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## COMMENTS

# PRIDE AND PREJUDICED: RUSSIA’S ANTI-GAY PROPAGANDA LAW VIOLATES THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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I. INTRODUCTION.....	1070
II. BACKGROUND .....	1073
A. RUSSIA’S INTERNATIONAL AGREEMENTS PROTECT THE FREEDOM OF ASSEMBLY .....	1076
B. RUSSIA HAS AN OBLIGATION TO PROHIBIT DISCRIMINATION THROUGH ITS INTERNATIONAL AGREEMENTS .....	1080
C. RUSSIA HAS AN INTERNATIONAL COMMITMENT TO ENSURE THE RIGHT TO AN EFFECTIVE REMEDY .....	1081
III. ANALYSIS .....	1082
A. RUSSIA’S BAN ON GAY PROPAGANDA VIOLATES THE ECHR’S PROTECTION OF THE FREEDOM OF ASSEMBLY .....	1082
B. THE BAN ON GAY PROPAGANDA DISCRIMINATES BASED ON SEXUAL ORIENTATION IN VIOLATION OF THE ECHR.....	1086
C. RUSSIA DOES NOT PROVIDE AN EFFECTIVE REMEDY FOR THOSE ERRONEOUSLY CHARGED WITH VIOLATING THE GAY PROPAGANDA BAN.....	1089
IV. RECOMMENDATIONS .....	1091
A. TO COMPLY WITH RUSSIA’S INTERNATIONAL AGREEMENTS, THE STATE DUMA SHOULD TAKE THE STEPS NECESSARY TO REPEAL OR, ALTERNATIVELY, NOT ENFORCE THE BAN ON GAY PROPAGANDA.....	1091

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B. PROVIDING EDUCATION AND SUPPORT ON LGBT ISSUES SERVES THE GOVERNMENT'S LEGITIMATE INTEREST OF PROTECTING MINORS .....	1091
C. ALLOWING LGBT GROUPS TO FREELY EXERCISE THEIR RIGHTS IN THE SAME MANNER AS OTHER GROUPS IS GOOD FOR RUSSIA FINANCIALLY .....	1093
D. RUSSIA SHOULD PROTECT ITS CITIZENS FROM VIOLENCE AND PROTECT ITS REPUTATION AMONG NATIONS BY NOT ENFORCING THE BAN ON GAY PROPAGANDA .....	1094
V. CONCLUSION.....	1095

## I. INTRODUCTION

Russia's State Duma passed article 6.13, or the "propaganda ban," on June 26, 2013, and Russian President Vladimir Putin signed the bill into law three days later.<sup>1</sup> This law bans distributing "propaganda" of "nontraditional sexual relations" to minors.<sup>2</sup> While the State Duma tweaked the language at the last minute to not specifically name the lesbian, gay, bisexual, and transgender ("LGBT") community as the sole target,<sup>3</sup> the law's only effect is to prevent gay rights activists from conducting demonstrations where they might come into contact with minors.<sup>4</sup> In the past, the Russian

1. КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ РФ ОБ АДМИНИСТРАТИВНЫХ ПРАВОНАРУШЕНИЯХ [KOAP RF] [CODE OF ADMINISTRATIVE VIOLATIONS] art. 6.13, available at <http://www.akdi.ru/scripts/gosduma/smotri.php?z=2025> \*Russ.) [hereinafter Propaganda Ban]; see also HUMAN RIGHTS FIRST, CONVENIENT TARGETS: THE ANTI-"PROPAGANDA" LAW AND THE THREAT TO LGBT RIGHTS IN RUSSIA 8 (2013), available at <http://www.humanrightsfirst.org/uploads/pdfs/HRF-russias-anti-gay-ban-SG.pdf> [hereinafter HUMAN RIGHTS FIRST] (explaining the provisions of the new law and discussing issues with compliance and enforcement).

2. See HUMAN RIGHTS FIRST, *supra* note 1, at 10 (reporting that the law defines propaganda as distributing information to minors that is aimed at creating "nontraditional sexual attitudes," making nontraditional relations seem attractive or equal to "traditional sexual relations," or creating an interest in such relations).

3. See *id.* (arguing that before becoming law, the Duma removed explicit references to homosexuality from the bill and instead refers to "nontraditional sexual relations" in an attempt to appear as though it does not discriminate based on sexual orientation).

4. See also Victoria Cavaliere, *Russia Arrests Four Tourists for Spreading "Gay Propaganda" to Nation's Youth*, VOCATIV (July 22, 2013), <http://www.vocativ.com/07-2013/russia-arrests-four-tourists-for-spreading-gay->

government (“Government”) has allowed progress for LGBT rights, including the decriminalization of homosexuality in 1993 and President Putin’s previous refusal to implement bans similar to article 6.13.<sup>5</sup> However, the gay propaganda ban follows a troubling trend of Russia’s recent suppression of human rights as evidenced by a review of the European Court of Human Rights’ (“the Court” or “ECtHR”) docket.<sup>6</sup> The percentage of ECtHR cases from Russia increased from 2.1% in 2002 to 22.5% in 2007.<sup>7</sup> Furthermore, the Court found in over ninety-four percent of the cases it heard that Russia violated a right protected by the European Convention on Human Rights (“ECHR”).<sup>8</sup>

The ban’s broad language also raises serious questions about the law’s compliance with Russia’s international obligations.<sup>9</sup> Part II of

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propaganda-to-nations-youth/ (suggesting that people engaging in nonverbal support of LGBT rights, including simply wearing a rainbow flag t-shirt, run the risk of being arrested, fined, and, if a foreign national, deported).

5. See HUMAN RIGHTS FIRST, *supra* note 1, at 1 (remarking how President Putin opposed similar bans in 2003, 2004, and 2006); Annabelle Quince, *The History of Homosexuality in Russia: from Soviet Sex Changes to Gay Gulags*, ABC RADIO NAT’L (Dec. 4, 2013, 3:04 PM), <http://www.abc.net.au/radionational/programs/rearvision/the-history-of-homosexuality-in-russia/5134412> (explaining that Russia criminalized homosexuality from 1934 to 1993).

6. See *Human Rights in Russia*, LINKTV WORLD NEWS, <http://news1.linktv.org/topics/human-rights-in-russia> (last visited May 12, 2014) [hereinafter *Human Rights in Russia*] (showing a dramatic increase in cases before the Court in recent years, corresponding with increased crackdowns on human rights).

7. See *id.* (observing a jump in cases involving the Russian Federation from 2.1% in 2002, to 10.6% in 2005, and to 22.5% in 2007).

8. See *Country Fact Sheets 1959-2010*, EUR. CT. HUM. RTS. 46, [http://www.echr.coe.int/Documents/Country\\_Factsheets\\_1959\\_2010\\_ENG.pdf](http://www.echr.coe.int/Documents/Country_Factsheets_1959_2010_ENG.pdf) (last visited May 13, 2014) [hereinafter *Country Fact Sheets 1959-2010*] (detailing examples of cases before the ECtHR filed against Russia and the respective alleged violations of the ECHR).

9. See discussion *infra* Part III (analyzing whether the ban can withstand a challenge within Russian courts or the European Court of Human Rights); see also KONSTITUTSIJA ROSSIKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 30, available at <http://www.russianembassy.org/page/constitution> (Russ.) (guaranteeing the freedom of association); Convention for the Protection of Human Rights and Fundamental Freedoms § 1 art. 11, Nov. 4, 1950, E.T.S. No. 005 [hereinafter ECHR] (ensuring the freedom of assembly); *id.* art. 13 (providing the right to an effective remedy); *id.* art. 14 (prohibiting discrimination based on sexual orientation).

this comment discusses standards that Russia and other parties to the ECHR must meet to comply with ECtHR decisions.<sup>10</sup> Part III then analyzes the potential outcomes of a legal challenge to Russia's ban on gay propaganda.<sup>11</sup> It explores several ECtHR cases with facts similar to those the ban presents, and shines light on ways the Russian ban on gay propaganda—particularly relating to the freedom of assembly, the freedom from discrimination, and the right to an effective remedy—is inconsistent with those decisions.<sup>12</sup>

Part IV recommends options for complying with the ECHR.<sup>13</sup> It argues that Russia should repeal the ban on gay propaganda to afford its citizens the rights guaranteed by Russia's international agreements.<sup>14</sup> Part IV also posits that failing to enforce the ban will save the Government time and resources on litigation, as well as improve Russia's standing in the international community.<sup>15</sup> Additionally, Part IV suggests that not enforcing the ban serves the Government's interest of protecting minors, a leading justification for the ban on gay propaganda.<sup>16</sup>

Part V concludes that the Russian ban on gay propaganda cannot withstand a legal challenge to the ECtHR.<sup>17</sup> As written, the law violates Russia's international commitments to protect the freedom of assembly, freedom from discrimination, and the right to an effective remedy.<sup>18</sup> This comment closes by determining that the ban

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10. See discussion *infra* Parts II–III (discussing how the Court ruled on cases with similar restrictions to recognized rights and examining the restrictions the ban on propaganda imposes).

