as the international community's understanding of human rights has evolved to include the right to home education as an alternative to government schooling.

Because home education is a human right within the meaning of Article 18.4 of the ICCPR and Article 13 of the ICESCR, Brazil's should recognize a right of education is part of Brazil's international legal obligations.

Finally, home education has been demonstrated to be both positive academically and socially for children who graduate. Research studies and anecdotal experience in the United States demonstrate how homeschooled students are well-integrated and productive members in society after 40 plus years of experience and now with by far the world's largest population of current and graduated homeschooled students.

ARGUMENT

- I. The right to home education is protected by international human rights instruments as a right possessed by both children and their parents.

Although homeschooling (or synonymously, home education) is not mentioned explicitly as a human right in any human rights treaty, virtually all international human rights documents refer to rights of the individual to education as well as to the rights of parents or guardians to direct the education of their children. The right to home education is clearly within the scope of this broadly protected right, as it is vital to ensuring that parents can make educational decisions to ensure that their children obtain the best possible education. When properly interpreted, Brazil's international legal obligations also include protecting the right of children to a meaningful education, including through home education. Failure to protect home education and other alternative forms of education strips children of this right, and can harm the protection of this right for children in remote or economically disadvantaged areas who may not have access to high-quality 'traditional' schools. International human rights instruments that protect the right to education bind this Court, and the right to home education is a logical and necessary element of that broader right.

This section examines four major sources of international human rights law and how they address education and the rights of parents. Although there are numerous sources of human rights law, which mention the right of education, four are of foundational importance to human rights: the UDHR, ICCPR, ICESCR and CRC.

This section also includes analysis of the application of Article 2, Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The ECHR was developed contemporaneously with the UDHR and is the only human rights system where home education has been litigated in a human rights framework. This analysis is especially important in this case because 18 Brazilian state prosecutors have filed an *amicus curiae* brief with this Court pointing to rulings of the Federal Constitutional Court of Germany and a subsequent decision of the ECtHR upholding the German FCC's decision to permit a ban on home education. Specifically, the prosecutors as amici point to these decisions as evidence that respect

for human rights does not demand the recognition and protection of home education as a human right.

As part of this analysis, this brief will then turn to the ECtHR's jurisprudence relative to home education including an analysis of the German FCC's application of the principle of proportionality as well as the ECtHR's proportionality analysis. The brief will also review concept of the margin of appreciation applied by the ECtHR in the *Konrad* case.

A. The Universal Declaration of Human Rights recognizes a parental right to educational decision-making, including home education.

To determine whether home education ought to be included as a human right within the modern human rights system, we start by examining the UDHR, which was created in response to the devastation and atrocities of World War II. Nearly 50 nations came together to create the United Nations (UN) whose founding members drafted a universal declaration of the rights they believed that civilized nations ought to protect (Cronin-Furman, 2009, p. 175, 176). With Eleanor Roosevelt as the Chair of the Committee on Drafting, the UDHR was adopted in 1948. The UDHR is a 30-article statement signed by every member of the United Nations and is considered the foundational human rights document in the modern international human rights framework. Although not a binding treaty, the UDHR is nonetheless a long list of the "rights," both positive and negative, that the nations of the world consider important. It is an aspirational document that, though not binding, is an important foundation for understanding the scope of human rights. In relevant part, the UDHR provides as follows:

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Since then virtually all governments have established a system of compulsory education at government-run education facilities as a means to fulfill the governmental duty to protect the right to education. Most countries with compulsory attendance laws make parents and/or children subject to state action unless exempted or excused by law. However, there is a significant difference between creating a compulsory *education* system and requiring compulsory *attendance* at a particular school.

The UDHR makes abundantly clear that parents have the prior right to decide what kind of education their children shall have. This indicates that there must be more than one means by which the right may be fulfilled and that parents supersede government in making the decision. Governments cannot require that the right to education be fulfilled through any particular means so long as the education the parents select provides sufficient education for the child; this includes through private, charter, parochial, or home education. This broad parental power places the decision-making power of the parent above that of the state. This foundational principle should inform the interpretation of parental rights in all other modern human rights documents. Further, it clearly supports the original intent of human rights—to protect the individual from the state, not the state from the individual.

B. Binding human rights instruments and international norms protect home education.

Following the adoption of the UDHR, the UN drafted two binding human rights treaties the ICCPR and the ICESCR, both of which came into force in 1976. These treaties are often known as the International Bill of Rights and they encompass the five broad categories of human rights: civil and political rights (sometimes referred to as “negative rights”) protected by the ICCPR and economic, cultural and social rights (sometimes referred to as “positive rights”) in the ICESCR.

1. The ICCPR protects a parental right to educational decision-making.

Article 18.4: The States Parties to the present convention undertake to have respect for the liberty of parents, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Although the ICCPR does not recognize education as a positive right, it does recognize and protect parental rights in education in article 18.4, which prohibits the state from interfering with parental liberty to ensure that their children receive a religious or moral education in conformity with the parents' own religious or philosophical convictions. Article 4.2 makes this right non-derogable, a right that is of such importance a country may not derogate from respecting the right even if the life of the nation is at risk, which places it in the same category as other non-derogable rights, such as the right to be free from torture, the right to life, and the right to be free from slavery. It is important to recognize that the international community considered the parental right to direct education to be of such vital importance.

2. Not protecting home education would violate the ICESCR, which protects the right to education through a means selected by parents, including through home education.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

...

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum

educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Unlike the ICCPR, the ICESCR recognizes a positive right to education. The ICESCR also goes further in its protection of parental rights, as it explicitly recognizes that parents have the right to send their children to non-public schools. In turn, these schools are guaranteed a right to exist, subject only to minimum educational standards established by the state. The ICESCR also mirrors provisions of the ICCPR by recognizing the right of parents to “ensure the religious and moral education of their children in conformity with their own convictions.”

Under the ICESCR, both individuals and groups have a right to “establish and direct educational institutions.” While at first glance this may not appear to be particularly relevant to home education due to the emphasis on “educational institutions,” a closer examination reveals otherwise. The family, as a fundamental unit of society, has existence as a societal institution, as Article 16.3 of the UDHR makes clear. Thus, this Court should view families that seek to educate their children at home as adding an educational component to an already existing institution.¹ The ICESCR recognizes that both individuals and groups may form educational institutions, and there is no logical reason to exclude families from participating in this right without simultaneously undermining the right of other more ‘traditional’ nonpublic educational institutions to exist.

Advanced learning technologies that allow children to receive education outside of a traditional school setting are developing rapidly, and these technologies are particularly important in economically disadvantaged areas that otherwise might not be able to provide sufficient education to a student to comply with the right to education. As technology advances, so too must the law’s understanding of how the right to education can be effectively fulfilled. With these

¹ As will be examined *infra* (particularly in the analysis of *People v. Levisen*), numerous jurisdictions permit home education as a type of private schooling, and view families who home school children as operating a nonpublic educational institution. It would be consistent with these jurisdictions for this Court to rule that home-educating families create a nonpublic educational institution within the meaning of the ICESCR.

technological increases, the question of who should decide what kind of education a child receives becomes ever more important. The notion that a child's circumstances should pose a limit to his or her educational development is directly counter to the foundational principles underlying all international human rights instruments. The mere fact that a child is born in an economically disadvantaged area with poor 'traditional' educational options does not, and cannot, strip that child of his or her right to a meaningful education.

A legal system that restricts the right of parents to choose among all available methods of educating their children violates both the child's right to education and the parental right to direct that education protected by Article 13 of the ICESCR. Indeed, the UN Special Rapporteur on the Right of Education observed in his mission to Germany

[I am] a strong advocate of public, free and compulsory education, [but] it should be noted that education may not be reduced to mere school attendance ... Distance learning methods and home schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children, as stipulated in article 13 of the International Covenant on Economic, Social and Cultural Rights. The promotion and development of a system of public, government-funded education should not entail the suppression of forms of education that do not require attendance at a school.

