

PEDRO CHAVERO

Petitioner

v.

FEDERAL REPUBLIC OF VADALUZ

Respondent

MEMORIAL FOR THE STATE

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III. STATEMENT OF FACTS

The Federal Republic of Vadaluz (“Vadaluz”) is a democracy governing and protecting its 60 million residents.¹ Over the past 20 years, the South American country has steadily worked towards the fullest expression of human rights protection sought, for instance, through a new Constitution.² Given the inherited disparity, the nation faces an uphill battle to achieve equality for all which made more difficult by a lack of resources to provide services.³

On February 1, 2020, the World Health Organization (“WHO”) declared a global pandemic caused by the swine virus.⁴ The WHO warned it was highly contagious and pressed for urgent social distancing measures as scientists around the world conducted more research on the outbreak.⁵

The President of Vadaluz immediately took action to minimize the impacts of the virus on poorer citizens.⁶ In an executive decree published on February 2, 2020, the President reiterated the warnings and guidance issued by the WHO.⁷ Protection of vulnerable communities was the President’s primary concern.⁸ Key provisions of Emergency Decree 75/20 indicated a moratorium on large gatherings, travel, and most in-person services so as to minimize the spread of an unknown virus.⁹ Many institutions decided to shutter their doors to avoid excessive spread of the unknown virus.¹⁰ Emergency Decree 75/20 set out parameters for the use of administrative detention to manage individuals found *in flagrante delicto*.¹¹ It was disseminated broadly

¹ Hypothetical, p.1, §1.

² *Id.* at §2, 6.

³ Hypothetical, p.2, §8.

⁴ Hypothetical, p.3, §15-16.

⁵ *Id.* at §16.

⁶ *Id.* at §17.

⁷ *Id.* at §§16-17.

⁸ Hypothetical, p.4, § 12,16.

⁹ *Id.* at §17.

¹⁰ Hypothetical, p.6, §25.

¹¹ Hypothetical, p.4, §17.

through various media organizations and directly to the General Secretariats of the Organization of American States (“OAS”) and the United Nations (“UN”) respectively.¹²

One month following the issuance of Emergency Decree 75/20, several student groups- including More Students, Fewer Soldiers, the Association of Students for a Secular State, and the Association of Public and Private University Law and Political Science Students- decided to plan a protest for the right to health.¹³ These students marched on San Martin Avenue on March 3, 2020.¹⁴ Upon reaching officers, the protestors were reminded by officers of Emergency Decree 75/20 and the global Pandemic.¹⁵ The officers also warned they would be forced to make arrests pursuant to Emergency Decree 75/20.¹⁶ Ms. Estela Martinez (“Martinez”) and Mr. Pedro Chavero (“Chavero”), student protestors, chose to continue walking.¹⁷

Martinez livestreamed the entire interaction on Facebook from her phone.¹⁸ Chavero was arrested *in flagrante delicto* for his violation of Emergency Decree 75/20.¹⁹ Other students began screaming and throwing objects at the officers.²⁰ Amidst the confusion, the police threw tear gas grenades into the crowd to disperse the demonstrators.²¹

Chavero was immediately taken to Police Headquarters No. 3 where he was charged with a violation of Articles 2.3 and 3 of Emergency Decree 75/20.²² His family and retained legal counsel, Ms. Claudia Kelsen (“Kelsen”), were informed of the charges, his living conditions, and

¹² *Id.*

¹³ Hypothetical, p.5, §18-20.

¹⁴ *Id.* at §20.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at §21.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at §22.

the timeframe for his release.²³ Per Emergency Decree 75/20, the period of administrative detention for ignoring public health directives was 96 hours.²⁴

In response, Kelsen filed a request for precautionary measures with the Inter-American Commission on Human Rights (“the Commission”) alleging violations of the right to freedom of expression, the right of assembly, and the right to personal liberty.²⁵ On March 4, 2020, the Commission rejected the request.²⁶ The Commission filed a request the same day for provisional measures from this Court.²⁷

Chavero came before the Chief of Police, twenty-four-hours after his arrest, represented by counsel to refute the administrative detention.²⁸ The ultimate ruling was he violated Executive Decree 75/20 and would remain in custody for the remaining 72 hours.²⁹

On March 5, 2020, this Court rejected the Commission’s request for provisional measures.³⁰ Kelsen filed an individual petition with the Commission immediately.³¹ The Commission expedited the petition.³²

Kelsen filed a writ of *habeas corpus* and made a constitutionality challenge of Emergency Decree 75/20 before domestic courts on March 6, 2020.³³ Due to the various emergency measures set in place to maintain the safety of state employees and essential workers in addition to some technical difficulties, she was unable to file prior.³⁴ The writ of *habeas*

²³ Hypothetical, p.5, §22.

²⁴ *Id.*

²⁵ Hypothetical, p.7, §33.

²⁶ *Id.* at §34.

²⁷ *Id.* at §35.

²⁸ Hypothetical, p.5, §23.

²⁹ *Id.*

³⁰ Hypothetical, p.7, §35.

³¹ Hypothetical, p.8, §36.

³² *Id.*

³³ Hypothetical, p.7, §31.

³⁴ Hypothetical, p.6, §25-26, 28-30.

corpus was dismissed as moot on March 15, 2020.³⁵ Two months later, on May 30, 2020, the Federal Supreme Court found no constitutional violation in Emergency Decree 75/20.

In its expedited review, the Commission adopted an admissibility report on August 30, 2020.³⁶ The report on the merits was adopted on October 30, 2020.³⁷ The case was submitted before the Court on November 8, 2020, a mere nine days after the Commission submitted the preliminary report and recommendations for reform to Vadaluz.³⁸

³⁵ Hypothetical, p.7, §32.

³⁶ Clarification Questions, p.3, §12.

³⁷ *Id.*

³⁸ *Id.*

IV. LEGAL ANALYSIS

A. Preliminary objections

As an initial matter, Vadaluz contests violations of a number of procedural matters preceding the instant petition. There was no prior exhaustion of domestic remedies. The Commission violated their procedural guidelines. The Commission explicitly wrote their wish for an advisory opinion in the petition before this Court. Any of these constitute a significant violation requiring the Court to deny jurisdiction.

1. The initial petition violated the requirement of prior exhaustion of domestic remedies rendering it inadmissible.

At the time Kelsen submitted the individual petition on March 5, 2020, she had not pursued any formal domestic remedies.³⁹ Domestic courts did not have the opportunity to resolve her concerns. Her initiation and participation with further domestic proceedings indicates both existence of and petitioner's knowledge of unexhausted remedies.⁴⁰ Vadaluz submits the exceptions to this requirement are inapplicable in this situation. In cases where domestic remedies are not exhausted, petitions are deemed spoiled and must be refiled reflecting recent considerations.⁴¹

Article 46(1)(a) of the American Convention on Human Rights ("the Convention") stipulates to determine the admissibility of a petition before the Commission, in accordance with Articles 44 or 45 the Convention, it is necessary the remedies available under domestic law have been "*pursued and exhausted in accordance with generally recognized principles of*

³⁹ Hypothetical, p.8, §36.

⁴⁰ *Id.*

⁴¹ *Case of Brewer Carías v. the Bolivarian Republic of Venezuela* (Preliminary objections). Judgment of May 26, 2014. Series C No. 278.

international law.⁴² The petitioner must have previously utilized all adequate and effective remedies.⁴³ When arguing for a lack of exhaustion of domestic remedies, the state must raise the issue *in limine litis*, as Vadaluz does now.⁴⁴

Pursuant to consistent precedent from this Court⁴⁵ and to international jurisprudence⁴⁶, “when the State alleges the failure to exhaust domestic remedies, it must at the same time describe the remedies that should be exhausted and their effectiveness.”⁴⁷ As for requirements of the state, the remedies must “*not only exist formally, but they must also be adequate and effective owing to the exceptions established in Article 46(2) of the Convention*.”⁴⁸ The remedies must be “adequate in a specific case”⁴⁹ and capable of producing a just result.⁵⁰

⁴² *Case of Velásquez Rodríguez v. Honduras*, Judgment of June 26, 1987, Series C No. 01, para. 85; *Case of Liakat Ali Alibux v. Suriname*, Judgment of January 30, 2014. Series C No. 276, para. 14; *Case of Mémoli v. Argentina*, Judgment of August 22, 2013. Series C No. 265, para. 46.

⁴³ Admissibility Report No. 134/11, Petition 1190-06, *Undocumented Workers* (United States), October 20, 2011, para. 27 (citing Admissibility Report No. 105/09, Petition 592-07, *Hul’Qumi’Num Treaty Group* (Canada), 30 October 2009, para. 31).