11. See discussion *infra* Part III (weighing the constitutionality of the gay propaganda ban and its compliance with the ECHR).

12. See discussion *infra* Part III (applying case law from the ECtHR on the aforementioned issues).

13. See discussion *infra* Part IV (outlining possible remedies to bring federal law in line with the ECHR).

14. See discussion *infra* Part IV (arguing that the Government could provide LGBT groups rights while protecting children from harm).

15. See discussion *infra* Part IV (detailing benefits to Russia not enforcing the ban on gay propaganda).

16. See discussion *infra* Part IV (offering evidence that the ban is counter-productive to its goal of protecting minors).

17. See discussion *infra* Part IV (emphasizing that the ban is contrary to the Russian Constitution and the ECHR).

18. See discussion *infra* Part V (concluding the ban is not necessary in a democratic society and predicting that the ECtHR will arrive at the same

on gay propaganda should be abandoned because of the incongruity between the language of the law and Russia's international commitments.

## II. BACKGROUND

Internationally, the LGBT community is accepted by society now more than ever.<sup>19</sup> Nations across Europe and the globe are repealing laws that discriminate based on sexual orientation, and the United Nations unveiled a first-of-its-kind office with the mission of changing negative perceptions of homosexuality.<sup>20</sup>

Although the ban on gay propaganda is contrary to these advances across Europe and the globe, Russia does have the infrastructure to protect LGBT rights.<sup>21</sup> The Russian Constitution provides for the supremacy of international agreements when a conflict arises

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conclusion given its case law on the matter).

19. See, e.g., *The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries*, PEW RES. CENTER (June 4, 2013), <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> [hereinafter *Global Divide on Homosexuality*] (finding the number of people saying society should accept homosexuality has grown by more than ten percent since 2007 in South Korea, Canada, and the United States).

20. See, e.g., *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993) (abolishing criminal liability for homosexual relations); *Norris v. Ireland*, App. No. 10581/83, Eur. Ct. H.R. Rep. (1988) (determining that Ireland's ban on homosexual relations adversely affected the applicant's article 25 ECHR rights); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (holding that Northern Ireland's ban on homosexual sex violated applicant's article 8 ECHR rights); see also *Karner v. Austria*, 2003-IX Eur. Ct. H.R. (ensuring tax equality and the right to succeed to a partner's tenancy); *L. v. Austria*, 2003-I Eur. Ct. H.R. (setting equal ages of consent under criminal law for sexual acts); *Salgueiro da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. (granting parental rights); *Smith v. United Kingdom*, 1999-VI Eur. Ct. H.R. (opening access to serve in the armed forces); *UN Human Rights Office Unveils Gay-Rights Campaign*, ASSOCIATED PRESS, July 26, 2013, available at <http://www.foxnews.com/world/2013/07/26/un-human-rights-office-unveils-gay-rights-campaign/> (commenting that the Free & Equal Office of the U.N. High Commissioner for Human Rights is the first U.N. office designated to change public perception).

21. See *Vladimir Lukin Thought of Freedom of Association for LGBT*, GAY RUSSIA (Apr. 9, 2013), <http://www.gayrussia.eu/russia/7636/> (discussing Russia's Human Rights Ombudsman endorsing constitutional challenges to federal laws discriminating against the LGBT community); discussion *infra* Part II (detailing the constitutional and legal framework in place to protect individual rights); *supra* notes 1, 5 and accompanying text.

between domestic and international law.<sup>22</sup> Therefore, even if the Russian Constitution and federal laws do not safeguard the freedom of assembly, freedom from discrimination, and the right to an effective remedy, Russia's obligations under international agreements still require those protections.<sup>23</sup> Though the Court upholds restrictions that are prescribed by law, advance a legitimate government interest, and are necessary in a democratic society,<sup>24</sup> the ECtHR generally invalidates restrictions on individual rights.<sup>25</sup> In

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22. See KONSTITUTSIYA ROSSIKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15.4 (Russ.), available at <http://www.russianembassy.org/page/constitution> ("If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.").

23. See *id.* (maintaining the supremacy of international agreements when a conflict arises); discussion *supra* Part II (detailing some of the international agreements that protect the rights and freedoms of Russian citizens); see also ECHR, *supra* note 9, arts. 11–14 (detailing individual rights that countries must protect); International Covenant on Civil and Political Rights, arts. 21–22, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> [hereinafter ICCPR] (ensuring the freedoms of association and assembly); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (protecting human rights similar to the ICCPR and ECHR); Universal Declaration of Human Rights, G.A. Res. 217 (III)A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> [hereinafter UDHR] (protecting human rights generally); Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903, 904 (2008) (confirming that the UDHR is not binding and therefore less persuasive than other agreements); Gennady M. Danilenko, IMPLEMENTATION OF INTERNATIONAL LAW IN RUSSIA AND OTHER CIS STATES 28 (1998) ("[T]he limits of permissible restrictions established by [international law] are directly applicable or self-executing.").

24. See, e.g., *Vejdeland v. Sweden*, App. No. 1813/07, Eur. Ct. H.R. 10-11 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046> (upholding a restriction under the three-part test).

25. See generally *Genderdoc-M v. Moldova*, App. No. 9106/06, Eur. Ct. H.R. 5-6 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394>; *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09, Eur. Ct. H.R. 19-20 (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257> (finding that the Russian government had no basis to prohibit a gay rights demonstration, especially considering the Government conceded that the pertinent demonstrations would not involve lewdness); *Bączkowski v. Poland*, App. No.

determining what is necessary in a democratic society, the Court values pluralism, tolerance, and broadmindedness.<sup>26</sup> Given the steep requirements to restrict a right the ECHR protects, governments have difficulty sustaining those restrictions when they are challenged.<sup>27</sup>

One case from the ECtHR, *Alekseyev v. Russia*,<sup>28</sup> is of particular relevance in discussing the gay propaganda ban as it involves Russian officials denying an LGBT group the right to publicly assemble.<sup>29</sup> The case reached the Court after a Russian district court dismissed Alekseyev's complaint, citing the Russian Assemblies Act ("Assemblies Act") as justifying the decision to ban gay pride marches in Moscow for safety concerns.<sup>30</sup> Alekseyev attempted to hold marches several more times, submitting dozens of alternative dates and plans, all of which the Government denied.<sup>31</sup> Alekseyev argued that "neither the Assemblies Act nor any other legislative instrument provided for a ban on public events."<sup>32</sup> The Government claimed they banned the event because it was the only way to avoid

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1543/06, 2007-VI Eur. Ct. H.R. 14 (holding that the Polish government's prohibition of a minorities' rights protest violated the applicant's article 11 rights under the ECHR).

26. *Alekseyev*, Eur. Ct. H.R. at 15 (discussing how banning gay pride events in Moscow did not conform to these ideals of a democratic society).

27. *See, e.g., supra* note 25 and accompanying text; *see also* Press Release, European Court of Human Rights, Factsheet – Sexual orientation issues, *available at* [http://www.echr.coe.int/Documents/FS\\_Sexual\\_orientation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf) (last visited May 13, 2014) (providing summaries of cases heard on these freedoms).

28. *Alekseyev*, Eur. Ct. H.R. at 19.

29. *See id.* at 19–22 (finding that the Russian government could not prohibit individuals from publicly associating with a sexual identity under the ECHR).

30. *See id.* at 4 (disagreeing with the lower court's conclusion that banning the event would not breach Alekseyev's right to hold assemblies or other events); *see also* Федеральный закон Российской Федерации от 19 июня 2004 г. N 54-ФЗ [Meetings, Rallies, Demonstrations, Processions and Pickets], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 2004, No. 54-FZ, §§ 5, 12, 14, 18, *available at* <http://www.rg.ru/2004/06/23/miting-dok.html> (protecting the right to organize a public event and detailing the Government's obligations to accommodate the organizers).

31. *Alekseyev*, Eur. Ct. H.R. at 6-8 (listing approximately 130 marches that the Government denied in less than a month, which the lower courts upheld as lawful).