(Muñoz, 2007)

The UN Special Rapporteur makes abundantly clear that the right to education cannot be limited to education that occurs in a formalized classroom setting.² Indeed, requiring children to attend schools that have this formalized setting deprives children who live in areas without access to high-quality schools reduces the right to education from a meaningful human right to the mere formality that a child should have the opportunity to go to a classroom, regardless of whether they receive a meaningful education there. International human rights instruments to which Brazil is a

² In fact, both home education and advanced distance learning technologies allow children to learn outside of this formal classroom setting. Sugata Mitra, professor of educational technology at Newcastle University, UK, has pioneered research based on the "school in the cloud" concept, wherein children group around computers to take advantage of internet learning resources (Mitra, 2013). This would be particularly helpful for economically disadvantaged children to fulfill their right to education.

party do not permit the government to deprive children of the right to a meaningful education. No matter how impoverished, no matter how disadvantaged, and no matter how remote, every child has the right to a meaningful education, and the ICESCR and other binding human rights treaties protect the right of parents to decide that the means of education that the government seeks to require is not good enough and to seek some alternative means of educating their children, including through home education.

If this Court were to rule that home education is not a protected right within the meaning of Article 13 of the ICESCR, it would be striking a blow against the right to education that is far broader in scope, as it would be ruling that the right to education can be contingent upon a child's circumstances, which would be contrary to the principles the international community sought to lay down in the ICESCR.

3. The UN CRC protects a child's right to alternative forms of education including the right to home education.

The CRC is intended specifically to protect the rights of children. In so doing, it also recognizes the rights of parents to direct their children's education in Article 18, which notes that "Parents have the primary responsibility for the upbringing and development of the child." The CRC also notes in Article 27.2 that parents bear a responsibility to "secure the conditions of living necessary for the child's development." Even when viewed in isolation, this broad language of "upbringing and development" certainly includes within its sweep the education of a child, and when viewing the CRC in relation to other human rights instruments (particularly the ICESCR, as well as the UDHR and ICCPR) the international community's intent to preserve the parental right of educational decision-making becomes clear. The CRC also imposes other requirements on State Parties, which support a broad view of the responsibilities of governments to permit alternative forms of education, such as home education. Article 28.1(b) of the CRC requires governments to "encourage the development of different forms of secondary education" and "make them available and accessible to every child." This responsibility to promote different forms of education is premised on the idea that different children are likely to require different types of education in order to flourish. Because the international community has recognized that no government (no matter how efficient) is perfectly capable of determining which form is optimal for each of the

millions of children within its jurisdiction, human rights instruments have protected the right of parents – those with the best understanding of their children – to select the best educational option for that child, whether free government education, private education, advanced distance education, or home education.

Article 28.1(b)'s requirement that governments make these educational options available and accessible to every child creates an obligation to ensure that every child can obtain education under all circumstances. The requirement is thus that no government may derogate from this obligation by shutting off an important means of ensuring that the right to education is fostered in a meaningful way. Because home education is an important way to ensure that children who might otherwise lack access to schools to receive meaningful protection of their right to education; to find otherwise would violate a child's rights under the CRC.

Article 5 of the CRC further requires government to “respect the responsibilities, rights, and duties of parents” to provide “appropriate direction and guidance” to their children. Because the CRC focuses on the rights of children, it does not examine parental rights in great detail. However, this language does suggest that even though the CRC explicitly protects parental rights to direct the upbringing of their children, the CRC is not intended to limit parental rights. The CRC must be read in light of the totality of all the other contemporaneous as well previous human rights treaties. The appropriate way, therefore, to determine the scope of parental rights to direct the education of their children is to evaluate that right as it exists under such other human rights instruments that address these rights more directly.

The CRC does not purport to restrict rights previously protected by other human rights instruments; thus, the CRC should not be interpreted to conflict with the ICESCR, the ICCPR, or the UDHR. Rather the CRC should be read harmoniously with these other treaties. The parental right to direct the education of children is entitled to significant protections under the ICESCR, the ICCPR, and the UDHR. The UN Special Rapporteur has also made clear that this is true under the ICESCR; parents must have the right to choose to educate children at home. This Court should read these rights in such a way to acknowledge them as part of Brazil's international obligations.

4. While binding human rights treaties permit Brazil to regulate its education system, it should not prohibit alternative forms of education in their entirety.

Brazil's international legal obligations do not prohibit it from regulating the conduct of its educational system. Article 13 of the ICESCR recognizes the authority of the state to establish certain "minimum standards". However, the possibility of regulation should not be read to include the authority to completely ban a kind of education entirely.

Article 29.2 of the CRC also permits governments to establish minimum educational standards, which educational institutions must meet. However, Brazil's failure to provide for any right to home education cannot be properly considered a "minimum standard" within the meaning of the CRC. A legitimate minimum standard under Article 29.2 should be consistent with Brazil's international legal obligations. A minimum educational standard must 1) apply (both in law and in practice) to all children in a country, regardless of the form of education in question, 2) establish a base threshold of required knowledge to operate within society, which some students may exceed to varying degrees, and 3) be designed to help guide education, not to create requirements that discriminate against alternative educational methods.

In contrast, a regulation of education that goes beyond this three-part test strays into prohibiting educational methods is not a legitimate regulation under Article 29.2. When viewed as a whole, international human rights permit governments to create minimum standards for educational attainment but do not permit government to totally ban on certain kinds of education. Governments must have flexibility to create educational standards; but educational standards must permit educational institutions to fulfill them rather than be pretexts to undermining alternative means of education; state parties to the CRC, ICESCR, and other human rights instruments should not use their regulatory authority to undermine substantive rights

C. Numerous international jurisdictions recognize the right to home education. Brazil should too.

1. The United States protects home education at both the federal and state levels.

The right to home education is clearly established in the United States under both federal and state jurisprudence and by statute. Over the past 112 years, every state in the United States has recognized a right to home education by either statute or judicial ruling (and sometimes both). The foundational case from the United States Supreme Court is *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), in which that court unanimously ruled that the liberties protected by the 14th Amendment of the federal Constitution include the right of parents to direct the education of their children. *Pierce* makes clear that, “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce*, 268 U.S. at 535. Numerous state supreme courts have acknowledged this fundamental right in their own state court decisions. See for example *Care and Protection of Charles*, 399 Mass. 324, 337-340 (1987).

The parental right to direct a child’s education extends to the right to select home education as the manner in which a child will be educated, as can be seen from an examination of state laws and judicial decisions. In *People v. Levisen*, 404 Ill. 574 (1950), the Illinois Supreme Court set forth a clear statement that home education is a protected right. *Levisen* addressed parents who chose to educate their children at home and were then prosecuted for truancy. The state of Illinois argued that it had the authority to require attendance at a local school and that home education was not permitted under the statutory system. The *Levisen* court rejected this argument and ruled that a school is any “place where instruction is imparted to the young” and that the “number of persons being taught does not determine whether the place is a school.” *Levisen*, 404 Ill. at 576. The *Levisen* court went on to observe that the proper object of the state is to ensure “that all children shall be educated, not that they shall be educated in any particular manner or place. *Id.*, at 577. See also *Commonwealth v. Roberts*, 159 Mass. 372 (1893).

The Indiana Supreme Court made a similar observation, ruling, “We do not think that the number of persons, whether one or many, make a place where instruction is imparted any less or more a school.” *State v. Peterman*, 70 N.E. 550, 551 (Ind. 1904). This lends strong support for the proposition that home education can qualify as a type of school. The *Peterman* court also noted that a school is “a place where instruction is imparted to the young. If a parent employs and brings into his residence a teacher... the meaning and spirit of the law have been fully complied with. This would be the school of the child or children so education, and would be as must a

private school as if advertised and conducted as such.” *Id.* The Washington Supreme Court also observed that “[t]he three essential elements of a school are (1) the teacher, (2) the pupil or pupils, and (3) the place or institution.” *Shoreline Sch. Dist.*, 346 P.2d 999, 1002 (Wash. 1959). Home education meets all three elements of the *Shoreline Sch. Dist.* test – the parents serve as the teachers, the children serve as the pupils, and the home serves as the place.

Under this approach of the meaning of “school,” twenty-one states permit home education as a form of private school.³ Such states recognize homeschools as private schools under either private school statutes or other judicial guidelines; they acknowledge that the home may be properly considered a “school” (or that a parent or group of parents may form a “school” by meeting statutory qualifications).