⁴⁴ *Case of Furlan and family members v. Argentina* (Preliminary objections, Merits, Reparations and Costs). Judgment of August 31, 2012. Series C No. 246, para. 24; *Case of Velásquez Rodríguez v. Honduras* (Preliminary Objections and Merits). Judgment of July 29, 1988. Series C No. 4, para. 88.

⁴⁵ *Case of Furlan and family members v. Argentina*, Judgment of November 20, 2009, para 25; *Case of Usón Ramírez v. Venezuela*, Judgment of August 31, 2012, para 22.

⁴⁶ ECtHR, *Case of Deweer v. Belgium* (No. 6903/75), Judgment of 27 February 1980, para. 26; *Case of Foti and Others v. Italy* (No.7604/76; 7719/76; 7781/77; 7913/77), Judgment of 10 December 1982, para. 48; *Case of de Jong, Baljet and van den Brink v. The Netherlands* (No. 8805/79 8806/79 9242/81), Judgment of 22 May 1984, para. 36.

⁴⁷ *Case of Brewer Carías v. the Bolivarian Republic of Venezuela*, Judgment of May 26, 2014, Series C No. 278, para. 83; *Case of Velásquez Rodríguez v. Honduras*. Judgment of 29 July 1988. Series C No. 4, paras. 60, 88; *Case of Escher et al. v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 6 July 2009. Series C No. 199, para. 28.

⁴⁸ *Case of Brewer Carías v. the Bolivarian Republic of Venezuela*, Judgment of May 26, 2014, Series C No. 278, para. 83; *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988. Series C No. 4, para. 63; *Case of Liakat Ali Alibux v. Suriname*, 2014, para. 15.

⁴⁹ *Case of Velásquez Rodríguez v. Honduras*. Judgment of 29 July 1988. Series C No. 4, para 63.

⁵⁰ *Id.* at para 66; *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90, 10 August 1990, para. 36.

Article 46(2) of the Convention provides a series of exceptions to the exhaustion requirement:⁵¹ lack of due process available, procedural bars from due process,⁵² and unreasonable delay.⁵³ The delay must be significant and disproportionate to the complexity of considerations.⁵⁴ These exceptions are found in unique cases of double jeopardy or excessive procedural delays.⁵⁵

- a. In filing with the Commission and domestic courts simultaneously, counsel violated the basic requirement of exhaustion of remedies.

Chavero failed to exhaust his remedies prior to filing before the international courts. In simultaneous claims at the domestic and international level and his current lack of exhaustion, his claims are inadmissible before the Court.⁵⁶ To find to the contrary of this would set a precedent of intervention in domestic court proceedings.

The requirement of prior exhaustion of remedies was violated by the petitioner in her series of filings with the Inter-American System of Human Rights (“IASHR”) from March 3 to March 5, 2020.⁵⁷ Beyond just abandoning domestic remedies before reaching the court of last resort, the petitioner actively sought relief in a writ of *habeas corpus* and Vadaluzian courts after filing an individual petition before this Court. She filed for domestic relief on x and x and x.⁵⁸ At the same time, she filed for international relief on x and x and x.⁵⁹ This parallel processing of claims is contrary to all notions of international law referenced above.⁶⁰ In *Allan v. Brewer*

⁵¹ American Convention on Human Rights, art. 46(2).

⁵² See Admissibility Report No. 134/11, Petition 1190-06, *Undocumented Workers* (United States), 20 October 2011, para. 30; Admissibility Report No. 51/03, Petition 11.819, *Christian Daniel Domínguez Domenichetti* (Argentina), 24 October 2003, paras. 42, 68.

⁵³ *Case of Suárez Rosero*, Judgment of November 12, 1997, Series C No. 35.

⁵⁴ *Id.*

⁵⁵ Admissibility Report No. 36/14, Petition 913-06, *Slaughter in Albania* (Colombia), 8 May 2014, para. 55.

⁵⁶ Hypothetical, p.7-8 §31-33,36.

⁵⁷ *Id.*

⁵⁸ Hypothetical, p.7 §31.

⁵⁹ Hypothetical, p.7-8 §31-33,36.

⁶⁰ *Supra* section IV.A.1.

Carias v. Venezuela, the Court found even filing an individual petition during an “early stage” of domestic proceedings resulted in non-exhaustion of remedies.⁶¹ These proceedings are similarly spoiled and inadmissible.

b. Exceptions to this requirement are plainly inapplicable in this case.

While the burden of production for a claim to an exception to the exhaustion requirement is on the petitioner, the state will address any claims of exemption within this memorandum. For instance, the domestic legislation of Vadaluz provides an acceptable means of due process to address the alleged rights violation, contrary to Kelsen’s *habeas corpus* filing on March 4, 2020.⁶² Likewise, the petitioners were not denied access to the available remedies, as evidenced in her later filings in the domestic system.⁶³ Further, there has been no unwarranted delay in rendering a final judgment for these remedies. The Federal Supreme Court of Vadaluz dismissed Kelsen’s Constitutional argument on May 30, 2020, finding no constitutional violation.⁶⁴ The proceedings available and initiated by the petitioner were consistent with the treaty provisions justifying no exception to the prior exhaustion of remedies requirement.

The petitioners failed to exhaust the domestic remedies offered by Vadaluz prior to initiating involvement by international courts. The State asks the Court to dismiss the petition on ground of inadmissibility of the application because the state was not presented with sufficient time or opportunity to remedy the concern domestically.

⁶¹ *Case of Brewer Carías v. the Bolivarian Republic of Venezuela*. Judgment of May 26, 2014. Series C No. 278.

⁶² Hypothetical p.6, §25.

⁶³ *Id.*

⁶⁴ Hypothetical p.7, §32.

2. *The Commission violated the agreed-upon procedural structure for complaints and resolutions within the IASHR.*

Once the individual petition came before the Commission, several procedural rules and norms were avoided. Minimization of Vadaluzian involvement and a deviation from agreed-upon procedure for member-states of the OAS signify a divergence from the consent-based jurisdiction. The instant petition is not compliant with procedural requirements before the Commission rendering it inadmissible before the Court.

Whether by the request of an individual or of its own accord, the IACHR may issue precautionary measures in response to “serious and urgent situations presenting a risk of irreparable harm to a person or the subject matter of a pending petition.”⁶⁵ Such precautionary measures are subject to limits regarding seriousness of an offense warranting intervention on this level with limited findings.⁶⁶ The Commission may look to this Court to issue a provisional measure only in four circumstances: when the state has not complied with precautionary measures, the existing measures have not been effective, there is a precautionary measure connected to a case submitted to the Court, or the Commission considers it pertinent for the efficacy of the requested measures.⁶⁷

Upon submission of an individual petition, the secretariat conducts an initial processing of the petition by checking for completeness,⁶⁸ registering the case with a number and replying to the petitioner with an acknowledgement.⁶⁹ The secretariat then files the petition to be considered in the order it was received.⁷⁰

⁶⁵ Charter of the Organization of American States, art. 106; American Convention on Human Rights, art 41.b; Statute of the Commission on Human Rights, art. 18.b; Rules of Procedure of the Inter-American Commission on Human Rights, art. 25 (Aug. 1, 2013).

⁶⁶ Rules of Procedure of the Inter-American Commission on Human Rights, art. 25, §§2-11 (Aug. 1, 2013).

⁶⁷ *Id.* at art. 76.

⁶⁸ *Id.* at art. 28.

⁶⁹ *Id.* at art. 26.

⁷⁰ *Id.* at art. 26.

When the case reaches the Commission’s formal process, a petition is sent to the state in question who is given 3 months to respond on the issue of admissibility.⁷¹ After considering the positions of both parties, the Commission evaluates the situation and issues a report.⁷²

First, the petitioner submits their investigation materials for four months.⁷³ Then, the State may then submit its own investigation materials, responding to the petitioner for a period of four months.⁷⁴ Through this time, any participating party may initiate the friendly settlement procedure.⁷⁵ From these materials, the Commission develops a preliminary report.⁷⁶

The Commission’s preliminary report indicates their findings, whether there are violations, and recommendations for rectifying them.⁷⁷ The report is submitted to the state in question.⁷⁸ The state is given three months to comply and submit a report,⁷⁹ after which the Commission may issue a final decision publicly,⁸⁰ or submit the case for review before the Court.⁸¹

All proceedings in the IASHR may be expedited in certain limited circumstances of serious and urgent cases or “the life or personal integrity of a person is in real and imminent

⁷¹ *Id.* at art. 30.