32. *See id.* at 14 (noting that the restrictions set out in "section 8(1) of the [Assemblies] Act on holding events in venues which were unsuitable for safety reasons required the authorities to suggest another venue . . . not to ban the event").

the high probability of violence the parade brought with it.<sup>33</sup> Alekseyev countered that not only did the Government present no evidence that the parade would incite violence,<sup>34</sup> but that the planned events would benefit Russia by “advocating the ideas of tolerance and respect for the rights of the lesbian and gay population.”<sup>35</sup> The ECtHR found the Government’s denials of assemblies unnecessary in a democratic society and that the Government violated the ECHR by banning the events.<sup>36</sup>

#### A. RUSSIA’S INTERNATIONAL AGREEMENTS PROTECT THE FREEDOM OF ASSEMBLY

The ECHR, the International Covenant on Civil and Political Rights (“ICCPR”), and the Universal Declaration of Human Rights (“UDHR”) all protect the right to peacefully assemble.<sup>37</sup> The ECHR further maintains that no restrictions may be placed on the freedom of assembly unless they are “prescribed by law and are *necessary in a democratic society* in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”<sup>38</sup>

The ECtHR invalidates restrictions on the freedom of assembly

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33. *Id.* at 12 (asserting the Government’s claim that banning the event could not have been avoided as no other measure would have adequately addressed the security risks).

34. *Id.* at 14 (referring to the organizers’ applications and public statements which showed no intention to demonstrate nudity, or sexually explicit or provocative behavior or material).

35. *Id.* at 14–15 (rebutting the argument that gay parade marches would be harmful by pointing out the Government’s failure to demonstrate how citizens or society would be harmed by the events).

36. *Id.* at 15 (concluding that freedom of peaceful assembly had been infringed).

37. *See* UDHR, *supra* note 23, art. 20 § 1 (declaring that everyone has the right to assemble peacefully); ICCPR, *supra* note 23, arts. 21–22 (recognizing the right to assemble peacefully and limiting restrictions using the same “necessary in a democratic society” criteria as the ECHR); ECHR, *supra* note 9, art. 11 § 1 (“Everyone has the right to freedom of peaceful assembly and to freedom of association with others.”).

38. ECHR, *supra* note 9, art. 11 (emphasis added); *see also* ICCPR, *supra* note 23, arts. 21–22 (mirroring the ECHR in banning restrictions that are unnecessary in a democracy).



that are not necessary in a democratic society. In *Bączkowski v. Poland*,<sup>39</sup> the Court stated “the only necessity capable of justifying an interference with any of the rights enshrined in [the ECHR] is one that may claim to spring from a ‘democratic society.’”<sup>40</sup> The Court recently reiterated this point by holding that the bans enforced by the Russian government on gay pride events were not necessary in a democratic society because of the “particular importance [of] pluralism, tolerance and broadmindedness.”<sup>41</sup> Furthermore, the ECtHR adopted Recommendation CM/Rec(2010)5 in *Alekseyev*,<sup>42</sup> ensuring that people are allowed to exercise their ECHR rights without discrimination based on sexual orientation. It holds, therefore, that discriminating on such a basis is unnecessary in a democratic society.<sup>43</sup>

Moral objections are insufficient to infringe on the right to assemble.<sup>44</sup> The Court held in concert with its previous rulings that

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39. App. No. 1543/06, 2007-VI Eur. Ct. H.R. 14.

40. *Id.* at 14 (requiring restrictions to be prescribed by law, to pursue a legitimate government aim, and be necessary in a democratic society); *see also* *Christian Democratic People’s Party v. Moldova*, App. No. 28793/02, 2006-II Eur. Ct. H.R. 1, 12 (holding that Moldova’s government did not provide adequate notice to applicants when it sent them a cease and desist letter because the letter did not elucidate the precise activities which were prescribed by law). *But see* *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, 2003-II Eur. Ct. H.R. 23, 44 (holding that Turkey did not violate article 11 of ECHR when it dissolved the Refah party, because Refah could have reasonably foreseen that it would be subject to judicial proceedings that could potentially lead to its dissolution).

41. *See* *Alekseyev*, Eur. Ct. H.R. at 16 (citing *Bączkowski*, 2007-VI Eur. Ct. H.R. at 14) (stressing that any restriction must be necessary in a democratic society); *see also* *Christian Democratic People’s Party*, 2006-II Eur. Ct. H.R. at 17 (stating that, since the protection of opinions and the freedom of protection are central to article 11 of the ECHR, permissible restrictions on a political parties’ freedom of expression are limited to activities which might threaten political pluralism, incite violent unrest, or otherwise undermine fundamental principles of democracy).

42. *Alekseyev*, Eur. Ct. H.R. at 10 (stating that CM/Rec/(2010)5 specifically establishes rights based on sexual orientation); *see also* Paul Johnson, *Russian Ban on Homosexual Propaganda Violates Human Rights*, JURIST – HOTLINE 1, 3 (Dec. 1, 2011), <http://jurist.org/hotline/2011/12/paul-johnson-russia-lgbt.php> (discussing the protection of sexual orientation in the ECHR).

43. Johnson, *supra* note 42 (detailing the ECtHR’s unequivocal protection of sexual orientation).

44. *See* *Alekseyev*, Eur. Ct. H.R. at 19-20 (holding that majoritarian moral

article 11 of the ECHR “protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claim that it is seeking to promote.”<sup>45</sup> The *Alekseyev* Court continued, stating that relying on majoritarian values to determine morals is not plausible in a democratic society.<sup>46</sup> The Court philosophized that if a minority group’s rights were dependent on majority acceptance, those rights “would become merely theoretical rather than practical and effective.”<sup>47</sup> The *Alekseyev* Court found that the threat to security was not so great as to require banning the event.<sup>48</sup> The Court continued by stating that possible moral objections “do not constitute grounds under domestic law for banning or otherwise restricting a public event.”<sup>49</sup>

The ECtHR also places affirmative obligations on governments to ensure the rights of citizens.<sup>50</sup> The *Bączkowski* Court stated that in protecting both freedom of association and assembly, “a purely negative conception would not be compatible with the purpose of article 11” and “[t]here may thus be positive obligations [placed on the Government] to secure the effective enjoyment of these

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objections are not adequate to ban an event).

45. *Id.* at 17 (citing *Stankov v. Bulgaria*, App. No. 29225/95, 29221/95, 2001-IX Eur. Ct. H.R. 22) (stressing the importance of the freedom to assemble).

46. *See id.* at 19–20 (noting that by banning gay pride marches and pickets in 2006, 2007, and 2008 the Government violated the participants’ freedom of peaceful assembly as guaranteed by the ECHR); *cf.* *Genderdoc-M v. Moldova*, App. No. 9106/06, Eur. Ct. H.R. 1, 5–6 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394> (finding a violation similar to *Alekseyev* based on the promulgation of majoritarian values).

47. *Alekseyev*, Eur. Ct. H.R. at 16 (“[D]emocracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities.”).

48. *See id.* at 19 (finding that banning the event in three consecutive years was especially unnecessary).

49. *Id.* (stating that the Government may not “substitute one Convention-protected legitimate aim for another one” and that the ban was disproportionate to any of its alleged aims).

50. *See Bączkowski v. Poland*, App. No. 1543/06, 2007-VI Eur. Ct. H.R. 14–15 (requiring more than a *laissez faire* attitude to ensure individual rights); *see also Ouranio Toxo v. Greece*, App. No. 74989/01, 2005-X Eur. Ct. H.R. 8–9 (finding that governments are subject to an affirmative obligation “to take effective investigative measures” when peoples’ right to freedom of association is threatened).

freedoms.”<sup>51</sup> Similarly, the *Alekseyev* Court held that nations have affirmative duties to “secure the effective enjoyment” of the freedom of assembly.<sup>52</sup> Therefore, governments must actively ensure the freedom of assembly. This is evidenced in *Alekseyev*, where the Court held that the Government failed to “carry out an adequate assessment of the risk to the safety of the participants in the events and to public order.”<sup>53</sup>

To be sure, the Court has sustained restrictions on freedoms enumerated in the ECHR.<sup>54</sup> In *Vejdeland v. Sweden*,<sup>55</sup> distributors left “unnecessarily offensive” anti-gay leaflets in school lockers, where the recipients had no opportunity to refuse the information.<sup>56</sup> The Court explained that exceptions to freedoms guaranteed by the ECHR must be strictly construed and convincingly established.<sup>57</sup> Determining that such offensive, inaccurate, and prejudicial information was unnecessary in a democratic society, the Court upheld the restrictions.<sup>58</sup>

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51. See *Bączkowski*, 2007-VI Eur. Ct. H.R. at 13–15 (maintaining that this positive obligation is particularly important for minorities “because they are more vulnerable to victimisation”); see also *Ouranio Toxo*, 2005-X Eur. Ct. H.R. at 7 (determining that a minority’s efforts to preserve its identity and raise awareness about itself does not constitute a threat to democratic society, even when the presence of minority views creates tension within a community).