Education is regulated at the state level in the United States, a federal republic, and thus there are numerous states with differing approaches by which parents can comply with compulsory attendance laws.⁴ In some states, there is no requirement that home-educating parents ever make any contact with authorities at all.⁵ In other states, parents simply notify the authorities at the initiation of home education and are not required to complete any application or approval process.⁶

2. Other international jurisdictions protect the right to home education.

Home education is a growing global movement and is recognized in most jurisdictions within the European Union and most other democratic countries.⁷ These nations have various regulatory frameworks within which parents are able to educate their children at home. These regulatory systems vary in their requirements, and range from systems where parents are not required to even notify local authorities of their intent to home educate their children to systems where formal state approval of home education is required.⁸ What is notable, however, is that these diverse systems exist and protect the right of parents and children to exercise these basic human rights of parents to direct the education of their children and for children to receive an education

³ See Appendix I for references and analysis of each jurisdiction.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See Homeschooling, Donnelly, Michael P. in *Balancing Freedom, Autonomy, and Accountability in Education*. Glenn and De Groof. Eds. Wolff Legal Publishers, Nijmegen Netherlands. 2012.

⁸ Appendix II contains a comprehensive listing of these countries, broken down by the level of regulation.

that is tailored to their individual needs. Governments can develop various different systems to allow their citizens to exercise these rights, but they should not foreclose this kind of education. This court has an opportunity to state that home education is within the constitutional framework of the Brazilian Constitution and if the Brazilian legislature chooses to exert additional oversight it is competent to do so. Until then however, home education ought to be recognized as a valid exercise of parental authority meeting the minimum standards and requirements of the Brazilian constitution regarding the child's right to education.

The existence of these different regulatory systems demonstrate that there are less restrictive means by which social order can be preserved and important governmental interests can be advanced. The widespread status of home education means that the political branches of the Brazilian government have many potential examples from which to choose if they exercise their authority to regulate.

D. This Court should decline to give weight to *Konrad v. Germany* in the present case because doing so would seriously undermine human rights protection.

On 18 February 2016, eighteen Brazilian State Prosecutors submitted a 27-page memo to this Court calling for the dismissal of the case and urging the Court to find home education to be an unlawful means of providing an education to children in Brazil. The State prosecutors point to the 2006 ruling by the ECtHR in *Konrad*, which denied an application by German homeschooling parents who had been denied the right to home educate their children by the FCC. In *Konrad*, the ECtHR reasoned that Germany's denial of the right to home education was within the margin of appreciation of the right to education and that it was not a violation of the ECHR for German federal states to ban home education for religious or philosophical reasons.

In *Konrad*, the ECtHR followed reasoning emanating from handful of cases that date back to 1968 from both the ECtHR and the European Commission on Human Rights. Spiegler (2015) observed that “[H]ome education is not allowed in Germany as an alternative to public schooling,” and affirms that fines, criminal prosecution and loss of custody of children are possible state actions against families who persist in homeschooling. Many German families who wish to home educate their children have been forced to emigrate. This cultural hostility in Germany (which is also shared by Sweden), has contributed to the bulk of international human rights case law on the

particular issue of home education. This section will focus on the German cases because they are the most recent, because they are well documented, and because Germany's FCC is a highly regarded court, a translation of the FCC decision in English is included. This translation was submitted as part of an application for Asylum that the author was an attorney for and which went to the Supreme Court of the United States. *Romeike v. Holder*, 718 F.3d 528, 6th Cir. (2014) cert denied, 571 U.S. ___, (U.S. March 3, 2014) (no. 13-471)

1. The German FCC improperly applied proportionality review in *Konrad*.

The German FCC is well known for employing the proportionality method of review, and its decisions are influential in the growth and development of the principles of proportionality review. Under proportionality review, virtually any action (even something as petty as riding a horse or feeding birds, *see Reiten im Walde Case*, BVerfGE 80, at IV-15) is considered a human right. This is because the German FCC considers every human action to be an expression of human dignity that should be accorded some level of judicial review. Accordingly, the German FCC never examines whether an action is a human right, but instead examines whether interference with the action is proportional.

Proportionality review involves a four-step process in which a reviewing court assesses 1) whether interference with the right pursues a legitimate goal; 2) whether the interference is suitable (or bears some rational connection to the achievement of the goal); 3) whether the interference is necessary, which means that there must be no alternative to the infringement that is less intrusive but equally effective; and 4) whether the interference imposes a disproportionate burden on the right-holder. These four steps can be labeled 1) the legitimacy prong, 2) the suitability prong, 3) the necessity prong, and 4) the balancing prong.

The German FCC applied proportionality analysis to *In Re Konrad*, prior to review by the ECtHR. The FCC ruled that Articles 6 and 7 of the German Basic Law permitted a complete denial of the right to home education because of the state's interest in integrating minorities and countering the development of parallel societies. The FCC also ruled that only schools run or approved by the state were a legitimate means of inculcating state-approved values. Spiegler (2015) suggests that a major reason for German education policy may be nothing more than maintaining cultural homogeneity, which would explain the FCC's repeated emphasis on avoiding

parallel societies and integrating minorities in *Konrad*. This subsection will show why *Konrad* was an erroneous application of the principles of proportionality.

- i.** Bans on home education survive the legitimacy prong of proportionality analysis.

To survive the first step of review under proportionality analysis, a restriction must pursue a legitimate governmental goal. The FCC in *Konrad* considers integration of minorities and countering the development of parallel societies to be legitimate governmental goals. Though the FCC is extremely vague and never defines what it considers “parallel societies” to be, at some level it seems clear that governments do have a legitimate interest in maintaining order by establishing a rule of law that applies equally to all within their jurisdiction. If an extreme example of a parallel society existed that sought to create, for example, an alternative judiciary and police force to replace the government’s own justice system, a government would clearly have a legitimate interest in preventing such a development in order to prevent repression in the name of some other philosophy or legal or political system (because the state has a duty to ensure that all citizens receive equal protection of the laws). While governments can have an interest in preventing parallel societies in the abstract, that does not prove that the interest is applicable to home education. The question then becomes whether the interference is rationally related to the achievement of this goal, which falls under the suitability prong.

- ii.** Bans on home education fail the suitability prong of proportionality analysis.

The FCC in *Konrad* assumes that home education leads to the development of parallel societies without reviewing any relevant evidence. Even the most cursory examination of relevant studies demonstrates that this assumption is empirically false. Murphy (2012) describes home education as a social movement that, while distant from certain aspects of society, does not isolate itself from the commons of society. Home educating families still operate under the same civic institutions, judiciary, common language, economic system, and political organizations as their

neighbors whose children obtain state education, so they do not set up a parallel society, as the term is commonly understood by social scientists.

Once again, *Konrad* assumes that inculcating the value of tolerance in youth can prevent the development of parallel societies without examining evidence of any kind to support this claim. Perhaps more significantly, the FCC assumes that this value can only be obtained through the public education system. However, the evidence paints a very different picture. Cheng (2014) observed the opposite tendency in his research, finding that a positive correlation exists between tolerance for differing views and home education. Cheng's research makes clear that prohibiting home education would actually have the opposite of the desired effect, as it could actually prevent children from developing tolerance for differing views.

Important questions of public policy should not be decided based assumptions and stereotypes that are verifiably incorrect. Academically, it is theoretically possible that school attendance could, in some limited circumstances, contribute in marginal ways to preventing the development of parallel societies. However, in the real world, whether attendance at a public school actually promotes the development of tolerance is unclear, and should not be assumed without evidence, particularly in light of Cheng's research that suggests that home education is linked to higher levels of tolerance. However, even if this Court were to proceed based on this demonstrable inaccurate assumption and find that the suitability prong has been met, other problems still result a ban on home education.

- iii. Bans on home education fail the necessity prong of proportionality analysis.

The third step of proportionality analysis is to determine whether the policy is necessary. Moller (2015) points out that the "principle of necessity requires that there must be no other, least restrictive policy that achieves the legitimate goal equally well." This analysis means that if those challenging the restriction can point to any other regulatory scheme that is as effective at achieving the governmental interest as the challenged restriction, and that imposes a lighter burden on human rights, the restriction cannot survive.