⁷² *Id.* at art. 36.

⁷³ *Id.* at art. 37.

⁷⁴ *Id.* at art. 37.1

⁷⁵ *Id.* at art. 40.

⁷⁶ *Id.* at art. 43.

⁷⁷ *Id.* at art. 44.2 (Aug. 1, 2013). *See also* Inter-Am. Comm’n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art. 44.2 (Mar. 18, 2013); American Convention on Human Rights art. 501, Nov. 22, 1969.

⁷⁸ Inter-Am. Comm’n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art 44.3 (Mar. 18, 2013).

⁷⁹ Rules of Procedure of the Inter-American Commission on Human Rights, Art. 47 (Aug. 1, 2013). *See also* Inter-Am. Comm’n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art 47 (Mar. 18, 2013).

⁸⁰ Inter-Am. Comm’n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art 45 (Mar. 18, 2013); *see also* Organization of American States, American Convention on Human Rights art. 51, Nov. 22, 1969.

⁸¹ Inter-Am. Comm’n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art 30-37 (Mar. 18, 2013); Organization of American States, American Convention on Human Rights art. 50, Nov. 22, 1969.

danger.”⁸² The Commission may deviate from standard practice and expedite processing of petitions for the following reasons: (1) when time would deprive the petition of its effectiveness because the alleged victim is older or a child, terminally ill, subject to the death penalty or connected to a precautionary or provisional measure in effect; (2) when the alleged victims are persons deprived of liberty; (3) when the State formally expresses its intention to enter into friendly settlement negotiations; or (4) when the resolution of the petition could address serious structural situations impacting the enjoyment of human rights or promoting legislation or state practices and thus avoid repetitious complaints.”⁸³ The Commission exists to “promote the observance and defense of human rights and to serve as an advisory body to the Organization.”⁸⁴ The expedient request for two immediate resolutions divorced from an individual petition, ignorance of procedural mandates for timelines, and essential exclusion of Vadaluzian officials from the proceedings represent serious derogations from the procedural rules to which all signatories are bound.

- a. The inappropriate processing of precautionary measures and provisional measures place the petitioner and the Commissions’ management of the petition in question.

The Commission’s handling of this petition presents a further embarrassment of the procedure within the commission. Kelsen’s initial request for precautionary measures was submitted on March 3, 2020.⁸⁵ Despite finding no basis for precautionary measures under Article 25, the Commission filed for provisional measures with the Court on March 4, 2020 on precisely

⁸² Rules of Procedure of the Inter-American Commission on Human Rights, art 37.3 (Aug. 1, 2013).

⁸³ *Id.* at art 29.

⁸⁴ Statute of the Inter-American Commission on Human Rights, art. 1(1) (1979).

⁸⁵ Hypothetical p.7, §33.

the same facts.⁸⁶ Just as the Commission had held, the Court rejected the request, finding none of the requisite circumstances from Article 63(2) present.⁸⁷ The similarities of the standards for each and the speed of filing for each represents an irrelevance for the significance of precautionary measures and their necessity in cases of grave danger.

The Commission’s finding of no “serious and urgent situation presenting a risk of irreparable harm to persons or to subject matter of a pending petition or case”⁸⁸ inherently rules out the Court finding “a situation of extreme gravity and urgency that could lead to irreparable harm” in the present case.⁸⁹ Similarities of the standards for each and the speed of filing for each represents an irrelevance for the significance of precautionary measures and their necessity in cases of grave danger. The requested measures were inappropriate in their timing without any shift in the situation.

- b. The shortened timeframe and essential exclusion of the state in question represents a violation of the procedural mandate and an incomplete preliminary report.

On March 5, 2020, just two days after the arrest of Chavero and immediately following the two rejections for precautionary measures,⁹⁰ Kelsen filed an individual petition with the Commission on behalf of Chavero.⁹¹ The Commission expedited processing the petition

⁸⁶ *Id.* at §33-34; *See also* Inter-Am. Comm’n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art 25 (Mar. 18, 2013) (“Such [precautionary] measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to subject matter of a pending petition or case before the organs of the inter-American system.”).

⁸⁷ Hypothetical p.7, §35; *See also* American Convention on Human Rights, art. 63(2) (Provisional measures apply in “a situation of extreme gravity and urgency that could lead to irreparable harm.”).

⁸⁸ Inter-Am. Comm’n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art 25 (Mar. 18, 2013).

⁸⁹ American Convention on Human Rights, art. 63(2).

⁹⁰ Hypothetical p.8, §35.

⁹¹ *Id.* at §36.

immediately upon its receipt and adopted an admissibility report four months later, on August 30, 2020.⁹²

While the procedural guidelines provide for a 4-month investigation period for the state and the petitioner,⁹³ the report on the merits was adopted after just two months of investigation.⁹⁴ The case was submitted before the Court on November 8, 2020, just nine days after the Commission submitted the preliminary report and recommendations for reform to Vadaluz.⁹⁵ This marks two deviations from the established procedure of the Commission.

The procedural requirements following the submission of the preliminary report to the state party is a provision of three months for a state to submit a compliance report.⁹⁶ At the end of the three-month grace period for compliance, the Commission may submit the case for review before the Court.⁹⁷ Breaking with the established process effectively removes the proceedings from the consent-based jurisdiction of the organization insofar as it is axiomatic that, “for an OAS member to be subject to jurisdiction before the Court, express consent is required twice: first by ratifying the American Convention and second by making an optional declaration.”⁹⁸ In rushing to pursue resolution through the Court, Vadaluz was given insufficient time to submit a complete response.

⁹² Clarification Questions, p.3, §12.

⁹³ Rules of Procedure of the Inter-American Commission on Human Rights, Arts. 36,37 (Aug. 1, 2013).

⁹⁴ Clarification Questions, p.3, §12.

⁹⁵ *Id.*

⁹⁶ Inter-Am. Comm’n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art 47 (Mar. 18, 2013).

⁹⁷ *Id.* at art 30-37; Organization of American States, American Convention on Human Rights art. 50, Nov. 22, 1969.

⁹⁸ Andrew Guzman, The Consent Problem in International Law, University of Cambridge, Berkeley Law School, 2011; Daniel Bodansky & J. Shand Watson, State Consent and the Sources of International Obligation, Proceedings of the Annual Meeting (American Society of International Law), Vol. 86, (April 1-4, 1992) pp. 108-113.

c. Pursuit of friendly settlement was insufficiently available to Vadaluz.

By accelerating the set-out procedures, the Commission precluded opportunity and sufficient time for the parties to seek friendly settlement to resolve the concerns presented. As set out above, either party may request a friendly settlement discussion at any point through the preparation of both the admissibility and preliminary report.⁹⁹

As a policy matter, OAS functions to mediate allegations of violations.¹⁰⁰ Friendly settlements have been recognized as an effective means to effectuate that. In *Strategic Plan 11* and *17*, the Commission indicated their goal to encourage friendly settlements among parties.¹⁰¹ Describing the current policy of the Commission, Commissioner James Cavallaro said, "The idea is to bring the standards down to earth and turn them into norms, laws, and public policies that are concrete and attainable, working in coordination with the relevant actors from the States and with networks of nongovernmental organizations and academics."¹⁰² The Commission has a mandate to promote respect for human rights in the region and acts as a consultative body to OAS member states in this area.

Fundamentally, domestic settlements, as available in friendly settlements through the Commission, have the best opportunity to provide timely recourse for the alleged victim.¹⁰³ Compliance rates with friendly settlements are almost double that with Court judgments and five

⁹⁹ Rules of Procedure of the Inter-American Commission on Human Rights, art. 40 (Aug. 1, 2013).

¹⁰⁰ IACHR ADOPTS RESOLUTION TO STRENGTHEN AND EXPAND FRIENDLY SETTLEMENT PROCEDURE OAS – ORGANIZATION OF AMERICAN STATES: DEMOCRACY FOR PEACE, SECURITY, AND DEVELOPMENT, http://www.oas.org/en/iachr/media_center/PReleases/2020/084.asp.

¹⁰¹ IACHR STRATEGIC PLAN 2011-2015 ORGANIZATION OF AMERICAN STATES: DEMOCRACY FOR PEACE, SECURITY, AND DEVELOPMENT, <https://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>; STRATEGIC PLAN 2017-2021 ORGANIZATION OF AMERICAN STATES: DEMOCRACY FOR PEACE, SECURITY, AND DEVELOPMENT, <https://www.oas.org/en/iachr/mandate/StrategicPlan2017/default.asp>.