52. *Alekseyev*, Eur. Ct. H.R. at 16–17 (citing *Informationsverein Lentia v. Austria*, 276 Eur. Ct. H.R. (ser. A.) (1994)) (holding that the State is the “ultimate guarantor of the principle of pluralism” and a “mere duty on the part of the State not to interfere . . . would not be compatible with the purpose of Article 11 nor with the Convention in general”).

53. *Id.* at 17–19 (remarking on the lack of a sufficient threat to justify banning the events and that those who morally objected could only be considered in regards to the interest in preserving morals, not in assessing security threats).

54. See, e.g., *Vejdeland v. Sweden*, App. No. 1813/07, Eur. Ct. H.R. 10 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046> (affirming the arrest and conviction of activists where all of the requirements were present and safeguards observed).

55. *Id.*

56. *Id.* at 10–11 (explaining how this manner of distribution created an imposition on the students who could not refuse the leaflets).

57. *Id.* at 10.

58. *Id.* at 11 (holding that interference with the freedom of expression was “necessary in a democratic society for the protection of the reputation and rights of others”).

B. RUSSIA HAS AN OBLIGATION TO PROHIBIT DISCRIMINATION  
THROUGH ITS INTERNATIONAL AGREEMENTS

Many of the agreements to which Russia is party provide sweeping protections against discrimination. The ECHR protects rights “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>59</sup> Similarly, the UDHR states that every person is equal before the law and “entitled without any discrimination to equal protection of the law.”<sup>60</sup>

The ECtHR maintains that a government needs to advance “weighty” interests to make a distinction based on sexual orientation.<sup>61</sup> In *Alekseyev*, the ECtHR restated that article 14 covers sexual orientation and that banning gay pride marches constituted discrimination.<sup>62</sup> The Court determined that the Government’s true reason for banning the marches was not the expected attitude or behavior of the organizers, but their association in an LGBT community.<sup>63</sup> The Court concluded that the Government did not provide “any justification showing that the impugned distinction [based on sexual orientation] was compatible with the standards of the [ECHR].”<sup>64</sup>

The Government also discriminates when an official denies an

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59. ECHR, *supra* note 9, art. 14 (including sexual orientation within the meaning of article 14).

60. UDHR, *supra* note 23, art. 7 (ensuring that all receive equal treatment before the law); *see also* ICCPR, *supra* note 23, art. 26 (guaranteeing protection against discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, or birth).

61. *See* *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09, Eur. Ct. H.R. 26 (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257> (warning that when drawing a line “in this intimate and vulnerable sphere of an individual’s private life . . . the margin of appreciation afforded to the State is narrow” and the State must show it was necessary).

62. *See id.* at 26 (citing *Kozak v. Poland*, App. No. 13102/02, Eur. Ct. H.R. (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97597>) (reiterating the ECHR protections afforded to sexual orientation).

63. *Id.* at 20 (highlighting the Government’s motive for banning gay pride marches and pickets as discriminatory).

64. *Id.* at 26–27 (concluding that the strong statements the mayor of Moscow made were undeniably linked to banning the events).

event permit and publicly states antipathy towards that cause. In *Bączkowski*, the Court held that it could not disregard the “strong personal opinions publicly expressed by the mayor” against homosexuality when he denied an LGBT event permit.<sup>65</sup> Similarly, the Court found that the Moldovan government discriminated in *Genderdoc-M*<sup>66</sup> by examining a confluence of events, including the mayor’s statements expressing disapproval of homosexuality.<sup>67</sup>

### C. RUSSIA HAS AN INTERNATIONAL COMMITMENT TO ENSURE THE RIGHT TO AN EFFECTIVE REMEDY

Russia’s international agreements require an effective remedy by a national authority for those whose rights are violated.<sup>68</sup> The availability of such a remedy rests on whether there is a “competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.”<sup>69</sup>

No effective remedy exists when a State fails to allow applicants to hold their events as planned. In *Bączkowski*, because no legally binding constraints required the Government to respond to an assembly permit within a prescribed timeframe, the Court held the remedies could not “provide adequate redress.”<sup>70</sup> In *Genderdoc-M*,

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65. *Bączkowski v. Poland*, App. No. 1543/06, 2007-VI Eur. Ct. H.R. 20–21 (finding an article 14 violation and that the mayor’s opinions could have affected the decision to ban the event “in a discriminatory manner”).

66. *Genderdoc-M v. Moldova*, App. No. 9106/06, Eur. Ct. H.R. 11 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394>.

67. *See id.* (deciding that the combination of disparate treatment, consideration of citizens’ opinions that opposed homosexuality, and rejection of the applications for inconsistent reasons amounted to the Moldovan government violating article 14 of the ECHR).

68. ECHR, *supra* note 9, art. 13 (ensuring against arbitrary arrests and preserving the right to be made whole if harmed by improper police action); *see also* UDHR, *supra* note 23, art. 8 (requiring prompt redress relative to the situation).

69. *Bączkowski*, 2007-VI Eur. Ct. H.R. at 16 (laying out the requirements under article 13 of the ECHR); *see also* *Chahal v. United Kingdom*, App. No. 22414/93, 1996-V Eur. Ct. H.R. 35–38 (holding that the judicial review granted *Chahal* was insufficient under article 13 of ECHR and subjected him to potentially irreparable harm).

70. *Bączkowski*, 2007-VI Eur. Ct. H.R. at 17 (determining that all of the remedies available were “of a *post-hoc* character” and therefore violated article 13 of the European Convention on Human Rights) (emphasis added).

despite legislation requiring a response within five days, the Court found no effective remedy because the applicant received a response eighteen months after lodging the request.<sup>71</sup> Similarly, Russia denied Alekseyev an effective remedy because all available options were of a *post-hoc* nature.<sup>72</sup> Without the opportunity to hold an event as planned, no effective remedy exists.<sup>73</sup>

### III. ANALYSIS

Russia has made numerous commitments to the international community regarding the rights and liberties of its citizens.<sup>74</sup> Those rights and liberties include the freedom of assembly, protection from discrimination, and the promise of an effective remedy.<sup>75</sup> The ban on gay propaganda violates many of Russia's aforementioned obligations, as evidenced by ECHR decisions.<sup>76</sup>

#### A. RUSSIA'S BAN ON GAY PROPAGANDA VIOLATES THE ECHR'S PROTECTION OF THE FREEDOM OF ASSEMBLY

The gay propaganda ban has flaws similar to those in cases heard before the ECtHR.<sup>77</sup> Like both *Alekseyev* and *Bączkowski*, the ban

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71. *Genderdoc-M*, Eur. Ct. H.R. at 7–8 (stating that “the notion of an effective remedy implies the possibility of obtaining a ruling concerning the authorisation of the event before the time at which it is intended to take place”); *see also Bączkowski*, 2007-VI Eur. Ct. H.R. at 17 (finding that Poland did not provide applicants with an effective remedy because all those available were *post-hoc* in nature).

72. *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09, Eur. Ct. H.R. 24–25 (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257>.

73. *See Genderdoc-M*, Eur. Ct. H.R. at 8 (requiring the opportunity to hold the event to avoid violating the ECHR); *Alekseyev*, Eur. Ct. H.R. at 24–25 (detailing how Russian authorities neglected to provide sufficient time to ensure applicants received adequate notice); *Bączkowski*, 2007-VI Eur. Ct. H.R. at 17 (furthering that States must act within a reasonable timeframe in relation to the peaceful assemblies of its citizens).

74. *See, e.g.*, discussion *supra* Part II (detailing agreements to which Russia is party and the obligations they impose).

75. *See* discussion *supra* Part II (explaining the duties Russia subjected itself to through the ratification of international agreements).

76. *See* discussion *infra* Part III (comparing settled law and prior cases before the ECtHR to the gay propaganda ban).

77. *See* Propaganda Ban, *supra* note 1 (prohibiting LGBT groups from assembling); *see also Alekseyev*, Eur. Ct. H.R. at 2 (discussing an attempt to ban

must meet the Court's three-part test: it must be prescribed by law, pursue a legitimate government aim, and be necessary in a democratic society.<sup>78</sup> In *Bączkowski*, the Court affirmed the Poland Supreme Court's ruling that banning a gay rights assembly is not necessary in a democratic society.<sup>79</sup> Here, the ban on gay propaganda is not just prohibiting one assembly, like in *Bączkowski*, but effectively prohibiting all LGBT demonstrations.<sup>80</sup> Similarly, the *Alekseyev* Court found that the Russian government's ban on gay pride demonstrations violated the ECHR because a ban was "gravely disproportionate to the notion of a democratic society which was 'pluralistic, tolerant and broadminded.'"<sup>81</sup> Here, the Government enforces the same gravely disproportionate ban on assemblies as it did in *Alekseyev* and rejects the tolerance and broadmindedness the Court requires.<sup>82</sup>

Furthermore, the ban on gay propaganda cannot be squared with the *Alekseyev* Court's embrace of Recommendation CM/Rec(2010)5 which requires nations to "ensure that the right to freedom of peaceful assembly, as enshrined in article 11 of the [ECHR], can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity."<sup>83</sup> The ban is in direct conflict with

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LGBT groups from assembling); *Bączkowski*, 2007-VI Eur. Ct. H.R. at 2 (pertaining to a quashed awareness demonstration on behalf of minority groups in Poland).