Even a superficial effort at comparative jurisprudence demonstrates that many other regulatory schemes exist which would permit the state to achieve its interest in preventing the

development of parallel societies without imposing the heavy burden on the parent-centric right to educational choice and the child-centric right to a meaningful education that a ban on home education imposes. The vast majority of European nations permit home education under some regulatory scheme (and indeed, some permit home education without requiring participation in any regulatory scheme whatsoever).⁹ The fact that these nations permit home education without any resulting problems of the development of parallel societies makes clear that governments can prevent the development of parallel societies while still permitting home education.

iv. Bans on home education fail the balancing prong of proportionality analysis.

The final step of proportionality analysis is the balancing prong, which examines whether the challenged restriction imposes a disproportionate burden on the right in question. *Konrad* challenged a complete ban on home education, which should have been viewed as disproportionate not as being within Germany's margin of appreciation. The available scientific evidence suggests that, statistically, the government interest in preventing the development of parallel societies is actually best advanced *by* home education, not banning it. The presumption that public schools are the only way to promote tolerance is conjecture and is not demonstrated by peer-reviewed scientific studies. The experience of many other nations of the world in regulating home education makes clear that less restrictive means of advancing this government interest exist; there is no evidence from such countries suggesting that permitting home education tends to create parallel societies.

Even assuming that some hypothetical benefit could be obtained from banning home education, the miniscule benefit would be vastly outweighed by the severe impact of such a ban on home education and other alternative forms of education. Not only does such a ban strip parents of their prior right to direct the education of their children, but it can also destroy the right of children to a meaningful education by trapping them in educational systems that are not equipped to allow them to obtain the education necessary to fully express their human dignity.

⁹ See Appendix II for a listing of countries sorted by the regulatory scheme used to permit home education.

2. In finding no-violation by Germany, the ECtHR erred in *Konrad*; its opinion should not be viewed as the appropriate interpretation of European human rights standards with regard to home education.
 - i. If applied to the right to education under the ICESCR, *Konrad* incorrectly applies the margin of appreciation.

Three categories of rights exist in the international legal system. First, some rights protected by human rights instruments are absolute (or non-derogable), which means that these rights “cannot be abrogated by states even in times of grave national emergency and war.” O’CONNELL, ET AL. (2015), p. 457. These non-derogable rights cannot be limited by governments. Second, some rights are absolute but derogable in officially declared cases of public emergency, so long as the restrictions are no greater or longer in duration than the exigencies of the situation. O’CONNELL, ET AL. (2015), p. 458. Third, some rights may be limited subject to the provisions of the international human rights treaty protecting that right. O’CONNELL, ET AL. (2015), p. 458.

The ECtHR’s decision in *Konrad* finds that Germany’s denial of the right to home education was within the margin of appreciation of the right to education under Protocol 1, Article 2 of the European Convention on Human Rights (ECHR). Notably, the ECHR does not protect the right to education as non-derogable, and thus it falls into the third category of rights explained by O’Connell and other prominent international legal scholars. Thus, under *Konrad*, the ECHR has chosen to exclude protection of the right to education from the generally very broad scope of the right to education contained in Protocol 1.¹⁰

However, human rights are often seen as “universal, indivisible, interdependent, and interrelated” (Vienna Program of Action 1993). The ICCPR and ICESCR both label the rights to parental educational choice, to meaningful childhood education, and to access to alternative forms of nonpublic education (including through home education) as rights of the first order; therefore, a complete prohibition on these rights cannot be within the margin of appreciation. The margin of

¹⁰ While we argue that this is a flawed interpretation of the ECHR, it is unnecessary to demonstrate that *Konrad* is an erroneous interpretation of the ECHR, because the protections of the right of home education are far greater and clearer under the ICESCR than under the ECHR.

appreciation is the degree to which restrictions on a right are acceptable for the purposes of, for example, protecting the rights of others or national security. *See, e.g.*, ICCPR, Art. 19. While there may be debates about the outer limits of conduct protected by a non-derogable right, these rights are not subject to limitation and have no margin of appreciation. O'CONNELL, ET AL. (2015), p. 457.

However, even if the margin of appreciation did apply in this context, the proper application of the margin of appreciation is never to eliminate the exercise of a right in its entirety. Essentially, if the margin of appreciation were applicable at all, regulations of home education to ensure that children are obtaining a minimum level of education would be within that margin of appreciation. A complete prohibition of a kind of education is not properly within any country's margin of appreciation.

- ii. Unlike the ECHR, the ICCPR and ICESCR protect the right to education as non-derogable.

The ICCPR and ICESCR provide far greater protection to the right to education through nongovernmental means than the ECHR does, and Article 4.2 of the ICCPR labels the right of parental educational choice under Article 18.4 of the ICCPR as a non-derogable right. Likewise, Article 15 of the ICESCR indicates that no human right that otherwise exists by law or custom may be derogated from on the basis that the ICESCR does not recognize the right or recognizes it to a lesser extent.

Because the ECtHR's authority is based on the ECHR, it has distinct authority, interests, and enforcement capacity than this Court. While this Court's duty is to give effect to the full spectrum of human rights protected by both domestic and international law, the ECtHR exists solely to give effect to the ECHR. As such, the ECtHR's decisions are only authoritative interpretations of the ECHR, not of any other binding human rights instrument. Further, the ECtHR also emphasizes the doctrine of European consensus, which is not relevant to this Court's analysis of the present case.¹¹ The doctrine of European Consensus holds that where there is a consensus among the contracting states of the ECHR then the court may hold that the margin of

¹¹ Even if it was relevant, however, subsequent developments have made it increasingly clear that there is a growing international consensus that home education is a human right within the meaning of the right to education.

appreciation is narrower. The court has been criticized for being inconsistent in this regard, and the case of *Konrad* is one where the court did not even examine whether there was an emerging consensus on the issue of home education. The author contends that there was at the time and since then has only become more apparent suggesting that the court should find that there is a consensus in favor of homeschooling in the contracting states.

- iii. The ECtHR inaccurately applied the principles of proportionality analysis.

The ECtHR in *Konrad* failed to clearly apply the four-step proportionality analysis to determine whether the prohibition of home education is justified. Rather than engaging in meaningful analysis of its own, the ECtHR accepted the FCC's proportionality analysis. As a result, its decision suffers from the same flaws that the FCC's *Konrad* decision did. A ban on home education fails the suitability prong of proportionality analysis, because the available evidence contradicts the assumption that home education fails to promote the value of tolerance. It further fails the necessity prong, because less restrictive means exists which can advance the governmental interest. Finally, even if the government interest could be advanced by a ban on home education, and even if that ban was necessary to advance the interest, the restriction would still be disproportionate to the interest advanced. As a result, for the reasons examined in more detail *supra*, the ECtHR's proportionality analysis in *Konrad* is flawed and should be rejected, just as the FCC's analysis in the same case should also be rejected as unpersuasive.

- iv. *Konrad*'s understanding of international consensus regarding the right to home education is outdated, as the consensus has evolved to recognize this right.

As additional nations create regulatory systems within which home educating families can operate, it becomes increasingly clear that the growing global consensus is that home education is a human right worthy of protection. Germany and Sweden find themselves among the most restrictive nations relative to home education, alongside nations with extremely poor human rights records like Cuba and the People's Republic of China. This should be considered an embarrassing

stain on these Western nations' human rights records. They find themselves on the wrong side of history, and this Court has an opportunity to exercise human rights leadership by recognizing this truth.

Konrad relies on the lack of consensus within the European community at the time on the legal status of home education. However, as the international community's understanding of human rights have evolved, protections for home education have grown. As such, a much clearer international consensus exists today that home education is within the scope of the right to education than existed at the time that the ECtHR decided *Konrad* over a decade ago. This global shift should result in *Konrad*'s restrictions being relegated to the dustbin of history as a relic of a time when the right to alternative forms of education was not valued nearly so highly by the international community.

- v. *Konrad* inaccurately relies on ECtHR precedent, which results in an erroneous interpretation of existing jurisprudence.

The ECtHR relies on the incorrect application of previous case law and thus is flawed. The ECtHR's decision in the *Belgian Linguistic Case (No.2)*, 1 EHRR 252 (1968) makes clear that while regulation will necessarily be present in any educational system, that regulation may never "injure the substance of the right to education, nor conflict with other rights enshrined...." *Belgian Linguistics Case*, 1 EHRR 252 at ¶5. This case set forth the right of education as a right of access to education, not as denial of any particular form of education. Accordingly, the proper interpretation of *Belgian Linguistics* is that children have the right to access education. It never sets forth the educational right as granting the government authority to impose a flat prohibition on any particular form of education.