¹⁰² IACHR PRESENTS ITS STRATEGIC PLAN 2017-2021 OAS: MORE RIGHTS FOR MORE PEOPLE, http://www.oas.org/en/iachr/media_center/PReleases/2017/054.asp.

¹⁰³ Fernando Basch et al., *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions*, 7 Sur: Int'l J. on Hum. Rts. 9 (2010).

times the rate of compliance with IACHR decisions.¹⁰⁴ Relevant treaty law sets out the obligation of the Commission to mediate friendly settlements.¹⁰⁵ In inappropriately shortening the investigation period for preparing the preliminary report, the Commission reduced Vadaluz's access to friendly settlement procedures, violating the country's right to access procedures and policies set out by the Commission¹⁰⁶ and derogating from the treaty agreements of member states.¹⁰⁷

3. *Alternate means of resolution are available, more appropriate, and more effective in resolving this case.*

As party to the Convention and Court, Vadaluz falls under the compulsory jurisdiction of the Court.¹⁰⁸ However, in any case, the Court has the power to determine its own jurisdiction following the doctrine of "compétence de la compétence"¹⁰⁹ and reject the petition as outside their self-defined jurisdiction. Vadaluz requests that this Court exercise their advisory jurisdiction, creating reports which would be applicable to all member states, given the broad impact of the emergency and the Commission indicated their interest in an advisory opinion.

a. The context of a global pandemic indicates a need for an advisory report to address the variety of state responses.

As a general matter, the swine pandemic had a broad global impact. The duty of the human rights system is to promote respect for human rights and provide recommendations for policies to come into compliance with the relevant convention.¹¹⁰ In the case of the novel swine

¹⁰⁴ *Id.*

¹⁰⁵ American Convention on Human Rights, art. 49.

¹⁰⁶ Hypothetical p.8, §§37-38.

¹⁰⁷ *Supra* note 98.

¹⁰⁸ Hypothetical p.1, §6. *See also* American Convention of Human Rights, Art. 62.

¹⁰⁹ *Case of Baruch Ivcher Bronstein v. Peru*, Judgment of 1999, Series C No.54, para. 55-56.

¹¹⁰ Rules of Procedure of the Inter-American Commission on Human Rights, art. 44.2. *See also* Inter-Am. Comm'n on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art. 44.2 (Mar. 18, 2013); American Convention on Human Rights art. 501, Nov. 22, 1969.

pandemic, Vadaluz asserts the advisory jurisdiction is decidedly the more appropriate venue for the concerns at hand and not the contentious jurisdiction of the Court.

b. The Commission’s preliminary report submitted to this Court indicated their interest in an advisory opinion.

The motivation of this referral to the Court is consistent with the pursuit of an advisory opinion and not through a decision rendered through the contentious jurisdiction of the Court. Various procedural idiosyncrasies and submissions before the Court indicate a disguised request from the Commission for an advisory opinion.

As described above,¹¹¹ the Commission filed a request for provisional measures immediately after rejecting a request for precautionary measures in quick succession.¹¹² The Commission sought the Court’s opinion despite their own rejection of the request. This procedural oddity points to the Commission’s interest in an advisory opinion from the Court in an unprecedented situation.

The Commission explicitly indicated to the Court that it sought new guidance regarding the increasing issuance of states of emergency for highly contagious pandemics. In the preliminary report submitted to the Court, the Commission noted, “this case provided a valuable opportunity for the Court to develop standards on which rights can be restricted—and under what criteria—during states of emergency, under Article 27 of the Convention.”¹¹³

The Commission’s explicit and implicit communication in managing this petition indicates an interest in blurring the lines between advisory and contentious jurisdiction of this Court or a disguised request for an advisory opinion on the Court. In either instance, Vadaluz requests the Court exercise its discretion to dismiss the instant proceedings and utilize its

¹¹¹ *Supra* section IV.A.1.a.

¹¹² Hypothetical, p.7, §§33,35.

¹¹³ Hypothetical p.8, §39.

advisory jurisdiction to assist all States Party to the OAS in their future management of public health emergencies.

B. Merits

Should the Court decide to consider the matter on the merits following analysis of admissibility, Vadaluz will demonstrate that the remedies were effective and that it fulfilled its obligations under the American Convention on Human Rights (“the Convention”) in relation to personal liberty (Article 7); a fair trial (Article 8); freedom from ex post facto laws (Article 9); freedom of thought and expression (Article 13); assembly (Article 15); freedom of association (Article 16); judicial protection (Article 25); and suspension of guarantees (Article 27).¹¹⁴ In sum, Vadaluz maintains the State has not violated its obligations under the Convention.

1. *Emergency Decree 75/20 was fully compliant with the State’s obligations under international law.*

The Convention specifies measures a state may take in response to a public health emergency to best protect the people. Article 29 of the Convention establishes restrictions regarding the interpretation of the Convention, and Article 30 creates the scope of these restrictions.¹¹⁵ Article 30 affirms that “the restrictions that . . . may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose. . .”¹¹⁶ Emergency Decree 75/20 legitimately utilized the extant Article 30 restrictions during a state of emergency for “reasons of general interest.”¹¹⁷

¹¹⁴ *Id.* at §38.

¹¹⁵ American Convention on Human Rights, art. 29,30.

¹¹⁶ American Convention on Human Rights, art. 30.

¹¹⁷ *Id.* See also Hypothetical, p.3-5, §17; Clarification Questions, p.1-3, §5,9 (stating the Federal Supreme Court finding that Vadaluz did not derogate rights under Article 27).

It is a well-established practice in the Americas, as well as other international regions, for states to declare a state of emergency during public health crises and pandemics.¹¹⁸ For example, the Commission adopted Resolution No. 1/2020, Pandemic and Human Rights in the Americas, to provide guidance to states on how to navigate a state of emergency.¹¹⁹ The resolution states that pandemics, “may seriously affect the full exercise of people’s human rights because of the severe risks to life, health and personal safety it poses, and may have an immediate, mid and long-term impact on societies as a whole.”¹²⁰ The Resolution also affirms that: “Under certain circumstances, it may become essential, in order to achieve sufficient social distancing, to restrict the full enjoyment of rights.”¹²¹ Additionally, the Commission issued a joint press release with the Office of the Special Rapporteur on Economic, Social, Cultural, and Economic Rights (OSRESCER) detailing instructions for protecting human rights and public health during the COVID-19 pandemic.¹²² This report conveyed that “In this regard. . .states may impose temporary restrictions on human rights while a state of emergency has been declared.”¹²³ Notably, during the COVID-19 pandemic, both the Commission and the Court suspended their sessions and typical operations from March 2020 to July 2020.¹²⁴

Frameworks for the restrictions of rights, for valid purposes such as public health, are recognized as valid and permissible numerous regional and international human rights

¹¹⁸ Julio A. Sanchez, *Inter-American Commission on Human Rights Response to COVID-19*, 24 Hum. Rts. Brief 1,2 (2020).

¹¹⁹ Inter-Am. Comm’n on Human Rights Res. 1/2020, Pandemic and Human Rights in the Americas, pg.3 (Apr. 10, 2020).

¹²⁰ *Id.*

¹²¹ *Id.* at pg.5.

¹²² Press Release, Inter-Am. Comm’n on Human Rights, IACHR and OSRESCER Urge States to Guarantee Comprehensive Protection for Human Rights and Public Health during the COVID-19 Pandemic (Mar. 20, 2020).

¹²³ *Id.*

¹²⁴ Julio A. Sanchez, *Inter-American Commission on Human Rights Response to COVID-19*, 24 Hum. Rts. Brief 1,2 (2020).

instruments.¹²⁵ Article 15 of the European Convention on Human Right governs derogation in times of emergency.¹²⁶ Comparable provisions exist in ICCPR Article 4(1) and Article 4 of the Arab Charter on Human Rights.¹²⁷ While derogations are not, and should not, be the norm, these provisions are necessary and permissible during extraordinary times.¹²⁸ The volume of guidance by international institutions speaks to both how necessary and unprecedented a pandemic forcing worldwide standstill truly is; during COVID-19, the UN collectively released over 150 statements guiding emergency restrictions continuing to respect human rights during a pandemic.¹²⁹ As of March 2021, a year after the original outbreak of COVID-19, 104 countries continue to utilize emergency declarations to ensure public health safety measures.¹³⁰ Many aspects of the swine pandemic parallel the COVID-19 pandemic, and the present crisis required a parallel emergency response from international and domestic partners alike.