78. See, e.g., *Bączkowski*, 2007-VI Eur. Ct. H.R. at 12, 14 (stressing that any limitation must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society).

79. See *id.* at 14 (detailing that the restrictions imposed by the Government's Road Traffic Act breached rights guaranteed by the Polish Constitution).

80. See Propaganda Ban, *supra* note 1 (barring all LGBT demonstrations without regard for how innocuous the events may be).

81. See *Alekseyev*, Eur. Ct. H.R. at 15 (finding no evidence for a total ban on the demonstrations, let alone banning events three years in a row); see also Adam Lake, *Moscow Bans Gays and Lesbians from Holding Demonstrations*, PINK NEWS (May 16, 2008, 4:06 PM), <http://www.pinknews.co.uk/2008/05/16/moscow-bans-gay-men-and-women-from-holding-demonstration/> (noting that the ban continues even after the Court's ruling).

82. Compare Propaganda Ban, *supra* note 1 (banning LGBT events portraying same-sex relations in a light equal to heterosexual relations), with *Alekseyev*, Eur. Ct. H.R. at 16 (holding that banning a gay pride parade is not necessary in a democratic society).

83. See Johnson, *supra* note 42 (detailing the Court's unequivocal protection of sexual orientation).

both the decision in *Alekseyev* and the Court's support of LGBT individuals' explicit right to assemble under the ECHR.<sup>84</sup>

The Government justifies the ban on assemblies with claims that the majority of Russians disagree with homosexuality.<sup>85</sup> Despite a majority of Russian citizens disagreeing with homosexuality,<sup>86</sup> a democratic society must protect the interests of minority groups.<sup>87</sup> The Court held in *Alekseyev* that if a minority's rights were dependent on the majority accepting them, those rights would "become merely theoretical rather than practical and effective."<sup>88</sup> Here, the ban on gay propaganda is merely an attempt to justify suppressing a minority group's right to freely assemble based on majority views.<sup>89</sup> Similarly, in *Genderdoc-M*, the Moldovan government attempted to justify banning LGBT events because the Christian Orthodox religion comprised ninety-eight percent of the population.<sup>90</sup> Here, the Government relies on seventy-four percent not agreeing with homosexuality.<sup>91</sup> Even in *Genderdoc-M*, the Moldovan government conceded that it violated the applicant's

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84. See *Alekseyev*, Eur. Ct. H.R. at 16 (defining the ban as unnecessary in a democratic society); Johnson, *supra* note 42 (detailing the *Alekseyev* Court's embrace of the freedom of assembly for sexual minorities).

85. See Propaganda Ban, *supra* note 1 (arguing that bans are the only way to prevent the LGBT minority from inciting others to violence); see also *Alekseyev*, Eur. Ct. H.R. at 16 (determining a parallel ban unnecessary in a democratic society).

86. See *Global Divide on Homosexuality*, *supra* note 19 (finding that only sixteen percent of Russians believe society should accept homosexuality).

87. See *Alekseyev*, Eur. Ct. H.R. at 16 (quoting *Bączkowski v. Poland*, App. No. 1543/06, 2007-VI Eur. Ct. H.R. 13) ("[A] balance must be achieved which ensures the fair and proper treatment of minorities.").

88. *Id.* at 19–20.

89. Cf. Propaganda Ban, *supra* note 1 (relying on views of the majority to suppress constitutionally prescribed rights of a minority); *Global Divide on Homosexuality*, *supra* note 19 (stating that sixteen percent of Russians believe society should accept homosexuality).

90. See *Genderdoc-M v. Moldova*, App. No. 9106/06, Eur. Ct. H.R. 5 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394> (using a majority's religion to ban gay rights events does not suffice as justification to restrict an otherwise protected right).

91. Cf. Propaganda Ban, *supra* note 1 (justifying the ban on the majority's prejudice against homosexuality); *Global Divide on Homosexuality*, *supra* note 19 (observing that a supermajority of Russian's disagree with homosexuality).



article 11 right to freely assemble.<sup>92</sup> If the ECtHR will not uphold a prohibition where ninety-eight percent of citizens do not agree with homosexuality, it certainly will not sustain a ban on assemblies based on seventy-four percent disapproval of homosexuality.<sup>93</sup>

The ban on gay propaganda also fails to enforce the affirmative obligations governments have to ensure individuals' freedom of assembly.<sup>94</sup> In *Alekseyev*, the Russian government failed to observe its obligations by inadequately assessing the safety risks of holding assemblies before denying permits.<sup>95</sup> Here, the ban gives the Government carte blanche to deny the right to assemble without assessing any security risks.<sup>96</sup> The Court has consistently held that governments have more than a mere obligation to not inhibit the free exercise of the right to assemble; they are obligated to ensure the right.<sup>97</sup> Here, not only does the ban on gay propaganda not ensure the right to assemble, its sole purpose is to prevent the free exercise of that right.<sup>98</sup>

However, the Court does uphold laws protecting minors if the

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92. See *Genderdoc-M*, Eur. Ct. H.R. at 5–6 (noting agreement between both parties that the ban did not pursue any legitimate aim and was unnecessary in a democratic society).

93. Compare *id.* at 5 (striking down a ban where ninety-eight percent of the country was Christian Orthodox and did not approve of homosexuality), with *Global Divide on Homosexuality*, *supra* note 19 (finding seventy-four percent of Russians disagree with homosexuality).

94. See *Bączkowski v. Poland*, App. No. 1543/06, 2007-VI Eur. Ct. H.R. 14–15 (requiring governments to actively assist in protecting the rights granted by the ECHR); see also *Ouranio Toxo v. Greece*, App. No. 74989/01, 2005-X Eur. Ct. H.R.; *Wilson v. United Kingdom*, App. No. 28212/95, 2002-V Eur. Ct. H.R.

95. See *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09, Eur. Ct. H.R. 17–19 (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257> (asserting that the Government failed to “carry out an adequate assessment of the risk to the safety of the participants in the events and to public order”).

96. See *Propaganda Ban*, *supra* note 1 (relying on the well-being of children and moral objections, not safety concerns, to ban gay propaganda).

97. Compare *id.* (allowing the denial of events before examining issues of security or facilitating an assembly), with *Alekseyev*, Eur. Ct. H.R. at 16–17 (requiring the Government take affirmative steps to facilitate an assembly), and *Bączkowski*, 2007-VI Eur. Ct. H.R. at 14–15, and *Ouranio Toxo*, 2005-X Eur. Ct. H.R., and *Wilson*, 2002-V Eur. Ct. H.R.

98. See *Propaganda Ban*, *supra* note 1 (allowing Government officials to ban LGBT events).

laws safeguard ECHR rights.<sup>99</sup> In *Vejdeland v. Sweden*, as previously mentioned, the Court sustained an arrest based on the dissemination of propaganda.<sup>100</sup> The Court admitted that minors are of a tender age and are quite impressionable.<sup>101</sup> The crux of the Court's holding did not rest on whether minors are impressionable, but rather focused on the fact that the minors did not have an opportunity to refuse the leaflets.<sup>102</sup> Here, as discussed above, the Russian ban prohibits any distribution of LGBT materials, even when its receipt is voluntary.<sup>103</sup> The Court in *Vejdeland* concluded that a "pressing social need" existed to justify the interference with the applicants' right to expression.<sup>104</sup> Here, the Government cites no similar pressing social need.<sup>105</sup> Because the ECtHR holds that democratic societies embrace pluralism and the Government presents no pressing social need for the ban on gay propaganda, the ban is unnecessary in a democratic society.<sup>106</sup>

#### B. THE BAN ON GAY PROPAGANDA DISCRIMINATES BASED ON SEXUAL ORIENTATION IN VIOLATION OF THE ECHR

The gay propaganda ban blatantly violates the ECHR provision guaranteeing freedom from discrimination.<sup>107</sup> As in *Alekseyev*, the

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99. See, e.g., Press Release, European Court of Human Rights, Factsheet – Protection of minors (June 2013), available at [http://www.echr.coe.int/Documents/FS\\_Minors\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Minors_ENG.pdf) (listing several landmark cases protecting minors).

100. See *Vejdeland v. Sweden*, App. No. 1813/07, Eur. Ct. H.R. 11 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>.