Likewise, the European Commission on Human Rights' (ECtHR's) decision in *Family H. v. United Kingdom* (Family H. v. United Kingdom, (dec.) No. 10233/83 ECHR Commission 1984), has also been stretched beyond its breaking point, as it has been misapplied far beyond the facts of that particular case to attempt to demonstrate that compulsory education imposes special duties on individuals and rights upon the government. This turns the ECHR's protections of the right to education upside-down. The obligations in the context of human rights are upon the

government – to respect, protect, and fulfill human rights; these obligations are not imposed upon individuals.

The ECtHR’s *Konrad* decision stretches these cases beyond what the propositions for which they plainly stand essentially assuming that these cases prove that governments have rights rather than duties to protect rights.

3. In cases of apparent conflict between human rights and societal interests, the conflict must be resolved in a manner that still provides meaningful protection of the human right.

When a human right that is protected by an international human rights instrument appears to conflict with a governmental interest, the basic principle is that the government interest cannot abrogate the right. If this were permitted, it could scarcely be said that any rights would ever exist at all. Instead, conflicts must be resolved so that rights receive meaningful protection. This case can be resolved to respect and protect the right to home education while still allowing Brazil to engage in appropriate regulation of its educational system.

II. Homeschooling Produces Well-Developed and Socialized Adults

A. Homeschooling has become a mainstream movement in the United States

Homeschooling has grown rapidly in the United States since the early 1980s, and especially so in the past decade. “The increase in the homeschooling rate (from 1.7 percent in 1999 to 2.2 percent in 2003 to 2.9 percent in 2007) represents a 74 percent relative increase over the 8-year period and a 36 percent relative increase since 2003.”¹² Early reports from the United States Department of Education’s National Center for Educational Studies show that homeschooling continued to grow

¹² U.S. Department of Education, National Center for Education Statistics, *1.5 Million Homeschooled Students in the United States in 2007*, NCES 2009–030, December 2008, at <http://nces.ed.gov/pubs2009/2009030.pdf>.

from 2.9 percent of the school-age population in 2007 to 3.4 percent in 2012.¹³ It is currently estimated that 1,770,000 million school-age children are homeschooled in the United States.¹⁴

B. Homeschooling produces well socialized adults

“Socialization may be defined as the process by which a child acquires the skills, behavior patterns, values, and motivation needed for competent functioning in the culture in which the child is growing up.”¹⁵ As homeschooling has increased in popularity, it has been the subject of much social-science research into this very issue.¹⁶ Most relevant to this case is research indicating that homeschooled students develop into well-rounded and socially integrated adults and become responsible citizens who are productive members of society.

Noteworthy among this body of research is Brian Ray’s 2004 study *Home Educated and Now Adults*.¹⁷ This study surveyed 5,254 homeschooled adults ages 18 through 24, and found that homeschoolers are involved in their community, civics, and higher education to a greater extent than their traditionally-educated peers. For example, 50.2 percent of homeschooled students go on to some form of college, compared to 34 percent of their peers; 8.7% received associates degrees, compared to 4.1 percent of their peers, 11.8 percent received bachelor’s degrees, compared to 7.6 percent of their peers; and 0.8 percent received master’s degrees, compared to 0.3 percent of their peers.

Furthermore, 95 percent of those surveyed responded that they either agreed or strongly agreed that they were glad to be homeschooled; 92 percent agreed or strongly agreed that being homeschooled gave them advantages in adulthood; 88 percent disagreed or strongly disagreed that homeschooling limited their educational opportunities; 94 percent disagreed or strongly disagreed

¹³ U.S. Department of Education, National Center for Education Statistics, *Parent and Family Involvement in Education, from the National Household Education Surveys Program of 2012*, NCES 2102-028, Table 7, August 2013. http://nces.ed.gov/pubs2013/2013028/tables/table_07.asp; visited November 7, 2013.

¹⁴ *Id.*

¹⁵ Richard G. Medlin, Ph.D., *Homeschooling and the Question of Socialization Revisited*, Peabody Journal of Education, Volume 88, Issue 3, 2013, at 285.

¹⁶ Tanya K. Dumas, Sean Gates, & Deborah Schwarzer, “Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research,” *Widener Law Review* (forthcoming), draft available at <http://ssrn.com/abstract=1317439>.

¹⁷ Brian D. Ray *Home educated and now adults: Their community and civic involvement, views about homeschooling, and other traits* (Salem, OR: National Home Education Research Institute, 2004).

that being homeschooled limited their career choices; and, 82 percent agreed or strongly agreed that they would homeschool their own children.

Homeschool graduates also ranked high in the areas of social and civic involvement. “Seventy-one percent of subjects were participating in any ongoing community service activity (e.g., coaching a sports team, volunteering at school, or working with a church or neighborhood association), while 37 percent of similarly aged U.S. adults and 39 percent of all U.S. adults did so in 1996. While 88 percent of these home-educated subjects were a member of an organization (e.g., a community group, church or synagogue, union, homeschool group, or professional organization), only 50 percent of similarly aged U.S. adults and 59 percent of all U.S. adults were in 1996.”¹⁸ The study also revealed that homeschooled graduates were as tolerant, if not more so, of differing viewpoints than the general population, and that they were more civically involved.¹⁹

These results are not limited to this single study. Another study, presented to the Annual Meeting of the American Educational Research Association in 1995, looked at homeschooled students who went on to college and discovered that homeschoolers are often leaders on college campuses.²⁰ This study looked at 60 students who had been exclusively homeschooled in high school, and compared them to the rest of the student population according to sixty-three indicators. Homeschooled students came in first in 43 of the 63 indicators. “Because many indicators for which home-schooled students took first place involved positions of leadership, Galloway concluded that home-schooled students were readily recognized for their leadership abilities. She stated flatly, ‘They are the leaders on campus.’”²¹

Other studies demonstrate the same results. One study found that homeschooled children score in the 84th percentile for socialization, in contrast to their peers who scored in the 23rd percentile, and concluded that “children kept home are more mature and better socialized than those who are sent to school.”²² Another study was unable to find a lack of adjustment among homeschooled students who went to college, and noted that “they appear to be able to adjust as well or better than traditionally schooled freshmen to collegiate life at a Christian college as

¹⁸ Id. 48, internal citations omitted.

¹⁹ Id. 48-49.

²⁰ Rhonda A. Galloway, “Home Schooled Adults: Are They Ready for College?,” in *American Educational Research Association* (San Francisco: 1995), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/0a/d0.pdf.

²¹ Richard G. Medlin, *The Question of Socialization*, *Peabody Journal of Education* 75(1 & 2), 107-123, 117, (2000).

²² Thomas C. Smedley, *Socialization of Home School Children*, *Home School Researcher* 8(3), 9-16, (1992).

measured by these various scales of college adjustment.”²³ Yet another study found that “[c]ollege students who were previously homeschooled were found to be significantly more agreeable, conscientious and open as compared to their peers in the national college-aged norms.”²⁴

In a 2000 article published in the *Peabody Journal of Education*, Richard Medlin, Professor of Psychology at Stetson University, who teaches both Child Psychology and Childhood Behavior Disorders, surveyed the research concerning homeschoolers’ social skills. In none of the studies, he reviewed were homeschoolers behind their traditionally educated peers. Rather, he found that homeschooled children were very engaged in their community and social lives:

Despite the widespread belief that home schooling is socially isolating, the research documents quite clearly that home-schooled children are very much engaged in the social routines of their communities. They are involved in many different kinds of activities with many different kinds of people. In fact, the flexible schedule and more efficient use of time home schooling affords may allow home-schooled children to participate in more extracurricular activities than children attending conventional schools.²⁵

He likewise found that homeschoolers are learning proper social behavior. The research confirms that home-schooled children are learning rules for appropriate social behavior and forming healthy attitudes toward themselves. Their social behavior and self-esteem are certainly no worse than those of children attending conventional schools and are probably better.²⁶

More recently, Medlin conducted another study and found, “Homeschooled children’s social skills scores were consistently higher than those of public school students. Differences were most marked for girls and for older children, and encompassed all four of the specific skills tested: cooperation, assertiveness, empathy, and self-control.”²⁷ He concludes that “[t]here appears to be, therefore, a convergence of evidence from three different perspectives—parental report, objective observers, and self-report—that homeschooled children’s social skills are exceptional.”²⁸

In 2013, Professor Medlin published a thorough review of the literature about homeschooling and socialization and concluded that:

²³ Scott White, et al., *Emotional, Social & Academic Adjustment to College: A Comparison Between Christian Home Schooled & Traditionally Schooled College Freshman*, *Home School Researcher* 17(4), 1-7, (2007).