Vadaluз enacted Emergency Decree 75/20, on February 2, 2020, as an emergency response to the WHO declaration of a worldwide pandemic on February 1, 2020.¹³¹ Emergency Decree 75/20 explicitly recognized health as a constitutional right and the State’s duty to safeguard the just demands of the common good.¹³² The Decree utilized the State’s authority to restrict rights under Article 30 of the Convention.¹³³ For “reasons of general interest,” Vadaluз enacted the Decree, in accordance with the best scientific knowledge available from the WHO, to protect the right to health. This, in turn, required temporary restrictions on certain rights as

¹²⁵ Audrey Leuret, *COVID-19 Pandemic and Derogation to Human Rights*, 7 J. L. and Biosciences 1,5-10 (May 4, 2020).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Lawrence R. Helfer, *Rethinking Derogations from Human Rights Treaties*, 115 Am. J. Int’l L. 20, 25 (2021).

¹³⁰ *COVID-19 Civic Freedom Tracker*, International Center for Not-for-Profit Law (Mar. 23, 2021), <https://www.icnl.org/covid19tracker/>.

¹³¹ Hypothetical, p.3, §16.

¹³² Hypothetical, p.3-5, §17.

¹³³ *Id.* See also American Convention on Human Rights, art. 30.

permitted under the law.¹³⁴ These restrictions were adopted consistent with Article 30 and international law.¹³⁵

2. The pandemic necessitated a legitimate state of emergency.

The February 2020 swine pandemic created a collective public health crisis, engulfing the world in a collective emergent situation requiring a rapid response to protect human life.¹³⁶ The WHO declared a worldwide pandemic on February 1, 2020.¹³⁷ The following day, Vadaluz promptly heeded WHO guidance—created by an international external body acting upon the basis of scientific evidence—and declared a state of emergency.¹³⁸ Under international human rights law and the Convention, five elements must be met for a valid state of emergency: (1) subject, (2) object, (3) cause, (4) proper notice, and (5) conduct.¹³⁹ Vadaluz acted responsibly in declaring a state of emergency consistent with international and domestic law by satisfying the five elements in what was a necessary and indeed urgent state of emergency.

- a. There must be a subject possessing legal authority to declare a state of emergency.

The executive branch of Vadaluz declared the state of emergency and did so within its juridical capacity.¹⁴⁰ The only requirement to establish the state party as a valid subject is that the entity possesses the ability to maintain and derogate human rights under international law.¹⁴¹ Vadaluz meets this requirement.

¹³⁴ Hypothetical, p.3-5, §17.

¹³⁵ *Id.* See also American Convention on Human Rights, art. 30.

¹³⁶ Hypothetical, p.3, §16.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 Am. U.J. Int'l L. & Pol'y 35, 40 (1986).

¹⁴⁰ Hypothetical, p.2, §7.

¹⁴¹ Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 Am. U.J. Int'l L. & Pol'y 35, 40 (1986).

- b. The terms of the decree must clarify the object of any restrictions.

The declaration of any state of emergency must clarify the object of any imposed restrictions on rights.¹⁴² In the present case, guidelines detailed by Emergency Decree 75/20 are satisfy that requirement.¹⁴³ These guidelines reflect the best knowledge and health guidance that the State had at the time, with the goal of protecting the health of the people of Vadaluz.¹⁴⁴

- c. There must be a present, legitimate cause to declare a state of emergency.

A legitimate state of emergency must clarify a legitimate basis—the cause—upon which the “subject” is compelled to derogate temporarily from certain peacetime human rights requirements.¹⁴⁵ The Convention refers to “war, public danger, or other emergency” as potential triggers, or causes, for the declaration of a state of emergency.¹⁴⁶ The extremely contagious, dangerous, and previously unknown to health authorities swine pandemic constitutes the cause in the instant case.¹⁴⁷ While there have been steady improvements in the national healthcare system, consideration must be taken of the fact that universal healthcare access in Vadaluz has yet to be achieved.¹⁴⁸ This emphasizes the need for strong action to curb the impacts of the swine pandemic and lessen the already-present strain on healthcare workers and healthcare system.¹⁴⁹

To further establish the cause as legitimate, three subsequent elements are required; (i) real or imminent event, (ii) exceptional gravity of the situation requiring “no less than a threat to the life of the nation,” and (iii) the emergency affects the continued viability of the community as

¹⁴² *Id.* at 41.

¹⁴³ Hypothetical, p.3-5, §17.

¹⁴⁴ Hypothetical, p.3, §16.

¹⁴⁵ Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 *Am. U.J. Int'l L. & Pol'y* 35, 42 (1986).

¹⁴⁶ American Convention on Human Rights, art. 27.

¹⁴⁷ Hypothetical, p.3-5, §16-17.

¹⁴⁸ Hypothetical, p.2, §8.

¹⁴⁹ *Id.*

a whole, specifically the people, territory, and legal order.¹⁵⁰ The pandemic constituted a very real and present event, as reaffirmed by the WHO.¹⁵¹ Moreover, the WHO emphasized the dramatic and exceptional gravity of the situation as a “highly dangerous acute respiratory infection” with an unknown mortality rate and unknown long-term consequences for human health.¹⁵² The uncertainty surrounding the new and unknown virus posed “a threat to the life of the nation,” affecting the people, government, and legal order of Vadaluz.¹⁵³ With the risk of infection and social distancing orders, the country came to a standstill.¹⁵⁴ Given the infectious nature of the swine pandemic, the imposition of such emergency health measures of this scale demonstrates the continued viability of the emergency to the community as a whole.

- d. Proper notice must be extended to the population impacted and the OAS Secretary General.

Proper notice in the issuance of an emergency declaration requires: (i) a reasonable guide for conduct for the country, (ii) immediate notification to the OAS Secretary General, and (iii) an exact date for the termination of such suspension.¹⁵⁵ Emergency Decree 75/20 provided a reasonable guide for conduct for Vadaluz, given it contained details regarding social distancing and essential activities.¹⁵⁶ The provisions in Emergency Decree 75/20 create guidance delineating the exact activities that are allowed and under what conditions such that the reasonable person would understand the information.¹⁵⁷ The official gazette and media

¹⁵⁰ Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 Am. U.J. Int'l L. & Pol'y 35, 41-47 (1986).

¹⁵¹ Hypothetical, p.3, §16.

¹⁵² *Id.* at §16-17.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 Am. U.J. Int'l L. & Pol'y 35, 47-48 (1986).

¹⁵⁶ Hypothetical, p.3-5, §17.

¹⁵⁷ *Id.*

disseminated and published the Emergency Decree 75/20 to inform residents.¹⁵⁸ Article 5 of Emergency Decree 75/20 included a notification to both the Secretary General of the OAS and the UN.¹⁵⁹

While Emergency Decree 75/20 lacked an exact date for the termination of suspensions, this decision remained justified for two reasons: (1) the unknown and indefinite character of the situation required this sort of flexibility, and (2) Emergency Decree 75/20 did not suspend guarantees, rather, it set temporary limitations of rights are required by the emergency under Article 30.¹⁶⁰ Emergency Decree 75/20 stated, “For the duration of the constitutional state of emergency, the following exceptional measures are issued.”¹⁶¹ Due to the infectious nature of an unknown disease and worldwide pandemic, Vadaluz acted appropriately in allowing a specifically defined, yet fluid durational timeline of Emergency Decree 75/20 to follow the scientific advances and progress of the swine pandemic.¹⁶² Creating a false and scientifically invalid timeline for countering an unknown disease would be inappropriate, legally unsound, and irresponsible. Setting an arbitrary expiration date for Emergency Decree 75/20 for a year or a week when new science and guidance from the WHO could counter this arbitrary timeline, it would altogether undermine the purpose of the Emergency Decree 75/20.¹⁶³ In addition to the timeline flexibility required by a pandemic, Emergency Decree 75/20 did not fully derogate from rights granted to its people, instead, Vadaluz proceeded more cautiously and simply created a temporary limitation of specific rights.¹⁶⁴

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* See also Clarification Questions, p.7, §36.

¹⁶⁰ Hypothetical, p.3-5, §17. See also American Convention on Human Rights, art. 30.

¹⁶¹ *Id.* at §17.

¹⁶² *Id.* at §16.

¹⁶³ Hypothetical, p.3-5, §17.

¹⁶⁴ *Id.* See also Clarification Questions, p.1, §5.

e. The state's conduct must comply with the Convention.