101. See *id.* at 10–11 (noting that protecting children is a societal expectation).

102. See *id.* (determining that because the leaflets were placed in the students' lockers without their consent, they did not have the chance to refuse receipt of the material and the Swedish government's actions were necessary in a democratic society).

103. See, e.g., *Cavaliere*, *supra* note 4 (explaining that something as simple as wearing a shirt with a rainbow flag on it would violate the ban on gay propaganda).

104. See *Vejdeland*, Eur. Ct. H.R. at 11 (emphasizing this limitation).

105. See *Propaganda Ban*, *supra* note 1 (inciting concern for the welfare of minors, but demonstrating no pressing social need); see also discussion *infra* Part IV.B (advancing that the ban violates article 14 and thus undermines the promotion of minor health and well-being).

106. See *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09, Eur. Ct. H.R. 15 (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257> (explaining some expectations of a democratic society).

107. See also ICCPR, *supra* note 23, art. 26 (prohibiting discrimination);

Government claims that the ban is not targeting homosexuality.<sup>108</sup> Here, the Government again relies on modified wording to avoid the appearance of discrimination in violation of the ECHR, while still effectively discriminating.<sup>109</sup> Despite claims to the contrary, the ECtHR will see the Government is discriminating based on sexual orientation.<sup>110</sup>

The Government fails to demonstrate a weighty interest to base a ban on sexual orientation.<sup>111</sup> The Court in *Alekseyev* held that even if weighty interests are present, the restrictions must be narrow and necessary.<sup>112</sup> There, the ECtHR held that banning individual gay pride events did not meet the high burden laid out by the Court.<sup>113</sup> Here, the Government bans LGBT events based solely on the possibility that their message will reach children.<sup>114</sup> Assuming the interest is considered weighty, the Court will find that categorically banning LGBT events is not narrow and will certainly hold that a ban is not necessary, as it has done in similar cases in the past.<sup>115</sup>

Furthermore, the statements that elected officials made about the true reasons for the ban on gay propaganda demonstrate discrimination in violation of the ECHR.<sup>116</sup> Despite the

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UDHR, *supra* note 23, art. 8. *Compare* Propaganda Ban, *supra* note 1 (discriminating based on orientation), *with* ECHR, *supra* note 9, art. 14 (ensuring freedom from discrimination).

108. *See* *Alekseyev*, Eur. Ct. H.R. at 25 (recalling the Government’s argument that denying the gay pride events protected the participants from the hatred they instill in others); HUMAN RIGHTS FIRST, *supra* note 1 (attempting to hide that the law is targeted at the LGBT community by removing explicit references to homosexuality and replacing them with references to “nontraditional sexual relations”).

109. *See* HUMAN RIGHTS FIRST, *supra* note 1 (discussing Russia’s rewording of the law to seem non-discriminatory against the LGBT community).

110. *See* *Alekseyev*, Eur. Ct. H.R. at 25 (noting that discrimination can be evidenced by factors other than the wording of a statute).

111. *See id.* at 26 (warning that drawing a line “in this intimate and vulnerable sphere of an individual’s private life” requires a weighty government interest).

112. *See id.* (emphasizing ECHR-protected rights receive strict review).

113. *See id.* at 19 (invalidating a ban on gay pride events).

114. *See* Propaganda Ban, *supra* note 1 (alleging the ban is in the interest of minors).

115. *See* *Alekseyev*, Eur. Ct. H.R. at 19, 26 (applying this standard to find a ban on gay propaganda to be unnecessary and disproportionate); *Bączkowski v. Poland*, App. No. 1543/06, 2007-VI Eur. Ct. H.R. 14.

116. *Alekseyev*, Eur. Ct. H.R. at 20; HUMAN RIGHTS FIRST, *supra* note 1 at 9-

Government's claims in *Alekseyev*, the Court held that the discriminatory statements of the officials who banned the events served as evidence of the true reason for banning the gay pride events and the action was therefore incompatible with the ECHR.<sup>117</sup> There, the mayor stated it was not the behavior or attire of the participants, but their desire to openly identify as LGBT individuals that fueled the decision to deny the assembly permit.<sup>118</sup> Here, many elected officials made statements attacking LGBT individuals and homosexuality generally before and after voting for the ban on gay propaganda.<sup>119</sup> Those statements provide evidence of discrimination, just as the Court used similar statements as evidence of discrimination in the past.<sup>120</sup>

The ban on gay propaganda violates article 14 of the ECHR's

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117. See *Alekseyev*, Eur. Ct. H.R. at 20 (citing statements made by the mayor of Moscow who denied the permit to hold the gay pride events and stating, "The Government admitted, in particular, that the authorities would reach their limit of tolerance towards homosexual behavior when it spilt . . . into the sphere shared by the general public"); see also *Bączkowski*, 2007-VI Eur. Ct. H.R. at 20–21 (explaining the Court could not ignore the strong personal opinions the mayor publicly expressed against homosexuality when the Court held that Poland discriminated based on sexual orientation).

118. See *Alekseyev*, Eur. Ct. H.R. at 20.

119. See, e.g., Michael Bohm, *The Roots of Russia's Homophobia*, MOSCOW TIMES (Sept. 6, 2013), <http://www.themoscowtimes.com/opinion/article/the-roots-of-russias-homophobia/485634.html> (quoting State Duma Deputy Tatyana Yakovelva as saying, "[H]omosexuality is a sexual perversion . . . [that] contradicts human nature"); *id.* (quoting state controlled television co-host, Dmitry Kiselyoc, saying, "[I]f homosexuals die in a car accident, 'their hearts should be burned because they are unsuitable to prolonging the lives of others'"); Alex Luhn, *Russian Anti-Gay Law Prompts Rise in Homophobic Violence*, GUARDIAN (Sept. 1, 2013), <http://www.theguardian.com/world/2013/sep/01/russia-rise-homophobic-violence> (noting one official called for legalized public flogging of LGBT individuals).

120. See *Genderdoc-M v. Moldova*, App. No. 9106/06, Eur. Ct. H.R. 11 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394> (viewing the comments made in conjunction with actions taken against LGBT groups as evidence of discrimination); *Alekseyev*, Eur. Ct. H.R. at 26–27 (holding that the strong personal opinions that the mayor of Moscow made in public were undeniably linked to the decision to ban the event); *Bączkowski*, 2007-VI Eur. Ct. H.R. at 20–21 (deciding the mayor's opinions could have affected the decision to deny the applicant's request and "impinged on the applicant's right to freedom of assembly in a discriminatory manner").

prohibition on discrimination because the ban makes distinctions based on sexual orientation, the Government does not advance a weighty interest in doing so, and the discriminatory comments by elected officials further evidence the intent to discriminate against the LGBT community.<sup>121</sup>

C. RUSSIA DOES NOT PROVIDE AN EFFECTIVE REMEDY FOR THOSE  
ERRONEOUSLY CHARGED WITH VIOLATING THE GAY  
PROPAGANDA BAN

The ban on gay propaganda violates the ECHR guarantee of an effective remedy. An effective remedy means that a competent national authority both addresses the substance of a complaint and grants appropriate relief.<sup>122</sup> One of the key tenants for a remedy to provide appropriate relief is having the opportunity to successfully appeal the denial of an application and continue to hold the event.<sup>123</sup> Without such a structure, applicants that are wrongfully banned will not be able to hold their events on the planned dates.<sup>124</sup> The ECtHR held in *Alekseyev* that when the only remedies available are of a *post hoc* nature, the remedy is not effective.<sup>125</sup> Here, Mr. van der Veen, a Dutch national arrested under the gay propaganda ban, appeared in

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121. Compare Propaganda Ban, *supra* note 1 (singling out “non-traditional sexual relations” for discrimination because they are non-traditional), with *Genderdoc-M*, Eur. Ct. H.R. at 11 (holding that disparate treatment based on sexual orientation is prohibited by article 14), and *Alekseyev*, Eur. Ct. H.R. at 26 (stating that sexual orientation is protected by the ECHR article 14).

122. *Bączkowski*, 2007-VI Eur. Ct. H.R. at 16 (setting out the requirements under article 13 of the ECHR); accord *Chahal v. United Kingdom*, App. No. 22414/93, 1996-V Eur. Ct. H.R.

123. See ECHR, *supra* note 9, art. 13 (requiring States to provide an effective domestic remedy for ECHR rights violations).

124. See *Bączkowski*, 2007-VI Eur. Ct. H.R. at 16 (quoting article 13 of the ECHR, requiring a “competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief”); Jared Milrad, *This Dutch Activist Was Arrested For Even Talking About Gay Rights in Russia*, POLICY MIC (July 30, 2013), <http://www.policymic.com/articles/56899/this-dutch-activist-was-arrested-for-even-talking-about-gay-rights-in-russia> (recounting the Russian government’s ongoing harassment of Kris van der Veen, a 33-year-old Dutch LGBT rights activist-turned-filmmaker, which ultimately deprived him of adequate redress).