²⁴ Scott White, Megan Moore, and Josh Squires, *Examination of Previously Homeschooled College Students with the Big Five Model of Personality*, *Home School Researcher* 25(1), 1-7, (2009).

²⁵ Medlin 2000, 112-113 *supra*.

²⁶ *Id.*, 116

²⁷ Richard G. Medlin, *Homeschooled Children’s Social Skills*, *Home School Researcher* 17(1), 1-8, (2006).

²⁸ *Id.*

Compared to children attending conventional schools, however, research suggest[s] that [homeschooled children] have higher quality friendships and better relationships with their parents and other adults. They are happy, optimistic, and satisfied with their lives. Their moral reasoning is at least as advanced as that of other children, and they may be more likely to act unselfishly. As adolescents, they have a strong sense of social responsibility and exhibit less emotional turmoil and problem behaviors than their peers. Those who go on to college are socially involved and open to new experiences. Adults who were homeschooled as children are civically engaged and functioning competently in every way measured so far.²⁹

Professor Medlin concludes that “[a]n alarmist view of homeschooling, therefore, is not supported by the empirical research.”³⁰ The trial court’s incorrect assumption about homeschooling and socialization embraces the alarmist view. That view reflects ignorance about the success of homeschooling in general and is contrary to the evidence in this case. While the trial court’s statement is consistent with what Professor Medlin recognized is a “widespread belief that home schooling is socially isolating,” that belief is nothing more than a false stereotype as shown by decades of research. This Court should not allow unsupported, prejudicial bias to creep into custody decisions by the lower courts of this State.

Research demonstrates that homeschooled students are also emotionally prepared for college. For instance, one study involving freshman students at a private liberal-arts college found that homeschooled students reported “significantly fewer anxiety symptoms than a matched sample of traditionally schooled students.”³¹ Using the College Adjustment Scale (a measure of emotional, behavioral, social, and academic problems used by university counseling centers), researchers found no other significant differences between the two groups of students.

Accordingly, colleges have recognized the potential of homeschooled students. The Chronicle of Higher Education has reported that as early as a decade ago, “over 700 post-secondary institutions across the United States, including Harvard University, Yale University, Stanford University, MIT, Rice University, and the Citadel, admitted homeschooled students.”³² Barmak

²⁹ Richard G. Medlin, Ph.D., *Homeschooling and the Question of Socialization Revisited*, Peabody Journal of Education, Volume 88, Issue 3, 2013, at 284.

³⁰ *Id.*

³¹ White, et al., 2007, *supra*.

³² Paula Wasley, *Home-Schooled Students Rise in Supply and Demand*, The Chronicle of Higher Education 54(7), 1, (Oct. 12, 2007); *see also* Patrick Basham, John Merrifield & Claudia R. Hepburn, *Home Schooling: From The Extreme*

Nassirian, associate executive director of the American Association of Collegiate Registrars and Admissions Officers explains: “After years of skepticism, even mistrust, many college officials now realize it’s in their best interest to seek out home-schoolers.”³³ Some are even actively recruiting homeschoolers. “UC Riverside [is] the first UC campus and one of the first public research universities in the nation to recruit students who were home-schooled at the kitchen table or on the road instead of inside a classroom. ‘These students are very prepared for college-level work and doing very well here,’ said Merlyn Campos, interim admissions director.”³⁴ Regina Morin, director of admissions at Columbia College in St. Louis, Missouri, says the school is seeing more homeschoolers apply each year. “They tend to be better than their public school counterparts,” she said. “They score above average on tests, they’re more independent, they’re often a grade ahead.”³⁵

C. Homeschooled Students Are Academically Successful

Since 1988, a number of studies have compared the academic success of homeschooled students with those in the public education system. These include official studies by the Tennessee Department of Education in 1988³⁶ and the Oregon Department of Education in 1999.³⁷ Additionally, there have been at least five national studies of the success of homeschooling by professional researchers³⁸, including Lawrence Rudner, formerly the Director of the Education

To The Mainstream, 2nd ed 6, The Fraser Institute 2007, available at http://www.fraserinstitute.org/COMMERCE.WEB/product_files/Homeschooling2.pdf. Basham at 15.

³³ Alan Scher Zagier, *Colleges Coveting Home-Schooled Students*, AP, September 30, 2006, available at http://www.boston.com/news/nation/articles/2006/09/30/colleges_coveting_home_schooled_students/.

³⁴ Elaine Regus, *UC Riverside a leader in courting home-schooled students*, The Press-Enterprise, November 23, 2007, available at http://www.pe.com/localnews/highereducation/stories/PE_News_Local_D_home-school24.3085ff7.html.

³⁵ Georgina Gustin, *Home-school numbers growing*, St. Louis Post-Dispatch, October 3, 2007, available at <http://forum.gon.com/showthread.php?t=141756>.

³⁶ Tennessee Department of Education. *Tennessee statewide averages, home school student test results, Stanford Achievement Test, grades 2, 5, 7 and 9* (Nashville, TN, 1988).

³⁷ Oregon Department of Education, Office of Student Services, *Annual report of home school statistics 1998-99* (Salem, OR, May 20, 1999).

³⁸ Brian D. Ray, *Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study*, Academic Leadership Live: The Online Journal, 8 no. 1 (February 2010), available at http://www.academicleadership.org/emprical_research/Academic_Achievement_and_Demographic_Traits_of_Hom

Resources Information Center (ERIC) Clearinghouse on Testing and Measurement, a research library sponsored by the U.S. Department of Education.³⁹

All of these studies demonstrate that homeschooling produces higher scores on educational achievement tests than public school students. Homeschoolers achieve, on average, between 15 and 30 percentile points above public school averages. These studies reveal that this is true for all grade levels and subjects. Studies also show that there is no significant correlation between teacher certification and educational success in homeschooling. Homeschool students achieve high results whether their parents possess a state teaching credential or not.⁴⁰

When the achievement of homeschooled students is analyzed according to the educational level of their parents (high school diploma, some college, college degree, etc.), some studies find that there is a small correlation between parental education and student success while other studies find no correlation at all.⁴¹ However, these studies have all found that even those students whose parents have the lowest level of educational background still score higher than public school students' average scores.

In public schools, however, there is a strong correlation between the parents' educational level and student success.⁴² In public schools, the children of highly educated families are the

[eschool Students A Nationwide Study.shtml](#); Brian D. Ray, *A nationwide study of home education: Family characteristics, legal matters, and student achievement* (Salem, OR: National Home Education Research Institute, 1990); *Research Project*. Home School Researcher, 6(4), 1-7; (1990); Deani Van Pelt. *The choices families make: Home schooling in Canada comes of age*, Frasier Forum, March 2004, available at http://www.fraserinstitute.org/Commerce.Web/product_files/The%20Choices%20Families%20Make~~%20Home%20Schooling%20in%20Canada%20Comes%20of%20Age-Mar04fpelt.pdf.

³⁹ Lawrence M. Rudner, *Scholastic achievement and demographic characteristics of home school students in 1998*, Educational Policy Analysis Archives, 7(8). (1999). Available at <http://epaa.asu.edu/epaa/v7n8/>.

⁴⁰ Jennie F. Rakestraw, *Home schooling in Alabama*, Home School Researcher, 4(4), 1, 5 (1988); Brian D. Ray 1990, 13, 38 *supra*; Brian D. Ray, *Home schooling: The ameliorator of negative influences on learning?* Peabody Journal of Education 75(1 & 2), 71, 83, 90 (2000); Howard B. Richman, William Girten, & Jay Snyder, *Academic achievement and its relationship to selected variables among Pennsylvania homeschoolers*, Home School Researcher, 6(4), 9, 13, (1990); Rudner 1999, Table 3.11 *supra*.