The fifth and final element to declare and maintain a valid state of emergency requires the state's conduct to comply with the Convention.¹⁶⁵ In this regard, the state must: (i) adhere to Article 1 at all times to prevent discrimination against protected classes, and (ii) ensure each emergency measure is accompanied by measures addressing potential human rights violations.¹⁶⁶ The preamble of Emergency Decree 75/20 explicitly highlights Article 1 classes, "recogniz[es] the need to protect vulnerable groups and those subject to historical discrimination, such as persons with disabilities, persons deprived of their liberty, women, and indigenous peoples."¹⁶⁷ Further, because Emergency Decree 75/20 only limited specified rights, rights unrelated to groups facing historical discrimination, no obstacles were placed with regard to providing a forum to address any potential Vadaluzian human rights violations caused by its health measures.¹⁶⁸ As evidenced by the successful filing and adjudication of Chavero's *habeas corpus* claim in the Federal Supreme Court, the justice system continued to operate to the best of its ability given the unprecedented circumstances.¹⁶⁹ While delays or logistical hiccups were present, the justice system of Vadaluz solved these issues as efficiently as possible to allow for the proper evaluations of any potential violations of human rights.¹⁷⁰ The present case is indicative of access to justice regardless of the status of the physical buildings. Vadaluz both explicitly highlights Article 1 protected classes and ensured judicial access and redress if required by the situation.

¹⁶⁵ Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 Am. U.J. Int'l L. & Pol'y 35, 48-49 (1986).

¹⁶⁶ *Id.*

¹⁶⁷ Hypothetical, p.3-5, §17.

¹⁶⁸ *Id.*

¹⁶⁹ Hypothetical, p.6-7, §25-32.

¹⁷⁰ *Id.* See also Clarification Questions, p.3, §14.

3. Emergency Decree 75/20 is valid under domestic law.

Emergency Decree 75/20 is valid under domestic law, even though Congress failed to approve or reject the declaration of a state of emergency within eight days.¹⁷¹ The measure is legitimate because (1) Congress adjourned itself to protect its members from the pandemic until the minimum necessary conditions were objectively met, and (2) the Supreme Court affirmed the validity and constitutionality of Emergency Decree 75/20.¹⁷²

The purpose of requiring Congress to approve or reject a declaration of a state of emergency is to ensure that the executive branch is not acting frivolously or exceeding its authority over the other branches of government.¹⁷³ This policy aims to block the executive from circumventing checks and balances under the guise of public safety.¹⁷⁴ The fact that Congress adjourned due to the sudden outbreak of the swine pandemic in Vadaluz underscores not only the very real and dangerous reality of the swine pandemic, but also that the pandemic was not an excuse for a power grab by the executive. If Congress believed Emergency Decree 75/20 threatened the people and emerged out of a faulty pandemic, Congress would not have adjourned and, instead, voted to reject the declaration of a state of emergency. The executive exercised no power over Congress nor influenced this decision. Additionally, the Commission and the Court also suspended their sessions during the COVID-19 pandemic, citing the emergency health crisis, for a span of five months, a practice found all over the world during health pandemics.¹⁷⁵

¹⁷¹ Hypothetical, p.3-5, §17.

¹⁷² Hypothetical, p.7, §32.

¹⁷³ Julio A. Sanchez, *Inter-American Commission on Human Rights Response to COVID-19*, 24 Hum. Rts. Brief 1, 3 (2020).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 2.

The Federal Supreme Court further validated Emergency Decree 75/20.¹⁷⁶ In Chavero's habeas corpus claim, the Court found Emergency Decree 75/20 to be fully constitutional.¹⁷⁷ The Court reasoned that "the executive branch, based on WHO recommendations, had taken extraordinary and urgent measures to prevent the spread of the virus; therefore, it could not wait for Congress to convene during the pandemic."¹⁷⁸ While it is certainly not ideal that Congress was unable to approve or reject Emergency Decree 75/20, pandemics are rare events and the executive was forced to take swift action in the name of public health. Finally, the Federal Supreme Court validated Emergency Decree 75/20 by finding the acts constitutional.

4. The restrictions enacted by Emergency Decree 75/20 were entirely permissible.

According to Commission Resolution No. 1/2020, Pandemic and Human Rights in the Americas, state action in response to a public health crises state of emergency must be (1) proportional, (2) temporary, (3) non-discriminatory, and (4) within the confines of existing law.¹⁷⁹ Through various tests, created and enforced by the Commission and Court, the above elements are applied to a range of situations involving restrictions on protected individual rights and have been satisfied by Vadaluz in the present case.

- a. The State met its obligations to respect rights without discrimination under Article 1 of the Convention.

Article 1 of the Convention requires state parties to respect rights "without any discrimination for reasons of race, color, sex, language, religion, political or other opinion,

¹⁷⁶ Hypothetical, p.7, §32.

¹⁷⁷ *Id.*

¹⁷⁸ Clarification Questions, p.2, §9.

¹⁷⁹ Inter-Am. Comm'n on Human Rights Res. 1/2020, Pandemic and Human Rights in the Americas, pg. 10-11 (Apr. 10, 2020). *See also* Julio A. Sanchez, Inter-American Commission on Human Rights Response to COVID-19, 24 Hum. Rts. Brief 1, 2 (2020).

national or social origin, economic status, birth, or any other social condition.”¹⁸⁰ The preamble of Emergency Decree 75/20 explicitly highlights Article 1 classes, stating “to protect vulnerable groups and those subject to historical discrimination.”¹⁸¹ Emergency Decree 75/20, both in its text and application, does not violate the Article 1(1) obligation of non-discrimination.¹⁸² It textually defines essential and non-essential activities and the required restrictions upon such activities for the sake of public health amid an unknown pandemic.¹⁸³ Discrimination under Article 1 does not occur whenever an activity that one desires to continue falls into an extant non-essential or non-permitted category.¹⁸⁴ The pandemic necessitated restrictions on group activities, such as school and social activities, and travel, such as border crossings and air traffic.¹⁸⁵ These restrictions apply to everyone, and do not discriminate against persons with disabilities, women, and indigenous peoples, or any other protected class.¹⁸⁶

For example, young people argue that closing bars and banning the sale of alcohol discriminated against them.¹⁸⁷ The response to this argument is twofold; (1) age is not a protected class under Article 1, (2) parties and gatherings of young people consuming alcohol are one of the proven causes of the surge of the pandemic and this action was necessary to curb the impact of the disease.¹⁸⁸ The circumstances of the state of emergency and pandemic necessitated state action and did not infringe upon the rights of any protected classes under Article 1.¹⁸⁹

¹⁸⁰ American Convention on Human Rights, art. 1(1).

¹⁸¹ Hypothetical, p.3-5, §17.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ American Convention on Human Rights, art. 1.

¹⁸⁵ Hypothetical, p.3-5, §17.

¹⁸⁶ *Id.*

¹⁸⁷ Hypothetical, p.5, §19.

¹⁸⁸ American Convention on Human Rights, art. 1(1). *See also* Hypothetical, p.5, §19.

¹⁸⁹ American Convention on Human Rights, art. 1.

Additionally, there was no discrimination based upon indigenous status in the enactment of Emergency Decree 75/20.¹⁹⁰ Prior and informed consent consultations for indigenous populations were suspended until further notice.¹⁹¹ At that same time, decision-making which might impact the indigenous population was likewise suspended until further notice.¹⁹² The indigenous population was not excluded from participation and decision-making because any state action which could affect the indigenous population had been suspended to protect the health of both the indigenous population and the nation of Vadaluz.¹⁹³ Considering indigenous populations are more at risk, the temporary suspension of this business was even more so necessary to proactively curb the impact of the pandemic on this specific population.¹⁹⁴

Further, religion is a protected class under Article 1.¹⁹⁵ Because religion is protected under Article 1, Emergency Decree 75/20 specifically excluded “churches and temples of any religious denomination and services where religious activities and funeral rites are held” from the bans on gathering.¹⁹⁶ While Vadaluz continued to discourage group gatherings in response to the pandemic, this law complied with the requirements outlines in Emergency Decree 75/20 regarding restrictions imposed on religious people as a class.¹⁹⁷ Also of note, the churches and temples of religious denominations followed all social distancing and capacity limits outlines by the authorities.¹⁹⁸

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Goha A, Mezue K, Edwards P, et al. *Indigenous People and the COVID-19 Pandemic*. 75 J. Epidemiol Community Health 207, 208 (2021)

¹⁹⁵ American Convention on Human Rights, art. 1(1).