125. *Alekseyev*, Eur. Ct. H.R. at 24–25; accord *Genderdoc-M*, Eur. Ct. H.R. at 7–8; *Bączkowski*, 2007-VI Eur. Ct. H.R. at 17.

court within forty-eight hours of being detained.<sup>126</sup> Mr. van der Veen was detained because of his association with House of Equality, an organization that coordinates activities for LGBT youth, including counseling. However, the dismissal of charges did not prevent further interrogation from police, nor are such prompt hearings required under the gay propaganda ban.<sup>127</sup> Despite the judge dismissing the charges against Mr. van der Veen for lack of evidence that he violated the gay propaganda ban, police continued to question him and make demands of him.<sup>128</sup> A court cleared Mr. van der Veen of any wrongdoing, but the Government prevented him from continuing his trip as planned, showing that the propaganda ban does not provide an effective remedy for an individual accused of violating the ban on gay propaganda.<sup>129</sup> Without the ability to be cleared of violating the ban on gay propaganda and the opportunity to carry out the event as planned, the ban violates the ECHR article 13 guarantee of an effective remedy.<sup>130</sup>

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126. See Milrad, *supra* note 124 (recalling his arrest after interviewing eight to ten people between the ages of eighteen and sixty and giving a history seminar on LGBT rights in the Netherlands).

127. See *id.* (discussing the Russian police's continued encounters with Mr. van der Veen, even as he attempted to leave Russia); see also *Genderdoc-M*, Eur. Ct. H.R. at 7 (concluding that there is no effective remedy when time limits for trials involving the right to assemble are not followed); *Alekseyev*, Eur. Ct. H.R. at 24–25.

128. See Milrad, *supra* note 124 (stating that Russian police demanded Mr. van der Veen sign an agreement to turn over information about the documentary he and his compatriots were filming and that he return to Russia in the future at the Government's request).

129. *Id.* (recalling the Government's failure to return materials and films Mr. van der Veen compiled during his time in Russia).

130. See *Genderdoc-M*, Eur. Ct. H.R. at 7–8 (noting that because the remedies available did not include holding the event as planned, no effective remedy existed); *Alekseyev*, Eur. Ct. H.R. at 24–25; *Bączkowski*, 2007-VI Eur. Ct. H.R. at 17.

#### IV. RECOMMENDATIONS

##### A. TO COMPLY WITH RUSSIA'S INTERNATIONAL AGREEMENTS, THE STATE DUMA SHOULD TAKE THE STEPS NECESSARY TO REPEAL OR, ALTERNATIVELY, NOT ENFORCE THE BAN ON GAY PROPAGANDA

Repealing the law will bring Russia's policy on freedom of assembly and association more in line with internationally recognized standards.<sup>131</sup> The ECtHR, for example, unequivocally stated that sexual orientation is protected by the ECHR.<sup>132</sup> Invalidating the ban begins to align Russian public policy with ECtHR decisions. This is shown in *Alekseyev*, where the Court held that a ban on gay pride events was "strong medicine" and not necessary in a democratic society.<sup>133</sup>

While claiming that the ban protects minors, the law cites no study or evidence to substantiate this claim.<sup>134</sup> Whatever the justifications put forward, the ECHR decided in previous cases, including *Alekseyev*, that a total ban on assemblies is not necessary in a democratic society.<sup>135</sup> As more and more European countries and democracies around the world continue to expand LGBT rights, repealing the ban on gay propaganda puts Russia on the right track to catch up to its neighbors.<sup>136</sup>

##### B. PROVIDING EDUCATION AND SUPPORT ON LGBT ISSUES SERVES THE GOVERNMENT'S LEGITIMATE INTEREST OF

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131. See ECHR, *supra* note 9, arts. 10–14 (protecting freedoms that conflict with the ban on gay propaganda).

132. See *Alekseyev*, Eur. Ct. H.R. at 26; see also ECHR, *supra* note 9, art. 14; Johnson, *supra* note 42 (detailing the ECHR's protection of sexual orientation).

133. See *Alekseyev*, Eur. Ct. H.R. at 15 (discussing a ban as an overreaction to a hypothetical problem).

134. See *Propaganda Ban*, *supra* note 1 (claiming the law protects minors, but providing no empirical or anecdotal proof). *Contra* discussion *infra* Part IV.B (analyzing studies showing discussion of sexuality does not harm, but protects minors).

135. See *Alekseyev*, Eur. Ct. H.R. at 15–19 (reiterating that democratic societies embrace pluralism and tolerance and that discriminating against sexual orientation does not adhere to these values).

136. See *supra* note 20 (listing numerous examples of nations expanding rights and protections to the LGBT community).

## PROTECTING MINORS

In defense of the ban, the Russian government uses the talismanic ideal of protecting children to deter and outright suppress LGBT groups and activists from partaking in the same freedoms that every other citizen of Russia may utilize without fear of prosecution or persecution.<sup>137</sup> Education and outreach to the LGBT community increases acceptance and understanding, which serves Russia's legitimate interest of protecting children. A recent study found that when families reject LGBT youth, it increases the risk of poor physical and mental health of those youth.<sup>138</sup> Another report shows that adolescents and adults who conceal their sexual orientation have lower relationship satisfaction, faster HIV progression, fewer job promotions and greater negativity about their jobs, and higher levels of stress and suicide.<sup>139</sup> Other studies have also shown that LGBT individuals who are less open about their sexuality have higher levels of identity confusion than those who are more open.<sup>140</sup> LGBT groups in the United States are using this data to become more proactive and inform parents and guardians of the importance of acceptance within

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137. See Propaganda Ban, *supra* note 1 (discussing the protection of minors as the driving justification for the ban on gay propaganda); Cavaliere, *supra* note 4 (explaining that simply wearing a t-shirt could violate the ban on gay propaganda); see also Luhn, *supra* note 119 (commenting that the ban has emboldened anti-gay actions and increased attacks on LGBT individuals in Russia).

138. See Christina Reardon, *Family Acceptance Project – Helping LGBT Youths*, SOCIAL WORK TODAY, Nov.-Dec. 2009, at 6, available at <http://www.socialworktoday.com/archive/112309p6.shtml> (noting that LGBT youth whose families rejected them were 8.4 times more likely to attempt suicide and 5.9 times more likely to become depressed).

139. See Nicole Legate et al., *Is Coming Out Always a “Good Thing”? Exploring the Relations of Autonomy Support, Outness, & Wellness for Lesbian, Gay, and Bisexual Individuals*, SAGEPUB.COM 145, 146 (2012), available at [http://www.selfdeterminationtheory.org/SDT/documents/2012\\_LegateRyanWeinstein\\_SPPS.pdf](http://www.selfdeterminationtheory.org/SDT/documents/2012_LegateRyanWeinstein_SPPS.pdf) (accumulating data from various scientific studies done on concealing sexual orientation).

140. See Robert M. Kertzner, et al., SOCIAL AND PSYCHOLOGICAL WELL-BEING IN LESBIANS, GAY MEN, AND BISEXUALS: THE EFFECTS OF RACE, GENDER, AGE, AND SEXUALITY 500, 501 (2009), available at <http://onlinelibrary.wiley.com.proxyau.wrlc.org/store/10.1037/a0016848/asset/a0016848.pdf?v=1&t=hoauyzxv&s=de80d69addf07c16fd97e1a164555d93113b7f28> (citing studies detailing the psychological benefits of being open about sexuality with one's family).



the family unit.<sup>141</sup> Given the evidence that outreach to children actually protects rather than harms them, outreach on LGBT issues to minors should have a more positive influence than the gay propaganda ban.<sup>142</sup>

C. ALLOWING LGBT GROUPS TO FREELY EXERCISE THEIR RIGHTS  
IN THE SAME MANNER AS OTHER GROUPS IS GOOD FOR RUSSIA  
FINANCIALLY

By allowing LGBT groups the right to assemble and disseminate information, Russia will protect the Government coffers. Not enforcing the ban on gay propaganda saves both time and resources that otherwise would go toward litigating challenges to the ban.<sup>143</sup> Furthermore, allowing LGBT groups to lawfully assemble will allow for litigation when there are actual instances of harm, as opposed to the hypothetical harm that the propaganda ban addresses.<sup>144</sup> As noted, cases against Russia in the ECtHR account for an increasing percentage of the Court's docket.<sup>145</sup> Furthermore, the cases against the Russian Federation are not without merit, as the Court in a vast majority of cases held for the applicant and found violations in 1019 of the 1079 judgments issued involving Russia.<sup>146</sup>

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141. See Reardon, *supra* note 138 (finding that Greater Boston Parents, Families & Friends of Lesbians and Gays has used this research to include a booklet on parental acceptance in Massachusetts back-to-school packets).