⁴¹ Joan Ellen Havens, *A study of parent education levels as they relate to academic achievement among home schooled children*. Doctoral (Ed.D.) dissertation, Southwestern Baptist Theological Seminary, Fort Worth TX (1991), 92-97; Brian D. Ray, *Home education in Oklahoma: Family characteristics, student achievement, and policy matters*, National Home Education Research Institute (Salem, OR, 1992), 25; Rudner 1999, Table 3.12: "It is worthy to note that, at every grade level, the mean performance of home school students whose parents do not have a college degree is much higher than the mean performance of students in public schools. Their [homeschooled] percentiles are mostly in the 65th to 69th percentile range."

⁴² Gary Neil Marks, *Are father's or mother's socioeconomic characteristics more important influences on student performance? Recent international evidence*. Social Indicators Research, 85(2), 293-309, (January 2008).

achievers; students from families with lower-level educational backgrounds score significantly lower on achievement tests. Not so in homeschooling. There is virtually no educational disparity between the children of the most highly educated compared to those with less education. Every segment of the homeschooling community scores materially higher than public school students' average scores.

This same phenomenon can be found when educational results are segmented according to family income. It is tragic to see that in public schools, students who come from low-income families have significantly lower results than students from high-income families.⁴³ In contrast, homeschooled children from every income level achieve results that are significantly above public school averages. Moreover, in some studies of homeschoolers there is no material difference in the achievement of the children from the poorest families compared to the children from the richest families.⁴⁴ Although some studies show a marginal difference in homeschool student success based on family income, even in these cases, students from the lowest income levels achieve well above public school averages.⁴⁵

Public schools appear unable to break the cycle of low achievement for students from low-income families. However, homeschooling has demonstrated that children from low-income families succeed; and children of parents with lower educational levels also succeed. Homeschoolers scored higher on the ACT than the national average for 10 years – from 1996 until 2006. In 2006, the ACT stopped reporting the results of homeschooled students separately. In 2006, the average ACT composite score for homeschooled students was 22.4, compared to the national average composite of 21.1.⁴⁶ The 2005 average ACT composite score for homeschooled

⁴³ James S. Coleman & Thomas Hoffer, *Public and private high schools: The impact of communities* Chapter 5 (New York, NY: Basic Books, Inc., 1987); Gordon Dahl & Lance Lochner, *The impact of family income on child achievement*. Discussion Paper No. 1305-05, Institute for Research on Poverty, 2005 available at <http://www.eric.ed.gov/>; Catherine E. Snow, Wendy S. Barnes, Jean Chandler, Irene F. Goodman, & Lowry Hemphill, *Unfulfilled expectations: Home and school influences on literacy* 2-3 (Cambridge, MA: Harvard University Press, 1991).

⁴⁴ Ray 2000, 83-90 *supra*; Terry Russell, *Cross-validation of a multivariate path analysis of predictors of home school student academic achievement*, Home School Researcher, 10(1), 9, (1994).

⁴⁵ Rudner 1999, Table 3.10 *supra*; Jon Wartes, *The relationship of selected input variables to academic achievement among Washington's homeschoolers*. (Woodinville, WA, September 1990), 79, 122.

⁴⁶ *Once Again Home-schoolers Score High on the ACT Exam*, HSLDA, July 31, 2007, available at <http://www.hslda.org/docs/news/hslda/200707310.asp>.

students was 22.5, compared to the national average of 20.9. Part of this academic achievement may be related to the fact that homeschooled kids spend their time in radically different ways than their public or private schooled counterparts. In a study of fourth graders, 0.1 percent of homeschooled children watched six hours or more of television per day whereas 19 percent of public-school children watched television at this staggering rate.⁴⁷ Studies also show that homeschooled graduates demonstrate success and do as well or better, on average, than the general public in all measures of adult success. These measures include the rates of matriculation in college, completion of college, civic engagement, and community service.⁴⁸

In the past thirty years, homeschooling has gained in popularity every year. Every mother who homeschools her children is familiar with the unfortunate myths that arose about socialization. Those myths have been empirically dispelled by a wide variety of research. On all counts, homeschooling meets the standard set by public schools, and virtually all of the research demonstrates that homeschoolers far exceed that bar.

Conclusion and Prayer for Relief

Multiple binding human rights instruments impose legal obligations on Brazil to protect the right to education, and this right includes within its scope the right to home education, as the UN Special Rapporteur on the Right of Education has made clear. The ICCPR, ICESCR, and CRC protect the parental right to select the means by which one's children will be educated, and protect the right of the child to alternative forms of education, including through home education. Numerous international jurisdictions protect the right to home education, and this Court should follow suit and recognize that home education is a human right deserving of protection. The Konrad decisions of the German FCC and the ECtHR inaccurately apply proportionality analysis and should be rejected as unpersuasive by this Court. Konrad also does not address the right to home education under the ICCPR, ICESCR, or CRC, which further makes its inapplicability clear.

⁴⁷ Rudner 1999, Table 2.10 *supra*.

⁴⁸ Clive R Belfield, *Home-schoolers: How well do they perform on the SAT for college admission?* in Bruce S. Cooper (Ed.), *Home schooling in full view: A reader* (Greenwich, CT: Information Age Publishing; Galloway, 2005), 167-177; Rhonda A. Galloway & Joe P. Sutton, *Home schooled and conventionally schooled high school graduates: A comparison of aptitude for and achievement in college English*, *Home School Researcher*, 11(1), 1-9 (1995); Paul Jones & Gene Gloeckner, *First-Year College Performance: A Study of Home School Graduates & Traditional School Graduates*, *Journal of College Admission* 183 (Spr. 2004), at 17, 20; Ray 2004, *supra*.

Home Education is a mainstream movement in the United States where it has demonstrated that it produces excellent outcomes. Children who are homeschooled excel both socially and academically. They integrate into society and become productive engaged citizens who add to society in a diverse and meaningful way. Home education is a new approach in modern educational history, but public schools are really the newcomers at only one to two hundred years old. The growth and results of this rediscovered approach to education deserves the respect and protection of this court for its outcomes as well as because of the rights implicated by it.

On this basis, Home School Legal Defense Association respectfully submits this brief in support of Appellant and urges that this Court grant relief to Appellant by declaring that home education is a protected human right and we further urges this Court to declare home education a constitutional and human right protected by Brazil's constitution and its international legal obligations.

This legal opinion signed this day on the of , 2017,

Respectfully submitted,

Michael P. Donnelly J.D., LLM*
Home School Legal Defense Association.

APPENDIX I

JURISDICTIONS IN THE UNITED STATES OF AMERICA REGULATING HOME EDUCATION AS A RECOGNIZED FORM OF PRIVATE SCHOOLING

Twenty-one states regulate home education as a form of private schooling:

Alaska, Alabama, California, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Nebraska, North Carolina, Louisiana, Ohio, Pennsylvania, Tennessee, Texas, Virginia, Washington and West Virginia.

In addition, 13 states offer parents two or more statutory means to homeschool:

ALABAMA: recognizes home-based instruction in “church schools” or “private schools,” ALA. CODE § 16-28-1 (2016), as well as “instruction by a private tutor.” ALA. CODE § 16-28-5 (2016). Homeschoolers who choose the “church school” option file a one-time notice.

COLORADO: *See* COLO. REV. STAT. § 22-33-104.5 (2016) (“home school”), § 22-33-104(2)(b) *and people in Interest of D.B.*, 767 P.2d 801 (Colo. App. 1988) (“independent school”), *or* § 22-33-104.5 (3)(f) (parent as certified teacher).

DELAWARE: DEL. CODE ANN. § 2703A(2) (2016) (“single-family homeschool”), § 2703A(1) (“multi-family homeschool”), *or* § 2703A(3) (“single-family homeschool coordinated with the local school district”).

FLORIDA: FLA. STAT. § 1002.41 (2016) (“home education program”), § 1002.01(2) *and State v. Buckner*, 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985) (a group of individual homeschools may form a “private school”), *or* § 1002.43 (“private tutor law”) [**Florida**];

KANSAS: offers parents two options to educate their children at home, neither of which is called a “homeschool,” and which require only a single registration with the State Board of Education. KAN. STAT. ANN. § 72-1111(a)(2) (2016); *see also In re Sawyer*, 672 P.2d 1093 (1983) (“non-accredited private school”); *In re Willms*, No. 87-JC-350 (Shawnee County Dist. Ct., Feb. 12, 1988) (recognizing a home instruction program as a “satellite to a local private school board”).