¹⁹⁶ Hypothetical, p.3-5, §17.

¹⁹⁷ American Convention on Human Rights, art. 1(1).

¹⁹⁸ Clarification Questions, p.7, §36.

- b. The State met its obligations to restrict its action to a temporary response as necessitated by the situation.

Emergency Decree 75/20 extended “for the duration of the constitutional state of emergency.”¹⁹⁹ This scope is both temporary, lasting only as long as the state of emergency, and necessitated by the situation, the swine pandemic.²⁰⁰ As previously stated, the nature of this infectious, unknown disease and the and global pandemic it caused necessitated a specifically defined, yet fluid timeline for the limitation of rights provided in the Decree.²⁰¹ The framework of Emergency Decree 75/20 created the flexibility needed for Vadaluz to monitor scientific advances and the course of the swine pandemic, while meeting the obligation to restrict its action to a temporary response as necessitated by the situation.²⁰² The action taken was appropriately circumscribed and addressed the exigencies of the unfolding pandemic.

- c. The State met its obligations under Article 13 (Freedom of Thought and Expression).

Vadaluz did not infringe upon protected rights under Article 13 in its enactment of Emergency Decree 75/20. Article 13 protects the right to freedom of thought and expression.²⁰³ The Joint Declaration on Freedom of Expression and Elections in the Digital Age (2020), signed by expert representatives from the UN, OSCE, and OAS, including the Commission Office of the Special Rapporteur for Freedom of Expression (“OSRFE”) details the scope of violations of Article 13, such as prior censorship, the seizing and barring of publications and, “any procedure that subjects the expression or dissemination of information to government control.”²⁰⁴

¹⁹⁹ Hypothetical, p.3-5, §17.

²⁰⁰ Inter-Am. Comm’n on Human Rights Res. 1/2020, Pandemic and Human Rights in the Americas, para. 21 (Apr. 10, 2020).

²⁰¹ Hypothetical, p.3, §16.

²⁰² *Id.* See also Hypothetical, p.3-5, §17.

²⁰³ American Convention on Human Rights, art. 13.

²⁰⁴ *Freedom of Expression in the Inter-American System*, Organization of American States (Mar. 23, 2021), [https://www.oas.org/en/iachr/expression/showarticle.asp?artID=630&IID=1#:~:text=Article%2013%20of%20The%](https://www.oas.org/en/iachr/expression/showarticle.asp?artID=630&IID=1#:~:text=Article%2013%20of%20The%20)

No portion of Emergency Decree 75/20 nor any enforcement action justified by the Decree limited the right to freedom of thought and expression protected by Article 13.²⁰⁵ As the facts disclose, there was no suppression of online protesting or action to censor or control speech. Examples of the exercise of Article 13 rights include the livestreaming of Chavero's arrest on Facebook, social media trends discussing the arrest, the Association of Women Justice Authorities protest of Directive No. 1 of 2020 to deem gender-based violence justice authorities essential, and Chavero's tweet discussing his arrest and treatment.²⁰⁶ Emergency Decree 75/20 exists to limit physical movements and gatherings to curb the impact of the pandemic, and does not constitute a sweeping limit on thought and expression such as online media conversations or print sources.²⁰⁷ Vadaluz has not taken a single action to censor or control the dissemination of information with relation to this incident, in compliance with its obligations under Article 13.²⁰⁸

- d. The State restrictions on Article 15 (Right of Assembly) and Article 16 (Freedom of Association) were permissible.

Vadaluz acted lawfully and legitimately in limiting the Article 15 right of assembly and the Article 16 freedom of association to protect public health to meet its obligations regarding the right to health in the face of an unprecedented swine pandemic.²⁰⁹ Article 15 provides that "no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security,

20American%20Convention%20on%20Human%20Rights%20says,to%20subsequent%20imposition%20of%20liability.

²⁰⁵ Hypothetical, p.3-5, §17.

²⁰⁶ Hypothetical, p.5-7, §21,24,27,31.

²⁰⁷ Hypothetical, p.3-5, §17.

²⁰⁸ American Convention on Human Rights, art. 13.

²⁰⁹ *Id.* at art. 15.

public safety or public order, or to protect public health or morals or the rights or freedom of others.”²¹⁰ Article 16 is likewise subject to those restrictions as necessary.”²¹¹

Expressions of Article 15 and Article 16 rights often go hand-in-hand, and because of these similarities, they follow the same tests for legitimate restrictions.²¹² The OSRFE and the Commission detail a three-part test to assess the permissibility of restrictions on demonstrations and protests, including Article 15 and Article 16 rights.²¹³ UN treaty bodies also recognize and utilize this same test.²¹⁴ This three-part test requires: (1) any limitation must be provided for in the law, (2) should pursue the legitimate objectives expressly set out in the Convention, and (3) be necessary, and proportional, in a democratic society.²¹⁵

First, Emergency Decree 75/20 explicitly provides for the limitations of the rights of assembly and freedom of association in the law.²¹⁶ Article 2 provides for the restrictions “in advance, expressly, exhaustively, precisely and clearly” in defining the limits on specific actions and activities related to assembly and association.²¹⁷ Emergency Decree 75/20 detailed the limitations imposed thereby providing notice as to exactly what movements and gatherings fell within the restrictions of the Decree.²¹⁸

Secondly, the limitations on assembly and association strictly pursued the legitimate objectives of “public safety” and “protect[ing] public health” consistent with Articles 15 and

²¹⁰ *Id.*

²¹¹ *Id.* at art. 16(2).

²¹² *Protest and Human Rights*, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, para. 33 (September 2019).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Hypothetical, p.3-5, §17.

²¹⁷ *Id.* See also *Protest and Human Rights*, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, para. 34 (September 2019).

²¹⁸ Hypothetical, p.3-5, §17.

16.²¹⁹ The Commission emphasized that this legitimate objective--public safety and public health--must be significantly compelling to “clearly prevail over the social need for the full enjoyment of th[ese] right[s].”²²⁰ It is well-established that the swine pandemic threatened the health and safety of every person in Vadaluz, and that the circumstances required extraordinary emergency action to protect the right to life and the right to health, rights that clearly satisfy the burden to “clearly prevail over the social need for the full enjoyment of th[ese] right[s]” and thus requiring prompt and extraordinary state action.²²¹

Third, the restrictions on Article 15 and Article 16 under Emergency Decree 75/20 satisfied the requirements for necessary and proportional restrictions.²²² The Commission has recognized that “necessary” restrictions require “that such legitimate and compelling objective cannot reasonably be achieved by means less restrictive of the human rights involved.”²²³

In evaluating necessity, the direct correlation between the spread of a highly contagious disease and the ability to distance people must be carefully assessed. In order to protect public health and prevent the spread, the most obvious and effective method of doing so required temporary restrictions on the ability for people to gather through the rights to assembly and association.²²⁴ No means less restrictive existed to ensure social distancing to stop the spread of the disease, so the state acted reasonably and responsibly to achieve the compelling government interest of public health under the emergency presented by the swine pandemic.²²⁵ The

²¹⁹ American Convention on Human Rights, art. 15,16. *See also* Hypothetical, p.3-5, §17. *See also* *Protest and Human Rights*, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, para. 36 (September 2019).

²²⁰ *Protest and Human Rights*, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, para. 36 (September 2019).

²²¹ *Id.* *See also* Hypothetical, p.3, §16. *Supra* section IV.B.1.b.

²²² Hypothetical, p.3-5, §17.

²²³ *Protest and Human Rights*, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, para. 39 (September 2019).

²²⁴ American Convention on Human Rights, art. 15,16.

²²⁵ Hypothetical, p. 3 §16.

Commission itself stated the extreme need for restrictions on the rights of assembly and association in a pandemic in Resolution No. 1/2020, Pandemic and Human Rights in the Americas: “Recognizing that under certain circumstances, it may become essential, in order to achieve sufficient social distancing, to restrict the full enjoyment of rights such as the right of assembly and freedom of movement in physical public or community spaces if not absolutely necessary for the provision of essential supplies or medical care.”²²⁶

In addition to necessity, the restrictions must be strictly proportional.²²⁷ Proportionality weighs whether “the sacrifice of freedom . . . it entails is exaggerated or excessive in relation to the advantages obtained through such measure.”²²⁸ The Court measures proportionality with the following three-part test: (1) the degree to which the competing right is affected, (2) the importance of satisfying the competing right, and (3) whether the satisfaction of the competing right justifies the restriction to freedom.²²⁹

In evaluating proportionality, Emergency Decree 75/20 only intermittently affected the restricted rights in direct response to the pandemic.²³⁰ While people were limited in their freedom of movement and rights to assemble and associate, groups of three were permitted to protest and freely assemble.²³¹ While the limitation of three people is not ideal, it constitutes a necessary and proportional restriction in response to the pandemic without altogether derogating from the enjoyment of such rights.²³² When weighing the importance of the rights to assembly and association with the unprecedented pandemic and the right to health, the intermediate

²²⁶ Inter-Am. Comm’n on Human Rights Res. 1/2020, Pandemic and Human Rights in the Americas, pg. 5 (Apr. 10, 2020).