142. Compare Propaganda Ban, *supra* note 1 (citing no data to support the ban on gay propaganda), with Reardon, *supra* note 138 (referencing scientific data to demonstrate the importance of engaging minors on LGBT issues).

143. See, e.g., Genderdoc-M v. Moldova, App. No. 9106/06, Eur. Ct. H.R. 12-13 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394> (granting 860 euros ("EUR") in pecuniary damage, EUR 7,250 in non-pecuniary damages, and EUR 2,856 in costs and expenses plus any chargeable tax and interest); Alekseyev v. Russia, App. Nos. 4916/07, 25924/08, 14599/09, Eur. Ct. H.R. 27-28 (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257> (awarding EUR 12,000 in non-pecuniary damage, EUR 17,510 for court costs and lawyer fees, and tax and interest).

144. See, e.g., Vejdeland v. Sweden, App. No. 1813/07, Eur. Ct. H.R. 2 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046> (holding accountable leafleting activists for their actions that violated the ECHR).

145. *Human Rights in Russia*, *supra* note 6 (noting increases from 2.1% in 2002, to 22.5% in 2007).

146. See *Country Fact Sheets 1959-2010*, *supra* note 8 (determining that as of January 2011, the Court found violations in over 94% of the cases brought against Russia).

D. RUSSIA SHOULD PROTECT ITS CITIZENS FROM VIOLENCE AND  
PROTECT ITS REPUTATION AMONG NATIONS BY NOT ENFORCING  
THE BAN ON GAY PROPAGANDA

Not enforcing the ban will protect Russian citizens. LGBT activists report that the ban on gay propaganda has “emboldened rightwing groups who use social media to ‘ambush’ gay people, luring them to meetings and then humiliating them on camera.”<sup>147</sup> Igor Kochetkov, head of the Russian LGBT Network, states that the ban on gay propaganda has “essentially legalised violence against LGBT people, because these groups of hooligans justify their actions with these laws.”<sup>148</sup> One such attack ended with three men, one of whom was a former classmate of the victim, beating the victim to death.<sup>149</sup>

Not enforcing the propaganda ban will also protect Russia’s standing as a European nation. Because of the ban on gay propaganda, the U.S. Department of State issued a travel warning for Russia.<sup>150</sup> The mayor of Reykjavik, Iceland, has advocated severing its sister-city relationship with Moscow because of the legislation.<sup>151</sup> In earlier reports, *Freedom House* ranked Russia as “partially free,” but has since downgraded Russia to “not free.”<sup>152</sup> *The Economist*

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147. Luhn, *supra* note 119 (recounting harassment tactics anti-LGBT groups use in Russia).

148. *Id.* (noting that many attacks by these groups go unreported, but that out of 20 reported attacks, only four were investigated and only one resulted in a trial).

149. Ellen Barry, *Officials Say Homophobia Motivated Murder in Russia*, N.Y. TIMES, May 12, 2013, at A8, available at [http://www.nytimes.com/2013/05/13/world/europe/homophobia-linked-to-murder-in-russia.html?\\_r=0](http://www.nytimes.com/2013/05/13/world/europe/homophobia-linked-to-murder-in-russia.html?_r=0) (reporting the assailants beat the man beyond recognition and sodomized him with beer bottles).

150. Albina Kovalyova, *‘Homosexual Propaganda’ Law Signals Latest Russian Crackdown*, NBC NEWS (July 27, 2013, 6:57 PM), [http://worldnews.nbcnews.com/\\_news/2013/07/27/19699629-homosexual-propaganda-law-signals-latest-russian-crackdown](http://worldnews.nbcnews.com/_news/2013/07/27/19699629-homosexual-propaganda-law-signals-latest-russian-crackdown) (warning of widespread “harassment, threats, and acts of violence” based on sexual orientation).

151. Yaroslava Kiryukhina, *Is Russia’s ‘Gay Propaganda’ Law Alienating it from the West?*, RUSSIA BEHIND THE HEADLINES (Sept. 10, 2013), [http://rbth.ru/society/2013/09/10/is\\_russias\\_gay\\_propaganda\\_law\\_alienating\\_it\\_from\\_the\\_west\\_29685.html](http://rbth.ru/society/2013/09/10/is_russias_gay_propaganda_law_alienating_it_from_the_west_29685.html) (adding that the Melbourne City Council received a petition of 10,000 signatures requesting it to consider severing its sister-city relationship with St. Petersburg).

152. See *Freedom House on Russia: 2003-2014*, FREEDOM HOUSE (Mar. 24, 2014), <http://www.freedomhouse.org/article/>

gave Russia similarly low scores on its democracy rating.<sup>153</sup> Allowing LGBT groups to assemble could have also quelled international calls to boycott the 2014 Sochi Olympics, an event which shone a bright light on the country's human rights record.<sup>154</sup> Despite no current moves within the Government to repeal the ban on gay propaganda, previous executive action and current reports from within the Russian federal government demonstrate willingness, by some, to rectify the situation.<sup>155</sup>

## V. CONCLUSION

Challenges to the ban on gay propaganda will reveal that the ban

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freedom-house-russia-2003-2014#.U3MQAiiwvwnB (recognizing a decline in freedom and in anticipated progress since President Putin returned to power); *Russia Downgraded to "Not Free"*, FREEDOM HOUSE (Dec. 20, 2004), <http://www.freedomhouse.org/article/russia-downgraded-not-free> (declaring the change in status due to actions taken by President Putin).

153. See Laza Kekic, *The World in 2007: The Economist Intelligence Unit's Index of Democracy*, ECONOMIST 4, [http://www.economist.com/media/pdf/DEMOCRACY\\_INDEX\\_2007\\_v3.pdf](http://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf) (last visited May 13, 2014) (ranking Russia 102nd out of 167 of the most democratic countries).

154. See, e.g., Robin Scott Elliot, *Winter Olympics 2014: Pussy Riot Join Campaign for Sochi Boycott*, INDEPENDENT (Oct. 17, 2013), <http://www.independent.co.uk/sport/olympics/winter-olympics-2014-pussy-riot-join-campaign-for-sochi-boycott-8884990.html> (reporting Russian protest group, Pussy Riot, called for a boycott of the Olympics after being imprisoned because of a prior protest); Benoit Finck, *Sochi Becomes Gay Activists' Focus Ahead of 2014 Olympics*, HUFFINGTON POST (Oct. 28, 2013 8:44 AM), [http://www.huffingtonpost.com/2013/10/28/sochi-gay-activists-olympics\\_n\\_4169080.html](http://www.huffingtonpost.com/2013/10/28/sochi-gay-activists-olympics_n_4169080.html) (listing actor Stephen Fry among those supporting a boycott, in addition to fifteen American and European athletes that requested the IOC President take a clear position on the issue); Sean Gregory, *U.S. Snowboarder Hannah Teter: Boycott The Sochi Olympics*, TIME MAGAZINE (Oct. 2, 2013), <http://keepingscore.blogs.time.com/2013/10/02/u-s-snowboarder-hannah-teter-boycott-the-sochi-olympics/> (discussing 2006 gold medalist Hannah Teter's support for a boycott of the Sochi Olympics); Alexander Imedashvili, *Georgian PM Says Sochi Olympics Boycott Possible*, RIA NOVOSTI (Oct. 15, 2013, 1:44 PM), <http://en.ria.ru/sochi2014/20131015/184150901.html> (citing the Prime Minister of Georgia's consideration of an Olympic boycott).

155. See HUMAN RIGHTS FIRST, *supra* note 1 (commenting on President Putin's previous administration rejecting similar bans three times before supporting one in 2013); GAY RUSSIA, *supra* note 21 (detailing Russia's Human Rights Ombudsman's endorsement of constitutional challenges to federal laws discriminating against the LGBT community).

violates the European Convention on Human Rights. By using sexual orientation as the basis for discrimination, the Government creates a restriction that the Court requires “weighty” interests to sustain. The Court has held that banning demonstrations without any evidence does not comply with the ECHR. While the ECtHR recognizes that protecting minors is a legitimate interest, in this case the ban is unnecessary in a democratic society. The Government failed to support its justification of protecting children as the reason for the gay propaganda ban and the ban stands in direct conflict with the ECtHR’s rulings, which explicitly state that sexual orientation is protected by the ECHR.

Because the Government put forth no support for its claim that the gay propaganda ban protects children and the Court has previously held that categorical bans on public events are unnecessary in a democratic society, the ban on gay propaganda cannot survive a legal challenge and should be invalidated.