LOUISIANA: LA. REV. STAT. § 17:236 (2016) (“home school statute”) *or* § 17:232 (“private school”).

MARYLAND: MD. CODE ANN., EDUC. § 7-301(a) (2016) (“portfolio” home school) *or* MD. REGS. CODE tit. 13A, §§ 09.09.01(C), 10.01.05 (2016) (“church umbrella school”).

MAINE: ME. REV. STAT. tit. 20-A, § 5001-A(3)(A)(4) (2016) (“home school”) *or* tit. 20-A, § 5001-A(3)(A)(1)(b) (“recognized” private school).

SOUTH CAROLINA: S.C. CODE § 59-65-40 (2016) (school district board of trustee approval), § 59-65-45 (membership in the South Carolina Association of Independent Home Schools), *or* § 59-65-47 (membership in an association for home schools which has at least fifty members).

TENNESSEE: TENN. CODE ANN. § 49-6-3050 (2016) (“home school”), § 49-6-3050(a)(2)(A) (associate with church-related school), § 49-6-3050(a)(3) (parent-as-teacher in church-related school), § 49-50-801 (satellite campus of church-related school), *or* § 49-6-3001(c)(3)(A)(iii) (enroll in distance learning program of accredited private school).

UTAH: UTAH CODE ANN. § 53A-11-102(2) (2016) (“home school”) *or* § 53A-11-101.5(2) (“private school”).

WASHINGTON: WASH. REV. CODE §§ 28A.255.010, 28A.200.010 (2016) (“home-based instruction”) *or* §§ 28A.225.010(1)(a), 28A.195.010(4) (an “extension program for parents” overseen by an “approved private school”).

WEST VIRGINIA: W.VA. CODE § 18-8-1(c)(1) (2016) (“approval” home school), § 18-8-1(c)(2) (“notice” home school), *or* § 18-8-1(k) (individual home schools forming a private, parochial, church, religious or “other nonpublic school”).

WYOMING: WYO. STAT. § 22-4-101, -102 (2016) (“home school”) *or* § 21-4-101(a)(iv) (a school “operated under the auspices or control of a local church or religious congregation or a denomination”).

Several states do not require parents to provide any notice to public authorities that they intend to home educate their children, including California and Texas, the two most populous states in the United States, which have a combined population of nearly 66 million persons.

These include California and Texas, the two most populous states in the United States.

CALIFORNIA: CAL. EDUC. CODE §§ 33190, 48222 (2016) (“private schools”) *and* *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571 (Cal. App. 2008).

TEXAS: TEX. EDUC. CODE ANN. § 25.086(a)(1) (2016) (“private schools”) and *Texas Educational Agency v. Leeper*, 893 S.W. 2d 432 (Tex. 1994).

CONNECTICUT: CONN. GEN. STAT. § 10-184 (2016) (“elsewhere receiving equivalent instruction in the studies taught in the public school”).

INDIANA: IND. CODE § 20-33-2-4-(2) (2016) (“another school [which is] taught in the English language) and *State v. Peterman*, 70 N.E. 550 (Ind. App. 1904).

ILLINOIS: 105 IL. COMP. STAT. ANN. § 5/26-1(1) (2016) (“a private or a parochial school where children are taught the branches of education taught to children of corresponding age and grade in the public schools, and where the instruction of the child in the branches of education is in the English language”) and *People v. Levisen*, 404 Ill. 574 (1950).

KENTUCKY: KY. REV. STAT. ANN. § 159.030(1)(b) (2016) (“private, parochial, or church school”).

MASSACHUSETTS: MASS. GEN. LAWS ch. 76, § 1 (2016) and *Care and Protection of Charles*, 399 Mass. 324 (1987) (“otherwise instructed in a manner approved in advance by the superintendent or the school committee”).

NEW JERSEY: N.J. STAT. ANN. § 18A:38-25 (2016) (“equivalent instruction elsewhere than at school”).

SOUTH DAKOTA: S.D. COD. LAWS § 13-27-3 (2016) (“otherwise provided with alternative instruction”).

Eleven states set up a one-time notification system, which means that parents only have a duty to notify public authorities when they initially begin to home educate their children, and have no further contact with those authorities.

ALASKA: ALASKA STAT. § 14.30.010(b)(12) (2016) (no notice).

ARIZONA: ARIZ. REV. STAT. § 15-802 (2016) (one-time notice).

MAINE: ME. REV. STAT. tit. 20-A, § 5001-A(3)(A)(4) (2016) (one-time notice).

MISSOURI: MO. ANN. STAT. § 167.031.2 (2016) (no notice).

NEVADA: NEV. REV. STAT. §§ 392.070, 392.700 (2016) (one-time notice).

NEW HAMPSHIRE: N.H. REV. STAT. § 193-A (2016) (one-time notice).

NEW JERSEY: N.J. STAT. ANN. § 18A:38-25 (2016) (no notice).

OKLAHOMA: Okla. Const., art. XIII, § 4, *School Bd. Dist. No. 18 v. Thompson*, 103 P. 578 (Okla. 1909) (no notice).

OREGON: OR. REV. STAT. §§ 330.030, 339.035 (2016) (one-time notice).

UTAH: UTAH CODE ANN. § 53A-11-102(2) (2016) (one-time notice, unless the family moves to another school district) [**Utah**].

VIRGINIA: VA. CODE § 22.1-254(B) (one-time notice) (Virginia also has a religious exemption statute).

APPENDIX II

INTERNATIONAL JURISDICTIONS RECOGNIZING THE RIGHT TO HOME EDUCATION BY STATUTE, CONSTITUTION, OR COURT RULING

No Regulation Jurisdictions do not require initial or ongoing contact between home-educating families and local authorities. These jurisdictions include:

Colombia
England
Wales
Finland
Georgia
India
Kosovo
Mexico
Peru
Alaska, USA
Connecticut, USA
Idaho, USA
Illinois, USA
Indiana, USA
Michigan, USA
Missouri, USA
New Jersey, USA
Oklahoma, USA
Texas, USA

Low-Regulation Jurisdictions require some form of annual notice to local authorities, but do not require any other approval process. These jurisdictions include:

Indonesia
Philippines
Russia

British Columbia, Canada
New Brunswick, Canada
Ontario, Canada
Prince Edward Island, Canada
Saskatchewan, Canada
Alabama, USA
Arizona, USA
California, USA
Delaware, USA
Kentucky, USA
Kansas, USA
Mississippi, USA
Montana, USA
Nebraska, USA
Nevada, USA
New Mexico, USA
Wisconsin, USA
Wyoming, USA

Moderate-Regulation Jurisdictions require annual notification and some type of annual assessment of student progress. These jurisdictions include:

Austria
Australia
Azerbaijan
Belgium
Denmark
Ireland
Northern Ireland
Norway
Portugal
Qatar

Slovenia
Manitoba, Canada
Yukon Territory, Canada
Arkansas, USA
Colorado, USA
Florida, USA
Georgia, USA
Iowa, USA
Louisiana, USA
Maine, USA
Maryland, USA
Minnesota, USA
New Hampshire, USA
North Carolina, USA
Ohio, USA
Oregon, USA
South Carolina, USA
South Dakota, USA
Tennessee, USA
Virginia, USA
Washington, USA
West Virginia, USA

High-Regulation Jurisdictions have extensive bureaucratic regulations or a formal approval system. These jurisdictions include:

Albania
Belarus
Czech Republic
Estonia
France
Hungary

Iceland
Israel
Italy
Latvia
Lithuania
Luxembourg
Malaysia
Netherlands
New Zealand
Poland
Singapore
South Africa
Sweden
Alberta, Canada
Quebec, Canada
Massachusetts, USA
New York, USA
North Dakota, USA
Pennsylvania, USA
Rhode Island, USA
Vermont, USA

Prohibited Jurisdictions do not permit home education. These jurisdictions include:

Bulgaria
People's Republic of China
Cuba
Germany
Greece
Spain
Sweden

Unrecognized Jurisdictions have no laws defining home education as permitted or prohibited.

These jurisdictions include:

Bosnia-Herzegovina

Japan

Jordan

Republic of Korea

Malta

Pakistan

Romania

Saudi Arabia

Ukraine

Uruguay