²²⁷ *Protest and Human Rights*, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, para. 42 (September 2019).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Hypothetical, p.3-5, §17.

²³¹ *Id.*

²³² *Id.*

restrictions of these rights for the temporary timeline of the pandemic fulfills the proportionality requirement.²³³ Vadaluz permissibly limited Article 15 and Article 16 rights with Emergency Decree 75/20 under international and domestic law in the name of public safety and public health.

- e. The State met its obligations under Article 9 (Freedom from Ex Post Facto Laws) and Article 7 (Right to Personal Liberty).

Vadaluz did not infringe upon protected rights under Article 9 and Article 7 in the March 3, 2020 arrest and subsequent detention of Chavero.²³⁴ Article 9 protects the freedom from ex post facto laws.²³⁵ Article 7 protects the right to personal liberty, including freedom from arbitrary arrest.²³⁶ The OSRFE and the Commission assign a three-part test to assess arrest during a protest, including Article 9 and Article 7 rights.²³⁷ This three-part test requires the following: (1) no one may be deprived of liberty except for reasons expressly defined in the law (2) arrest must follow all procedural formalities outlined for judicial and police authorities, and (3) arrest must be compatible with fundamental individual rights.²³⁸

First of all, Chavero’s charge was explicitly provided for in Emergency Decree 75/20.²³⁹ Article 3 of Emergency Decree 75/20 declares: “Any person who fails to comply . . . may be arrested . . . and detained in police stations and temporary detention centers for up to four days and prosecuted under the Criminal Code for noncompliance with public health measures.”²⁴⁰ It is well-established that Emergency Decree 75/20 was valid domestic law and enacted on February

²³³ *Protest and Human Rights*, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, para. 42 (September 2019).

²³⁴ American Convention on Human Rights, art.7,9.

²³⁵ *Id.* at art.9.

²³⁶ *Id.* at art.7.

²³⁷ *Protest and Human Rights*, Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, para. 225 (September 2019).

²³⁸ *Id.*

²³⁹ Hypothetical, p.3-5, §17.

²⁴⁰ *Id.*

2, 2020, before Chavero's arrest on March 3, 2020.²⁴¹ Chavero sought out and participated in a protest of over 40 people, while the law permitted only groups of three.²⁴² He failed to follow the law, and was permissibly arrested.²⁴³ Given the charge applied to Chavero was not assigned post facto, but rather existed prior to his arrest, Emergency Decree 75/20 did not violate Vadaluz's Article 9 obligations.²⁴⁴

Further, judicial and police authorities complied with all procedural formalities following the arrest. Chavero was arrested for a valid reason and promptly informed of the charges, pursuant to Article 7.4.²⁴⁵ Accompanied by his lawyer, he appeared before the Chief of Police Headquarters No. 3 for the prescribed proceedings within 24 hours, pursuant to Article 7.5.²⁴⁶ When he wished to contest those proceedings, judicial redress was available, evidenced by the successful filing of *habeas corpus*.²⁴⁷ His arrest and following detention and judicial proceedings were consistent with Emergency Decree 75/20 and the Convention, specifically Article 9 and Article 7.²⁴⁸ Significantly, during Chavero's detention, his family was assured by officials that he "was in good health and that his right to be treated with dignity was being respected."²⁴⁹ Moreover, Chavero himself, after his release, tweeted that he had "not been subjected to cruel, or inhumane treatment."²⁵⁰

Additionally, not only was Chavero's arrest and processing valid under all domestic laws, they were consistent with the responsibility of Vadaluz to respect, protect, and fulfill other

²⁴¹ *Id.* at §17,21.

²⁴² Hypothetical, p.3-5, §17,20.

²⁴³ Hypothetical, p.5, §21.

²⁴⁴ American Convention on Human Rights, art. 9.

²⁴⁵ American Convention on Human Rights, art. 7.4. *See also* Hypothetical, p.5-6, §21-25.

²⁴⁶ *Id.*

²⁴⁷ Hypothetical, p.6-7, §25-32.

²⁴⁸ American Convention on Human Rights, art. 7,9.

²⁴⁹ Hypothetical, p.5-6, §22.

²⁵⁰ Hypothetical, p.7, §31.

fundamental individual rights.²⁵¹ No rights under the Convention, specifically Article 9 and Article 7, were violated by the state in the arrest, detention, and judicial redress of Chavero.²⁵²

- f. The State met its obligations under Article 8 (Right to a Fair Trial) and Article 25 (Right to Judicial Protection).

Vadaluz did not infringe upon protected rights under Articles 8 and 25 during Chavero's judicial proceedings. Article 8 protects the right to a fair trial, with detailed specifications about what is required for a fair trial.²⁵³ Article 25 protects the right to judicial protection.²⁵⁴

Article 8(1) requires a due process hearing within a reasonable timeline by a previously established legal, competent, independent, and impartial tribunal with a substantiated criminal accusation.²⁵⁵ Chavero was immediately notified of his charges and the proceedings occurred promptly after his arrest.²⁵⁶ The proceedings were facilitated by the Chief of Police, as lawfully provided for in Executive Decree 75/20.²⁵⁷ Article 8(2) affirms the presumption of innocence until guilt is proven.²⁵⁸ Chavero participated in lawful proceedings--where he did not deny the committed acts--and was found to be guilty as charged and required to serve four days in administrative detention.²⁵⁹ The proceeding rejected Chavero's affirmative defense, that his actions were protected as lawful protest, and established his guilt.²⁶⁰ A rejection of an invoked defense does not translate to a violation of Article 8. Chavero had access to counsel and adequate time to craft a defense.²⁶¹ Further, Chavero had the right to appeal the judgment to a higher court,

²⁵¹ American Convention on Human Rights, art. 7,9.

²⁵² *Id.*

²⁵³ *Id.* at art.8.

²⁵⁴ *Id.* at art.25.

²⁵⁵ *Id.* at art.8(1).

²⁵⁶ Hypothetical, p.5-6, §22-23.

²⁵⁷ *Id.* at §23.

²⁵⁸ American Convention on Human Rights, art. 8(2).

²⁵⁹ Hypothetical, p.6, §23.

²⁶⁰ *Id.*

²⁶¹ American Convention on Human Rights, art. 8(2)(d), 8(2)(c), 8(2)(e).

which he did, and the Federal Supreme Court dismissed this claim.²⁶² Chavero was treated fairly, competently, and in conformity with all required individual rights under Article 8 and the Convention.

Lastly, Article 25(2) requires: (1) a remedy decided by the competent authority provided for by the legal system, (2) a judicial remedy, and (3) enforcement of such granted remedies.²⁶³ The legal system and Executive Decree 75/20 provided the applicable, competent authorities to hear Chavero's case.²⁶⁴ The administrative detention was determined by the Police Commissioner, and the subsequent appeal was determined by the Federal Supreme Court.²⁶⁵ He was granted the possibility of judicial remedies both at the initial charge and later through *habeas corpus* proceedings with the Federal Supreme Court.²⁶⁶ He faced a four-day administrative detention as his penalty for the above charges, which he served and was thereupon appropriately released.²⁶⁷ Chavero enjoyed full access to his right to judicial protection, and while his claims were rejected, the proper judicial remedies were presented and duly played out pursuant Article 25.

V. REQUEST FOR RELIEF

Based on the foregoing submission, the respondent Federal Republic of Vadaluz respectfully requests the Honorable Court to declare and adjudge that:

- (1) The request of the petitioners is declared inadmissible for failure to exhaust domestic remedies; and

²⁶² American Convention on Human Rights, art. 8(2)(h). *See also* Hypothetical, p.7, §32.

²⁶³ American Convention on Human Rights, art. 25(2).

²⁶⁴ Hypothetical, p.3-5, §17.

²⁶⁵ Hypothetical, p.6-7, §23,32.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at §23,31.

(2) The state did not violate its international obligations under Articles 1, 7, 8, 9, 13, 15, 16, and 25 of the American Convention.